Filed 3/30/17 Johnson v. Moore Dry Dock CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RICHARD JOHNSON et al., Plaintiffs and Appellants, v. MOORE DRY DOCK, Defendant and Respondent.	A146775 (San Francisco County Super. Ct. No. CGC-15-276389)

Plaintiffs Richard and Marcella Johnson sued defendant Moore Dry Dock, along with a host of other defendants, alleging that Richard Johnson (Johnson) developed mesothelioma from his occupational exposure to asbestos during his service in the Navy in the 1960s. The trial court granted defendant's motion for summary judgment, concluding that plaintiffs' expert witness's declaration failed to establish a triable issue of fact as to whether Johnson was exposed to asbestos from any of defendant's products. Agreeing that there are no triable issues of material fact, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Complaint

Johnson was diagnosed with mesothelioma in November 2014. Plaintiffs filed their complaint for personal injury and loss of consortium against defendant and multiple other corporate defendants on February 5, 2015. They alleged that Johnson developed mesothelioma as a result of his contact with a variety of asbestos-containing products over the course of his life, including during his service in the United States Navy during

the 1960s. Plaintiffs alleged causes of action against defendant for negligence and products liability, as well as a derivative claim for loss of consortium by Marcella Johnson. Their claims as to defendant are based on Johnson's work as a boiler tender aboard a Navy vessel called the U.S.S. Carter Hall (Carter Hall). The Carter Hall was built by defendant. Plaintiffs sought compensatory and punitive damages arising from Johnson's asbestos-related injuries.

The Carter Hall was stationed out of Long Beach Naval Shipyard while Johnson was assigned to her. During the course of his service, he was aboard the vessel for two Western Pacific tours. He was also aboard the ship during three separate overhauls of the vessel. At all times he was assigned to the port boiler room, and the only other spaces he visited were his bunk, the galley, and the laundry. His duties aboard the ship included removing and replacing gaskets, packing, and thermal pipe insulation. Additionally, he observed work performed by contractors during the three separate overhauls of the ship, including work involving thermal pipe insulation and refractory materials in the boilers.

II. Summary Judgment

A. Defendant's Motion

On May 26, 2015, defendant filed a motion for summary judgment or, in the alternative, summary adjudication, on the grounds that there was no triable issue of material fact as to any cause of action against defendant. Specifically, it alleged plaintiffs could not establish that Johnson was exposed to asbestos from any of defendant's products because they could not establish he had encountered any such product.

In support of its motion, defendant cited to plaintiffs' responses to written discovery, wherein they affirmed the Carter Hall was built by defendant in 1943 and returned to defendant for repairs in 1945. They asserted Johnson was exposed to " 'asbestos-containing original equipment manufactured, assembled, sold and/or supplied' " by defendant while serving aboard the Carter Hall from December 1962 through September 1966. They admitted, however, that they did not have any personal

knowledge of the ship's repair or maintenance history with respect to any of the insulation or any of the gaskets, packing, or refractory materials aboard the ship prior to the time Johnson boarded, including whether any of the products he was exposed to were original to defendant's construction of the ship. Defendant asserted plaintiffs' claims failed as a matter of law because they failed to present evidence that the hazardous materials in the boilers to which Johnson was allegedly exposed included materials that had been installed by defendant, or at its direction, up to 19 years before he boarded the vessel.

B. Plaintiffs' Opposition

In opposition, plaintiffs offered the declaration of "expert insulator" Charles Ay, who opined that "very substantial portions of the [original] asbestos-containing insulation" remained on the Carter Hall into the 1960s period when Johnson was on the ship, and that it was "far more likely than not" that he was exposed to asbestos dust originating from these "original materials." In support of this opinion, Ay stated that the Carter Hall and other Navy vessels constructed prior to and during World War II utilized "a distinctive hand-stitching method to secure the material covering thermal pipe insulation." During the 1960s, half or more of the originally installed insulation on these ships still remained, "consistent with the general experience that high percentages of originally installed insulation persists for decades after construction." Conceding that Johnson lacked percipient knowledge regarding the products to which he had been exposed, plaintiffs argued that Ay, who had also served on the Carter Hall during the 1960s, offered sufficient evidence to support their claim that Johnson had been exposed to defendant's products.

