

<b>Geraghty v Airco Inc.</b>
2020 NY Slip Op 30824(U)
March 17, 2020
Supreme Court, New York County
Docket Number:190149/2018
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**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**

**RAYMOND M. GERAGHTY,**

**Plaintiffs,**

**-against-**

**AIRCO, INC., et al.,**

**Defendants.**

**INDEX NO. 190149/2018**  
**MOTION DATE 03/04/2020**  
**MOTION SEQ. NO. 003**  
**MOTION CAL. NO. \_\_\_\_\_**

**The following papers, numbered 1 to 6 were read on this motion for summary judgment by Defendant CNH Industrial America LLC pursuant to CPLR § 3212:**

**Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...**

**Answering Affidavits — Exhibits \_\_\_\_\_**

**Replying Affidavits \_\_\_\_\_**

**PAPERS NUMBERED**

<u>1-3</u>
<u>4-5</u>
<u>6</u>

**CROSS-MOTION       YES       NO**

Upon a reading of the forgoing cited papers, it is Ordered that defendant CNH Industrial America LLC’s (hereinafter “CNH”) motion for summary judgment pursuant to CPLR § 3212 to dismiss plaintiff’s complaint, is denied.

Plaintiff, Raymond M. Geraghty, was diagnosed with lung cancer in April of 2018 as a result of his alleged exposure to asbestos. He worked as a heavy equipment operator and mechanic in New York City from approximately 1982 to the present day. While employed as a heavy equipment operator and engineer, he performed maintenance tasks on a variety of different pieces of heavy equipment, such as cranes, bulldozers, backhoes, loaders, graders, and generators. During the performance of the maintenance tasks, it is alleged that he was exposed to asbestos friction materials and gaskets which created asbestos dust that he inhaled.

Plaintiff commenced this action on May 11, 2018 to recover for the injuries he sustained. CNH acknowledged service on July 30, 2018.

CNH now makes this motion for summary judgment pursuant to CPLR § 3212 to dismiss plaintiff’s complaint against it. CNH alleges that plaintiff has failed to provide evidence that he was exposed to asbestos from any asbestos-containing product supplied or distributed by CNH.

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

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 [1<sup>st</sup> Dept. 1998]).

In support of its motion, CNH argues that plaintiff's deposition testimony fails to adequately and properly identify CNH friction materials and gaskets as a specific source of his alleged exposure to asbestos and that his deposition testimony was based on speculation.

In opposition to the motion for summary judgment, plaintiff argues that he sufficiently described what he believed to be CNH friction equipment. Plaintiff states that CNH contemporaneously manufactured and sold asbestos-containing friction equipment to the manufacturers of the heavy equipment he alleges asbestos exposure from. Plaintiff further argues that CNH failed to make a prima facie case. Plaintiff claims that his product identification establishes he worked with asbestos-containing friction materials manufactured by CNH, and in any event, contend issues of fact remain as to his exposure.

Plaintiff alleges that CNH does not provide an affidavit by someone with knowledge of the facts in support of its motion, and thus Abex's motion should be denied.

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 [1<sup>st</sup> Dept, 2012] *citing* *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 [1<sup>st</sup>

dept. 2015]; *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D.3d 614, 878 N.Y.S.2d 717 [1<sup>st</sup> Dept. 2009]).

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

Plaintiff's deposition testimony provides product identifications of various manufacturers that CNH has sold asbestos-containing friction materials to. Plaintiff alleges that he worked in multiple locations, but can specifically recall Battery Park City, World Wide Plaza, the West Side Highway, Knapp Street Pollution Plant, and North River Pollution Plant. (Moving papers, Exh. C). He specifically states that he worked at these locations between 1981 and 1992. As a heavy equipment operator and engineer, plaintiff states that he was responsible for maintaining the heavy equipment which exposed him to asbestos friction materials and gaskets which created asbestos dust that he inhaled. (Moving papers, Exh. C). Plaintiff identified various manufacturers that supplied heavy equipment to the locations during the times in which he worked at the various listed locations. Although he could not state specifically which brake materials and linings he worked with and at which location, he was able to identify that CNH had potentially manufactured, sold, and distributed asbestos-containing friction materials and gaskets to be used in the backhoes that he maintained and which he alleged his exposure from. (Moving papers, Exh. D at 159-160).

Plaintiff provides CNH's interrogatories that referenced CNH's sales of asbestos-containing friction materials to various manufacturers. (Opp., Exh. 5). The interrogatories state that CNH asbestos-containing friction materials were present in various heavy equipment such as tractors, combines, harvesting equipment, dozers, crawlers, loaders/backhoes, front-end loaders, and cotton pickers among many others. (Opp., Exh. 5, pg. 1).

Plaintiff further provides the deposition of CNH corporate representative, Stephen Burdette, dated March 17, 2015. In Mr. Burdette's deposition, he testified that gaskets on the engines of CNH equipment, including oil pan gaskets, contained asbestos through approximately 1988. (Opp., Exh. 6 at 127:5-16, 131:7 to 132:6, 136:8-16).

CNH argues that plaintiff failed to identify CNH as a manufacturer, seller, or distributor of any products from which he was allegedly exposed to asbestos. CNH argues that plaintiff testified that he worked with and around various products and equipment during his time as a heavy equipment operator and engineer, however, he could not identify any product or piece of CNH equipment, other than that he worked on a Backhoe at the Knapp Street Pollution Project in the early to mid 1990's. (Moving papers, Exh. D at 145-146).

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 A.D.2d 462, 622 N.Y.S.2d 946 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 2004]).

Plaintiff’s deposition testimony, CNH interrogatories, and the deposition of CNH’s corporate representative provide sufficient evidence to meet the *Reid* standard mentioned above. Plaintiff has shown facts and conditions from which the defendant’s liability may be reasonably inferred. (*Reid, supra*). Plaintiff has demonstrated through CNH interrogatories, his own deposition testimony, and the deposition of CNH’s corporate representative, that CNH manufactured, sold, and distributed asbestos-containing friction materials and gaskets to manufacturers of the heavy equipment. The CNH interrogatories, plaintiff’s deposition testimony, and the deposition of CNH’s corporate representative is sufficient evidence 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]).

CNH fails to make a prima facie showing of entitlement to judgment as a matter of law. CNH’s contention that plaintiff was never exposed to asbestos-containing friction materials and gaskets manufactured, sold, or distributed by CNH is unavailing. Alternatively, plaintiff has raised issues of fact to be resolved at trial. Plaintiff has specifically identified heavy equipment manufactured by CNH that he saw during the time of his alleged exposure. Plaintiff has demonstrated “facts and conditions from which [CNH’s] liability may be reasonably inferred” to warrant the denial of CNH’s motion for summary judgment. (*Reid v. Ga. Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S.2d 946 [1<sup>st</sup> Dept. 1995]).

Accordingly, it is ORDERED that defendant CNH Industrial America LLC's motion for summary judgment pursuant to CPLR 3212, dismissing plaintiff's complaint, is denied.

ENTER: **MANUEL J. MENDEZ**  
**J.S.C.**

Dated: March 17, 2020

  
\_\_\_\_\_  
**MANUEL J. MENDEZ**  
**J.S.C.**

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