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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Peter H. Moulton, *Justice* PART 50

MARK RICCI

Plaintiff

v.

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

Defendants

INDEX NO. 190224/2014

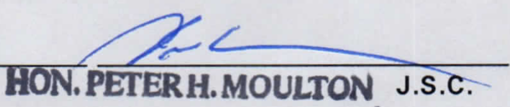
MOTION DATE ______

MOTION SEQ. NO. 008

MOTION CAL. NO. ______

Upon the foregoing papers, it is ORDERED that this motion is decided in accordance with the attached written decision of today's date.

Dated: 10/14/15



HON. PETER H. MOULTON J.S.C.

New York, New York

1. Check one: .... ☐ Case Disposed ■ Non-Final Disposition
2. Check as Appropriate: .... Motion is: ☐ Granted ■ Denied ☐ Granted in Part ☐ Other

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______

SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK
--X Index 190224/2014
IN RE NEW YORK CITY ASBESTOS LITIGATION
--X
MARK RICCI,

Seq 008

Plaintiff

-against-

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

Defendants
--X

In this action, plaintiff Mark Ricci ("plaintiff") contends that he developed mesothelioma as a result of bystander exposure to asbestos from dust that his father Aldo Ricci ("Aldo") brought home on his clothes. As is relevant to this motion, plaintiff asserts that his father was exposed to asbestos from moving defendant's boilers during his father's career as a draftsman engineer for Segner & Dolton from 1952 to 1971, as an engineer for Joseph Loring from 1971 to 1986, and for four years thereafter at Dolton & Ricci Consulting Engineers, Aldo's own engineering firm. Plaintiff maintains, and the moving defendant does not dispute, that an unspecified number of defendant's boilers contained asbestos.

Cleaver-Brooks, Inc. (Cleaver-Brooks) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all claims and cross-claims against it. The company submits no affidavit in support of its motion but asserts that it is entitled to summary judgment based upon Aldo's deposition testimony.[1] Aldo was 90 years old when he testified (Tr at 149). He could

[1] Plaintiff has not been deposed. While defendant asserts that counsel has "upon information and belief" not produced plaintiff, it is unclear why any complaining defendant has not moved for plaintiff's deposition or whether there is reason, medical or otherwise, for why plaintiff has not been produced.

not remember certain facts, which he attributed to his advanced age (Tr at 149, 152).

Arguments

To support its motion for summary judgment, Cleaver-Brooks points to the large number of defendants sued. The company notes that Aldo worked in an "office" setting for Segner & Dolton and performed only "ten percent" of his work in the field inspecting construction sites to ensure that the work was done properly and to code (Tr at 48). Cleaver-Brooks highlights that on direct examination Aldo could not recall whether he came into contact with asbestos while working at Joseph Loring (Tr at 66), could not recall personally handling asbestos on inspections while working at Joseph Loring (Tr at 72), could not recall being in the presence of asbestos while working at Joseph Loring (Tr at 72) , and could not identify the source of the asbestos while working at Joseph Loring (Tr at 72). Aldo also answered "No" to a question regarding whether he observed anyone "work on a Cleaver Brooks boiler that you recall?" (Tr at 292-93). Cleaver-Brooks asserts that Aldo's identification of a number of products (including Cleaver-Brooks' boilers) on re-direct was prompted by plaintiff's counsel and should be disregarded. Additionally, because Aldo testified to seeing contractors haphazardly remove asbestos-containing insulation located on boilers (Tr at 98-99), but also stated that he never saw anyone insulate a Cleaver-Brooks boiler (Tr at 292), he failed to identify a Cleaver-Brooks product.

Plaintiff opposes the motion, highlighting Aldo's testimony that he saw workers haphazardly pulling asbestos apart and throwing it aside from the boilers (Tr at 98-99). Plaintiff points to Aldo's testimony in which he identified the names of a number of boiler manufacturers that he recalled seeing throughout his career, including Cleaver-Brooks (Tr at 98-100). Plaintiff also points to Aldo's testimony that he brought home dust on his clothes (Tr at 204-05). Plaintiff attaches a

Cleaver-Brooks Boilers Part list to demonstrate that Cleaver-Brooks sold asbestos-containing products for use with its boilers and as replacement parts. Plaintiff cites to the deposition testimony of a Cleaver-Brooks' corporate representative regarding the asbestos component parts that were incorporated into Cleaver-Brooks boilers from 1935 through the mid 1980s.