C. Trial Court's Ruling

The trial court sustained several of defendant's evidentiary objections to the Ay declaration.[1] However, the court overruled objections as to paragraphs in which he stated that: (1) pipe-covering insulation used during World War II was installed with cloth that was hand-stitched, and (2) such insulation was asbestos-containing, and (3) half or more of the pipe-covering insulation he observed in ships of the Carter Hall class during the 1960s was original to the ship's construction.[2] After having considered Ay's declaration, the court rejected plaintiffs' inference that Johnson was exposed to defendant's asbestos-containing insulation while serving on the Carter Hall. The court granted the motion for summary judgment. This appeal followed.

DISCUSSION

I. Standard of Review

We review the trial court's decision to grant defendant's motion for summary judgment de novo. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Summary judgment must be granted if all the papers and affidavits submitted, together with "all inferences reasonably deducible from the evidence" and uncontradicted by other inferences or evidence, show "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Where, as here, the defendant is the moving party, he or she may meet the burden of showing a cause of action has no merit by proving one or more elements of the cause of action cannot be established. (See *id.*, subd. (*o*)(1).) Once the defendant has met that burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583.)

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[1] Plaintiffs do not challenge these evidentiary rulings on appeal.

[2] The trial court rejected Ay's claim that original insulation on the vessel was hand-stitched, because no foundation had been laid.

We also must consider all evidence in the light most favorable to the nonmoving party, in this case, plaintiffs. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) However, " '[t]he plaintiff . . . may not rely upon the mere allegations or denials of its pleading to show . . . a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . .' " (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69 (*Scheiding*).)

II. Did Defendant Shift the Burden?

Plaintiffs assert the trial court erred in finding that defendant had shifted the burden in its motion. A defendant moving for summary judgment must make a prima facie showing that there are no triable issues of fact in order to meet its initial burden of production. (*Aguilar, supra,* 25 Cal.4th at p. 861.) To make this showing, a defendant must "present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854, fn. omitted.) Circumstantial evidence supporting a defendant's summary judgment motion "can consist of 'factually devoid' discovery responses from which an absence of evidence can be inferred," but "the burden should not shift without stringent review of the direct, circumstantial and inferential evidence." (*Scheiding, supra,* 69 Cal.App.4th at p. 83.) Once the defendant has met that burden, the burden shifts to the plaintiff to make a prima facie showing that a triable issue of material fact exists. (*Aguilar*, at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for." (*Id.* at p. 851.)

We find that defendant met its initial burden of production by making a prima facie showing that plaintiffs did not have and could not obtain admissible evidence necessary to show causation. In order for plaintiffs to state a viable claim, they had to be able to prove Johnson's exposure to defendant's asbestos-containing products. "A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. [Citations.] If there has been no exposure, there

is no causation." (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103 (*McGonnell*).) Defendant's showing that plaintiffs did not have and could not produce admissible evidence of exposure to asbestos from any of its products was sufficient to shift the burden to plaintiffs. (See *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 741 [summary judgment required because only evidence of causation was inadmissible hearsay]; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 16 (*Wiz Technology*) [lack of admissible evidence supporting causation mandated summary judgment].)

We agree with defendant that plaintiff's discovery responses were "factually devoid." While they asserted in their responses to interrogatories that Johnson had worked around asbestos-containing original equipment manufactured, assembled, sold, and/or supplied by defendant, they failed to provide a factual basis for this assertion. Defendant asserts in its brief on appeal that plaintiffs had "produced no documents and identified no witnesses or facts supporting their contention that asbestos-containing material or insulation was installed by, or at the direction of, [defendant] at the time the ship was built or when it underwent repairs . . . ." It thus asserts it presented prima facie evidence of plaintiffs' inability to prove exposure, resulting in their failure to prove causation.

Plaintiffs counter that nothing provided in defendant's separate statement of undisputed material facts demonstrated that they do not have and cannot obtain evidence to support causation. Plaintiffs point out that while they have no personal knowledge as to whether Johnson was exposed to defendant's products, their lack of knowledge "does not meet the defendant's burden to show that [they do] not have and cannot obtain evidence to support an element of the cause of action." However, defendant did more than simply contend plaintiffs lacked personal knowledge. In support of its motion, defendant cited to plaintiffs' discovery responses, including documents, "none of which support [their] claim that the Carter Hall was repaired at Moore *or that* [*Johnson*] *was*

exposed to an asbestos-containing product for which Moore can be held liable." (Italics added.) In disputing this statement below, plaintiffs only partially addressed defendant's contention: "Plaintiff[s] note[] that defendant only claims plaintiffs' responses to be deficient regarding the asserted *repair* of the CARTER HALL in 1945 and not with regard to [defendant's] construction and launch of the vessel in 1943." Plainly, defendant was raising *both* the ship's initial construction *and* the 1945 repair.

Plaintiffs also contend that nothing in defendant's separate statement shows that any of the products that were installed when the Carter Hall was built were ever removed. On this basis, they fault the trial court for failing to recognize that defendant had failed to shift the burden.

It is true that the trial court, justifiably in our view, believed plaintiffs had waived the burden shifting issue because they failed to raise it in their opposition. Plaintiffs urge that the trial court erred in finding waiver. However, as the side with the ultimate burden of proof, they were obligated to show that at the time of its construction, the Carter Hall was originally equipped with, or repaired by using, insulation or parts containing asbestos for which defendant could be held liable. They do not seriously argue that they made this showing in their discovery responses.

For example, defendant propounded the following interrogatory during discovery: "If YOU contend YOU were exposed to asbestos for which MOORE is responsible, identify all DOCUMENTS that relate to your contention." In their opposition to defendant's motion below, plaintiffs did not dispute their failure to identify documents or witnesses supporting their claim that Johnson was exposed to originally installed asbestos-containing material on the Carter Hall.[3] As plaintiffs could not prove their

[3] On appeal, plaintiffs assert they provided documents showing that the Carter Hall was constructed with asbestos-containing material. Defendant counters that "none of the documents provided evidence that asbestos-containing insulation or material was installed in the Carter Hall at the time it was built or that such material was on the ship in the 1960s . . . ." We are unable to evaluate this dispute, as neither party has directed us to

claims without admissible evidence that Johnson was exposed to products that defendant was responsible for, the trial court did not improperly favor defendant in concluding the burden of proof to show a triable material issue shifted to plaintiffs.

This case is similar to *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96 (*Andrews*), in which the defendant had propounded "a series of special interrogatories which called for all facts regarding [the plaintiff's] exposure to asbestos from [the defendant's] products." (*Id.* at p. 104.) In response, the plaintiff provided "little more than general allegations against" the defendant and did "not state *specific facts* showing that [the plaintiff] was actually exposed to asbestos-containing material from [the defendant's] products." (*Ibid.*, italics added.)

The *Andrews* court held that by failing to provide any information in response to these discovery requests, the plaintiffs effectively admitted that they had no further information. (*Andrews*, *supra*, 138 Cal.App.4th at pp. 106–107.) "If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiffs' factually devoid discovery responses. [¶] In short, [the defendant's] discovery was sufficiently comprehensive, and plaintiffs' responses so devoid of facts, as to lead to the inference that plaintiffs could not prove causation upon a stringent review of the direct, circumstantial and inferential evidence contained in their interrogatory answers and deposition testimony." (*Id.* at p. 107, fn. omitted.)

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where these documents appear in appellants' appendix filed in this appeal. We note that a trial court's ruling is presumed to be correct, and the burden of demonstrating error rests squarely on plaintiffs as the appealing parties. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631–632.)

Of course, to meet its initial burden defendant was not required to conclusively negate plaintiffs' claims. (See *Aguilar, supra,* 25 Cal.4th at p. 850 ["It would make little, if any, sense to allow for the shifting of a burden of persuasion. For if the moving party carries a burden of persuasion, the opposing party can do nothing other than concede."].) Defendant's prima facie showing sufficiently satisfied the moving party's initial burden. (See *id.* at p. 851 ["A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for."].) Plaintiffs still had the opportunity to respond to defendant's motion by presenting admissible evidence that established exposure and causation, or even by presenting competent evidence showing they may be able to obtain admissible evidence but could not present it at the time. (See Code Civ. Proc., § 437c, subds. (h), (p)(2).) But, as discussed below, plaintiffs did none of these things.

III. Plaintiffs Failed to Produce Admissible Evidence Raising a Triable Issue of Material Fact.

A. General Principles

Once a defendant moving for summary judgment meets its initial burden, the burden then shifts to the plaintiff, who is "subjected to a burden of production of his own to make a prima facie showing of the existence of a genuine issue of material fact." (*Aguilar, supra,* 25 Cal.4th at p. 845.) The plaintiff cannot satisfy this burden merely through speculation or conjecture, but instead must produce admissible evidence raising a triable issue of fact. (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524.) " '[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.' " (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1261.) Moreover, "the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation." (*Wiz Technology, supra,* 106 Cal.App.4th at p. 11.)

