5

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

NELSON S. BRIGGS, JR. And JOHANNA BRIGGS.

Plaintiffs.

Sequence No.: *035*
Index No.: 013775/05

- against -

GENERAL ELECTRIC CO., et al

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, motion by defendant Robert A. Keasbey Co. pursuant to CPLR 3212 for summary judgment dismissing the complaint as against it is denied, except for those causes of action sounding in strict products liability and breach of warranty which are dismissed.

Plaintiff Nelson S. Briggs (hereafter plaintiff or Briggs) was diagnosed with mesothelioma in March of 1995. He was a trained electrician and member of the Electricians' Union Local 25. He worked at numerous construction sites from approximately 1952 to 1993, first as an apprentice, then as a journeyman and eventually as a foreman. He brings this action premised upon the development of his disease due to exposure to asbestos.

In the early 1950s Briggs worked for more than a year for Arc Electric as an apprentice during the construction of a Powerhouse at the Long Island Lighting Company's Glenwood Landing. He alleges that he was exposed to asbestos dust created by employees of various contractors while working there, including insulators. In his Interrogatory answers, he identified defendant Keasbey as one of the contractors whose employees exposed him to asbestos dust at Glenwood Landing. Deposition testimony of a former Keasbey employee in another action indicates that Keasbey performed insulation work at the Glenwood Landing Powerhouse around the time that Briggs did electrical work there for Arc, and that he used products which generated

asbestos dust.

Keasbey here seeks summary judgment dismissing the negligence and products liability causes of action asserted against it. Keasbey alleges that it has not been identified by plaintiff in the record, that plaintiff cannot meet his burden of proof on proximate causation with respect to the cause of action for failure to warn, that there is no factual basis in the record to support a claim of negligence, and that the strict products liability and breach of warranty causes of action must be dismissed as a matter of law.

Addressing the last allegation first, Keasbey asserts that it cannot be held in strict liability or breach of warranty as it was not a manufacturer or seller of asbestos products; it was a commercial and industrial insulation contractor performing a service.

The doctrine of strict products liability renders the manufacturer or seller of a defective product liable to any person injured thereby, regardless of privity, foreseeability or due care "if the defect was a substantial factor in bringing about the injury" (Van Iderstine v. Lane Pipe Corp., 89 A.D.2d 459, 460-461 [4th Dept 1982], *app dsmd* 58 N.Y.2d 610 [1983]). Briggs' strict liability claim against Keasbey fails as a matter of law because in performing insulating work at the LILCO project Keasbey was not a manufacturer, seller or assembler of the asbestos product, nor did it place such product in the stream of commerce (*see,* Louis Joy Corp. v. Boriss Breslow Corp., 168 A.D.2d 223 [1st Dept 1990]; Van Iderstine v. Lane Pipe Corp., *supra*). The breach of warranty cause of action fails as well as there was no sale of a product by Keasbey (Van Iderstine v. Lane Pipe Corp., *supra*).

With respect to the causes of action sounding in negligence, the proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853[1985]). Keasbey has offered no evidence except the deposition testimony of plaintiff, and asserts that *plaintiff* has failed to meet his burden of proof to show negligence or even that Keasbey was present at the worksite or used products containing asbestos.

The critical flaw in defendant's reasoning is that it is Keasbey, as proponent of this summary judgment motion, who "must make a prima facie showing of entitlement to judgment as a matter of law" and it is Keasbey who must tender "sufficient evidence" to eliminate material issues of fact (Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853[1985]). It is only then that the burden shifts to plaintiff "to produce evidentiary proof in admissible form" to raise a material question of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 326-327 [1986]). A movant's failure to meet its burden of proof mandates denial of the motion regardless of the sufficiency of the opposing papers (1014 Fifth Ave. Realty Corp. v. The Manhattan Realty Co., 67 N.Y.2d 718 [1986]).

