

At a Civil Special Term, Part 33, of the Supreme Court, held in and for the Counties of Niagara and Erie, State of New York, on the 1<sup>st</sup> day of February, 2016

PRESIDING: HON. DEBORAH A. CHIMES

SUPREME COURT : STATE OF NEW YORK  
EIGHTH JUDICIAL DISTRICT

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In Re: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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MARK DENISON and TAMMY DENISON,

Plaintiffs

vs.

DECISION AND ORDER  
Index No. 813767/2014

ADVANCE AUTO SUPPLY, et al.,

Defendants

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Defendants Bird, Inc. (Bird), Euclid-Hitachi Heavy Equipment, Inc. (Euclid-Hitachi), F.E. Myers (Myers), Oshkosh Corporation (Oshkosh) and WT/HRC Corporation (WT/HRC) move for summary judgment pursuant to CPLR §3212.

In support of its motion, defendant Bird submitted its Notice of Motion dated October 29, 2015, the Attorney Affidavit of Carol G. Snider, Esq., with attached exhibits,

sworn to October 29, 2015 and the Reply Affidavit Carol G. Snider, Esq., with attached exhibit, sworn to December 29, 2015.

In opposition to the motion, plaintiffs submitted the Affirmation of Michael Macrides, Esq, with attached exhibits, dated December 16, 2015.

In support of its motion, defendant Euclid/Hitachi submitted its Notice of Motion dated November 30, 2015, the Affirmation of Donald A. W. Smith, Esq., with attached exhibits, dated November 30, 2015, the Affidavit of Otto Hutka, sworn to October 28, 2015 and the Supplemental Affidavit of Otto Hutka, sworn to January 5, 2015.

In opposition to the motion, plaintiffs submitted the Affirmation of Michael Macrides, Esq, with attached exhibits, dated December 16, 2015.

In support of its motion, defendant Myers submitted its Notice of Motion dated November 30, 2015, the Affirmation of Michelle D. Grady, Esq., with attached exhibits, dated November 30, 2015, the Affidavit of Jack Bevington, sworn to October 28, 2015 and the Affirmation Michelle D. Grady, Esq., with attached exhibits, dated December 23, 2015.

In opposition to the motion, plaintiffs submitted the Affirmation of Michael Macrides, Esq, with attached exhibits, dated December 16, 2015.

In support of its motion, defendant Oshkosh submitted its Notice of Motion dated October 30, 2015, the Attorney Affidavit of Molly M. Krauz, Esq., with attached exhibits, sworn to October 30, 2015, and the Attorney Reply Affidavit of Molly M. Krauz, Esq., with attached exhibits, sworn to December 23, 2015 .

*Denison v Advance Auto Supply, et al.*,  
Index No. 813767/2014

In opposition to the motion, plaintiffs submitted the Affirmation of Michael Macrides, Esq, with attached exhibits, dated December 16, 2015.

In support of its motion, defendant WT/HRC submitted its Notice of Motion dated November 25, 2015, the Attorney Affirmation of Ronald G. Hull, Esq., with attached exhibit, dated November 25, 2015, the Affidavit of Frederick Teggelaar, with attached exhibits, sworn to November 23, 2015, the Affidavit of Gary J. Bases, with attached exhibit, sworn to December 27, 2015, the Reply Affidavit of Frederick Teggelaar, with attached exhibits, sworn to December 28, 2015, and the Reply Affirmation of Ronald G. Hull, Esq, dated December 30, 2015.

In opposition to the motion, plaintiffs submitted the Affirmation of Seth A. Dymond, Esq, with attached exhibits, dated December 16, 2015.

#### Background

Plaintiff Mark Denison is living with mesothelioma at the age of 61. His asbestos exposure varied, but as relevant to these motions spanned 1964/1965 to early 1990. Specifically, from 1964/1965 until 1969, Mr. Denison visited and worked at his father's hardware store, Service Hardware. The defendants and their products which allegedly harmed plaintiff at the store include Bird for its asbestos roofing felt and Myers for asbestos-containing packing used with its pumps. The plaintiff claims exposure to

asbestos while he was employed at Dunkirk Radiator (Dunkirk) from 1972 - 1987. Specifically, he alleges exposure to asbestos used in a “cupola” manufactured by Whiting Corporation, now known as WT/HRC. This defendant also supplied bridge cranes to Dunkirk which plaintiff alleges were equipped with asbestos-containing wire insulation and brake shoes to which Mr. Denison was exposed when he worked on the cranes. Finally, plaintiff alleges he was exposed to asbestos while performing mechanical work on vehicles. The record shows that plaintiff began working on vehicles in 1976 and established a mechanical business which was in operation from 1980 to 2006. It is noted the plaintiff does not claim exposure to asbestos after the early 1990s with respect to this work. Plaintiff alleges exposure to asbestos-containing brakes and clutches used with Oshkosh vehicles and exposure to asbestos-containing brakes, clutches and parts he identified as Euclid.

