

Shanahan v Aerco Intl., Inc.
2020 NY Slip Op 31608(U)
May 26, 2020
Supreme Court, New York County
Docket Number: 190011/2017
Judge: Manuel J. Mendez
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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

**MICHELLE SHANAHAN, as Executrix for the Estate,
of ARTHUR SHANAHAN and MICHELLE SHANAHAN
Individually,**

**INDEX NO. 190011/2017
MOTION DATE 05/18/2020
MOTION SEQ. NO. 004
MOTION CAL. NO. _____**

Plaintiffs,

-against-

AERCO INTERNATIONAL, INC., et al.,

Defendants.

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Mario & DiBono Plastering Co. Inc. pursuant to CPLR § 3212:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause <input type="radio"/> Affidavits <input type="radio"/> Exhibits ...	<u>1- 3</u>
Answering Affidavits <input type="radio"/> Exhibits _____	<u>4-5</u>
Replying Affidavits _____	<u>6</u>

CROSS-MOTION **YES** **NO**

Upon a reading of the forgoing cited papers, it is ordered that defendant Mario & DiBono Plastering Co. Inc.'s (hereinafter "Mario & DiBono") motion for summary judgment pursuant to CPLR § 3212 to dismiss plaintiffs' complaint, is denied.

Plaintiff, Arthur Shanahan, was diagnosed with lung cancer on November 3, 2016 and died on May 11, 2018 as a result of his alleged exposure to asbestos. He worked as a carpenter from approximately 1982 to 2016. While employed as a carpenter, he worked in various commercial, residential, and industrial sites in Manhattan. During 1986 Mr. Shanahan worked at the World Trade Center framing walls. It is alleged that he was exposed to asbestos when he removed asbestos-containing fireproofing spray that had been previously applied on the ceilings, to put up the top track to frame the walls. The removal of the fireproofing spray with a claw hammer would cause the asbestos-containing fireproofing spray to fall to the floor, which would then be swept up and caused the asbestos dust that he inhaled.

Plaintiffs commenced this action on January 9, 2017 to recover for the injuries Mr. Shanahan sustained. Mario & DiBono filed its answer on February 15, 2017. (Affirmation in Support).

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

Mario & DiBono now makes this motion for summary judgment pursuant to CPLR § 3212 to dismiss plaintiffs' complaint against it. Mario & DiBono alleges that plaintiffs have failed to provide evidence that Mr. Shanahan was exposed to asbestos from any Mario & DiBono employee using asbestos-containing products in his vicinity and, that as a contractor only, they cannot be held liable for any of Mr. Shanahan's interactions with already existing asbestos-containing fireproofing spray.

To prevail on a motion for summary judgment, the proponent must make 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 N.Y.2d 833, 652 N.Y.S.2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving party to rebut the 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 N.Y.2d 525, 569 N.Y.S.2d 337 [1999]). 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 A.D.2d 772, 461 N.Y.S.2d 342 [1983], *aff'd* 62 N.Y.2d 686, 465 N.E.2d 30, 476 N.Y.S.2d 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 N.Y.3d 499, 942 N.Y.S.2d 13, 965, N.E.2d 240 [2012]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. (SSBS Realty Corp. v. Public Service Mut. Ins. Co., 253 A.D.2d 583, 677 N.Y.S.2d 136 [1st Dept. 1998]).

In support of its motion, Mario & DiBono argues that in Mr. Shanahan's deposition testimony he concedes that he was not in the same vicinity as any Mario & DiBono employee during the installation of the fire-proofing spray. Mario & DiBono further argues that Mr. Shanahan, not Mario & DiBono employees, created his own unsafe working condition, which was illegal and non-compliant with OSHA standards

In opposition to the motion for summary judgment, plaintiffs argue that Mr. Shanahan sufficiently described what he believed to be asbestos-containing fireproofing spray that was earlier applied by Mario & DiBono employees. Plaintiffs state that Mario & DiBono declined the opportunity to use non-asbestos containing fireproofing spray. Plaintiffs further claim that Mario & DiBono knew the dangers associated with the removal of asbestos-containing fireproofing spray, and that as an experienced and skilled tradesman Mr. Shanahan acted accordingly, and that any inquiry of the foreseeability of the way Mr. Shanahan removed the asbestos-containing fireproofing spray is an issue of fact the jury to determine. Finally, plaintiffs contend that issues of fact remain as to Mr. Shanahan's exposure. (Affirmation in Opposition).

