

**Vantosh v 3M Co.**

2014 NY Slip Op 30888(U)

April 1, 2014

Sup Ct, New York County

Docket Number: 190439/12

Judge: Sherry Klein Heitler

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

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RUTH VANTOSH and HAROLD VANTOSH,

Plaintiffs,

Index No. 190439/12  
Motion Seq. 002

**DECISION & ORDER**

-against-

3M COMPANY, et al.,

Defendants.

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**SHERRY KLEIN HEITLER, J.:**

Defendant Union Carbide Corporation (“UCC”) moves in this asbestos personal injury action for summary judgment dismissing all claims and cross-claims asserted against it on the ground that there is no evidence to show that it contributed to plaintiffs’ injuries. The motion is denied as set forth below.

On September 28, 2012 plaintiff Ruth Vantosh and her husband plaintiff Harold Vantosh commenced this action to recover for injuries alleged to have been caused by Mrs. Vantosh’s exposure to asbestos.<sup>1</sup> Mr. Vantosh was deposed in January and February of 2012.<sup>2</sup> In general he testified that while working as a glazier he sustained bystander asbestos exposure from other trades that worked with asbestos-containing products in his presence, including but not limited to floor tiles and joint compound. Mrs. Vantosh was deposed in November of 2013.<sup>3</sup> She testified that she was exposed to asbestos by virtue of washing her husband’s dirty work clothes.

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<sup>1</sup> Mrs. Vantosh has mesothelioma.

<sup>2</sup> Copies of Mr. Vantosh’ deposition transcripts are submitted as exhibit 9, 10, & 11 to the moving papers (“Deposition”).

<sup>3</sup> Copies of her deposition transcripts are submitted as defendant’s exhibits 7 & 8.

UCC mined and manufactured asbestos. It asserts, however, that Mr. Vantosh's failure to specifically identify UCC as a cause of his asbestos exposure entitles it to summary judgment. UCC also attacks plaintiffs' allegation that Mrs. Vantosh was exposed to its asbestos from floor tiles manufactured by Kentile Floors, Inc. ("Kentile"). Plaintiffs assert that UCC's moving papers are erroneously based on the assumption that plaintiffs' sole source of exposure to UCC's asbestos was through Kentile floor tiles while the evidence demonstrates that during the 1970's Mrs. Vantosh was exposed as well to UCC's asbestos in Georgia-Pacific ("GP") joint compound.

In this regard, Mr. Vantosh testified that from 1965 through 1993 while he was self-employed he saw cans of GP joint compound at unspecified work sites. Initially Mr. Vantosh could not recall whether he saw sheetrockers use such joint compound in his presence

(Deposition pp. 396-98):

- Q. Can you recall while you were self-employed ever seeing any worker using Georgia-Pacific joint compound?
- A. I don't remember any -- I remember seeing cans on the job, among other names, but I don't remember what they -- they -- on those occasions what they were using, actually.
- Q. Okay.
- A. Because I'd come and go.
- Q. You remember the word "Gypsum"?
- A. Gypsum, yeah.
- Q. But you would agree with me that you can't recall ever seeing the words Georgia-Pacific on any can or label in any -- in any job site that you worked at, would you agree with that? . . .

THE WITNESS: I don't remember eyeballing any of it. . . .

- Q. Okay. So you don't --
- A. But they did -- they did have the material on the job.
- Q. Who had material?
- A. The Sheetrockers.

Q. The Sheetrockers. Okay. And so the Sheetrockers had Georgia-Pacific material on the job?

A. I suppose so, sure.

Q. Well, when you say "suppose so," I don't want you to guess, I want to know what you remember seeing.

A. I saw Georgia-Pacific cans coming in; and what they did with it, I didn't follow.

Upon further examination, Mr. Vantosh testified that the sheetrockers spackled and sanded dried GP joint compound in his presence on multiple occasions (Deposition pp. 402-03, 498-499, 502-03, objections omitted):

Q. You believe that you -- that you were exposed to asbestos-containing products . . . That you were at one point, or any time in your career, exposed to an asbestos-containing product like joint -- like Georgia-Pacific joint compound. Would you agree with that?

A. Would you repeat?

Q. Yeah . . . This exposure sheet and this chart indicates that you were exposed to Georgia-Pacific joint compound. When did that happen?

A. Any time I went into a -- a structure where the Sheetrockers were working, they were sanding the spackle compound, make the walls smooth, painting.

Q. Okay. And you would say that was less than 10 times, though, correct? . . .

A. Oh, God. 20 times. 10 times.

Q. Twenty times.

A. 10 times.

Q. Okay. . . .

THE WITNESS: Many times during my career.

\* \* \* \*

Q. Okay. Do you believe that you saw Sheetrockers working with Georgia-Pacific joint compound in your presence?

A. Yes.

Q. Do you believe that you saw Sheetrockers sanding Georgia-Pacific joint compound in your presence?

A. Yes.

Q. Okay. How often do you believe that happened? . . .

THE WITNESS: During my working years whenever I would go in on a job site, invariably there would be Sheetrockers working, whether they were spackling or sanding, whatever.

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Q. Now, all of these different kinds of joint compounds, whichever brand it is, what conditions are created around you when Sheetrock workers were sanding joint compound? . . .

THE WITNESS: Lots of dust. . . .

Q. And did that dust get on your clothing?

A. Yes. . . .

Q. And you were asked about trying to wipe off your clothes before you were home for the day. Were you successful in getting all of the joint compound dust off your clothes? . . .

THE WITNESS: To the -- from what I saw, the clothing was -- the clothing -- the clothing was clean and when it was applicable I would -- I put it on for the following day, or several days later. I don't get --

Q. Were your clothes sometimes still dusty when you took them off at home? . . .

THE WITNESS: Yes. Yes.

UCC contends that plaintiffs position regarding GP's asbestos joint compound and Mrs. Vantosh's exposure thereto is mere speculation. To the contrary, this testimony is sufficient to raise a triable issue of fact in this regard. *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996). The weight to be given thereto is a matter to be determined by the trier of fact. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226, (1st Dept 2002).

The defendant further argues that plaintiffs can only speculate whether any GP joint compound Mr. Vantosh may have encountered during his nearly 30 years of self-employment contained UCC asbestos because UCC did not supply asbestos to GP prior to 1970 or after 1977. However, an examination of the record reveals that Mr. Vantosh was never asked in what period

of time his alleged exposure to GP joint compound actually occurred.

CPLR 3212(b) provides, in relevant part, that a motion for summary judgment shall be granted if “the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” *See also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The party moving for summary judgment carries the initial burden to produce evidence which *prima facie* resolves all material issues of fact in its favor. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012).

Here, Mr. Vantosh was not asked to indicate the time period during which he believed he was exposed to asbestos from GP joint compound. UCC cannot rely on this omission in seeking to present its *prima facie* case. *See Velasquez v Gomez*, 44 AD3d 649, 650 (2d Dept 2007) (quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 585 N.Y.S.2d 894, 895 [4th Dept 1992]) (“a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.”)

Accordingly, it is hereby

ORDERED that Union Carbide Corporation’s summary judgment motion is denied.

This constitutes the decision and order of the court.

DATED: April 1, 2014

  
SHERRY KLEIN HEITLER, J.S.C.