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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Justice

Index Number : 190210/2009
LOVAGLIO, NICHOLAS
vs
A.W. CHESTERTON CO.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. 190210/09

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 7.13.12.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7.13.12

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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NICHOLAS LOVAGLIO and DOROTHY LOVAGLIO,

Index No. 190210/09
Motion Seq. 003

Plaintiffs,

DECISION AND ORDER

-against-

A.W. CHESTERTON CO., et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.:

In this asbestos-related personal injury action, defendant John J. Doody & Son, Inc., ("Doody") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff Nicholas Lovaglio, now deceased, was diagnosed with mesothelioma in March of 2009. On June 12, 2009, he and his wife Dorothy Lovaglio filed this action to recover for personal injuries allegedly caused by Mr. Lovaglio's exposure to asbestos-containing products. Due to Mr. Lovaglio's illness and short life expectancy, his case was added to the April 2010 accelerated trial cluster as per the New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO").[1] This trial cluster was posted on the NYCAL website no later than October 27, 2009, when the cluster was established.

Mr. Lovaglio was deposed on July 15-16, 2009 and on August 5, 2009. In relevant part he testified that while renovating his home in the 1950s and 1960s, he purchased asbestos-containing

[1] The NYCAL Accelerated Docket is comprised of "actions brought by plaintiffs who are terminally ill from an asbestos-related disease with a life expectancy of less than one year." CMO ¶ XIII(1).

products from Doody's Brooklyn hardware store and that he was exposed to asbestos fibers from those products. While Doody was named as a defendant in the initial complaint, plaintiffs were not able to serve Doody with a copy of the summons and complaint until after Mr. Lovaglio's deposition.[2] Thus, Doody was not present to cross-examine Mr. Lovaglio with regard to his allegations at that time.

Proof of service of such process was filed with the clerk of this court on October 8, 2009.[3] Doody then sought and received two extensions of time to answer the complaint. The first request was granted on October 28, 2009 and the second on November 23, 2009. Doody served its answer on all parties on December 7, 2009, accompanied by a notice to depose "all parties" at "a time and date to be agreed upon between the parties." (Plaintiffs' exhibit I). On January 22, 2010, Doody re-noticed Mr. Lovaglio's deposition for February 22, 2010. However, Mr. Lovaglio died on January 26, 2010, four days after Doody had re-noticed his deposition.

Plaintiff Dorothy Lovaglio was deposed by the defendant on April 23, 2010.[4] She testified that while she never accompanied her husband to a Doody hardware store, she did remember that

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[2] Plaintiffs' process server averred that he served Doody on August 5, 2009. Defendant's exhibit G. Plaintiffs did not, however, file an affidavit of service with the Clerk of the Court demonstrating that service actually took place on such date. The affidavit on file with the Clerk lists October 1, 2009 as the date process was served on the defendant. Defendant's exhibit F.

[3] As a New York corporation, Doody appointed the Secretary of State of New York as an agent for receiving service. Plaintiffs' process was served upon the Secretary of State as Doody's agent on October 1, 2009. Business Corporation Law § 306(b)(1) prescribes that service is complete when plaintiffs serve the Secretary of State. Service upon Doody was complete at the moment the Secretary of State received the summons and complaint, whether or not Doody received actual notice of the lawsuit at the time. *See Union Indem. Ins. Co of New York v 10-01 50th Ave Realty Corp*, 102 Ad2d 727 (1st Dept 1984).

[4] Her deposition transcript is submitted as defendant's exhibit O.

her husband shopped there on occasion. She also remembered seeing receipts from the local Doody store, but could not recall what her husband had purchased.

Doody first moved this court for summary judgment dismissing the case against it on or about May of 2010. It also sought to preclude plaintiffs from using Mr. Lovaglio's testimony against it at trial pursuant to CPLR 3117.[5] That motion was denied without prejudice pending the completion of discovery. The court also held that Doody's motion to preclude the use of Mr. Lovaglio's deposition testimony at trial was really in the nature of a motion *in limine* that is more properly made before the judge in charge of the trial of this matter.

Doody herein renews its motion for summary judgment on the ground that there is no admissible evidence in this case which could link it to Mr. Lovaglio's asbestos exposure. Doody asserts that Mr. Lovaglio's deposition testimony cannot be used against it because Doody was not present at, represented at, or noticed of the deposition as required by CPLR 3117. Doody further argues that Mrs. Lovaglio's testimony is based entirely on hearsay and thus is also inadmissible against it. Absent such proof, the defendant asserts there is no case against it.

DISCUSSION

Generally, deposition testimony is inadmissible at trial against a person or party not notified thereof. *See* CPLR 3117. It is the primary function of a motion *in limine* to permit a party to seek a preliminary order before or during trial to exclude or limit the introduction of such testimony. *See State v Metz*, 241 AD2d 192, 198 (1st Dept 1998).