Mr. Shanahan's deposition testimony provides identifications of asbestos-containing fireproofing spray applied by Mario & DiBono. Mr. Shanahan can specifically recall that he worked at Tower One of the World Trade Center (Affirmation in Opp., Exh. 1 at 1136). Mr. Shanahan states that as a carpenter he was responsible for framing out the walls and in the process of framing the walls, he had to remove the asbestos-containing fireproofing spray on the ceilings. When the fireproofing spray fell to the floor, it was swept up which created asbestos dust that he inhaled. (Affirmation in Opp., Exh. 1 at 90, 878, and 1105). Mr. Shanahan specifically identified Mario & DiBono as the contractor who previously installed fireproofing spray in the World Trade Center. Mario & DiBono had the exclusive contract to provide asbestos-containing fireproofing spray in the World Trade Center from 1966 through approximately 1969. (Affirmation in Opp., Exh. 2,3, 4, and 5).

James Verhalen, former chairman of the Board of U.S. Mineral, the supplier of asbestos-containing fireproofing spray to Mario & DiBono, testified that U.S. Mineral issued sales and application manuals to its licensed contractors which required the use of masks and proper protective equipment, placed warnings on the asbestos-containing fireproofing spray bags themselves starting as early as 1962, and conveyed to its contractors that sweeping up dry asbestos dust would cause a health hazard. (Affirmation in Opp. Exh. 6 at 3570-3577). Mr. Verhalen further testified that Mario & DiBono declined the opportunity to use non-asbestos fireproofing spray for their work at the World Trade Center. (Affirmation in Opp. Exh. 6 at 3570-3577).

Mario & DiBono argues that Mr. Shanahan illegally removed the asbestos-containing fireproofing spray from the ceilings in contravention of OSHA standards, he was not a bystander during the installation of the asbestos-containing fireproofing spray, and that they are not liable to Mr. Shanahan because they did not create or leave the worksite in a dangerous condition. (Affirmation in Reply).

In New York City Asbestos Litigation, the "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 A.D.2d 462, 622 N.Y.S.2d 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." (Oken v. A.C.&S. (In re N.Y.C. Asbestos Litig.), 7 A.D.3d 285, 776 N.Y.S.2d 253 [1st Dept. 2004]).

Mr. Shanahan's deposition testimony, Mario & DiBono's World Trade Center contracts, and the trial testimony of James Verhalen former chairman of the Board of U.S. Mineral, the supplier of asbestos-containing fireproofing spray to Mario & DiBono, provide sufficient evidence to meet the *Reid* standard mentioned above.

Plaintiffs have shown facts and conditions from which the defendant’s liability may be reasonably inferred. (Reid, supra). Plaintiffs have demonstrated through exclusive contracts, Mr. Shanahan’s deposition testimony, and the trial testimony of James Verhalen, that Mario & DiBono applied asbestos-containing fireproofing spray knowing the dangers and risk associated with dried asbestos dust, even to third party contractors. Summary judgment must be denied when the plaintiff has “presented sufficient evidence, not all of which is hearsay, to warrant a trial.” (Oken v. A.C. & S. (In re N.Y.C. Asbestos Litig., supra).

Furthermore, it is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof). (Vega v. Restani Const. Corp., 18 N.Y.3d 499, 965 N.E.2d 240, 942 N.Y.S.2d 13 [2012]).

Mario & DiBono fail to make a prima facie showing of entitlement to judgment as a matter of law. Mario & DiBono’s contention that Mr. Shanahan illegally removed the asbestos-containing spray against OSHA standards, is unpersuasive. Alternatively, plaintiffs have raised issues of fact to be resolved at trial. Mr. Shanahan has specifically identified Mario & DiBono as the exclusive contractor who applied the asbestos-containing fireproofing spray in the World Trade Center. Plaintiffs have demonstrated “facts and conditions from which [Mario & DiBono’s] liability may be reasonably inferred” to warrant the denial of Mario & DiBono’s motion for summary judgment. (Reid v. Ga. Pacific Corp., 212 A.D.2d 462, 622 N.Y.S.2d 946 [1st Dept. 1995]).

Accordingly, it is ORDERED that defendant Mario & DiBono Plastering Co. Inc.’s motion for summary judgment pursuant to CPLR 3212, dismissing plaintiffs’ complaint, is denied.

ENTER:



**MANUEL J. MENDEZ
J.S.C.**

Dated: May 26, 2020

**MANUEL J. MENDEZ
J.S.C.**

**Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE**