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

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

PATRICK DEMARTINO and JOY DEMARTINO

INDEX NO. 190128/2014

MOTION DATE _____

v.

MOTION SEQ. NO. 002

AURORA PUMP COMPANY, *et al.*

MOTION CAL. NO. _____

The motion for summary judgment made by Aurora Pumps Company is decided per attached

Dated: 10/27/16

J.S.C.
New York, New York **PETER H. MOULTON**

1. **Check one:** ..... ☐ **Case Disposed** ■ **Non-Final Disposition**
2. **Check as Appropriate:** ..... **Motion is:** ☐ **Granted** ☒ **Denied** ☐ **Granted in Part** ■ **Other**
3. **Check if Appropriate:** .....: ☐ **Settle Order** ☐ **Submit Order**

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

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

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190128/14
Motion Seq. 002

PATRICK DEMARTINO and JOY DEMARTINO

Plaintiff,

-against-

DECISION & ORDER

AURORA PUMP COMPANY, *et al.*,

Defendants

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PETER H. MOULTON, J.S.C:

This motion arises out of claims by plaintiff Patrick DeMartino ("plaintiff") that he developed mesothelioma as a result of his alleged exposure to asbestos-containing materials manufactured, sold, distributed, and/or supplied by Aurora Pump Company ("Aurora"). Plaintiff identified defendant's pumps (which he states said "Aurora" on the name plate) as a source of his exposure to asbestos while he was employed as a maintenance man from 1975-1986 at Walker-Prismatic, a printing company in Manhattan. It is undisputed that during the relevant period of time, defendant used asbestos-containing gaskets with its pumps and sold asbestos-containing gaskets as replacement parts. However, defendant asserts that it did not use or sell external asbestos-containing gaskets. Rather, Aurora contends that the only asbestos-containing gaskets that it used or sold were internal to its pumps.

Arguments

Aurora moves, pursuant to CPLR § 3212, for summary judgment dismissing

plaintiff's complaint and all claims and cross-claims against it. Defendant asserts that "plaintiff failed to present a *prima facie* case showing that Patrick DeMartino was exposed to any asbestos-containing products manufactured, sold, or specified by Aurora" as "plaintiffs have not produced evidence linking Mr. DeMartino's injuries to any asbestos fibers released from a product manufactured, sold, distributed, or installed by Aurora" (Lakhani Affirm in Support at ¶ 2, 15). To support the motion, Aurora submits the affidavit of Leroy Franklin, who is currently the Engineering Process Manager for Aurora. He avers that he has "personal knowledge of the Aurora Pump Company products that we now sell and sold" (Franklin Aff at ¶ 3). Based on his review of unidentified Aurora "business records" and review of plaintiff's deposition, Franklin concludes:

> Aurora Pump Company did not sell, design, manufacture or specify asbestos-containing flange gaskets for use on its pumps. There are no drawings for Aurora Pump Company pumps which include asbestos-containing external gaskets as part of its design of the pump. Aurora Pump Company did not recommend or specify asbestos-containing external gaskets to its customers.

(*id.* at ¶ 6).

Defendant cites plaintiff's response "Yes, Yes" to defense counsel's question whether plaintiff's only source of exposure to asbestos from an Aurora pump was from the replacement of external flange gaskets (Ex D, Tr at 309). Aurora further argues that plaintiff did not recall that the gaskets had "Aurora" on them; rather, he believed the external gaskets were manufactured by Aurora because "someone" told him (*id.* at 311).

Plaintiff opposes the motion, arguing that defendant failed to meet its burden of

proof on summary judgment. The Franklin affidavit should not be considered, plaintiff argues, because Franklin admitted at a deposition that he began working for Aurora one year after plaintiff concluded working as a maintenance man, and, four years after plaintiff's exposure to asbestos from defendant's pumps at Walter Prismatic. Plaintiff also notes that Franklin admitted at a deposition that he joined Aurora in 1979, but his knowledge of the use of asbestos on Aurora pumps prior to 1979 was based on his review of old catalogs, drawings, correspondence and office documents and conversations with other employees. Plaintiff cites to evidence that defendant sold asbestos-containing gaskets and packing made by others. Plaintiff also cites his testimony regarding his work with gaskets and his work in the presence of others who worked on pumps (Ex 1, Tr at 50, 57-61), as well as his testimony concerning how his supervisor taught him to change gaskets and how his supervisor would dismantle pumps when repairing them to replace the gaskets (Tr at 58-60).

