

At a Civil Special Term, Part 33, of  
the Supreme Court, held in and for  
the County of Erie, State of New  
York, on the 18<sup>th</sup> day of November  
2019

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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PATRICIA SCHUMAN, Executrix for the Estate of  
MATTHEW G. SCHUMAN, Deceased and Individually  
as the Surviving Spouse of MATTHEW G. SCHUMAN,

Plaintiff

vs.

DECISION AND ORDER  
Index No. 802965/2017

ALLIS-CHALMERS ENERGY, INC., et al.,

Defendants

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Defendant Foster Wheeler, LLC (Foster Wheeler) moves for summary judgment on the ground that plaintiff has failed to establish that decedent was exposed to asbestos from any Foster Wheeler product.

In support of its motion, Foster Wheeler submitted its Notice of Motion dated September 17, 2019 and the Affirmation of William T. Meidel, Esq., with attached exhibits, dated September 17, 2019.

In opposition to Foster Wheeler's motion, plaintiff submitted the Affirmation of Seth A. Dymond, Esq., with attached exhibits, dated October 11, 2019.

Plaintiff's decedent, Matthew G. Schuman, died at age 70 of mesothelioma alleged to be caused by exposure to asbestos. Decedent passed away before he could be deposed in this case, but testified in an action he commenced in 2002 seeking damages for pleural plaques. That deposition took place on March 26, 2003.

For purposes of this motion, plaintiff alleges that decedent was injured by exposure to asbestos while working with and around a Foster Wheeler furnace as a yardman, welder and repairman at the Ashland Oil Refinery located in Tonawanda, New York, where he worked from 1956-1982.

Defendant has established that plaintiff, in her Answers to Defendant's Interrogatories, did not identify any of Foster Wheeler's products.

" [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]). That failure shifts the burden to plaintiff to come forward with facts and conditions from which defendants' liability can be reasonably inferred (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Gorzka*). It must be demonstrated "that plaintiff worked in the vicinity where defendant's products were used, and that plaintiff was exposed to defendant's product" ( *Matter of New York City Asbestos Litig. [Comeau] v A. C. & S., Inc.* , 216 AD 2d 79, 80 [1<sup>st</sup> Dept 1995] citing *Cawein v Flintkote Co.*, 203 AD2d 105, 105-106 [1<sup>st</sup> Dept 1994]) or plaintiff must " show facts sufficient to require a trial on any issue of fact" (*Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel]*, 269 AD2d 749, 750 [4<sup>th</sup> Dept 2000]) .

Defendant Foster Wheeler, through plaintiff's interrogatories, has succeeded in sustaining its initial burden and the burden has shifted to plaintiff.

Plaintiff attempts to meet her burden by relying on the 2003 testimony of decedent and the deposition of decedent's co-worker Joseph McNeil. McNeil testified that he supervised and worked with decedent. In his 2003 deposition, decedent mentioned that Foster Wheeler once "may have been on the synthetic gas plant ... I think as the prime contractor". However, there is nothing in his testimony linking asbestos exposure to the synthetic gas plant. McNeil identified Foster Wheeler as a manufacturer of a furnace located at Ashland. He testified that he would have been the person who

assigned decedent to work on the furnace and that he observed him working on the furnace. With respect to asbestos exposure, plaintiff appears to rely on the McNeil deposition and the myriad references to insulation work performed by decedent as well as clean-up work. There is no testimony, however, that decedent insulated or worked with insulation or asbestos-containing components on the Foster Wheeler furnace or was present when others did so.

Plaintiff also submits the testimony of Foster Wheeler corporate representatives Robert Tracey and Thomas Scroppe and what plaintiff describes as Foster's interrogatory admissions in an unspecified action in New York. The relevant portions of the testimony and interrogatory responses show only that, in the 1940's, boilers used in a refinery probably specified asbestos and that Foster Wheeler's furnaces or heaters used in oil refineries, "may or may not have contained asbestos components" including insulation, gaskets and seals.

Taking the evidence in light most favorable to plaintiff, she has failed to reveal any admissible evidence showing that decedent was exposed to asbestos or asbestos-containing components or products as a result of any work on or near the Foster Wheeler furnace at the refinery (*see Comeau; compare Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1995]).

The mere presence of defendant's furnace "is insufficient to create a reasonable inference that [it] was a source of an asbestos-containing product to which [decedent] was exposed" (*Gorzka*, citing

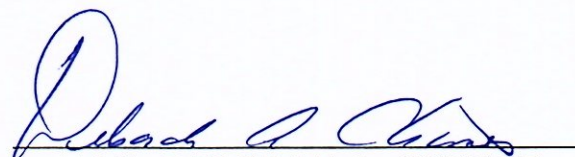
*Diel v Flintkote Co.*, 204 AD2d 53, 54 [1994]; *Heckel*; see also *Matter of New York County Asbestos Litig. [Perdicaro]*, 52 AD3d 3000 [2008]); *Reid*.

Based on the foregoing, it is hereby

ORDERED, that defendant Foster Wheeler's motion for summary judgment is granted.

SO ORDERED:

DATED: Buffalo, New York  
January 24, 2020

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