

Marinacci v Aid Auto Stores Inc.

2011 NY Slip Op 32533(U)

September 19, 2011

Sup Ct, Nassau County

Docket Number: 18501109

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 17

-----X
**ALBERT J. MARINACCI and BARBARA
MARINACCI,**

Plaintiffs,

- against -

AID AUTO STORES INC., et al.

Defendants.
-----X

DECISION AND ORDER

Index No: 18501/09

Motion Sequence No: 001

Original Return Date: 02-25-11

P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 8 were submitted on this Notice of Motion on June 16, 2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmation and Affidavit in Support	1-3
Exhibit Appendix	4
Memorandum of Law in Support	5
Affirmation in Opposition	6
Reply Affirmation and Affidavit	7-8

This motion (seq. No. 1) by the defendant Harris Corporation for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant Harris Corporation dismissing all claims asserted in the Complaint and all cross-claims against it is decided as hereinafter set forth.

This is an action for personal injuries allegedly sustained by the plaintiff ALBERT J. MARINACCI as a result of alleged exposure to asbestos-containing products manufactured, distributed, sold or installed by various defendants, including the movant, Harris Corporation ("Harris").

Plaintiff was born in Brooklyn, N.Y. in 1945. The plaintiff alleges asbestos exposure from the following sources: products used during substantial home improvements and renovations at various times during the 1960's, 1970's and 1980's at his own homes and while self employed; products used while doing personal auto repairs and maintenance; pipe insulation in barracks and buildings he lived and worked in while serving in the U.S. Army during the period 9/65-9/67; pipe covering, floor tile and insulation in buildings while employed by the U.S. Postal Service during the period 1970-2004; and while working as a helper at a printing shop in West Hempstead during the years 1964-65 and 1967-69.

With respect to defendant Harris, plaintiff has alleged that he was exposed to asbestos while cleaning Harris' printing presses. Specifically, he has alleged that brakes used to operate those presses contained asbestos. According to plaintiff's employment history chart, he was employed as a "helper" at "Foil Craft Printing Company" in West Hempstead during the periods 1964-65 and 1967-69. It is at the Foil Craft Printing Company that plaintiff contends he came into contact with asbestos from machines he used which were manufactured by defendant Harris.

The defendant Harris denies manufacturing, selling, distributing or supplying any asbestos-containing products to which the plaintiff was exposed. In support of its motion for summary judgment, defendant has submitted an affidavit of Richard J. Leigh, who has been servicing Harris sheet-fed presses since 1959. Mr. Leigh was not aware of any brake located on a Harris sheet-fed printing press that utilized an asbestos-containing component. Mr. Leigh operated Harris sheet-fed printing presses for two and a half years in 1956-1959 in a print shop at the Quantico Marine base in Virginia. In 1959 he was hired by Harris to work in the service department. In 1970, he became Service Manager for Manhattan and was responsible for the installation and warranty servicing of

Harris sheet-fed offset printing presses. In 1973 Mr. Leigh left Harris and started RJI Machine Co, which he still owns and operates. RJI has been in the business of installing and servicing printing equipment, approximately 90% of which was manufactured by Harris before the discontinuance of its sheet-fed press operations in 1976. Mr. Leigh has been installing and servicing Harris sheet-fed offset printing presses for more than 50 years. In his affidavit he stated:

6. While employed with Harris, I visited Foil Craft Printing on several occasions to perform service and repair of printing presses manufactured by Harris. I only recall Foil Craft Printing having Harris "sheet-fed" presses, which utilize various size individual sheets of paper. While Foil Craft Printing did have "web" presses, which utilize large rolls of paper, I do not recall Foil Craft Printing having any web presses manufactured or sold by Harris....

8. In past lawsuits brought against Harris, exposure to asbestos has been alleged from brakes in main drive motors. I have never seen a main drive motor provided by Harris that contained any brake, much less a brake that utilized asbestos-containing brake pads. To stop a Harris sheet-fed press the operator engages a "Stop" button, which cuts off electric power to the main drive motor, causing the press to stop. Pressing a "Stop" button does not engage a brake of any kind either inside or outside of the main drive motor casing.

9. As manufactured by Harris prior to the discontinuation of its sheet-fed press operations in 1976, sheet-fed printing presses did contain constant tension brakes at several locations, including the camshaft, the feed roll, the pile feeder, and the ink duct roll. These brakes were always made exclusively of leather, except for a short period of time when the feed roll brake on certain model pressure was made of a composite material that contained copper wire.

10. I am not aware of any brake located on a Harris sheet-fed printing press that utilized an asbestos-containing component.

On a motion for summary judgment, the court's function is to decide whether there is a material issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can

be granted to a movant. *Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.* 129 AD2d 611 (2nd Dept 1987); *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133 (2nd Dept 1987). Defendant Harris has made an adequate *prima facie* show of entitlement to summary judgment by demonstrating that it neither manufactured, sold, distributed or supplied any asbestos-containing products to which the plaintiff was exposed.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs, Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422 (2nd Dept 1984); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app. disp.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app. den.* 82 NY2d 660.

In opposition to the motion for summary judgment plaintiff's attorney submitted the following documents (Exhibit "3"):

A drawing designated "5VA105" to establish that the Harris offset presses contained asbestos-metallic brakes.