Plaintiff argues that not only does Aurora fail to meet its burden of proof, but the motion should additionally be denied because Aurora failed to provide discovery. Plaintiff notes that in March 2011 in *Graham v A.O. Smith Water* (2011 NY Slip Op 30710 [U]), Judge Heitler ordered Aurora to produce discovery of 1,000,000 microfilm images and 24,000 pump specifications. In that action, the plaintiff alleged exposure to asbestos-containing products while maintenance work was performed in his presence between 1973 to 1993 on (among other things) asbestos-containing pumps in the basements of housing developments. It is undisputed that Aurora never provided the discovery. While plaintiff complained to the Special Master about the lack of discovery in

this action, plaintiff states that she held her final decision in abeyance because Aurora stated that it would provide responsive documents. However, the only documents Aurora produced were a defense report substantiating that exposure to asbestos gaskets and packing is safe and six manuals which plaintiff asserts were carefully screened to avoid mention of asbestos-containing materials. Plaintiff points to other manuals which plaintiff uncovered relating to asbestos gaskets and packing which were not produced by Aurora. Finally, plaintiff contends that even assuming that Aurora did not supply the gaskets at issue, Aurora should be held liable under the standard articulated in *Matter of New York City Asbestos Litig.* (2016 NY Slip Op 05063 [2016] [hereafter *Dummitt*]). Plaintiff cites to purchase orders, manuals, diagrams and deposition testimony from defendant's corporate representative to support that argument.

In reply, defendant reiterates its arguments, and highlights that plaintiff conflates the difference between external and internal gaskets to gloss over the lack of evidence. Defendant stresses that it did not supply external flange gaskets, which it argues is the only product at issue here. Defendant's original or replacement asbestos-containing flange gaskets, it maintains, were only internal to its pumps. Defendant asserts that Franklin has personal knowledge of the facts in his affidavit because he is a corporate representative and not an expert like Admiral Sargent in *Dummit*. Defendant asserts "[w]hile Mr. Franklin does not have first-hand knowledge of Aurora's activities during the alleged exposure period, he has been sufficiently educated so that he may provide complete and knowledgeable testimony regarding Aurora's activities during that period" (Reply Mem at

17). To support this argument, defendant cites federal court cases. Defendant also submits a second affidavit from Franklin in reply. Finally, defendant asserts that the evidence proffered by plaintiff does not satisfy the *Dummitt* standard because Aurora did not sell, design, manufacture or specify asbestos-containing external flange gaskets for use with its pumps.

Discussion

When moving for summary judgment, a defendant must first establish its prima facie entitlement to judgment by demonstrating the absence of material issues of fact *(see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). 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]). Additionally, a defendant cannot obtain summary judgment merely by "pointing to gaps in plaintiffs' proof" (*see Torres v. Industrial Container*, 305 AD2d 136, 136 [1st Dept 2003]). Therefore, the motion must be denied regardless of the sufficiency of plaintiff's opposing papers (*id.*).

The First Department recently reiterated this holding in two asbestos cases, *Koulermos v. A.O. Smith Water Prods.* (137 AD3d 575 [1st Dept 2016]) and *Ricci v A.O. Smith Water Prods* (2016 NY Slip Op 06741 [October 13, 2016]). In *Koulermos*, the court held that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*id.* at 576). The court further noted that the failure to present evidence, such as affidavits, which affirmatively demonstrate the merit of

the defense is enough to deny summary judgment (*id.*). In *Ricci*, the court held that Cleaver-Brooks failed to establish entitlement to summary judgment by "merely pointing to perceived gaps in plaintiff's proof, rather than submitting evidence showing why his claims fail" (2016 NY Slip Op 06741, *supra*). Even testimony proffered by a long-tenured company witness is insufficient if that person did not have knowledge during the relevant time periods *(see Matter of New York City Asbestos Litig.*, 2016 NY Slip Op 05063 [2016] *21 ["[a]lthough Admiral Sargent had ample experience with Navy procurement practices, he gained personal knowledge of those practices only once he started working on procurement for the Navy more than a decade after Dummitt's work on Crane's valves ended and several decades after the Navy bought the valves. As a result, Admiral Sargent had no personal knowledge of the effects of the Navy procurement practices that existed when Crane might have tried to provide warnings to Dummitt and similarly situated workers"]).

