# 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**

ELVIS LICUL and NEVENKA RADOVIC, as Co-Executors of the Estate of ALBINA LICUL, and VIKTOR LICUL, Individually,

Plaintiffs,

- against -

A. O. SMITH WATER PRODUCTS CO., *et al.*,

Defendants.

INDEX NO. 190173/2015
MOTION DATE 02/20/2019
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Mario DiBono Plastering Co., Inc.:

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 - 4 |
| Answering Affidavits — Exhibits | 5 - 6 |
| Replying Affidavits | 7 - 9 |

**Cross-Motion:** ☐ Yes **X** No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Mario DiBono Plastering Co., Inc.'s (hereinafter referred to as "Mario DiBono") motion for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' complaint and all cross-claims asserted against it, is denied.

On May 11, 2015, Mrs. Albina Licul was diagnosed with malignant pleural mesothelioma (Opp. Green Aff., Exh. 1). Plaintiffs commenced this action on June 2, 2015, to recover for damages resulting from Mrs. Licul 's exposure to asbestos (Mot. Turbert Aff., Exh. A, NYSCEF Docket # 1). On July 11, 2015, before she could be deposed, Mrs. Licul (hereinafter referred to as "decedent") died from the disease at 73 years of age (Opp. Green Aff, Exh. 2). Decedent's husband, Mr. Victor Licul, was deposed in this action over the course of two days, September 29 and 30, 2015.

Plaintiffs allege that the decedent was exposed to asbestos from Mr. Licul's work clothes. They claim Mr. Licul's clothes were covered in asbestos dust from his work, as a union carpenter employed by Design Office Partition, at construction sites where he performed work on doors and floors, and installed sheetrock, from about 1968 through 1980 (Mot. Turbert Aff. Exh. C, pgs. 28 and 66 - 69).

Decedent's alleged second hand exposure to asbestos - as relevant to this motion - is from washing Mr. Licul's work clothes and hugging him when he came home from work during the construction of the World Trade Center. Plaintiffs allege that Mr. Licul's clothing was exposed to the asbestos fireproofing, manufactured by Mario DiBono, that was sprayed on structural steel beams while he was working at the World Trade Center. Mr. Licul described his work clothes as white and dusty with the dust sticking to them when he worked at the World Trade Center. Mr. Licul testified that he wore his unwashed work clothes after working and dust would be created when the decedent hugged him after he came home. He testified that the dust was visible when the decedent hugged him and she breathed it in. He claims his work clothes were washed by

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

his wife (decedent). Mr. Licul also testified that at times he observed the decedent launder his dusty work clothes by shaking them in the slop sink before putting them in the washing machine. He testified that he saw dust as the decedent shook the clothes and that she breathed the dust in (Mot. Turbert Aff., Exh. C, pgs. 204-206, 325, 363, 378-379 and 406-412).

Mario DiBono's motion seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it.

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 non-moving 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]). 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]).

In support of its motion for summary judgment Mario DiBono relies solely on the affirmation of its attorney, the plaintiffs' complaint, plaintiffs' Answers to Interrogatories, Mr. Licul's deposition transcripts, and prior decisions of this Court (Mot. Turbert Aff., Exhs. A, B, C, D and E).

An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (Kase v. H.E.E. Co., 95 A.D. 3d 568, 944 N.Y.S. 2d 95 [1st Dept., 2012] citing to Zuckerman v. City of New York, 49 N.Y. 2d 557 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980). A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge, such as plaintiff's deposition testimony (See Aur v. Manhattan Greenpoint Ltd., 132 A.D. 3d 595, 20 N.Y.S. 3d 6 [1st Dept.,2015] and Hoeffner v. Orrick, Herrington & Sutcliffe LLP, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1st Dept. 2009]).

Plaintiffs argument that Mario DiBono's motion should be dismissed because it relies on the hearsay affirmation of an attorney is unavailing. The attorney's affirmation in support of Mario DiBono's motion is being used as a vehicle to submit deposition transcripts and is sufficient to sustain this motion.

