

Matter of N.Y. City Asbestos Litig.

Supreme Court of New York, Appellate Division, First Department

May 25, 2021, Decided; May 25, 2021, Entered

Index No. 190011/17, Appeal No. 13907, Case No. 2020-04707

Reporter

2021 N.Y. App. Div. LEXIS 3377 *; 2021 NY Slip Op 03291 **

Opinion

[1]** In the Matter of New York City Asbestos Litigation. Michelle Shanahan, as Executrix for the Estate of Arthur Shanahan and Michelle Shanahan Individually, Plaintiff-Respondent, Aerco International, Inc. et al., Defendants, Mario & DiBono Plastering Co., Inc., Defendant-Appellant.

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Core Terms

fireproofing, summary judgment motion, court properly, documentation, launch

Counsel: **[*1]** Clyde & Co US LLP, New York (Jeffrey C. Fegan of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Jason P. Weinstein of counsel), for respondent.

Judges: Before: Renwick, J.P., Webber, González, Scarpulla, JJ.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about May 28, 2020, which denied defendant Mario & DiBono Plastering Co., Inc.'s (M&D) motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs.

The court properly denied M&D's summary judgment motion since it failed to unequivocally establish that the materials it used could not have contributed to plaintiff's injury (see *Matter of New York City Asbestos Litig.*, 122 AD3d 520, 521 [1st Dept 2014]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]). In light of the decedent's testimony, which M&D submitted in support of its motion, identifying the fireproofing as a source of his exposure and M&D as the contractor that applied the fireproofing, plaintiff's failure to specifically list M&D in response to interrogatories was not, by itself, sufficient for M&D to satisfy its burden (cf. *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]).

In any event, in opposition to M&D's motion, plaintiff submitted sufficient evidence of facts and conditions from which M&D's liability may be reasonably inferred (*Reid* at 463). In addition to decedent's **[*2]** own testimony, this included documentation from the 1960s and testimony from a representative of one of M&D's suppliers concerning the use of asbestos in the fireproofing material, as well as M&D's knowledge of hazards associated with such fireproofing material (*id.*). Contrary to M&D's contention, the court properly considered the testimony and documentation submitted by plaintiff in opposition to the motion (*Matter of N.Y. City Asbestos Litig.*, 7 AD3d 285, 285 [1st Dept 2004]; see also *Matter of New York City Asbestos Litig.*, 190 AD3d 589 [1st Dept 2021]).

Regardless of whether M&D would have had the burden of showing that it did not launch a force or instrument of harm, the evidence submitted by plaintiff in opposition to the motion was sufficient to raise an issue of fact as to whether M&D's actions launched such a force or instrument of harm (see generally [Karydas v Ferrara-Ruurds, 142 AD3d 771, 772 \[1st Dept 2016\]](#)).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 25, 2021

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