#### Interrogatories

In their answers to defendants’ first set of interrogatories, plaintiffs did not identify any defendant or any asbestos-containing products manufactured or sold by any of the moving defendants. Additionally, plaintiffs never amended or supplemented their answers to interrogatories despite the filing of as many as twelve amended complaints.

“ [T]he failure of plaintiffs to name [defendant] as a supplier in their response to interrogatories constitutes an admission that [defendant] was not a source of an asbestos-

containing product to which plaintiff was exposed and [defendant] thus established that plaintiffs' action against it has no merit." (*Matter of Eighth Jud. Dist. Asbestos Litig. [Gorzka]*, 28 AD3d 1191, 1192 [2006] [internal citations omitted]).

The plaintiff's failure to identify defendants' products in their answers to interrogatories shifts the burden to plaintiff to come forward with facts and conditions from which defendants' liability reasonably can be inferred. (see *Gorzka, supra, Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel]*, 269 AD2d 749 [4<sup>th</sup> Dept, 2000] ; *Lang v Crane Co.*, [ Sup Ct, Erie County , March 30, 2015, Chimes, J. Index No. I 2012-202 ] ; *Dickman v Trane U. S. Inc.*, [Sup. Ct, Erie County, September 16, 2010, Lane, J. Index No.2008-12697). However, plaintiffs are not required to show the precise causes of the damages sought, but, only required to show those facts and conditions, from which defendant's liability can be reasonably inferred. (see *Matter of Eighth Jud. Dist. Asbestos Litig. [Reynolds]*, 32 AD3d 1268 [2006]).

The Court recognizes: "The function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination" *Sillman v Twentieth Century - Fox Film Corp.*, 3 NY2d 395, 404 [1957]. Any inconsistencies in the testimony or issues of credibility are to be resolved by the trier of fact, not the court on a motion for summary judgment (see *Dollas v W.R. Grace and Co.*, 225 AD2d 319 [1996]; *Heckel, supra*, 269 AD2d 749 [2000]). Moreover, in deciding a motion for summary judgment, "the court should draw all reasonable inferences in favor of the nonmoving party and should not

pass on issues of credibility” *Assaf v Ropog*, 153 AD2d 520, 521-522 [1989] [internal citations omitted].

Bird, Inc.

Plaintiff alleges exposure to defendant Bird’s asbestos-containing roofing felt while cutting the felt and sweeping up in his father’s hardware store. Defendant Bird admitted to manufacturing asbestos-containing roofing felt, but contends that it also manufactured non-asbestos roofing felt. The defendant points to Mr Denison’s testimony wherein he mentioned working with non-perforated felt. Bird argues that the asbestos containing felt was perforated and its non-asbestos felt, which was not perforated, was the product identified by the plaintiff. In support of this contention, Bird submitted the affidavit of Richard Maloof, its former president, employed at Bird from 1971-2003.

However, Mr. Denison’s testimony is not as clear-cut as defendant suggests. Mr. Denison, testified at one point he could not recall whether the felt was perforated and defined perforations as being a quarter of an inch in diameter. This testimony, along with the business records from Bird revealing that not all Bird’s asbestos-containing roofing felts were described as perforated and that little or no visible perforations were on its asbestos-containing felt, raises questions of fact. The motion for summary judgment is therefore denied.

F.E Myers

Plaintiffs alleges Mr. Denison was exposed to asbestos-containing packing from jet pumps, manufactured by Myers, when that packing was removed and replaced by his father and on one occasion, himself.

In support of its motion, defendant supplied the affidavit of Jack Bevington, a chief development engineer. This affidavit along with the 482 pages of company records that accompanied it, established that defendant Myers never manufactured jet pumps for use with wells which had any asbestos components, nor were these pumps designed to be used with asbestos components. In opposition, plaintiffs rely solely on Mr. Denison's deposition and trial testimony. However, his testimony is nothing more than speculation based on observations of fibers and particles that glittered. Plaintiffs have failed to sufficiently raise a triable issue of fact and defendant Myers' motion is granted.

WT/HRC Corporation

Plaintiffs allege that Mr. Denison was exposed to asbestos used in a "cupola" manufactured by Whiting Corporation, now known as WT/HRC Corporation. The cupola is described as a large structure used for melting metal, lined with brick and other refractory materials. Mr. Denison alleges he was exposed to asbestos when he repaired and replaced asbestos-containing refractory material.

Plaintiff also alleges exposure to asbestos from Whiting bridge cranes when he re-wired the control circuits, worked with wire insulation which contained asbestos and when he replaced asbestos-containing brake shoes on the cranes.

