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

MICHAEL FLORIO,

Plaintiff,

- against -

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

Defendants.

INDEX NO. 190187/2017
MOTION DATE 11/20/2019
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by Rheem Manufacturing Company:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits	6 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Rheem Manufacturing Company's (hereinafter "Rheem") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it, is denied.

Michael Florio was diagnosed with lung cancer on April 21, 2017 (Opp. Exh. A). His alleged exposure to asbestos - as relevant to this motion - was from working with Rheem's asbestos containing commercial Heating Ventilation and Air Conditioning (HVAC) Units and Air Conditioning Units, as an oil delivery man and helper for Bergen Fuel, from 1984 through 1985.

Mr. Florio was deposed over the course of three days, February 13,14 and 16, 2018 (Mot. Exhs. A, B and C, Opp. Exh. B). He testified that he started working for Bergen Fuel in November of 1984 and remained with the company through June 1, 1993. Mr. Florio stated that he mostly did oil delivery work but from November of 1984 through November of 1985 he was also a helper responsible for installing commercial air conditioning units on rooftops in the Manhattan Garment District. Mr. Florio testified that he worked on the removal of approximately three Rheem air conditioners (Mot. Exh. A, pgs. 101-102 and 110, Mot. Exh. B, pgs. 187-188 and 191).

Mr. Florio stated that the air conditioning units were replaced with new ones and he was responsible for unhooking the gas lines connected to the old units and installing the gas lines on the new units (Mot. Exh. A, pgs. 110-111). He stated that the first thing he did was disconnect all the unit's feed lines for the burners, a process that took about half an hour. He specifically recalled disconnecting the gas lines which were surrounded by filters. He stated that the air filter was between the Rheem unit and the air duct. Mr. Florio stated that after a new unit was brought to the roof, he would add new filters, then connect the lines. Mr. Florio initially stated he thought he was exposed to asbestos from the filters which he described as some kind of fine needle insulation, and from the insulation that was wrapped like tape around the part of the pipes which were exposed. Mr. Florio later stated that he also had to remove the "dooring" to work on the pipes and there was insulation material that was "some kind of felt coating, like a cotton stuff" that he handled which contained asbestos (Mot. Exh. A, pgs. 138-144, Mot. Exh. B, pgs. 199 and 200-201 and Mot. Exh. C, pgs. 537-538).

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

Mr. Florio estimated that the old Rheem units were made of sheet metal, about six or seven feet wide and seven or eight feet long. He stated the units sat on a foundation and were about six feet in height between the foundation and the unit. He stated that the foundation under the Rheem roof top units would have been a couple of feet high. He testified that the new Rheem units were about the same size as the old units that were removed. Mr. Florio stated that he was unable to determine if either the old or the new Rheem units were compressor units, combination units, or something else. Mr. Florio testified that he is color-blind and unable to determine the exact color of the Rheem units and related parts. He stated he is only able to determine if something is light or dark in color. He stated that the exposed insulation was wrapped around the pipes like tape, light in color - probably white or gray - about one inch thick and of a rubber-type material. Mr. Florio stated that the felt type material he found inside the Rheem unit looked like insulated cotton felt and was of "a middle darkness" in between dark and light. (Mot. Exh. B, pgs. 192-197 and 200-201, and Mot. Exh. C, pgs. 550-551).

Plaintiff commenced this action on June 23, 2017 alleging his injuries resulted from exposure to asbestos (NYSCEF Doc. # 1). The Summons and Complaint were subsequently amended on October 18, 2017 to add additional defendants, including Rheem (NYSCEF Doc. # 31). Rheem filed its Verified Answer on November 15, 2017 (NYSCEF Doc. # 34).

Rheem now seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it. Rheem argues that it is entitled to summary judgment because there is no evidence the plaintiff was actually exposed to asbestos fibers released from a product manufactured, sold, supplied, distributed and/or installed by Rheem. Rheem argues that plaintiff's testimony is too vague to establish exposure to asbestos, and that it would be pure speculation and conjecture to determine there was any asbestos containing components associated with the Rheem air conditioning units he allegedly worked on during the relevant time period.

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]).

A defendant seeking summary judgment in an asbestos case must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (Comeau v W. R. Grace & Co.- Conn. (In re N.Y.C. Asbestos Litig.), 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995]). Rheem must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (Matter of N.Y.C. Asbestos Litig., 122 AD3d 520, 997 NYS2d 381 [1st Dept. 2014]). It is not until after Rheem meets its preliminary burden that the plaintiffs are required to raise any issues of fact (Amatulli v Delhi Constr. Corp., 77 NY2d 525, supra).