In reply, Cleaver-Brooks maintains that it is not attacking Aldo's credibility. Rather, it asserts that Aldo's "admissible" testimony supports the company's position that Aldo was never exposed to asbestos from a Cleaver-Brooks boiler.[2] Further, Aldo's identification of Cleaver-Brooks boilers was merely a "generic statement as calculated to create a feigned issue" (Reply Mem at 15). Aldo's testimony "was contradicted by his earlier direct testimony, and again contradicted by his later testimony, which was specific to Cleaver-Brooks only" and his testimony was only "extracted upon rehabilitation examination of plaintiff's counsel" (id. at 16). The company points out that Aldo's wife did the laundry, not plaintiff (Tr at 397). Cleaver-Brooks also criticizes the evidence attached to plaintiff's opposition as "irrelevant" because it asserts that the issue is not whether Cleaver-Brooks manufactured boilers with asbestos. Rather, pursuant to *Schneider v Kings Hwy. Hosp. Ctr., Inc.*, Cleaver-Brooks asserts that it is entitled to summary judgment because plaintiff has failed to "set forth facts and conditions from which the negligence of defendant and the causation of the accident by negligence may be reasonably inferred" (67 NY2d 743, 744 [1986]); Reply ¶ 10).[3] Arguing that it does not have to prove a negative, Cleaver-Brooks cites several cases

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[2]Defendant does not indicate which testimony it considers admissible/inadmissable.

[3] *Schneider v Kings Hwy. Hosp. Ctr.* relates to the standard for upholding a jury verdict (not the standard on summary judgment) and provides in relevant part:

> To establish a prima facie case of negligence based wholly on circumstantial evidence, "[it] is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that

including *Martinez v Hunts Point Coop. Mkt., Inc.* (79 AD3d 569, 570-71 [1st Dept 2010] ["our jurisprudence does not require a defendant [moving for summary judgment] to prove a negative on an issue as to which [it] does not bear the burden of proof" [internal quotations and citations omitted]).[4]

Additionally in reply, Cleaver-Brooks takes aim at two cases cited by this court in many of its decisions on summary judgment, *Reid v Georgia Pacific* (212 AD2d 462 [1st Dept 1995]) and *Berensmann v 3 M Co.* (122 AD3d 520 [1st Dept 2014]). *Reid* is distinguishable, Cleaver-Brooks asserts, based on "[t]he strength of plaintiff's evidence" (Reply Mem at 7). The defendant there "was one of a handful of large companies used extensively by the Navy" (id.). Further, other witnesses corroborated the plaintiff's product identification (id.). *Berensmann* is also distinguishable, it argues. In that case plaintiff presented evidence that he used joint compound in his home and defendant admittedly sold products that contained asbestos along with asbestos-free products. Therefore, Cleaver-Brooks explains, it did not matter that plaintiff did not believe that the joint compound contained asbestos because an issue of fact was raised as to whether the product

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> negligence may be reasonably inferred" (Ingersoll v Liberty Bank, 278 NY 1, 7). The law does not require that plaintiff's proof "positively exclude every other possible cause" of the accident but defendant's negligence . . . Rather, her proof must render those other causes sufficiently "remote" or "technical" to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence.

[4]In that case, defendant established a prima facie case that it did not have actual or constructive notice of the dangerous condition of a steel hook which dislodged from an overhead rail, and plaintiff failed to raise an issue of fact. However, defendant had established its case through the deposition testimony of Hunts Point's general manager, who had personal knowledge of nonroutine repair requests, and through plaintiff's employer's vice-president of operations, each of whom testified that he never observed damage to the overhead rail system and never received any complaints about it.

contained asbestos. Here, however, Cleaver-Brooks argues, the issue is whether Aldo ever came into contact with Cleaver-Brooks' boilers (whether they contained asbestos or not).

Instead of following *Reid* and *Berensmann*, Cleaver-Brooks maintains, the court should grant its summary judgment motion (and other similar motions made by defendants) based on the weight and strength of plaintiff's evidence. In doing so the court should follow the cases often cited by defendants, *In re New York City Asbestos Litig. (Comeau) v W.R. Grace & Co.* (216 AD2d 79 [1st Dept 1995]), *Diel v Flintoke Co.* (204 AD2d 53 [1st Dept 1995]) and *In re New York City Asbestos Litig (Perdiaco) v Treadwell* (52 AD3d 300 [1st Dept 2008]).

Discussion

A. Summary Judgment Standards

CPLR 3212 (b) provides, in relevant part:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Thus, a defendant moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). An affidavit from a corporate representative which is "conclusory and without

specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig.* (*DiSalvo*), 123 AD3d 498 [1st Dept 2014]).