WT/HRC argues that the cupola they manufactured was not delivered to Dunkirk Radiator until 1975, postdating plaintiff's relevant exposure period; WT/HRC did not sell refractory products; and WT/HRC recommended only non-asbestos generic refractory products to be used with its cupolas. In support of its contentions, WT/HRC submitted an affidavit of Frederick Teggelaar, former safety director of Whiting. WT/HRC also submitted an affidavit of Gary J. Bases, a refractory expert who stated that during the 1970's and 1980's no refractory products contained asbestos.

Plaintiffs' opposition failed to show facts and conditions from which WT/HRC's liability can be reasonably inferred. Mr. Denison offered nothing more than speculation that he used or was exposed to asbestos while working at the cupola, which is insufficient to sustain plaintiffs' burden. WT/HRC's motion with respect to the cupola is granted.

Regarding plaintiffs' claim of exposure while replacing brakes and wiring on the Whiting cranes, the defendant argues in part, that they are not responsible for replacement brakes or wires and therefore are not responsible for any exposure from asbestos-laden replacement parts. This argument however has been clearly rejected in both *Matter of New York City Asbestos Litig. [Konstantin/Dummitt]*, 121 AD3d 230 (1<sup>st</sup> Dept, 2014) and *Matter of Eighth Jud. Dist. Asbestos Litig. [Sutner]*, (Sup Ct, Erie County, March 15, 2013, Lane, J., Index No. 2010-12499) *aff'd for reasons stated below* 118 AD3d 1369 (4<sup>th</sup> Dept 2014) *lv granted* 24 NY3d 907 (2014). There is no evidence or basis presented in this case to depart from precedent.



WT/HRC admits that the cranes' wiring contained asbestos, but speculated that the wiring was not original, which, even if true, fails in light of *Suttner* and *Dummitt*. Similarly, Mr. Denison's testimony concerning his exposure to asbestos as a result of his work with the wire and Mr. Tegglar's contentions, in both his original and reply affidavit, that Mr. Denison would not have been exposed to the asbestos contained in the wire creates an issue of fact for resolution by a jury. Therefore, the defendant's motion to dismiss the claim relative to the wiring and brakes is denied

Oshkosh Corporation

It is uncontested that plaintiffs' only evidence of exposure to asbestos from an Oshkosh product, is his deposition testimony. As Oshkosh was not in the case at the time of the plaintiff's deposition, this testimony is inadmissible against Oshkosh. (See CPLR 3117; *Perkins v New York Racing Assn.*, 51 AD2d 585, 586([ 2<sup>nd</sup> Dept, 1976 ])).

Oshkosh's motion is granted.

Euclid- Hitachi

Euclid / Hitachi moves for summary judgment contending that it never manufactured the brakes or clutches identified as Euclid by Mr. Denison in his deposition and trial testimony. Mr. Denison testified he used Euclid brakes and clutches as replacement parts for on-road vehicles.

Defendant submitted an affidavit of Otto Hutka supporting the contention that Euclid solely manufactured off-road trucks and did not make or sell on-road vehicles or parts for them. He also averred that though it sold replacement brakes they were only for

off-road trucks. Mr. Hutka also stated in a supplemental affidavit, that the brakes for on-road and off-road vehicles are not interchangeable.

The Court notes that in its answers to interrogatories filed in *Potter v A.W. Chesterton*, an Eighth Judicial District case, Euclid-Hitachi admitted selling replacement parts for its heavy equipment (p.3 of Exhibit C of plaintiffs' opposing affirmation) and that prior to 1980, the replacement parts, including clutch facings and brake linings, may have contained asbestos (*id.* at 14). That Euclid-Hitachi sold asbestos-containing brake linings was testified to in 2001 by Clarence E. Eckert, Euclid-Hitachi's corporate representative in *Hilman Stubbefield*, a California case. Mr. Denison testified repeatedly about his use of Euclid's parts and described how his work with these parts caused him to be exposed to asbestos.

Plaintiffs have succeeded in raising triable issues of fact concerning the use of Euclid parts. Therefore, defendants motion is denied.

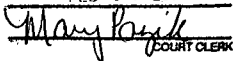
Conclusion

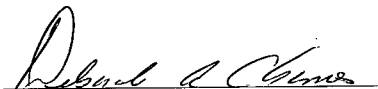
In summary, the motions brought by Myers and Oshkosh are granted. The motion brought by WT/HRC is granted in part and denied in part. The motions made by Bird and Euclid/ Hitachi are denied.

SO ORDERED:

DATED: Buffalo, New York  
February 2, 2016

**GRANTED**  
FEB 03 2016

  
COURT CLERK

  
**HON. DEBORAH A. CHIMES**  
Justice of the Supreme Court