| **Jackson v 3M Co.** |
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| 2020 NY Slip Op 30123(U) |
| January 13, 2020 |
| Supreme Court, New York County |
| Docket Number: Index No. 190063/2017 |
| 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

VERONICA JACKSON, as Administratrix of the Estate of STEPHEN JACKSON,

Plaintiffs,

-against-

3M COMPANY, et al.,

Defendants.

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| INDEX NO. | 190063/2017 |
| MOTION DATE | 01/08/2020 |
| MOTION SEQ. NO. | 003 |
| MOTION CAL. NO. | |

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Henry Company pursuant to CPLR § 3212:

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1- 3 |
| Answering Affidavits — Exhibits | 4-6 |
| Replying Affidavits | |

**CROSS-MOTION** ☐ YES X NO

Upon a reading of the forgoing cited papers, it is Ordered that Defendant Henry Company's ("Henry") motion for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiff's complaint, is denied.

Veronica Jackson brings this action as administratrix of the Estate of Stephen Jackson to recover for injuries sustained by decedent Stephen Jackson (hereinafter "Decedent").

Decedent was diagnosed with mesothelioma on January 12, 2017 and died approximately a year later on December 20, 2017. Decedent worked as a roofing mechanic in New York City for LH Kramer Inc. (a/k/a Kramer Roofing) from approximately 1970 to 1997. While employed as a roofing mechanic, he regularly applied asbestos-containing roofing cements, sealants, and coatings. Decedent alleges that he was exposed to asbestos-containing roofing cement, sealants, and coatings when he applied the asbestos-containing products manufactured by Henry on the roofs and once the asbestos-containing products dried, often on his tools, clothes, and shoes, it would be scraped or chipped off, which created asbestos dust.

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

Plaintiffs commenced this action on February 17, 2017 to recover for the injuries and death resulting from the decedent's exposure to asbestos.

Henry now moves for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiffs' complaint against it. Henry contends that Plaintiffs have failed to provide sufficient evidence that Decedent was exposed to asbestos from any asbestos-containing product supplied or distributed by Henry. Plaintiffs oppose the motion contending that Henry failed to make a prima facie showing that the Decedent's product identification regarding Henry does not sufficiently establish that he worked with any asbestos-containing roofing cement, sealants, and coatings manufactured by Henry, and in any event, contend issues of fact remain as to whether the Decedent was exposed to asbestos from Henry products.

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 N.Y.2d 833, 652 N.Y.S.2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving party to rebut the 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 N.Y.2d 525, 569 N.Y.S.2d 337 [1999]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist. (Kornfeld v. NRX Tech., Inc., 93 A.D.2d 772, 461 N.Y.S.2d 342 [1983], aff'd 62 N.Y.2d 686, 465 N.E.2d 30, 476 N.Y.S.2d 523 [1984]).

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 N.Y.3d 499, 942 N.Y.S.2d 13, 965, N.E.2d 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 non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. (SSBS Realty Corp. v. Public Service Mut. Ins. Co., 253 A.D.2d 583, 677 N.Y.S.2d 136 [1st Dept. 1998]).

In New York City Asbestos 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 A.D.3d 285, 776 N.Y.S.2d 253 [1st Dept. 2004]).

In support of its motion, Henry argues that the Decedent's deposition testimony fails to adequately and properly identify Henry cement, sealants, and coatings as a specific source of Decedent's alleged exposure to asbestos and that

Decedent's testimony was based on speculation and guesswork and a jury verdict must be based on more than such (Bernstein v. City of New York, 69 N.Y.2d 1020, 511 N.E.2d 52, 517 N.Y.S.2d 908 [Court of App. 1987]).

In opposition to the motion for summary judgment, Plaintiffs argue that the Decedent sufficiently described what he believed to be Henry plastic roof cement, flashing cement, lap cement, and "fibrated" roof coating.

