

<p>Jackson v 3M Co.</p>
<p>2019 NY Slip Op 30938(U)</p>
<p>April 9, 2019</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 190063/2017</p>
<p>Judge: Manuel J. Mendez</p>
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<p>This opinion is uncorrected and not selected for official publication.</p>

**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK
COUNTY**

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
VERONICA JACKSON, as Administratrix of the Estate
of STEPHEN JACKSON, deceased

INDEX NO.

190063/2017

Plaintiff(s),

MOTION DATE

10/24/2018

- against -

**3M COMPANY f/k/a MINNESOTA MINING &
MANUFACTURING CO., et al.**

MOTION SEQ. NO.

002

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on CertainTeed Corporation's motion for summary judgment:

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

1-3

Answering Affidavits – Exhibits

4-5

Replying Affidavits

6-7

Cross-Motion: **Yes** **X No**

Upon a reading of the foregoing cited papers, it is Ordered that defendant, CertainTeed Corporation's, (hereinafter, "CertainTeed") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff, Stephen Jackson, commenced this action on February 17, 2017 to recover for injuries sustained as a result of his alleged exposure to asbestos from his work with roofing products from the early 1980s to the late 1990s. He was diagnosed with malignant mesothelioma on approximately January 12, 2017 (see Aff. in Opp., Exh. 1) and died from the disease on December 20, 2017 (see Aff. in Opp., Exh. 2). His disease was linked to asbestos-exposure (see Aff. in Opp., Exh. 1).

Throughout his career, Mr. Jackson alleged exposure to a variety of CertainTeed roofing products (see Aff. in Supp., Exh. B). He testified to using CertainTeed roof coating more often than other such products and described it as "more of a watery product" that "went on a little quicker" (*id.* at 350:14-22).

Mr. Jackson stated that he used CertainTeed roofing shingles on pitched roofs, described the CertainTeed shingles as well as how often he used them. (*id.* at 524:22-527:25). He stated a general belief that the shingles contained asbestos because, essentially, all such products in the industry did at that time (see *id.* at 533:6-541:8). He also stated that he believed installing CertainTeed shingles exposed him to asbestos because the cut shingles generated dust which got into his skin and lungs (see *id.* at 545:16-547:8).

Mr. Jackson testified that he ripped off and installed CertainTeed asphalt shingles on many roofs throughout his career (*id.* at 548:9-563:14). He knew these were CertainTeed brand products because the homeowner or contractor would

specify the use of that brand of product (*id.*). He stated that the shingles generated dust when they were cut and generated dust when the trash from the job was being cleaned up (*id.*).

Plaintiff-decedent also installed CertainTeed felt on pitched roofs in Queens, New York around 1998 while doing supervising and roofing work (*id.* at 570:2-572:16). He alleged exposure to asbestos from the felt material because it was dusty, and he described non-perforated felt that came in 30-pound rolls (see *id.* at 573:6-576). He further stated that he believed CertainTeed roofing felt contained asbestos (see *id.* at 580:8-18) and that cutting the felt exposed him to asbestos dust (see *id.* at 582:25-583:4).

Mr. Jackson testified to having used CertainTeed roof coating which came in a metal pail and could be applied by brush or spray-gun (*id.* at 584:23-588:25). He specifically states that he used this coating during a job in College Point, NY from 1983-1984 (*id.*). The CertainTeed coating was sprayed onto the roof in College Point to protect the paper (*id.* at 593-594). He also alleged that he sprayed asbestos roof coating on a flat roof in College Point (*id.* at 595:12-16). Spraying the CertainTeed coating took about four months (*id.* at 609:13-610:6) and it took one year to finish the job tearing up and installing the flat roof at the College Point condos (*id.* at 610-611). Plaintiff-decedent testified to having then used left-over CertainTeed roof coating on flat roofs by brushing it on (*id.* at 613:13-614:17). It took five years overall to complete the job in College Point, NY (*id.* at 615:2-18). Mr. Jackson also testified that there were 75 to 90 cans of CertainTeed roof coating remaining when the job at College point was complete which were then used for other jobs (*id.* at 616:10-16). He explained that the roof coating was used as a preserver to help seal any older building materials such as deteriorating roofs and walls (*id.* at 618:1-619:20).

