

**Middleton v Amchem Prods. Inc.**

2013 NY Slip Op 32424(U)

October 3, 2013

Supreme Court, New York County

Docket Number: 190367/12

Judge: Sherry Klein Heitler

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

**HON. SHERRY KLEIN HEITLER**

PRESENT: \_\_\_\_\_  
*Justice*

PART 30

Index Number : 190367/2012  
MIDDLETON, DARRYL W.  
vs.  
AMCHEM PRODUCTS, INC.  
SEQUENCE NUMBER : 007  
SUMMARY JUDGMENT (MAREMONT)

INDEX NO. 190367/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 007

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**is decided in accordance with the  
memorandum decision dated 10/3, 2013**

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

Dated: Oct 3, 2013

  
\_\_\_\_\_, J.S.C.  
**HON. SHERRY KLEIN HEITLER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
DARYL W. MIDDLETON and BELINDA MIDDLETON,

Index No. 190367/12  
Motion Seq. 007

Plaintiffs,

**DECISION & ORDER**

-against-

AMCHEM PRODUCTS INC., n/k/a RHONE  
POULENC AG COMPANY, n/k/a BAYER  
CROPSCIENCE INC., *et al.*,

Defendants.

-----X  
**SHERRY KLEIN HEITLER, J:**

In this asbestos-related personal injury action, defendant Maremont Corporation (“Maremont”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that there is no evidence to show that plaintiff Daryl Middleton was exposed to asbestos fibers released from a product manufactured, sold, supplied, or distributed by Maremont. For the reasons set forth below, the motion is denied.

**BACKGROUND**

Daryl Middleton was diagnosed with lung cancer in June of 2012. On August 14, 2012, Mr. Middleton and his wife Belinda Middleton commenced this action to recover for injuries allegedly caused by his exposure to asbestos-containing products. Mr. Middleton provided deposition testimony concerning his alleged asbestos exposure on October 3, 2012 and October 4, 2012.<sup>1</sup>

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<sup>1</sup> Portions of Mr. Middleton’s deposition transcripts are submitted on the motion as defendant’s exhibits C and D and as plaintiffs’ exhibit 2. At the court’s direction a complete copy of the

In relevant part, Mr. Middleton testified that he was employed as a mechanic at Meineke Car Care Center, also known as Meineke Discount Mufflers and Meineke Discount Mufflers and Brakes (collectively, "Meineke"), from 1980 to 1984 and again from late 1989 to about 1995. He was responsible for the installation and removal of asbestos-containing engine pipes, mufflers, and brakes manufactured by various companies, including Maremont. Mr. Middleton testified that dismantling old mufflers as well as fitting new ones involved cutting their necks which released asbestos-containing dust. He further stated that he was exposed to asbestos as a result of cutting engine pipes and sanding brakes.

Defendant argues that there is no evidence to show that Mr. Middleton was exposed to asbestos from a Maremont product. In this regard, Maremont submits the affidavit, sworn to June 5, 2013, of Carl Liggett, former Vice President of Operations for Maremont's friction products division from November 1973 to July 1, 1997 (defendant's exhibit F) as well as Maremont's Responses to Plaintiffs' Product Identification Interrogatories and Document Requests (defendant's exhibit E) to show that Maremont ceased manufacturing friction products under the brand name "Grizzly," including brakes, as of June 30, 1977, two and a half years before Mr. Middleton began working for Meineke. The Liggett affidavit also alleges that Maremont ceased using its encapsulated asbestos-containing paper in certain of its mufflers in 1978. Maremont also submits the deposition testimony in an unrelated action venued in Oregon of its muffler division quality control manager Robert T. McBride, who testified that asbestos was not used by Maremont's muffler division as of the late 1970's, and that Maremont engine

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deposition transcript was submitted by defendant post submission ("Deposition").

pipes never contained asbestos. (Defendant's Exhibit G). Defendant argues that its asbestos-containing mufflers were stamped or embossed with the words "Asbestos Wrapped" (Defendant's Exhibit F, ¶ 9) and that since Mr. Middleton failed to testify that he saw any such stamp or embossment, he could not have been exposed to asbestos from a Maremont muffler.

Plaintiffs contend that Mr. Middleton clearly testified to asbestos exposure from Maremont mufflers, and whether Maremont may have ceased making asbestos-containing products shortly before Mr. Middleton began working at Meineke does not alleviate the issue of residual use of such products in the marketplace. Plaintiffs further argue that any conflict between Mr. Middleton's testimony and defendant's witnesses creates triable issues of fact that must be resolved by a jury.

