

2019 WL 1580152 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
New York County

In Re: NEW YORK CITY ASBESTOS LITIGATION.
John C. Spicijaric, as Executor for the Estate of John Spicijaric, Plaintiff(s),
v.
A.O. Smith Water Products Co., Electrolux Home Products, Inc., Individually
and as successor to Tappan and Copes-Vulcan, et al., Defendants.

No. 190014/2016.
April 12, 2019.

Trial Order

Present: [Manuel J. Mendez](#), Justice.

MOTION DATE 4/3/2019

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

***1 The following papers, numbered 1 to 6 were read on the summary judgment motion of ELECTROLUX HOME PRODUCTS, INC., Individually and as successor to Tappan and Copes-Vulcan, et al.:**

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	1-3
Answering Affidavits -- Exhibits _____	4-5
Replying Affidavits _____	6

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Electrolux Home Products, Inc., Individually and as successor to Tappan and Copes-Vulcan's (hereinafter, "Electrolux") motion for summary judgment pursuant to [CPLR § 3212](#), dismissing plaintiff's complaint and all cross-claims against it, is granted.

Mr. Spicijaric was diagnosed with Lung Cancer on June 27, 2014 and died shortly thereafter on July 3, 2014 on account of cardiopulmonary arrest due to lung cancer. Plaintiff's expert has causally connected asbestos exposure to Mr. Spicijaric's lung disease. Prior to this diagnosis of Lung cancer, Mr. Spicijaric was also diagnosed with the underlying disease of asbestosis. He was deposed in the underlying case on August 2, 1985. Mr. Spicijaric was never deposed in the instant matter, however, due to his death. Beginning in 1959, Mr. Spicijaric joined the Local 12 Asbestos workers union, of which he was a member through the early 1990's. Subsequently, Mr. Spicijaric was diagnosed with asbestosis and asbestos

related pleural disease. Plaintiff now brings this action to recover for John C. Spicijaric's personal injuries due to asbestos-exposure.

Defendant moves for summary judgment, claiming plaintiff has failed to identify an Electrolux product as a source of Mr. Spicijaric's asbestos-exposure. Further, defendant claims that the “supplemental” depositions which plaintiff offers do not properly establish that plaintiff-decedent was exposed to asbestos from their products such as to survive this motion for summary judgment.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept 1998]; *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

*2 Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]). A defendant cannot obtain summary judgment by “pointing to gaps in plaintiffs' proof (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; see also *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept 2016]). Regarding asbestos, a defendant must “make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury” (*Comeau v W. R. Grace & Co.- Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]). The defendant must “unequivocally establish that its product could not have contributed to the causation of plaintiff's injury” for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520, 997 NYS2d 381 [1st Dept 2014]).

“Plaintiff is not required to show the precise causes of his damages, but only show facts and conditions from which defendant's liability may be reasonably inferred” (*Reid v Ga. - Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]).

Defendant argues that the plaintiff has failed to show that an Electrolux product was the cause of and/or contributing factor to Mr. Spicijaric's asbestos-exposure. This is because Mr. Spicijaric offers no testimony identifying Electrolux products as a specific source of such exposure. Moreover, defendant argues that it is improper for the plaintiff to advocate that “supplemental” testimony from unrelated cases be used as the sole basis for the Court's summary judgment determination.

Plaintiff opposes the motion and argues that it has submitted sufficient evidence to supplement the plaintiff-decedent's deposition and, thereby, establish that the plaintiff was exposed to asbestos from Electrolux products. Plaintiff further argues that it has, in this way, presented sufficient admissible evidence to rebut the defendant's prima facie entitlement to summary judgment.

Defendant, however, argues that these “supplemental” deposition transcripts of the “powerhouse workers” are not admissible under [CPLR § 3117\(c\)](#) because they were taken in prior, unrelated cases and were not between the same parties as in the instant case (Aff. in Opp., Exhs. 8-12).

[CPLR § 3117\(c\)](#) provides, in relevant part that “When an action has been brought in any court of any state or of the United States and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest all depositions taken in the former action may be used in the latter as if taken therein” ([CPLR § 3117\(c\)](#)). Further, “when the matter currently in dispute “involv[es] the same subject matter” of a prior litigation that produced depositions, those depositions are usable in the later action to the same extent that they were or could have been used in the prior one. [CPLR 3117\(c\)](#). *A key requirement is that the parties to the second action must be the same as the parties to the first action.*” ([McKinney's CPLR Rule 3117](#), *emphasis added*).

That being said, deposition testimony from unrelated cases may be used to identify a defendant's product “in use at the relevant work site at the relevant time” so long as it does not become the sole basis for the court's summary judgment determination (see [Diedrich v. A.C. & S, et al](#), 7 AD3d 285, 776 NYS2d 253 [1st Dept 2004]).

Here, the plaintiff attempts to present “supplemental” deposition testimony from unrelated cases as the only basis for opposing the defendant's summary judgment motion. This is evident because the plaintiffs in the instant action were, in fact, not parties to any of the actions involving the “powerhouse workers.” Plaintiff-decedent's own testimony and that of Salvatore Gargiulo make no reference to defendant's products at any time (Aff. in Opp., Exhs. 2 and 7). The plaintiff has, thus, not shown “facts and conditions from which defendant's liability may be reasonably inferred” and has not met the *Reid* standard. (*Reid v Ga. - Pacific Corp., supra*). Plaintiff has failed to rebut defendant's prima facie entitlement to summary judgment and summary judgment is granted.

*3 Accordingly, it is ORDERED that defendant Electrolux Home Products, Inc., Individually and as successor to Tappan and Copes-Vulcan's motion for summary judgment pursuant to [CPLR § 3212](#), dismissing plaintiff's complaint and all cross-claims against it, is granted, and it is further

ORDERED that the complaint and all cross-claims against defendant Electrolux Home Products, Inc., Individually and as successor to Tappan and Copes-Vulcan's are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

Dated: April 4, 2019

ENTER:

<<signature>>

MANUEL J. MENDEZ

J.S.C.