Plaintiff now brings this action to recover for Mr. Jackson's personal injuries due to asbestos-exposure. Defendant moves for summary judgment, claiming it has presented evidence that conclusively establishes that plaintiff could not have possibly encountered asbestos-containing CertainTeed roofing products.

To prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that *prima facie* showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; see also *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept 2016]). Regarding asbestos, a defendant must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.-Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]). The defendant must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520, 997 NYS2d 381 [1st Dept 2014]).

"Plaintiff is not required to show the precise causes of his damages, but only show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga. - Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Okem v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285, 776 NYS2d 253 [1st Dept 2004]).

Defendant argues that the Affidavit of William Eberle establishes that any CertainTeed roofing products plaintiff allegedly encountered could not possibly have contained asbestos (see Aff. in Supp., Exh. A).

Plaintiff opposes the motion, arguing that CertainTeed has failed to show prima facie entitlement to summary judgment because Mr. Eberle's Affidavit should not be considered by this court due to his lack of personal knowledge of the relevant facts. Plaintiff further argues that defendant's documents raise issues of fact when compared to plaintiff's testimony, thereby warranting denial of summary judgment. Lastly, plaintiff claims that defendant relies on cases to support its position which have fact patterns that are not on point and should not be considered by this court.

The Affidavit of William Eberle contains sworn statements as to when and where the CertainTeed products at issue were manufactured as well as when and to what areas these products were distributed and sold (see Aff. in Supp., Exh. A). However, Mr. Eberle's sworn testimony is not supported by any business records or other external/empirical documentation. Therefore, Mr. Eberle's Affidavit does not constitute conclusive evidence that the products plaintiff claims to have encountered could never have contained asbestos such as to warrant summary judgment. This is because such sworn testimony fails to eliminate "all material issues of fact" and, thus, does not satisfy the defendant's burden to establish prima facie entitlement to summary judgment (see *Klein v City of New York, supra*).

It is also unclear whether Mr. Eberle's Affidavit even exculpates CertainTeed from any responsibility for the plaintiff's exposure to asbestos

containing products. This is because Mr. Jackson alleged that 75 to 90 cans of CertainTeed asbestos roof coating were left as surplus from the College Point, NY job he did somewhere around 1983-1984 (Aff. in Supp., Exh. 4 at 585). He then testified to having used this surplus supply of coating material for many years thereafter (*id.* at 614:5-18). This means that even if Mr. Eberle's affidavit is correct that the last sale of asbestos roof coating with the CertainTeed name on it was produced in 1982, it is still possible that Mr. Jackson could have been spraying and incurring exposure to old asbestos-containing cans of this product for many years after the product was no longer produced (Aff. in Supp., Exh. A at ¶ 11).

This case, therefore, presents credibility issues which require weighing the claims of Mr. Eberle's affidavit against Mr. Jackson's sworn testimony. It is not, however, the function of the Court deciding a summary judgment motion to weigh credibility issues or make findings of fact, but to identify material issues of fact (or point to the lack thereof) (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). Conflicting testimonial evidence raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v New York City Transit Authority*, 84 AD 3d 439, 922 NYS 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 AD 3d 439, 29 NYS 3d 178 [1st Dept 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]).

Defendant has failed to meet its burden of presenting evidence which "unequivocally establish[es] that its product could not have contributed to the causation of plaintiff's injury" (see *Matter of N.Y.C. Asbestos Litig.*, *supra*). On the other hand, Mr. Jackson's testimony sufficiently shows "facts and conditions from which defendant's liability may be reasonably inferred" (see *Reid v Ga. - Pacific Corp.*, *supra*). Mr. Jackson's testimony also presents enough contrary evidence to that of the defendant to warrant a trial (see *Amatulli v Delhi Constr. Corp.*). Therefore, summary judgment is denied.

Accordingly, it is ORDERED that defendant CertainTeed Corporation's motion for summary judgment pursuant to CPLR §3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

MANUEL J. MENDEZ
J.S.C.

Dated: April 9, 2019

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