

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

PRESENT: HON. ADAM SILVERA PART 13

Justice

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RAMSIS EL-SHEIKH, AMAL EL-SHEIKH,

Plaintiff,

INDEX NO. 190159/2019

MOTION DATE 06/29/2021

MOTION SEQ. NO. 002

- v -

ADVANCE AUTO PARTS INC., ARVINMERITOR,
INC., BORG-WARNER CORPORATION, CUMMINS
ENGINE COMPANY, INC., DANA COMPANIES,
LLC, EATON CORPORATION, FREIGHTLINER
CORPORATION, GENUINE PARTS COMPANY,
HONEYWELL INTERNATIONAL, INC., INTERNATIONAL
TRUCK AND ENGINE CORPORATION, LIPE
AUTOMATION CORPORATION, MACK TRUCKS
INC., MCCORD CORPORATION, MOTION CONTROL
INDUSTRIES, INC., NAVISTAR, INC., PACCAR,
INC., PNEUMO ABEX LLC, ROCKWELL AUTOMATION,
INC., STANDARD MOTOR PRODUCTS, INC., TDY
INDUSTRIES, INC., UNION CARBIDE CORPORATION,
WESTERN AUTO SUPPLY COMPANY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ordered that defendant Pneumo Abex LLC's (hereinafter referred to as "Abex") motion for summary judgment to dismiss this action is hereby denied for the reasons set forth below.

Here, defendant Abex moves for summary judgment arguing that plaintiff is unable to demonstrate causation. In support, defendant Abex argues that plaintiff's evidence fails to establish that he was exposed to the levels of asbestos from defendant Abex's brakes at levels which could be a substantial contributing factor to plaintiff's development of mesothelioma. In support of its motion, defendant Abex proffers plaintiff's deposition transcript, his social security

records, as well as the report of plaintiff's expert Dr. David Y. Zhang MD, PhD, MPH.

Defendant Abex argues that plaintiff cannot establish that he was exposed to asbestos fibers from one of defendant Abex's products. Notably, defendant Abex does not provide its own expert with regards to its brakes and whether any asbestos fibers could be released from its products. Rather, defendant Abex relies solely on plaintiff's deposition and expert.

In opposition, plaintiff argues that issues of fact exist as to causation. In support, plaintiff argues that he testified that he worked with asbestos containing brakes, clutches and gaskets from 1983 to 1994. A review of plaintiff's deposition transcript reveals that he specifically identified defendant Abex's products as brakes that he worked with and handled. Plaintiff further testified that he was exposed to visible dust created by working on such brakes. Contrary to defendant Abex's arguments, plaintiff's expert reports explicitly state that "[m]alignant mesothelioma is a rare malignancy and is caused by inhalation of asbestos fibers". Affirmation in Opposition to Pneumo Abex LLC's Motion for Summary Judgment, Exh. O, Report of David Y. Zhang, dated February 19, 2020, p. 5. Dr. Zhang's supplemental report further opines that "[e]xposure levels were significantly higher when workers, such as *Mr. El-Sheikh*, who routinely handled and were in the vicinity of other workers who worked on asbestos-containing materials and equipment including brakes, clutches, and gaskets, etc. and performed this work without dust control." *Id.* at Exh. P, Supplemental Report of David Y. Zhang, dated August 13, 2020, p. 20. Dr. Zhang concluded "within a reasonable degree of medical and scientific certainty that *Mr. El-Sheikh*'s mesothelioma was caused by that asbestos exposure." *Id.*

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). "The proponent of a summary judgment

motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]". *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). The court's role is "issue-finding, rather than issue-determination". *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

The Court notes that defendant Abex cannot satisfy its burden by merely pointing to gaps in plaintiff's proof. *See Alvarez v 21st Century Renovations Ltd.*, 66 AD3d 524, 525 (1st Dep't 2009). Here, defendant Abex's motion relies solely on gaps in plaintiff's proof in an attempt to meet its burden for summary judgment. Thus, defendant Abex's argument that plaintiff's testimony is not expert testimony which may link its product to plaintiff's asbestos exposure fails. Here, defendant Abex has provided no evidence that their product did not create visible asbestos dust which plaintiff testified he was exposed to. Moving defendant contests causation but fails to proffer a single report from any industrial hygienist, physician, or medical expert, in support of its motion. Defendant Abex has merely pointed to gaps in plaintiff's proof and has

failed to provide evidence to prove that plaintiff was not exposed to asbestos through one of its products. Thus, defendant Abex has failed to meet its burden for summary judgment.

Further, as to specific causation, Judge Mendez noted that “plaintiffs are not required to show the precise causes of damages as a result of [plaintiff’s] exposure to [defendant’s] product, only facts and conditions from which defendant’s liability may be reasonably inferred”.

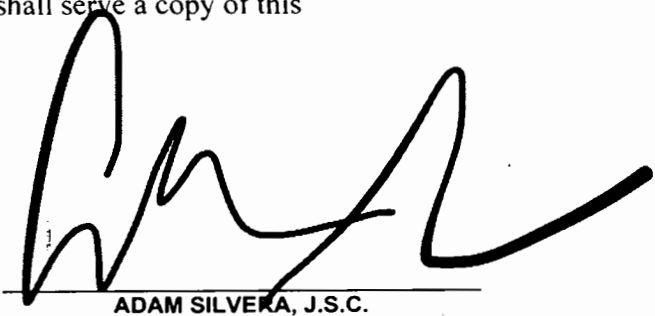
Marzigliano v Amchem Products, Inc., et. al., Index No. 190134/17, mot. 003, p. 5 (internal citations and quotations omitted). Here, like in *Marzigliano*, plaintiff’s deposition testimony identified defendant Abex’s brakes as a source of his exposure to asbestos. Such testimony combined with the report of Dr. Zhang has created “facts and conditions from which [defendant Abex’s] liability may be reasonably inferred” and raises issues of fact. *Reid v Ga.-Pacific Corp.*, 212 AD 462 (1st Dep’t 1995). Thus, plaintiff has provided evidence of causation stating that asbestos fibers cause mesothelioma. As such, defendant Abex’s motion to dismiss is denied.

Accordingly, it is

ORDERED that defendant Pneumo Abex LLC’s motion for summary judgment to dismiss plaintiff’s complaint and all cross-claims against it is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.


ADAM SILVERA, J.S.C.

10/12/2021
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: