SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X

IN RE NEW YORK CITY ASBESTOS LITIGATION

----------X

Index 107016/2008
Motion Seq. 004

EILEEN M. TAVENIERE as Executor of the Estate of WARREN TAVENIERE,

Plaintiffs

-against-

AMERICAN STANDARD INC., et al.,

Defendants

----------X

Plaintiff Warren Taveniere ("plaintiff") was diagnosed with lung cancer that he attributes to his alleged exposure to asbestos while working as a United States Merchant Marine for Moore McCormack Lines from March 1953 until May 1955. During his time as a Merchant Marine, plaintiff served as an engine cadet on several vessels, including the USS Constitution and USS Mormak Surf. As such, this matter is subject to federal maritime law, namely the Jones Act, which provides a right of action by a seaman against a shipowner for personal injuries sustained in the course of his employment due to the shipowner's negligence (*see* 46 U.S.C. § 30104).

Plaintiff commenced this action on or about May 20, 2008. The following day, May 21, 2008, plaintiff served responses to Defendants' Amended Standard Set of Interrogatories, which included a list of product manufacturers plaintiff stated contributed to his asbestos exposure. Among the manufacturers named by plaintiff was Defendant Aurora Pump Company ("Aurora"). On July 30, 2008, plaintiff was produced for a deposition during which he identified gaskets and packing for use in connection with pumps manufactured by multiple entities, including Aurora, as

a source of his exposure to asbestos. At the conclusion of less than four hours of testimony, plaintiff's deposition was adjourned at plaintiff's counsel's request due to plaintiff's deteriorating health. At the time of the adjournment neither plaintiff's counsel nor Aurora's counsel had examined plaintiff, even though both were present at the deposition. Instead, other equipment manufacturers including Weil McClain, JH France, Cleaver Brooks, and CBS examined plaintiff. Upon adjournment of the matter, at plaintiff's counsel's request, the deposition was to "reconvene on a mutually agreed upon date" (Warren Taveniere Deposition Transcript at p. 106). Subsequently, plaintiff's counsel sent five separate notices to all defendants adjourning plaintiff's deposition, the last of which adjourned the deposition to March 18, 2010.[1] Plaintiff's deposition did not resume on March 18, 2010. No subsequent notices seeking to re-schedule plaintiff's deposition were sent by either plaintiff or defendant. At oral argument on October 28, 2015, the court queried whether Aurora made any efforts to depose plaintiff after March 18, 2010. Aurora answered that it did not send any notices or other correspondence to plaintiff at any time indicating its desire to depose plaintiff. Plaintiff passed away on November 3, 2013.

Aurora moves for summary judgment on the grounds that: 1) its inability to question plaintiff about whether he was exposed to asbestos fibers released from an Aurora product makes any deposition testimony yielded from plaintiff inadmissible as against it; and 2) even if plaintiff's

[1] In its Reply Affirmation, Aurora annexes five letters that were sent by plaintiff's counsel to all defendants after July 30, 2008 further adjourning plaintiff's deposition. The first letter, dated August 14, 2008, adjourned the deposition to October 1, 2008; a second letter, dated October 7, 2008, adjourned the deposition to October 29, 2008; a third letter, dated October 27, 2008, adjourned the deposition to November 18, 2008; a fourth letter, dated September 16, 2009, adjourned the deposition to December 16, 2009; and a fifth letter, dated December 16, 2009, adjourned the deposition to March 18, 2010 (*see* Ex. A, Defendant's Reply Affirm).

deposition testimony were admissible, plaintiff has failed to establish the existence of a triable issue of fact with respect to his alleged asbestos exposure in connection with Aurora pumps.

In support of its first ground for summary judgment, Aurora cites various cases for the general proposition that deposition testimony offered against a party that was not afforded an opportunity to examine the witness is inadmissible (*see e.g. In Re Ciraolo*, 37 AD3d 461 [2d Dept 2007][finding deposition testimony properly precluded where witness died prior to the completion of deposition and before cross-examination]). In support of its next ground, Aurora argues that since the only evidence plaintiff has is his insufficient deposition testimony, no triable issue of fact can be raised with respect to his alleged asbestos exposure in connection with Aurora pumps.

