

**Ombramonti v Aluminum Co. of Am.**

2019 NY Slip Op 30168(U)

January 18, 2019

Supreme Court, New York County

Docket Number: 190127/2017

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 FRANCO OMBRAMONTI

Plaintiff,

- against -

ALUMINUM COMPANY OF AMERICA (ALCOA), et al.,

Defendants.

INDEX NO. 190127/2017 MOTION DATE 12/12/2018 MOTION SEQ. NO. 001 MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on Morse Diesel's motion for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes Notice of Motion/ Order to Show Cause, Answering Affidavits, Replying Affidavits, and Cross-Motion.

Upon a reading of the foregoing cited papers, it is Ordered that Defendant, Morse Diesel's, motion for summary judgment pursuant to CPLR §3212, dismissing Plaintiff's complaint and all cross-claims against it, is denied.

Plaintiff, Franco Ombromonti, was diagnosed with Mesothelioma on April 10, 2017. Plaintiff claims he was exposed to asbestos at many New York City large commercial and residential jobsites. Specifically, he claims he was exposed to asbestos as a Local 3 Mosaic and Terrazzo Worker Apprentice and Mechanic from approximately May of 1971 through 1977, and as a Local 780 Cement Mason Journeyman from approximately 1977 through the mid-1980s.

To prevail on a motion for summary judgment, the proponent must make a 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 NY2d 833, 652 NYS2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that 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 NY2d 525, 569 NYS2d 337 [1999]).

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 NY3d 499, 942 NYS2d 13, 965 NE2d 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 nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs'

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

proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept. 2003]; see also *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept. 2016]).

Labor Law 200 codifies a general contractor's common-law duty of care to provide construction site workers with a safe place to work (*Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 850 NYS2d 428 [1st Dept. 2008]). "The party charged with that responsibility must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 [1981]). Therefore, to be charged with liability under Labor Law §200, a general contractor must perform more than its "general duty to supervise the work and ensure compliance with safety regulations" (*De La Rosa v Philip Morris Management Corp.*, 303 AD2d 190, 757 NYS2d 527 [1st Dept 2003]). However, if a general contractor creates the dangerous condition, the plaintiff need not demonstrate that the general contractor had supervision and control (*Murphy v Columbia Univ.*, 4 AD3d 200, 773 NYS2d 10 [1st Dept 2004]).

In NYCAL 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 AD2d 462, 622 NYS2d 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 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

In support of its motion, Defendant Morse Diesel argues that Plaintiff has failed to establish that he was exposed to asbestos fibers attributable to a Morse Diesel product. Morse Diesel contends that there is no liability for a general contractor under the circumstances of this case based on a strict products liability theory and that New York does not recognize causes of action for breach of warranty arising out of the performance of services (see Defendant's Memorandum of Law in Support at 5). However, this argument by Morse Diesel is unavailing because Morse Diesel has failed to respond to the Plaintiff's Product Identification Interrogatory and Document Request after many requests to date (see Affirmation in Opposition at 13:32).

Defendant also argues that it is entitled to summary judgment because Plaintiff has failed to establish that Morse Diesel exercised sufficient actual supervision or control over the work at issue to establish a duty of care on the part of Morse Diesel to the Plaintiff. This argument fails because Morse Diesel improperly attempts to shift the burden onto the plaintiff of establishing that it did not, in fact, have enough actual supervision or control over the work at issue. In other words, Morse Diesel does not put forth evidence to show that Morse Diesel did not exercise sufficient supervision or control over the work at issue or was not a general contractor for the jobsites at issue; rather, Morse Diesel merely shifts the burden onto the Plaintiff for him to produce said evidence and points to gaps in Plaintiff's arguments (see Defendant's Memorandum of Law in Support at 5). Therefore, this argument also fails because, as mentioned above, a defendant may not obtain summary judgment from this court simply by "pointing to gaps in the Plaintiffs' proof" (*Torres v Indus. Container, supra*; see also *Koulermos v A.O. Smith Water Prods., supra*).

Lastly, 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 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). Conflicting testimonial evidence raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v New York City Transit Authority*, 84 AD 3d 439, 922 N.Y.S. 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 A.D. 3d 439, 29 NYS 3d 178 [1st Dept., 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept., 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]).

As shown below, Plaintiff has put forth enough evidence of Morse Diesel's potential liability (not all of which is hearsay) for Defendant's motion for summary judgment to be denied (see *Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, *supra*). At his deposition, when asked about Morse Diesel; Plaintiff answered as follows:

**Q: Now this sweep-up work that the Morse Diesel laborers did, do you believe you were exposed to asbestos from that work?**

**A: Yes.**

**Q: How so?**

**A: When they sweep it up, it flies up in the air and you breathe it in.**

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**Q: You then discussed with us how the laborers employed by the general contractor or the general contractor laborers cleaned the work area, which included the asbestos debris created from the asbestos-containing products that we just discussed; is that correct?**

**A: Yes.**

**Q: Did these laborers sweep up and clean the asbestos-containing pipe covering?**

**A: Yes.**

**Q: Did these laborers clean up the asbestos-containing sheetrock?**

**A: Yes.**

**Q: Did these laborers clean up the asbestos-containing joint compound?**

**A: Yes.**

**Q: Did these laborers clean up the vinyl asbestos floor tile debris?**

**A: Yes.**

**Q: How did these laborers, the general contractor's laborers do this based on your recollection?**

**A: They come in with brooms and shovels, broom it, clean sweep, shovel it and put it in dumpsters.**

**Q: When they use the broom, what, if any, visual observations did you make?**

**A: There was dust in the air.**

**Q: What was this dust made of?**

**A: Asbestos.**

**Q: Where was this dust in relation to you?**

**A: All around me.**

**Q: Do you believe you inhaled this dust?**

**A: Yes, I did.**

**Q: Do you believe you were exposed to asbestos from this work?**

**A: Yes.**

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**Q: Did it specifically occur with Morse Diesel laborers?**

**A: Yes.**

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Q: How often during this time did this occur with Morse Diesel Laborers?  
A: Many times.

(Exh. D at pgs. 196:9-15; 293:8-295:7; 298-24-299:3; 299:17-20)

The above testimony is enough to satisfy the *Reid v Georgia* standard (*supra*) because it shows facts and conditions from which defendant's liability may be reasonably inferred.

Moreover, although Defendant may point to pieces of testimony which illustrate that Plaintiff may provide some conflicting testimony on the matters at issue in this case, this merely raises issues of credibility (*see generally* Defendant's Memorandum of Law in Support and Defendant's Reply Affirmation). And, as stated above, conflicting testimony is a basis to deny summary judgment (*Messina v New York City Transit Authority*, 84 AD 3d 439, 922 N.Y.S. 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 A.D. 3d 439, 29 NYS 3d 178 [1st Dept., 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept., 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]).

Plaintiff has raised sufficient issues of material fact to warrant a trial.

A jury shall weigh the credibility of any conflicting testimony in this case, and a jury shall decide if the evidence presented in this case credibly establishes that Morse Diesel was the general contractor at the jobsites at issue and exercised sufficient supervision or control over the work at issue to be liable to the Plaintiff.

Accordingly, it is ORDERED that Defendant Morse Diesel's motion for summary judgment pursuant to CPLR §3212, dismissing Plaintiff's complaint and all cross-claims against it, is denied.

ENTER:

Dated: January 18, 2019

  
MANUEL J. MENDEZ  
J.S.C.

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