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]). To defeat summary judgment, a plaintiff's evidence must create "[a] reasonable inference" that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*, 216 AD2d 79 [1st Dept. 1995]). Issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact . . . [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]).

Defendant's motion is denied because defendant has failed to demonstrate that its pumps (which it concedes that it sold during the relevant times) "could not have contributed to the causation of plaintiff's injury" (*Matter of New York City Asbestos Litig. (Berensmann)*, 122 AD3d 520 [1st Dept 2014]); *Reid*, 212 AD2d 462, *supra*; *Matter of New York City Asbestos Litig. (DiSalvo),* 123 AD3d 498 [1st Dept 2014]). Contrary to defendant's position, it is not plaintiff's burden to make a *prima facie* showing that plaintiff was exposed to asbestos-containing products manufactured, sold, or specified by Aurora. Moreover, Franklin's conclusory affidavit, which lacks specific factual basis, does not meet defendant's burden (*see Matter of New York City Asbestos Litig. (DiSalvo),* 123 AD3d 498, *supra*). Contrary to defendant's argument, Franklin does not acquire personal knowledge based on his review of unspecified documents and conversations (*see Matter of New York City Asbestos Litig.*, 2016 NY Slip Op 05063, *supra* [Admiral Sargent's testimony was properly precluded because he gained personal knowledge of Navy practices only once he started working on procurement for the Navy more than a decade after Dummitt's work on Crane's valves ended and several decades after the Navy bought the valves]). Defendant unpersuasively distinguishes Franklin's testimony because he is a merely "corporate representative" while Admiral Sargent was an expert. Franklin's second

affidavit fares no better. Additionally, except for paragraphs 9 and 14-17 (stating that plaintiff's evidence submitted in opposition depict internal rather than external gaskets), the balance of the affidavit is improper since it was submitted for the first time in reply (i.e., the affidavit raises new facts to bolster the arguments previously made in defendant's moving papers).

Furthermore, defendant cannot satisfy its burden of proof because it does not dispute that millions of documents exist which it has not been turned over in discovery because they are stored by pump serial number and, therefore, Aurora "cannot" find them (Tr of oral argument 8/30/16 at 12). Presumably, not only does plaintiff not have a complete picture of the asbestos-containing flanges used or sold by Aurora, but neither does Aurora's corporate witness. Defense counsel conceded that the "terseness" of Franklin's affidavit "comes from really what he can do, search those records that are available to him, speak with people who are there" (*id.*). Defense counsel also noted that Franklin "would have reviewed every document that's been presented to him, searched historical records that are available to him, interviewed or met with people who had historically been present" (*id.* at 11). However, because Franklin only reviewed unspecified "available" records, he cannot reliably opine on the universe of Aurora's business and whether defendant only used or sold internal asbestos-containing gaskets.

Therefore, this motion is properly denied based solely on defendant's failure to meet its burden of proof on summary judgment (*see e.g.*, *Ricci v A.O. Smith Water Prods.*, 2016 NY Slip Op 06741, *supra*). However, even assuming arguendo, the truth of defendant's

arguments, plaintiff has raised issues of fact for trial (and discovery might raise additional issues of fact). Assuming that the only asbestos-containing products used or sold by Aurora were internal to its pumps, plaintiff described how his supervisor taught him to change gaskets and how his supervisor would "dismantle pumps" when repairing them to replace gaskets (Tr at 58-60). It is for the jury to determine whether this description of dismantling pumps, in order to replace gaskets, would involve the internal gaskets which defendant readily admits could have contained asbestos.

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to proceed with discovery before the Special Master.

This constitutes the Decision and Order of the Court.

Dated: October 27, 2016

JSC