Plaintiff opposes the motion, claiming that Aurora is essentially asking the court to make an *in limine* evidentiary determination with respect to the admissibility of its evidence. Such a determination, plaintiff argues, is best left to a trial judge. Even if the court were to find otherwise, plaintiff argues that a party's incomplete deposition testimony may still be admitted at trial (*see e.g. Fleury v. Edwards*, 14 NY2d 334 [1964][wherein court admitted former testimony of plaintiff's decedent first taken at an administrative proceeding and later used at trial in a subsequent personal injury action]). Plaintiff further argues that defendant cannot challenge the admissibility of plaintiff's deposition because defendant never reserved its rights to continue questioning plaintiff after his original deposition date (*see Matter of Harmon*, 38 AD2d 988 [3d Dept 1972][court would not admit incomplete deposition testimony at trial because defendant reserved its rights to cross-examine witness following adjournment]; *see also Owens v. Sokol*, 65 AD2d 569 [2d Dept 1978]). Plaintiff contends that allowing defendant to challenge the admissibility of a deposition that it did not make any efforts to continue would permit defendant to use plaintiff's

deposition as a metaphorical sword and shield – a sword because defendant disingenuously argues that it intended to take the deposition, and a shield because defendant now seeks to expunge the use of that same deposition on summary judgment. Plaintiff also annexes to its opposition records from plaintiff's Merchant Marine service. Plaintiff claims that these records further establish that plaintiff worked on ships at the same time that those ships contained asbestos products, including asbestos pumps. Defendant does not dispute that its pumps were on two of the vessels that plaintiff worked on, the USS Mormak Surf and USS Constitution.

In reply, defendant states that it did not waive its right to cross-examine plaintiff, because the initial adjournment of plaintiff's deposition, as well as the subsequent notices of adjournment, were at plaintiff's counsel's request. Aurora also reiterates its position that even if plaintiff's deposition were admissible, plaintiff has failed to raise any triable issues of fact. [2]

Discussion

A. Waiver

Under CPLR § 3113[c], depositions include the rights of adversaries to exercise, "[e]xamination and cross-examination of deponents...as permitted in the trial of actions in open court" (*see* CPLR § 3113[c]). As such, deposition testimony is generally admissible at trial where the party against whom the testimony is offered has had the opportunity to cross-examine the

[2] To further advance this argument, Aurora notes that plaintiff's other evidence beyond his deposition testimony – namely the uncertified records of his work history – is insufficient to defeat summary judgment. Defendant also states that such records merely confirm plaintiff's service, years, rank, and vessels to which he was assigned. The records, in defendant's view, are otherwise devoid of any reference to any asbestos-containing gaskets or packing inside an Aurora pump. Defendant argues that since the records are uncertified, they should not be considered by the court. Given the relative ease by which certified copies of these records could have arguably been attained, it is preposterous that plaintiff's counsel attempts to add to the factual basis of his clients' claims through the submission of uncertified records of plaintiff's service on ships that Aurora pumps were aboard. Plaintiff's counsel provides no explanation for why these seemingly uncontested records were unauthenticated when it submitted its opposition to the instant motion.

deponent even if that opportunity is not exercised. Indeed, the Court of Appeals has long held that the "[a]dmissibility of such testimony does not depend on the actual act of cross-examination so long as it appears that the opportunity to cross-examine was available. A failure to exercise such right is deemed a waiver thereof" (*see Matter of White*, 2 NY2d 309, 314 [1957]; *see also Bradley v. Mirick*, 91 NY 293 [1883]["[O]n every trial the opposing party has the power to cross-examine. If he does not choose to appear and exercise this power, the consequences should fall on him and not on his adversary. To deal otherwise with the matter would operate unjustly in the present and all other cases"]; *compare Stern v. Inwood Town House*, 22 AD2d 650 [1st Dept 1964][Court did not permit introduction of deceased witness' testimony by citing CPLR § 3113[c] without addressing whether defendant timely sought to depose plaintiff]).

CPLR § 3117[a][3][i] allows for the use of a deposition of a witness who is dead (*see* CPLR § 3117[a][3][i] ["[t]he deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition who had the notice required under these rules, provided the court finds...that the witness is dead"]). However, if the deposition is not completed before death, and there has been no cross-examination, the deposition may not be admissible (*see Matter of Harmon*, 38 AD2d 988, *supra*). This principle holds particularly true where a defendant has preserved its rights by expressly conveying its desire to cross-examine a plaintiff prior or subsequent to the adjournment of a deposition (*see Owens v. Sokol*, 65 AD2d 569, *supra* [adjournment of a deposition may not be deemed a waiver of defendants' right to conduct cross-examinations where defendants clearly expressed their intention to continue the examination, thereby reserving their rights]). However, a defendant's argument that the admission of deposition testimony impinges upon its right to cross-examination may be

undermined where a defendant could have, but elected not to, timely cross-examine the declarant before he or she died (*see Matter of Luis R.*, 184 AD2d 1012 [2d Dept 1992]["[R]espondent was afforded the opportunity to cross-examine the witnesses but, by the actions of her counsel and as a result of her unexplained absence from the proceedings, failed to avail herself of that opportunity, thereby waiving her right to cross-examine"]; *see also Matter of White*, 2 NY2d 309, *supra*; *Bradley v. Mirick*, 91 NY 293, *supra*).