In reply, ANTHONY DEGLOMINE, III, ESQ., the Vice-President and Deputy General Counsel for defendant Harris states that the drawing of the "5VA105" is not applicable to a brake, or any other component of a Harris printing press, but rather to an unidentified component of a Model 5VA "Seybold single Knife Trimmer." Defendant's counsel asserts that plaintiffs' attorneys, Weitz &

Luxenberg, PC, should be aware that this drawing does not pertain to a Harris printing press as the drawing was one of the many documents selected for production following Weitz & Luxenberg's inspection of documents at the Harris corporate headquarters in Melbourne, Florida in February 2009 [paragraph "5" of Deglomine affidavit]. In short, defendant Harris is not in possession of any records to demonstrate that a "Seybold Model 5VA" trimmer was sold to plaintiff's employer, Foil Craft Printing.

Plaintiff asserts that Montalvo Corporation, a non-party to this action, sold asbestos-containing brakes to plaintiff's employer that Montalvo purchased from companies such as Raybestos Manhattan. Harris has submitted documentary evidence to establish that the brakes Montalvo sold to Harris were used solely for unwind applications for web presses (presses that utilize large rolls of papers as opposed to individual sheets). Montalvo was unaware of any Montalvo brakes used on sheet-fed printing presses which did not utilize unwinders. In addition, Montalvo had no records of sales to the Harris facility in Cleveland, Ohio, where sheet-fed presses were manufactured. Also, the only records of parts sales to Harris that Montalvo had were sales to the Harris facility in Westerly, Rhode Island during the period June 1972 to November 1973, to the Harris facility in Fort Worth, Texas in 1975, and a single sale to a Harris facility in Pawtucket, Connecticut in 1977. The record demonstrates that even if the Montalvo corporation sold some asbestos-containing friction parts to the Harris facilities in Westerly, Rhode Island, Fort Worth, Texas and Pawtucket, Connecticut, for use on web presses, those sales took place several years after the plaintiff concluded his employment with Foil Craft Printing. Further, defendant has shown that it is not in possession of any records which indicate that any of the four presses manufactured for and sold to the U.S. Army, were ever located or used by the plaintiff's employer Foil Craft Printing.

Although summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY2d 361, 364), nevertheless, a “court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Assing v United Rubber Supply Co., Inc.*, 126 AD2d 590 (2nd Dept 1987); see *Rotuba Extruders Ceppos*, 46 NY2d 223, 231) and where there is nothing left to be resolved at trial, the case should be summarily decided. *Andre v Pomeroy*, *supra* at 364.

Notably, bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment. See *Spodek v Park Property Dev. Assocs.*, 263 AD2d 478 (2nd Dept 1999). “‘[A]verments merely stating conclusions, of fact or of law, are insufficient’ to ‘defeat summary judgment.’” *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383, quoting from *Mallad Constr. corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290. It is well settled that “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue of fact. See *Billordo v E.P. Realty Associates*, 300 AD2d 523 (2nd Dept 2002); see *Zuckerman v City of New York*, 49 NY2d 557, 562; *Dunlap v Levine*, 271 AD2d 396.

The plaintiff’s belief that the brakes of the Harris printing press contained asbestos is not based on any admissible evidence, but speculation and unsubstantiated assertions that during the period in dispute “all brakes in the world” contained asbestos. Plaintiffs cannot create a triable issue of liability on the part of Harris just by alleging, based on hearsay and speculation, that the printing presses manufactured by Harris contain an asbestos-containing component and that these components were a source of asbestos fiber to which the plaintiff was exposed, and that it was more likely than not that the alleged exposure was a substantial factor in causing his injuries. See *Diel v Flinkote Co.*, 204 AD2d 53 (1st Dept 1994); *Cawein v Flinkote Co.*, 203 AD2d 105 (1st Dept 1994).

Plaintiffs have failed to put forth any credible evidence to demonstrate that the plaintiff was exposed to asbestos-containing products either manufactured or sold by defendant Harris.

Accordingly, after due deliberation, it is

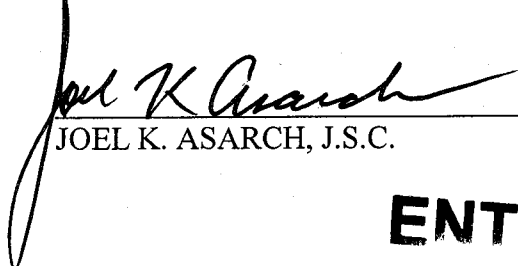
ORDERED, that the motion for summary judgment by defendant Harris Corporation is **granted**. The complaint and all cross-claims against defendant Harris Corporation are dismissed. Harris Corporation shall be deleted from the caption as a party defendant; and it is further

ORDERED, that counsel for defendant Harris Corporation shall serve a copy of this Decision and Order with notice of entry upon all other parties appearing herein.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 19, 2011

ENTER:


JOEL K. ASARCH, J.S.C.

Copies mailed to:

O'Hare Parnagian LLP
by Richard A. Menchini, Esq.
Attorneys for defendant Harris

Weitz & Luxenberg, P.C.
By Chris Romanelli, Esq.
Attorneys for plaintiffs

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