Defendant Keasbey has failed to offer any evidence to show that it was not negligent, did not perform services at Glendale Landing, did not use asbestos containing products, or that plaintiff was not negligently exposed to asbestos dust by its workers. Accordingly, the burden

did not shift to Plaintiff to raise a triable issue (1014 Fifth Ave. Realty Corp. v. The Manhattan Realty Co., *supra*), and summary judgment is denied.

Insofar as Keasbey claims that it has not been identified in this lawsuit and therefore is entitled to summary judgment, the record belies that claim. Keasbey is identified in Plaintiff's interrogatory answers. Keasbey's reliance upon United Bank Limited v. Cambridge Sporting Goods Corp. to support exclusion of the plaintiff's interrogatory answer is misplaced. While it is true that it would be improper to allow self serving interrogatory answers to be introduced at trial "as direct evidence . . . as part of [the] case-in- chief" (see, United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 255 [1976]), Briggs neither submits his interrogatory answer at a trial nor in support of a case in chief. On a summary judgment motion the interrogatory answer is asserted only to refute Keasbey's false allegation that it has not been identified in the record.

Moreover, the deposition testimony of Enrico Curasco, a former employee of Keasbey, places it at the Glenwood Landing project for LILCO using asbestos products. While Keasbey is correct that the deposition testimony is not admissible pursuant to CPLR 3117 , such testimony is admissible pursuant to CPLR 3212 if it may be deemed as reliable as an affidavit (*see,* State v. Metz, 241 A.D.2d 192, 198-199 [1st Dept 1998] [By focusing solely upon CPLR 3117 and its definition and use of CPLR depositions "[a]t the trial or upon the hearing of a motion" the motion court ignored the issue of whether "investigatory depositions can constitute an 'affidavit', 'depositions', 'written admissions' or 'other available proof' " under CPLR 3212(b) "and thereby be appropriately considered by the court as supporting proof on a motion for summary judgment"]). Accordingly, as a deposition may be considered pursuant to CPLR 3212 as evidence as reliable as an affidavit the deposition is admissible on this motion (State v. Metz, *supra*).

Finally, addressing plaintiff's cause of action for failure to warn, defendant contends that plaintiff's deposition testimony establishes as a matter of law that he would not have heeded a warning had one been given. Defendant relies upon plaintiff's admission that he read a 1966 article in Popular Mechanics magazine concerning asbestos in the air and did not change the way he worked after reading the article. The article reads in full:

> **Asbestos in the air** *may someday* be a new hazard of urban living. That warning comes from two medical researchers who reviewed autopsies performed on 500 residents of Miami. Writing in a professional journal, they report that asbestos fragments - presumably from auto brake linings, roofing materials, floor tiles - were found in the lungs of 30 percent of the males and 20 percent of the females.
>
> Though none of the deaths studied was caused by a lung ailment, it is known that asbestos, if inhaled in sufficient quantities, can cause lung disease, including malignant tumors.(emphasis added)

Plaintiff's deposition testimony indicates that he did not change the way he worked after reading the article. If the un-attributed broad statement regarding malignant tumors may be

regarded as a warning, defendant's argument fails to acknowledge that plaintiff may have been taking precautions against inhaling dust prior to reading the article and continued to do so afterward. Indeed, he testified he took heed of friction brake product warnings regarding health hazards, and did not remember whether he was aware of the brake warnings before or after the Popular Mechanics article (T 462). He testified that he was "more careful" of dust that came from the brakes and "used a compound" that would keep the dust from "floating in the air..."(T471-472). Moreover, he also testified that he wore protective masks at work, both a cannister and a dust mask when they were made available (T 302-303). Based upon the deposition testimony, when given a specific warning and when provided with respiratory protection he took precautions, thus his testimony that he did not change after reading Popular Mechanics does not establish as a matter of law that he would not have heeded warnings had they been given. A question of fact is presented and precludes summary judgment on the failure to warn claim.

So Ordered.

A.J.S.C.

Dated: December 13, 2007