Where a witness has died, New York federal courts have adopted this same approach under the Federal Rules of Civil Procedure, foreclosing cross-examination where a party, through inaction, fails to exercise its rights (*see Duttle v. Bandler & Kass*, 127 FRD 46, 49 [SD NY July 6 1989]["[D]efendants' counsel had ample opportunity to cure any problems resulting from the inconvenient scheduling of the deposition by arranging for cross-examination at some later time."]; *Shanker v. Helsby,* 515 F.Supp. 871, 873 n. 4 [SD NY Mar. 18 1981], *aff'd,* 676 F.2d 31 [2d Cir.1982][lack of notice is no bar to the admissibility of a deposition where the objecting party had the opportunity to cure by scheduling cross-examination]; *see also* 5 Wigmore on Evidence § 1390 [Chadbourn rev. 1974]["Where, however, the failure to obtain cross-examination is in any sense attributable to the cross-examiner's own consent or fault, the lack of cross-examination is of course no objection - according to the general principle ... that an opportunity, though waived, suffices"]).

New York courts' approach of having parties timely exercise their rights is further evidenced by the fact that the CPLR incorporates protections for parties who request discovery, such as a deposition, and receive no response from adversely interested parties. If a party requests discovery and does not receive a response by an adversely interested party, the party seeking discovery can make a motion to compel (*see* CPLR § 3124). Also, New York City Asbestos

Litigation ("NYCAL") is governed by a Case Management Order ("CMO"). The CMO requires that "the deposition of plaintiffs and co-workers who testify in lieu of plaintiff will each be completed within a reasonable amount of time based on, among other things, the number of defendants in the case and the number of work sites. Counsel shall keep in mind the medical condition of the deponent...Any issues with regard to the deposition shall be raised with the Special Master" (*see* NYCAL CMO, Sec. X. Depositions, A. General Guidelines ¶ 5). In addition, the CMO provides that "Depositions of plaintiffs or plaintiffs' fact witnesses not noticed for dates on or before the closure dates designated in [a] discovery order will not be taken" unless "good cause" is shown (*see id.*, Sec. XV. E. Discovery Schedules (Time Lines) and Sanctions ¶ 2).

Here, Aurora waived its right to challenge plaintiff's deposition testimony as a basis to support his claims. Aurora's counsel had required notice under the CPLR, and was present at the taking of plaintiff's deposition. Nevertheless, Aurora contends that plaintiff's deposition is inadmissible because it did not have an opportunity to cross-examine plaintiff with respect to his claims of alleged exposure to its pumps prior to plaintiff's death. As highlighted earlier, plaintiff died on November 3, 2013, more than five years after the date that he was originally deposed. Between the original date of plaintiff's deposition, July 30, 2008, and its last adjourn date, March 18, 2010, plaintiff's deposition was re-noticed five times at the election of plaintiff's counsel: On August 14, 2008 it was noticed for October 1, 2008; on October 7, 2008 it was noticed for October 29, 2008; on October 27, 2008 it was noticed for November 18, 2008; on September 16, 2009 it was noticed for December 16, 2009; and on December 16, 2009 it was noticed for March 18, 2010. However, after March 18, 2010, nothing happened. Aurora concedes that it did not follow-up with plaintiff's counsel between any of the aforementioned adjourn dates to assert its desire to depose

plaintiff. Even if Aurora initially properly relied on plaintiff's counsel's representations with respect to adjourning plaintiff's deposition, by late March 2010 when plaintiff's counsel was no longer sending notices with respect to the deposition, it was incumbent upon Aurora to demand its right to depose plaintiff (*see Matter of White*, 2 NY2d 309, *supra*; *Bradley v. Mirick*, 91 NY 293, *supra*; *Matter of Luis R.*, 184 AD2d 1012, *supra*). Instead, defendant elected to do nothing. The record is devoid of defendant making any attempts whatsoever to depose, and presumably cross-examine, plaintiff between March 2010 and the date of plaintiff's death, a delay of over three years.