Throughout Decedent's deposition, he offers specific product identifications of Henry's plastic roof cement, flashing cement, and fibrated roof coating. Decedent alleges that his employer would often purchase the cheapest product available if possible. Decedent states that he used "plastic roof cement", "flashing cement" and specifically named Henry as one of the manufacturers of the products. Decedent then goes on to claim, "for all the years that I worked with Kramer, I've used Henry products." When asked what else he used, Decedent explained he used "fibrated roof coating" (Affirmation in opposition, Exh. 3 at 201:13-20; 201:25- 202:4-6; 447:1-4). Decedent further goes on to state when asked "How many of those would you use Henry versus the other manufacturers," that he used Henry 40 percent of the time (Affirmation in opposition, Exh. 3 at 452:16-20). Decedent continued to state in his deposition that he remembered the specific cans he used for lap cement being blue with white lettering and that the cans said Henry on it (Affirmation in opposition, Exh. 3 at 435:5-7).

Plaintiffs point to Henry's corporate representative, Ariel Lender's, deposition testimony. Mr. lender admits that Henry manufactured and sold asbestos-containing roofing cements and coatings from 1981 through 2004 (Affirmation in opposition, Exh. 4 at 13:16 – 14:11). Mr. Lender further stated in his deposition testimony that it would be fair to assume that "a worker using a Henry Co. roofing cement any time between 1981 and 2004... would be using an asbestos-containing product unless they were using Number 108 lap cement" (Affirmation in the opposition, Exh. 4 at 29:25 - 30:4). Plaintiffs then go on to show that in Henry's general catalog and Henry's commercial products catalog, it states that Henry did produce and manufacture asbestos-containing plastic roof cement, flashing compound, and roof coating (Affirmation in opposition, Exh. 5 and 6). Mr. Lender further admitted in his deposition testimony that Henry's asbestos-containing products were both sold in higher volumes and were cheaper than their non-asbestos containing equivalents (Affirmation in opposition, ,Exh. 4 at 130-149).

Henry alleges through Mr. Lender's deposition testimony that they produced analogous non-asbestos versions of each of its asbestos-containing roof cements. Mr. Lender claims that the non-asbestos versions of Henry's asbestos-containing products were sold and manufactured from the 1980's to 2014. When asked how he knows this information, Mr. Lender explained that he does not know the exact dates the non-asbestos containing products were manufactured and sold, and the information he does have on those products is background information he

received from the people that have worked there before him (Affirmation in support, Exh. C at 123:3-125:19).

In light of the above testimony, there is evidence on the record sufficient to meet the *Reid* standard mentioned above. Plaintiffs have shown facts and conditions from which the Defendant's liability may be reasonably inferred (Reid, *supra*). Plaintiffs having mentioned Henry products as one of the products that exposed the Decedent to asbestos, the Decedent identified the cans he used matching those in the Henry general and commercial catalogs, and Mr. Lenders knowledge on the non-asbestos containing equivalents are sufficient to meet the *Reid* standard. 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.), *supra*.

Furthermore, it is not the function of the Court on 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.S2d 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 A.D.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 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]).

Henry fails to make a prima facie showing of entitlement to judgement as a matter of law. Henry's contention that Decedent was never exposed to asbestos-containing products manufactured, sold, or distributed by Henry is unavailing. Even if Henry was able to meet its prima facie burden, Plaintiffs raise issues of fact to be resolved at trial. Plaintiffs have specifically identified Henry asbestos-containing products and Mr. Lender's deposition testimony states that Henry produced and manufactured asbestos-containing products during the time of the Decedent's exposure to asbestos. Referring to the decision in *Bernstein*, "plaintiff need not refute remote possibilities; it is enough for plaintiff to show facts and conditions from which the negligence of defendant may be reasonably inferred" and Plaintiffs have demonstrated "facts and conditions from which [Henry's] liability may be reasonably inferred" to warrant the denial of Henry's motion for summary judgment (Reid v. Ga. Pacific Corp., 212 A.D.2d 462, 622 N.Y.S.2d 946 [1st Dept. 1995]).

Accordingly, it is ORDERED that Defendant Henry Company's motion for summary judgment pursuant to CPLR § 3212, dismissing Plaintiff's complaint, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: January 13, 2020

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
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