Mario DiBono argues that it is entitled to summary judgment on causation because Vicktor Licul did not specifically identify its product, or testify that he saw sprayed beams or overhead piping. Mario DiBono claims that to the extent Mr. Licul testified he observed the spraying, it was not in his vicinity, and that he was confused or did not know whether that work actually occurred at the World Trade Center site (Mot. Turbert Aff. Exh. C, pgs.207-208, 405, 410-415). Mario DiBono also argues that Mr. Licul's deposition testimony states he was only exposed to the fireproofing product starting in 1972, after the company stopped using asbestos in its product (Mot. Turbert Aff. Exh. C, pgs. 419-422).

"In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant's product" (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff need "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]). A plaintiff's inability to recall exact details of the exposure is not fatal to the claim and should not automatically

result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [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]).

Plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of Mr. Licul's ability to provide a detailed description of his exposure. Plaintiffs in opposition provide a copy of a contract that shows that in 1967 Mario DiBono was the sole sub-contractor of ALCOA, the entity that was awarded the contract from the Port Authority of New York to provide the asbestos fireproofing on columns (Opp. Green Aff., Exh. 4). They also provide proof that starting in 1969 Mario DiBono directly contracted with the Port Authority of New York to provide asbestos fireproofing (Opp. Green Aff., Exh. 5). Although in 1970 Mario DiBono agreed to stop using asbestos fireproofing, plaintiffs claim the company continued to apply an asbestos overspray in elevator shafts, utility shafts and on mechanical equipment floors(Opp. Green Aff., Exh. 6). Plaintiffs have established that Mario DiBono was the exclusive supplier of asbestos fireproofing at the World Trade Center during at least part of the relevant period. Mr. Licul's failure to provide specific identification of Mario DiBono does not mean that he was not exposed to the product as part of his work at the World Trade Center.

"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 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony 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 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], Almonte v. 638 West 160 LLC, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018] citing to S.J. Capelin Assoc. v. Globe Mfg. Corp., 34 N.Y. 2d 338, 313 N.E. 2d 776, 357 N.Y.S. 2d 478 [1974]).

Plaintiffs have raised triable issues of fact as to whether Mario DiBono's liability may be reasonably inferred from his work around the company's asbestos fireproofing at the World Trade Center.

Mr. Licul provided internally contradictory testimony. Mr. Licul initially testified that he worked at the World Trade Center from 1968 to 1980 (Mot. Turbert Aff., Exh. C, pg. 205). Mr. Licul testified that he worked at the World Trade Center from about 1970 through 1978 or 1979 (Mot. Turbert Aff., Exh. C., pg. 363). He testified that he started working at the World Trade Center in the early 1970's and specifically in 1972 (Opp. Turbert Aff., Exh. C, pgs. 411 and 419). Mr. Licul testified that he observed the spraying many times while he was working at the World Trade Center, but could not remember specifically in which of the two towers (North and South Tower) he had observed the spraying (Opp. Turbert Aff., Exh. C, pgs. 365,410-412 and 420-421). Mr. Licul then testified he could not remember whether he was at the World Trade Center when spraying was taking place (Opp. Turbert Aff., Exh. C, pg. 422).

There is no proof that Mr. Licul's contradictory testimony was for purposes of obtaining a favorable outcome in this action or in summary judgment. Mr. Licul's conflicting testimony presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1st Dept., 1999]). There remain issues of fact as to whether the exposure to spraying in 1970

meant Mr. Licul was exposed to Mario DiBono's asbestos products and brought asbestos dust on his clothes home to the decedent causing her mesothelioma. The conflicting evidence and testimony raise issues of fact that cannot be resolved on a motion for summary judgment.

Accordingly, it is ORDERED that defendant, Mario DiBono Plastering Co., Inc.'s motion for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' complaint and all cross-claims asserted against it, is denied.

ENTER:

Dated: March 7, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

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