Rheem relies on the October 31, 2019 affidavit of its corporate representative, Richard Fuhrman, employed with the company from 1966 through 1999. He was employed as a Product Development Engineer with Rheem from 1981 through 1999. Mr. Fuhrman states that he obtained personal knowledge of the company's products through his work which required him to become familiar with "technical drawings, promotional data, parts lists, specifications, component materials and operational and performance characteristics of various Rheem products" both prior to and during his employment with the company

(Mot. Fuhrman Aff., paras. 2 and 3). Mr. Fuhrman states that, after reviewing plaintiff's deposition testimony, the Rheem units described are Rheem's rooftop or packaged air conditioning units. Mr. Fuhrman states that Rheem did not "manufacture, sell, supply, distribute, recommend or specify the use of asbestos containing insulation on piping leading to or from any of the rooftop or air conditioning units"(Mot. Fuhrman Aff., paras. 5 and 7). Mr. Fuhrman also states that Rheem's rooftop or packaged air conditioning units "were manufactured with fiberglass insulation on the interior of the cabinet. No asbestos material was used on the interior of a Rheem packaged air conditioner" (Mot. Fuhrman Aff., para. 9). He concludes that during the relevant time period (1984 through 1985) plaintiff would not have encountered asbestos materials during his work with Rheem air conditioning units (Mot. Fuhrman Aff., para. 10).

Mr. Fuhrman's affidavit is sworn but undated, Rheem failed to correct this defect when it annexed another copy of his affidavit to the Reply papers (Reply Exh.1). To the extent the defect is ignored, Mr. Fuhrman failed to identify which of Rheem's corporate records he searched or reviewed in preparing his affidavit. Mr. Fuhrman refers to annexed literature as "1" and "2" but there are no labels on the Rheem brochure and literature annexed to the motion and Reply papers to identify them (Mot. Fuhrman Aff. and Reply Exh. 1). Mr. Fuhrman does not state where, in the multiple pages of the materials annexed to his affidavit, it states that the interior insulation was manufactured with fiberglass. Furthermore, the pages are numbered and this could have easily been accomplished. Additionally the Rheem "Corsair" model referred to in the literature attached to Mr. Fuhrman's affidavit is identified with a "home owners guide" and does not appear to have been manufactured for commercial use. Mr. Fuhrman's Affidavit is conclusory and does not state a prima facie case on summary judgment (See In re New York City Asbestos Litigation (DiSalvo), 123 AD 3d 498, 1 NYS 3d 20 [1st Dept. 2014], Shanahan v. AERCO International, Inc., 172 AD 3d 534,101 NYS 3d 28 [1st Dept. 2019], Residential Credit Solutions, Inc. V. Gould, 171 AD 3d 38, 101 NYS 3d 2 [1st Dept. 2019], and Barraillier v. City of New York, 12 AD 3d 168, 784 NYS 2d 55 [1st Dept., 2004]).

In any case, plaintiff in opposition provides Rheem's response to corporate interrogatories wherein it is stated that for a limited time period the company incorporated encapsulated chrysotile-containing components manufactured by third-party manufacturers that included "gaskets, tape, wire, rope or corrugated paper." The interrogatories state that the asbestos components were phased out by 1975 (Opp. Exh. , pg. 6). To the extent Rheem argues that these components did not exist in the new units, it has not provided proof that they were removed or did not exist in the units the plaintiff helped remove from 1984 through 1985. Plaintiff argues that this evidence, when combined with Mr. Florio's deposition testimony, at the very least creates credibility issues warranting denial of summary judgment.

"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]).

Mr. Florio provided conflicting testimony. However, his conflicting testimony presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 AD 3d 514, 997 NYS 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 AD 2d 152, 700 NYS 2d 22 [1st Dept., 1999]). There remain issues of fact as to whether Mr. Florio's exposure to asbestos in either filters, or exterior and interior insulation in Rheem commercial HVAC or Air

Conditioning units he worked on from November 1984 through November of 1985 caused his lung cancer. The conflicting evidence and testimony raise credibility issues that cannot be resolved on papers.

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]). 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]). Furthermore, plaintiff, as the non-moving party, is entitled to the benefit of all favorable inferences, regardless of Rheem's allegation that he is unable to provide sufficient proof of exposure.

The opposition papers have provided sufficient proof to create an inference that plaintiff was exposed to asbestos from component parts in the Rheem air conditioning units he worked with during the relevant time period (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, supra and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, supra). Mr. Florio's deposition testimony, combined with plaintiffs' other evidence, creates credibility issues and "facts and conditions from which [Rheem's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, supra), warranting denial of summary judgment to Rheem.

Accordingly, it is ORDERED that Rheem Manufacturing Company's motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C

Dated: December 16, 2019

MANUEL J. MENDEZ
J.S.C.

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