Defendant's summary judgment motion focused on the cause-in-fact component of causation, arguing that plaintiffs were unable to demonstrate that Johnson was ever exposed to asbestos from any product supplied by defendant. As we have noted already, without exposure, there is no causation. (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084.) It is plaintiffs' burden to establish some threshold exposure to asbestos through defendant's products. (*Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236.)[4]

"As recognized by the Ninth Circuit, '[t]wo different approaches have been taken by the courts in determining the sort of evidence an asbestos plaintiff must adduce in order to establish a defendant's products as a legal cause of [his] injuries.' [Citation.] The more stringent approach requires particularized proof that the plaintiff came into contact with the defendant's product. [Citation.] Under the more lenient approach, it is sufficient if the plaintiff proves the defendant's product was at his or her work site." (*Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 Cal.App.4th 650, 655 (*Dumin*).) Our Supreme Court in *Rutherford, supra*, 16 Cal.4th 953 specifically declined to endorse a particular standard for establishing exposure, as that issue had not been raised in that case. (*Id*. at p. 982, fn. 12.) However, at a minimum, the plaintiff carries the burden to show "exposure to a defendant's product, of whatever duration, so that exposure is a possible factor in causing the disease . . . ." (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416 (*Lineaweaver*).)

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[4] To ultimately prevail in their underlying claim, plaintiffs would need to establish that this exposure was to a reasonable medical probability a substantial factor in contributing to any asbestos-related disease suffered by Johnson. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 974–977 (*Rutherford*).) However, the parties did not address this issue in their summary judgment briefing or on appeal, focusing instead on the preliminary question of the sufficiency of proof that Carter Hall contained asbestos attributable to defendant during the relevant time period.

"Ultimately, the sufficiency of the evidence of causation will depend on the factual circumstances of each case." (*Rutherford, supra,* 16 Cal.4th at p. 958.) This is also true with respect to the evidence of the exposure component of causation in asbestos litigation. Mere speculation or conjecture about exposure to a defendant's asbestos, however, is insufficient to demonstrate the existence of a triable issue of fact to preclude summary judgment. (*Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1289 (*Hunter*), disapproved on another ground in *Aguilar, supra,* 25 Cal.4th at pp. 854–855, fn. 23 [where the plaintiff testified he was unfamiliar with the defendant and could not recall working in same area with the defendant's employees constituted speculation and conjecture that they might have been in same place at different times].) Nor does the simple "possibility" of exposure create a triable factual issue. (*McGonnell, supra,* 98 Cal.App.4th at p. 1105 [speculation that at same time plaintiff might have encountered a wall that might have contained the defendant's compound that might have contained asbestos insufficient evidence].)

The quality of evidence of exposure must be sufficient "to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment." (*McGonnell, supra,* 98 Cal.App.4th at p. 1105.) At the very least, the plaintiff must provide "circumstantial evidence . . . sufficient to support a reasonable inference of exposure" to defendant's asbestos product. (*Lineaweaver, supra,* 31 Cal.App.4th at p. 1420; accord *Hunter, supra,* 37 Cal.App.4th at p. 1290 [plaintiff must provide "evidence with respect to the time, location and actual circumstances of his exposure" to defendant's asbestos]; *Dumin, supra,* 28 Cal.App.4th at p. 656 ["circumstantial evidence [must] be of sufficient weight to support a reasonable inference of causation"].)

B. Inadequacy of Plaintiffs' Evidence

As noted above, plaintiffs conceded they did not have personal knowledge as to whether Johnson was exposed to any asbestos-containing materials that defendant would

have been responsible for. Instead, they relied solely on three paragraphs of Ay's declaration in support of their claim that the original insulation installed on the Carter Hall during its construction contained asbestos. These same paragraphs from Ay's declaration are also the only basis for their claim on appeal that this original insulation was present on the vessel during the time of Johnson's service in the 1960s.

In opposing summary judgment, "[p]laintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning." (*McGonnell, supra,* 98 Cal.App.4th at p. 1106; accord *Andrews, supra,* 138 Cal.App.4th at p. 108.) An expert declaration is of no evidentiary value where it is "rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion" because "an expert opinion is worth no more than the reasons and facts on which it is based." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) When an expert can attest to nothing more than the possibility that a plaintiff's condition was caused by a defendant, the plaintiff's case is not supported: "An expert's speculations do not rise to the status of contradictory evidence, and a court is not bound by expert opinion that is speculative or conjectural." (*McGonnell,* at p. 1106.)