In providing an explanation for this level of inaction, defense counsel stated, "It is simply not the process in NYCAL litigation for a defendant to demand that a plaintiff reschedule a deposition. The responsibilities governing the scheduling of depositions in NYCAL litigation have always fallen upon the plaintiff." Defense counsel made this representation despite the fact that NYCAL's CMO is replete with references to completing depositions within a reasonable amount of time, especially when one considers the deteriorating health of many litigants within the litigation (*see* NYCAL CMO, Sec. X. Depositions, A. General Guidelines ¶ 5; Sec. XV. E. Discovery Schedules (Time Lines) and Sanctions ¶ 2). Similarly, defense counsel made this representation despite the fact that NYCAL's CMO also states that if parties have problems concerning depositions that they are unable to resolve, such issues "shall be forthwith brought to the Special Master for resolution" (*see* NYCAL CMO, Sec. X. Depositions, A. General Guidelines ¶ 4). Aurora made no request for assistance from the Special Master on this issue. Moreover, within the parameters of NYCAL's CMO, Aurora has not shown that there was any "good cause" for an over three-year delay in seeking to depose plaintiff. Additionally, within the requirements of the CPLR, defendant has not shown that it made a motion to compel, let alone any request

whatsoever, to demand that plaintiff's counsel reschedule plaintiff's deposition between March 2010 and November 3, 2013. Consequently, defendant waived its right to depose plaintiff (*see Matter of White*, 2 NY2d 309, *supra*; *Bradley v. Mirick*, 91 NY 293, *supra*; *Matter of Luis R.*, 184 AD2d 1012, *supra*).

The cases cited by defendant to rebut plaintiff's use of his deposition testimony are inapposite. In support of exclusion, Aurora relies heavily on a Third Department case, *In re Will Harmon*, 38 AD2d 988, *supra*. There, the Third Department excluded incomplete deposition testimony at trial. However, the facts in *Harmon* differ from the instant case. In *Harmon*, a witness's deposition was adjourned before direct examination concluded. Contemporaneously with the adjournment, the direct-examiner reserved its rights to continue the direct, and the adverse party reserved its rights to cross-examine the witness (*see Harmon*, 38 AD2d at 988). In January of the relevant year in the case, the parties stipulated that the deposition would not continue before April (*id.* at 989). The witness subsequently died in February (*id.*). Under such a circumstance, the court concluded that the incomplete deposition testimony had to be excluded at trial, in part, because both sides had reserved their rights to continue the deposition at the time that the witness died (*id.*). In the instant case, defendant did not reserve its rights to continue questioning plaintiff, but instead relied on plaintiff's counsel's representations. No efforts were undertaken to continue plaintiff's deposition after March 2010. Therefore, defendant's reliance on *Harmon* is misplaced because Aurora, in contrast to the defendant in *Harmon*, failed to pursue plaintiff's deposition. Defendant's additional reliance on the Second Department case *Owens v. Sokol*, 65 AD2d 569, *supra*, is similarly misplaced. The record in *Owens* also shows that the parties preserved their

respective rights to continue the deposition at issue. Here, Aurora failed to make such a showing despite having over three years after March 2010 to re-notice and compel plaintiff's deposition.

B. Summary Judgment Standard

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.

Plaintiff argues that defendant's motion should be denied as premature, because it is in essence an *in limine* motion rather than a motion for summary judgment. The court disagrees. A motion for summary judgment is a procedural device to accelerate judgment in a matter by "eliminating the trial stage when the only issues to be resolved are questions of law" (*see S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Andre v. Pomeroy*, 34 NY2d 361, 364 [1974]). As such, the evidence presented to the court on a summary judgment motion has to be evidence that would be admissible at trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Courts are therefore able to factor the admissibility of evidence at trial when deciding a motion for summary judgment (*id.*). While courts may also choose to apply a lesser standard to a party opposing summary judgment by raising a question of fact, the proponent of the motion must be held to trial standards (*Raybin v. Raybin,* 15 AD2d 679 [2d Dept 1962]). Conversely, the function of a motion *in limine* is "to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or

limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact" (*see State v. Metz*, 241 AD2d 192, 198 [1st Dept 1998]). Courts discourage motions *in limine* that actually seek the resolution of matters of law more appropriately fashioned for summary judgment where such motions are, in effect, untimely motions for summary judgment (*see Ofman v. Ginsberg*, 89 AD3d 908, 909 [2d Dept 2011]). And while *in limine* motions solely seek the resolution of pre-trial evidentiary issues, summary judgment motions take the broader approach of seeking to "determine whether [the] evidence [is] sufficient to require a trial of any issue of fact" (*Metz*, 241 AD2d at 198). The court in *Metz* correctly observed that while *in limine* motions seek the court's guidance on evidentiary issues prior to the commencement of a trial, summary judgment motions seek to determine whether the evidence of one party is so inadequate that it obviates the need for a trial. While Aurora's instant motion has some of the evidentiary aspects of an *in limine* motion in that Aurora is seeking the court's guidance as to whether certain evidence will ultimately be admissible at trial, it is more aptly denominated as a summary judgment motion since Aurora is primarily arguing that the insufficiency of plaintiff's evidence should preclude the need for a trial.

