

**Hammer v Algoma Hardwoods, Inc.**

2014 NY Slip Op 31993(U)

July 28, 2014

Sup Ct, NY County

Docket Number: 190363/12

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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 MARGARET S. HAMMER, Individually and as Executrix  
 of the Estate of ROLF T. HAMMER, deceased,

Index No. 190363/12  
 Motion Seq. 007

Plaintiffs,

**DECISION & ORDER**

-against-

ALGOMA HARDWOODS, INC., et al.,

Defendant(s).

-----X  
**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Mario & DiBono Plastering Co. (“Mario & DiBono”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that there is no evidence to show that it contributed to plaintiffs’ decedent Rolf Hammer’s alleged asbestos exposure. For the reasons set forth below, Mario & DiBono’s motion is denied.

Mr. Hammer commenced this action in August of 2012 to recover for personal injuries<sup>1</sup> allegedly caused by his occupational exposure to asbestos. He was deposed on October 26 and November 7, 2012<sup>2</sup> and testified, among things, that he worked for U.S. Plywood in its Sales and Marketing Department between 1960 and 1985. As part of his job duties Mr. Hammer toured construction sites. Relevant to this motion, Mr. Hammer accompanied his supervisor to the World Trade Center (“WTC”) construction site during the winter of 1970 where he observed construction workers fireproof structural steel beams with spray insulation for approximately four hours (defendant’s exhibit B, pp. 103-104, defendant’s exhibit C, pp. 203, 204-05):

<sup>1</sup> Mr. Hammer had been diagnosed with malignant mesothelioma.

<sup>2</sup> Mr. Hammer’s deposition transcripts are annexed as exhibits B and C to the defendant’s moving papers (“Deposition”). Mr. Hammer was also presented for a *de bene esse* deposition, portions of which are annexed as exhibit B to plaintiffs’ opposition papers.

Q. Is there a way that you believe you encountered asbestos while you were working out of the New York City office?

A. Yes.

Q. How was that?

A. Well, one case was not related to our products, but my boss got an invitation to the World Trade Center in Tower One. I think it was 1970. And we went up a freight elevator to floor 30 or something like that. And they opened the -- the freight elevator door and there were guys spraying asbestos insulation on structural steel, and it was -- you know, some of it was a wet slurry and some -- there was a lot of dust as well there.

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Q. What I'm asking is, do you have a specific recollection of seeing the fireproofing sprayers mix that material at any time when you were there?

A. Just that it was being done, and it was dusty.

\* \* \* \*

Q. Okay. So is it fair to say that you believe you were exposed to asbestos from being in the vicinity of that spray being applied to the steel?

A. Absolutely.

Q. All right. What's your basis for believing that that material contained asbestos?

A. Because we were told it was asbestos.

Q. By who?

A. By the architect and the supervisor whose men were applying it.

It is undisputed that Mr. Hammer was unable to recall the name of the fireproofing contractor he observed at the WTC. It is primarily on this ground that Mario & DiBono moves for summary judgment. In response plaintiffs submit historical documents which demonstrate that Mario & DiBono was the WTC's fireproofing contractor during the relevant time period. For example, a May 1970 memorandum entitled "THE WORLD TRADE CENTER - SPRAY FIREPROOFING - CONTRACT WTC 400.00, WTC 113.00, WTC 120.00" identifies Mario & DiBono as the WTC fireproofing contractor and suggests that the use of asbestos created concerns regarding air quality (plaintiffs' exhibit D. n. 2):

On April 17, 1970, the spray fireproof contractor, Mario & DiBono Plastering Co. who is a subcontractor to ALCOA under WTC 400.00 and also the Port Authority's contractor under WTC 113.00 was served with five summonses, one for each day of the week of April 13<sup>th</sup>. . . . Mario & DiBono also received a Show Cause order returnable before the Commissioner of the Department of Air Resources on April 24<sup>th</sup> in connection with the fireproofing work being performed at the World Trade Center, as to why the job should not be sealed off.

A second memorandum circulated in 1970 entitled "CONDITION CREATED BY IMPROPER SPRAYING OF ASBESTOS FIRE PROOFING MATERIAL" describes how Mario & DiBono workers had "been observed spraying the fireproofing material onto the east face of Tower 'A' without the use of protective coverings that would prevent the spray-on fireproofing material from blowing into the surrounding air space." The memorandum directs Mario & DiBono to correct this "potentially serious problem" immediately.<sup>3</sup>

Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). In deciding a summary judgment motion the court's role is to determine if any triable issues exist, not the merits of any such issues. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). In doing so, the court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013). In asbestos personal injury cases, should the defendant establish its *prima facie* entitlement to summary judgment, the plaintiff can avoid summary judgment by demonstrating that there was exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this context, the plaintiff need only show "facts and conditions from which the defendant's liability may be reasonably inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

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<sup>3</sup>

Plaintiffs' exhibit G.

Here, Mr. Hammer testified that he was exposed to asbestos fireproofing spray insulation at the WTC construction site. The documents show that Mario & DiBono applied such insulation. Taken together, this is sufficient evidence from which Mario & DiBono's liability may be reasonably inferred. *See Cawein, supra; Reid, supra.*

Although Mario & DiBono does not expressly raise a causation argument, it insinuates that Mr. Hammer's four-hour exposure period is too *de minimis* to be deemed a substantial contributing cause of his injuries. However, it has not submitted any medical evidence, expert testimony, or relevant caselaw to support its position, and as such has not met its *prima facie* burden in this regard. *See Vega, supra*, at 503; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Accordingly, it is hereby

ORDERED that Mario & DiBono Plastering Co.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

7.28.14

  
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SHERRY KLEIN HEITLER, J.S.C