Before the trial court, defendant challenged Ay's declaration on the ground that it does not provide any information as to whether originally installed asbestos was present on the Carter Hall during the relevant time period. They also raised evidentiary objections, asserting Ay's statements lacked foundation. They noted he was not presented as an expert in Navy history, or in the history of the application of thermal insulation. He also did not indicate the basis for his claim that hand-stitched insulation was used on the vessels of the period.

A review of the Ay declaration leaves much to be desired. He states during the 1960s he worked on four ships (including the Carter Hall) that "were effectively identical in their design and the materials used in their construction," while offering no explanation

as to what he means by the term "effectively identical." He does not state that all of these ships were manufactured by defendant. He also refers to ships "like" the Carter Hall and those of the "same vintage" as having original, hand-stitched pipe-covering insulation. Remarkably, while Ay himself had worked on the Carter Hall at some unidentified period, his declaration does not indicate that he saw hand-stitching on the Carter Hall. Instead he states: "My experience on these ships, consistent with my experience on other types of naval vessels of similar vintage[,] was that half or more of the pipe covering insulation I encountered was original to the ship's construction."

We agree with defendant that Ay's declaration does not create a prima facie showing of causation because it does not create a triable issue of fact as to Johnson's alleged exposure to any asbestos for which defendant could have been responsible. Ay could not have actual knowledge based on personal experience regarding defendant's construction of the vessel since, like Johnson, he first worked on the ship in the 1960s, or more than 17 years after the ship was built. His suggestion that ships built around the same time as the Carter Hall still contained half of their original asbestos pipe covering in the 1960s is not relevant evidence as to the Carter Hall itself. As to the Carter Hall, Ay's claims are entirely speculative. As we concluded in *Dumin*, the mere possibility of exposure will not create a triable issue of fact. The evidence must be of sufficient weight to support a reasonable inference of causation. (*Dumin, supra,* 28 Cal.App.4th at p. 656.)

In *Dumin,* the plaintiff alleged that he was exposed to asbestos-containing insulation manufactured and/or distributed by the defendant while he worked on two different Navy ships. (*Dumin, supra,* 28 Cal.App.4th at p. 653.) To prove his exposure, the plaintiff relied on deposition testimony from a different case in which the witness listed some of the insulation materials used at a naval shipyard and testified that he may have seen the insulation in question " 'somewhere around the '50s,' " and testimony from an engineer who said it was " '[q]uite probable' " that supplies on the Navy ships would be the same as those used at the shipyard. (*Id.* at pp. 653–654.) The trial court granted

defendant's motion for nonsuit, and we affirmed. We concluded that, when viewed in the best light, the evidence established only that the plaintiff was aboard a Navy ship in 1953 and 1954, that his duties included making repairs using insulation materials, that the ship was home ported at a particular shipyard at which the defendant's asbestos-containing product was one of many used, and that the ship's repair supplies probably came from the shipyard. (*Id.* at pp. 654–655.) But there was no evidence that the product supplied by the defendant was used aboard the ship where the plaintiff worked in 1953 and 1954. (*Id.* at p. 655.) We determined that on this evidence, "a conclusion that Dumin was exposed to [the defendant's product] while aboard [the Navy ship] in 1953 and 1954 would require a stream of conjecture and surmise." (*Id.* at p. 656.)

More recently, in *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, this court held the plaintiff had failed to produce evidence raising a triable issue he suffered bystander exposure while working at a power plant. He declared he observed construction workers on the site, including insulators insulating piping in the turbine building. He did not know whether or on how many instances he observed the insulation process or whether he merely saw the results of the process after being offsite for a period. On those facts, we found it inappropriate to infer that the plaintiff was present during the insulation of the asbestos-containing components. We held that where the inference of a plaintiff's exposure to asbestos "would be 'only as likely . . . or even less likely' than the contrary inference," a court must grant a defendant's motion for summary judgment, because a reasonable trier of fact could not find for plaintiff. (*Id*. at p. 252.) The same rationale apples to this case.

DISPOSITION

The order granting summary judgment is affirmed.

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Dondero, J.

We concur:

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Margullies, Acting P. J.

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Banke, J.