When moving for summary judgment, a defendant 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, supra*). 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]). 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 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]).

Aurora has failed to meet its burden of establishing a prima facie case here. No affidavit whatsoever was proffered in support of its motion. Nor did Aurora cite to any deposition testimony from a witness that would support a prima facie showing in its favor. Additionally, Aurora does not deny that its pumps contained asbestos during the relevant years of plaintiff's alleged exposure. In fact, Aurora concedes that plaintiff, at a minimum, identified its pumps as a source of his asbestos exposure in both his interrogatory responses as well as at his deposition. At his deposition, plaintiff testified as follows:

Q. Did you personally handle any products that contained asbestos?
A. Yes.
Q. Please list for me the product types that you handled that contained asbestos?
A. All kinds of gaskets, sheet gaskets. Pumping packing, valve packing. Powdered asbestos. We would mix it with water and put it on where the tops of the valves were exposed. Hand packed that.
...
Q. You mentioned the pumps. Do you know the brand name, trade name or manufacturer name of any of the pumps that you encountered specifically aboard the SS Constitution?
A. Let's see. Aurora. Buffalo. Aurora. Buffalo. I think Crane. Goulds. Let's see. Warren. Worthington. Tuthill. Taco. DeLaval Hemo. Ingersoll Rand. Fairbanks Morse. That's all I can think of right now.

(Tr 72 – 74)

Plaintiff also testified that he was exposed to Aurora pumps while aboard the USS Mormak Surf:

Q. Do you know the brand name, trade name or manufacturer name of any of the pumps specifically aboard the Mormak Surf?
A. Yeah, I think I do.
Q. Please list them.
A. Aurora. Buffalo. Let's see. Crane. Gould. Worthington. Warren. Taco. Tuthill. DeLaval Hemo. Ingersoll-Rand. And let's see. Fairbanks and Morse.

(Tr 88 – 89)

The aforementioned testimony illustrates plaintiff's belief that he was exposed to asbestos as a result of his work with asbestos-containing gaskets and packing for use in connection with pumps manufactured by Aurora, among others. When plaintiff was questioned about how he was specifically exposed to asbestos, he testified as follows:

Q. While you were aboard the SS Constitution, do you believe that you were exposed to asbestos as a result of pumps?
A. Yeah.
Q. How so?
A. Working on them. Packing them. Gaskets, asbestos gaskets. Asbestos packing.
Q. Have we now talked about all the ways that you believe you were exposed to asbestos during the time that you served aboard the SS Constitution?
A. Excuse me?
Q. Have we now talked about all the ways that you believe you were exposed to asbestos while working aboard the SS Constitution?
A. Well, you know, there was main propulsion engine. I believe it was a Westinghouse turbine. Auxiliary generators, I think were Elliott or possibly Westinghouse. Many things. Let me think. Boilers, of course. They were loaded. Let me see. Boilers. Turbines. Air compressors. Pumps. The whole place was full of asbestos dust with the vibrations and the noise and the fans blowing and everything else, you know?

Tr 74 – 75)

Aurora submits no evidence challenging the veracity of the aforementioned claims. Setting aside the issue of admissibility that was addressed earlier in this decision, defendant states that plaintiff has "failed to present a factual basis for [his] claims against Aurora" (*see* Aurora Affirm in Support at ¶ 8). This of course is the incorrect standard on a motion for summary judgment, as

the moving party (here, Aurora) must first establish a prima facie case before a plaintiff must show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, *supra*). Defendant failed to establish a prima facie showing here. Even if it had, its claims with respect to the insufficiency of plaintiff's evidence are unpersuasive as plaintiff's aforementioned testimony not only identifies Aurora pumps, but also explains the manner in which plaintiff was allegedly exposed to asbestos dust emanating from those pumps. As such, issues of fact exist for trial.

Based on the foregoing, it is hereby

ORDERED that defendant has waived its right to challenge the admissibility of plaintiff WARREN TAVENIERE's deposition testimony at trial on the basis that it had no opportunity to question plaintiff; and it is further

ORDERED that defendant's motion for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: December 14, 2015

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

J.S.C.