The role of the court on a motion for summary judgment, on the other hand, is to determine

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[5] CPLR 3117(a)(3)(i) provides: "any part of a deposition, so far as admissible under the rules of evidence, may be used . . . by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required . . . provided the court finds . . . that the witness is dead."

whether evidence sufficient to require a trial of any issue of fact exists. *See, Metz, supra*, at 198. One opposing a motion for summary judgment must "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form. . ." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The court may consider hearsay evidence in opposition to a summary judgment motion so long as it does not form the sole basis for the court's determination. *Oken v A.C.&S.*, 7 AD3d 285, 285 (1st Dept 2004). As set forth in *Wertheimer v New York Prop. Ins. Underwriting Ass'n*, 85 AD2d 540, 541 (1st Dept 1981), "evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that this evidence does not form the sole basis for the Court's determination."

Courts are keenly aware that "summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact or where such issue is even arguable." *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-29 (1st Dept 2002). If a case "turns on an item of evidence whose admissibility at the trial is arguable, summary judgment must be denied." Siegel, NY Prac. § 282, p. 482, 5th Ed; *see also Gallo Painting, Inc. v Aetna Insurance Co.*, 49 AD2d 746 (2d Dept 1975).

Here, armed with the knowledge of Mr. Lovaglio's in-extremis status, and in the circumstances which underlie this summary judgment motion, I find there is a material issue in this case as to whether Doody could have timely cross-examined Mr. Lovaglio before he died. *See Duttle v Bandler & Kass*, 127 FRD 46, 49 (SDNY July 6 1989) ("[D]efendants' counsel had ample opportunity to cure any problems resulting from the inconvenient scheduling of the deposition by arranging for cross examination at some later time."); *Shanker v Helsby*, 515 F. Supp. 871, 873 n.4 (SDNY Mar. 18 1981), *aff'd*, 676 F.2d 31 (2d Cir. 1982) (lack of notice is no bar to the

admissibility of a deposition where the objecting party had the opportunity to cure by scheduling cross-examination); 5 Wigmore on Evidence § 1390 (Chadbourn rev. 1974) ("Where, however, the failure to obtain cross-examination is in any sense attributable to the cross-examiner's own consent or fault, the lack of cross-examination is of course no objection - according to the general principle. . . that an opportunity, though waived, suffices").

Assuming, *arguendo*, that Mr. Lovaglio's deposition testimony is not admissible against Doody at trial, summary judgment is still not appropriate in light of plaintiffs' other submissions herein, including the depositions of plaintiff Dorothy Lovaglio and of Doody's corporate representative, all of which the court has considered in making this decision. *Oken, supra*, 7 AD3d at 285.

Mr. Lovaglio testified that he was exposed to dust from various asbestos-containing products he used to perform home renovations, including asbestos-containing sheetrock and joint compound. He testified that he purchased these products from the Doody store in Brooklyn, New York.

Despite defendant's assertions, Mrs. Lovaglio's testimony does not appear to be entirely based on hearsay. It does, however, plainly support her husband's claims. Mrs. Lovaglio testified that her husband often performed home renovation work that would require, among other products, sheetrock and joint compound, and that her husband purchased products for the renovations from a Doody-owned lumberyard. She further indicated that her husband bought supplies from that location many times during the 1970s, and she had also formerly possessed receipts from the Doody lumberyard which corroborated her husband's purchases. While she could not specifically recall what Mr. Lovaglio purchased at the Doody lumberyard or which items were on the receipts Mr. Lovaglio brought home from the Doody store, it appears that such products were used for Lovaglio family home renovations.

Plaintiffs also point to the deposition testimony of Doody's corporate witness, Mr. John Festa.[6] Mr. Festa, who was examined in this case on December 14, 2010, testified that during the relevant time period Doody's Staten Island store stocked U.S. Gypsum joint compound,[7] confirming that Doody sold asbestos-containing products similar to those Mr. Lovaglio testified were used to renovate the Lovaglio family home.

I find the additional evidence advanced by plaintiffs sufficiently corroborates Mr. Lovaglio's testimony, which gives rise to a triable issue of fact concerning plaintiffs' case against Doody. In this regard, it is worth noting that such corroborating evidence need not independently create issues of fact to support the court's ruling. What is important is that the allegedly inadmissible evidence does not necessarily form the sole basis of plaintiffs' opposition. *See Wertheimer, supra.*

Accordingly, and in light of the foregoing, it is hereby

ORDERED that John J. Doody & Son, Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 7.12.12

SHERRY KLEIN HEITLER
J.S.C.

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6 Mr. Festa's deposition transcript is submitted as defendant's exhibit N.

7 The plaintiffs submitted interrogatory responses from U.S. Gypsum in an unrelated case (plaintiffs' exhibit R) and a court transcript from a U.S. Gypsum employee in an unrelated case (plaintiffs' exhibit S) to show that U.S. Gypsum-brand joint compound containing asbestos was available for purchase through 1976.