It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]).[5] The plaintiff cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept 2010]). It is also well-settled that in personal injury litigation, a plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which a defendant's liability can be reasonably inferred (*Reid, supra*; *Matter of New York City Asbestos Litg.* (*Brooklyn Nav. Shipyard Cases*), 188 AD2d 214, 225 [1st Dept], *affd* 82 NY2d 821 [1993]). The failure to recall or identify the name of a defendant is not necessarily fatal to a plaintiff's claim (see *Proctor v Alcoa, Inc.*, 125 AD3d 447 [1st Dept 2015] [even where plaintiff failed to identify the name of any entity that used asbestos at the former World Trade Center site where he worked, an issue of fact was raised by evidence demonstrating that the moving defendant's predecessors worked on the site doing the type of work that plaintiff observed]).

In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60 [1st Dept 1995] ["Supreme Court's conclusion that plaintiff's allegations are "not credible" therefore constitutes the impermissible determination of an issue that must await trial"]). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of

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[5]Contrary to defendant's argument, the holding in *Reid* did not revolve around the strength of the testimony. Nor could this be the court's unarticulated position, as such a reading would impermissibly merge the distinct burden of proof and issue of fact prongs articulated in *Zuckerman v City of New York* (49 NY2d 557 [1980]).

fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st Dept. 1996] [internal citations omitted]). Thus, it was reversible error for the supreme court to reject, "as being unworthy of belief" the testimony of a plaintiff in a separate action which was offered in opposition to defendant's summary judgment motion (*id.*). A defendant's contention that a plaintiff's description of the asbestos-containing product differs from the true description of that product also merely raises issues of credibility for the jury (*see Penn v Amchem Products*, 85 AD3d 475 [1st Dept 2011]).

Because assessment of credibility is a jury function, summary judgment must be denied even where plaintiff's testimony is equivocal. In *Berensmann,* 122 AD3d 520, *supra*, the First Department affirmed the trial court's denial of defendant's motion for summary judgment where the plaintiff identified the moving defendant's product by testifying that "It might've been" a brand that he used, then testified "No I can't remember" then testified "it's likely that I did, but that's the best I could do" and ultimately, that he did not even believe the product contained asbestos (*Berensmann*, 2013 NY Slip Op 33137 (U) [Sup Ct, New York County 2013]). The First Department held that, except as to the wallboard product which "undisputedly" never contained asbestos, summary judgment was properly denied because the evidence demonstrated that the moving defendant manufactured joint compound containing asbestos at the relevant times, and failed to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*see*

Berensmann, 122 AD3d at 521, *supra* [citing *Reid,* 212 AD2d at 463, *supra*]).[6]

Cleaver-Brooks has failed to establish a prima facie case. It failed to proffer unequivocal evidence that its product could not have contributed to plaintiff's injury (*Reid,* 212 AD2d at 463, *supra*; *Berensmann* 122 AD3d at 521, *supra, Matter of New York City Asbestos (DiSalvo),* 123 AD3d 498, *supra).* In order for this court to find that plaintiff had failed to set forth what defendant describes as "a factual issue of consequence for the jury" it must do what *Dollas* (225 AD2d at 321, *supra*) found was reversible error - - weigh the quality of the testimony and disregard portions of it "as being unworthy of belief." It is for the jury, not the court, to weigh Aldo's credibility (*see Berensmann; Penn v Amchem Products*, 85 AD3d 475, *supra*). This is a particularly important jury function in asbestos cases, where the testimony presented is often proffered by witnesses attempting