### **DISCUSSION**

Summary judgment is a drastic remedy that must not be granted if there is any doubt as to the existence of a triable issue of fact. *Tronlone v Lac d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). In asbestos-related litigation, the moving defendant must make a *prima facie* showing of entitlement to judgment as a matter of law before plaintiffs must demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for plaintiffs to show facts and conditions from which the defendant's liability may be reasonably inferred (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]) and all reasonable inferences should be resolved in the plaintiffs' favor (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). Any doubt must be resolved against summary resolution. *Henderson v New York*, 576 AD2d 129, 130 (1st Dept 1991).

In this case, Mr. Middleton testified that he worked with Maremont mufflers which consequently exposed him to asbestos (Deposition, pp. 77-78, 495):

Q. You also told me you believe you were exposed to asbestos as a result of the mufflers, --

A. Right. . . .

Q. Why would you have to wrap the mufflers?

A. No, I didn't say I had to wrap the mufflers. The mufflers, especially that 19 line of Maremont, I know had, were wrapped inside. They were double wrapped and they had asbestos on the inside . . .

\* \* \* \*

Q. Do you know who manufactured any of the mufflers, the old mufflers you removed from these vehicles?

A. Some of them were Maremont, some of them are original equipment, some of them were Walker.

Q. Do you know who manufactured any of the new mufflers you installed?

A. Same ones.

\* \* \* \*

Q. Now, with respect to the Maremont muffler you installed, did you have to cut through or otherwise alter the muffler during the course of installation?

A. Yes. . . .

Q. And when you had done that, when you would cut through, did this create any sort of dust?

A. Yes.

Mr. Middleton also testified that he was exposed to asbestos from Maremont engine piping and Maremont brakes (Deposition pp. 76, 77, 79, 80, 82, 89):

Q. When you replaced the engine pipes, did you also have to do the muffler at the same time or were there times that you just did the engine pipes?

A. There were times I just did the engine pipes.

Q. When you did the engine pipes, when you had to install a new engine pipe into any of these vehicles, --

A. Yes.

Q. -- who manufactured the new engine pipe?

A. It could be Maremont or the dealer themselves . . .

\* \* \* \*

Q. Do you know who manufactured any of the old engine piping that you removed from these vehicles?

A. Most of the time the original dealership, if it's a replacement that we had to do, then -- if it was from us, then we'll do that and that came from Maremont or Walker.

\* \* \* \*

Q. You told me about the engine pipes and muffler work that you did at Meineke.

A. Yes.

Q. Do you believe you were exposed to asbestos in any other way at Meineke?

A. At that time, no.

\* \* \* \*

Q. Do you have any reason to believe you were exposed to asbestos as a result of the brake work at Meineke?

A. Yes.

\* \* \* \*

Q. Do you know where Meineke obtained any of their brakes from, the suppliers?

A. Local -- how do you call it -- auto parts places and sometimes dealerships.

Q. Do you remember the names of any of the local auto parts places?

A. Yes . . . And they did get brakes through Maremont.

\* \* \* \*

Q. How do you believe you were exposed during that time period?

- A. Because I was still doing the same exact jobs, sanding the brakes down after [sic] got the car up . . . blowing the dust out.

The defendant's challenge to Mr. Middleton's testimony on the ground that Maremont stopped producing asbestos-containing mufflers and brakes prior to Mr. Middleton working at Meineke is unavailing on this motion. Although Mr. Liggett's and Mr. McBride's conclusions on that issue are stated to be based in part on their review of corporate documents, not a single catalog, specification, or other relevant documentation accompanies defendant's submissions in this regard, and the defendant's assertions are merely conclusory. *See Ayotte v Gervasio*, 81 NY2d 1062 (1993). Furthermore, Mr. Middleton testified that he worked with Maremont products whereas Mr. Liggett's affidavit addresses asbestos-containing friction products which Maremont manufactured under the "Grizzly" brand name.

Where summary judgment is concerned, it is the defendant's initial burden to show there is no issue of material fact that requires the fact finder's determination. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The most that Mr. Liggett's and Mr. McBride's submissions do is create a conflict as between their and Mr. Middleton's testimony. Issues of credibility must be determined by the trier of fact. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Similarly unavailing is Maremont's position that Mr. Middleton could not have been exposed to asbestos from one of its mufflers because Mr. Middleton did not see the words "Asbestos Wrapped" on the mufflers he handled. Again, Maremont's failure to support its corporate representatives' un-cross examined submissions with documentary support renders this an impermissible conclusory assertion. (*Ayotte, supra*, at 1063).



Accordingly, it is hereby

ORDERED that Maremont Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: Oct 3, 2013

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER, J.S.C.