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[6]Contrary to defendant's arguments *Berensmann* is not distinguishable on the basis that the only issue there was whether the moving defendant's product contained asbestos. Defendant ignores the fact that plaintiff's identification of the moving defendant's product was equivocal. In denying summary judgment, the *Berensmann* court reiterated the standard in *Reid.* It did not cite *Diel* (204 AD2d 53, *supra*) or *Diel's* companion case *Cawein* (203 AD2d 105 [1st Dept 1994]). Defendant correctly notes that the First Department has not overruled *Matter of New York City Asbestos Litig. (Comeau),* 216 AD2d 79 *supra*, *Diel,* 204 AD2d 53, *supra* or *Matter of New York City Asbestos Litig (Perdiaco)*, 52 AD3d 300, *supra.* However, in this Department, *Diel* (and *Cawein*) are cited in name only (*see e.g., Matter of New York City Asbestos Litig. (Bernard),* 99 AD3d 410 [1st Dept 2013]), are not cited at all (*see Berensmann*) or are distinguished (*see e.g., Reid, Matter of Asbsestos Litig. (Rosini),* 256 AD2d 250 [1st Dept 1998]; *Salerno v Garlock, Inc.*, 212 AD2d 463 [1st Dept 1995] and *Millerman v Georgia Pac. Corp.* 214 AD2d 362 [1st Dept 1995]). *Matter of New York City Asbestos Litig. (Comeau)* has been cited alongside *Reid* (*see Matter of New York City Asbestos Litig (DiSalvo),*123 AD3d 498 [1st Dept 2014]), or is cited in support of a *denial* of defendants' summary judgment motions (*see e.g., Matter of New York City Asbestos Litig (Kestenbaum,* 116 AD3d 545 [2014]) or as a *"cf."* (*see Trolone* v *Lac d'Amiante Quebec*, 297 AD2d 528 [1st Dept 2002]). Additionally, to my knowledge *Matter of New York City Asbestos Litig (Perdiaco)* has not been cited by any New York Appellate Division case. Thus, it appears to me that the most recent and legally correct standard in asbestos cases in this Department is the standard articulated in *Berensmann and Reid (see also Matter of New York City Asbestos* [*DiSalvo*]).

to recall remote events that are years and perhaps even decades removed from the present.

Even if Cleaver-Brooks had met its burden, issues of fact exist for trial. Aldo had a long career as a mechanical engineer (Tr at 138). He testified that while working at Joseph Loring, the company was busy designing and developing systems, electrical, sprinklers, plumbing and air conditioning for hospitals, schools and other facilities in New York City, New Jersey, and Massachusetts (Tr at 32-33). He testified to similar work at his own firm (Tr at 34). He went out on inspections at "buildings, schools, hospitals, museums" primarily in Westchester for Segner & Dolton, and testified that "they were using asbestos and I did come in contact because of the atmosphere, the air circulation picking up the products and you know, touching the person, your body whatever" (Tr at 50).[7] Aldo inspected for Joseph Loring to make sure that equipment was installed correctly (Tr at 59). He recalled working on a job for Mobil Oil in New York City where he inspected boilers, pumps and fans, and recalled working on jobs with hospitals, schools, homes and apartments (Tr at 62-63, 67). He recalled working at Woodlands High School which was near his Hartsdale home where he inspected the mechanical equipment, piping, pumps, controls and expansion tanks (Tr at 177). He testified that he encountered Cleaver-Brooks boilers at schools, hospitals, office buildings, factories and hotels in White Plains (Tr at 289-90). He testified that he did not know a specific location because "Cleaver-Brooks did so many installations with their boilers" (Tr at 290). He described the appearance of the Cleaver-Brooks boilers (Tr at 291). He described bringing home dust on his clothes (Tr at 204-05, 161-2) and testified to seeing dust in connection with asbestos pulled from boilers (Tr at 99).

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[7]It is for the jury to determine whether Aldo's other statements, made minutes later, diminishes the weight of this testimony.

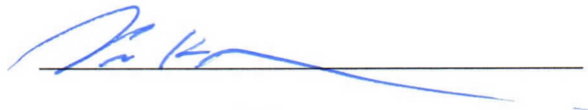
Additionally, Aldo's long career was in an industry where an engineer might reasonably be expected to come in contact with Cleaver-Brooks boilers (among others), and asbestos was admittedly a component in a number of unidentified Cleaver-Brooks boilers. Further, plaintiff has advanced no other theory to account for his contracting mesothelioma "an exceedingly rare disease . . . whose only known cause is the exposure to asbestos" (*Dollas* citing *O'Brien v National Gypsum Co.*, 944 F2d 69, 72 [2d Cir 1999]).[8] Accordingly, plaintiff has raised issues of fact for trial.

It is hereby

ORDERED that Defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: October 14, 2015



JSC

HON. PETER H. MOULTON
SUPREME COURT JUSTICE

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[8]Plaintiff's response to defendant's fourth amended interrogatories (interrogatory response) interrogatory 17 states that "Plaintiff is unaware of any exposure from any aspects of work around him." According to Chart A of the interrogatory response, plaintiff worked as a proofreader and editor, ran a typesetting department, and managed corporate communications at two hotels. Plaintiff was also unaware of any significant home improvement renovations *(see* interrogatory 4) during which he might come into contact with an asbestos product.