

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____ x
**FRANK RANDAZZO and CHRISTINE
RANDAZZO,**

Plaintiff(s),

-against-

AMCHEM PRODUCTS INC et. al.,

Defendant(s).

_____ x

**TRIAL/IAS, PART 12
NASSAU COUNTY**

Index No.: 608412/18

**Motion Seq. No.: 004, 005 & 008
Motion Submitted: 9/13/21**

The following papers read on this motion:

Notices of Motion/Supporting Exhibits/Memorandum of Law.....XXX
Affirmations in Opposition/Supporting Exhibits/Memorandum of Law.....XXX
Affirmations in Reply.....XXX

Defendant, ArvinMentor, Inc., successor in interest to Rockwell International Corporation (ArvinMentor), moves this court (Motion Seq. 004) for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Defendant, Cleaver-Brooks, Inc. (Cleaver-Brooks), moves this court (Motion Seq. 005) for summary judgment, dismissing the complaint against it. Defendant, Perkins Engines, Inc. (Perkins), moves this court (Motion Seq. 008) for summary judgment, dismissing the complaint against it. Plaintiffs, Frank Randazzo (Frank) and Christine Randazzo (Christine), oppose all three the motions.

This asbestos litigation matter was commenced by summons and complaint dated June 21, 2018. ArvinMentor served an answer dated July 24, 2018. Perkins served an answer with cross claims dated July 27, 2018. Cleaver-Brooks submitted an answer dated June 20, 2019. An amended complaint was filed on January 18, 2021, and a third amended complaint was filed on June 27, 2019. The case certified ready for trial on July 20, 2020 and a note of issue was filed on July 30, 2020.

Frank alleges asbestos exposure from, *inter alia*, working on Rockwell brakes, breathing in dust from his father's clothing when his father worked on Cleaver-Brooks boilers and burners, and from Perkins' gaskets. Each Defendant alleges Frank could not have been exposed by their products.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to

the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

In a toxic tort matter, to establish causation, a plaintiff must establish that the toxin is capable of causing the illness from which the plaintiff suffers (general causation), and that the plaintiff was exposed to enough of the toxin to cause the illness (specific causation). (*Parker v. Mobil Oil Corp.*, 7 NY3d 434 [2006]). Part of the defendant's burden in moving for summary judgment is trying to establish that its chemicals could not have caused the illness. (*Cinquemani v. Old Slip Associates*, 43 AD3d 1096 [2d Dept 2007]).

**ARVINMENTOR'S MOTION FOR
SUMMARY JUDGMENT (MOTION SEQ. 004)**

In support of its motion, ArvinMentor relies on the affidavit of Bruce Ketcham, Litigation Consultant. Mr. Ketcham has worked in this capacity since 2000, and prior to that he was employed by Rockwell as a manager at their after-market parts distribution facility and automotive headquarters. According to Mr. Ketcham, during the years 1973 to the early 1990s, neither Rockwell nor its successors manufactured brakes for the type of vehicles Frank testified he worked on. Specifically, Mr. Ketcham states:

During the relevant time period in this action, between 1973 and the early 1990s, Rockwell manufactured and sold brake assemblies for medium and heavy-duty vehicles. Rockwell

did not manufacture or distribute any asbestos-containing brake products for use on passenger cars or pickup trucks.

The motion will be denied. Mr. Ketcham's affidavit is too scant and provides no detail. He does not define a "medium" or "heavy-duty vehicle", nor does he state from where he got this information. He does not explain how being a "litigation consultant" qualifies him to reach his conclusion. While he states in general that the affidavit is based upon his personal knowledge and reviewing corporate records, he does not explain where this specific information comes from. Clearly, it should be easy to document what kinds of vehicles qualify as "medium" and "heavy duty". Even if these are terms of art used in the field, that should be explained. It is not.

As the basis for ArvinMentor's motion is Mr. Ketcham's affidavit, the court finds ArvinMentor has failed establish entitlement to summary judgment as a matter of law. The motion will be denied regardless of the sufficiency of the opposition papers.

**CLEAVER-BROOKS MOTION FOR
SUMMARY JUDGMENT (MOTION SEQ. 005)**

Cleaver-Brooks relies on the affidavit of John Tornetta, Manager of Technical Services for Cleaver-Brooks as of the date of the affidavit. Mr. Tornetta states he has been employed by Cleaver-Brooks since 1985, and since that time he has reviewed "thousands of pages of documents relating to boilers manufactured by Cleaver-Brooks".

He also states that he has “spoken to individuals who have been employed by Cleaver-Brooks before 1985...”. The last sentence of that affidavit states “In addition, Cleaver-Brooks did not sell cast iron boilers prior to 1985”.

Using this affidavit as the basis for their motion, the court finds Cleaver Brooks the motion should be denied. The affidavit lacks detail, and does not explain what kind of documents he reviewed, or which persons he spoke to, that led him to the conclusion that Cleaver-Brooks did not sell cast-iron boilers prior to 1985. As someone who has worked for the company as long as he did, Mr. Tornetta could have spoken with persons who work or worked in sales, who could provide a basis for his statement. Further, the documents he reviewed could have been invoices of items purchased and sold, or listings of items in stock. There are countless documents that could establish what Cleaver-Brooks did and did not sell, yet Mr. Tornetta fails to identify a single, specific document, or a single specific person. The lack of specificity in the affidavit, combined with the deposition testimony of Frank and his father, Frank Randazzo Sr., leads the court to find Cleaver-Brooks has failed to established entitlement to summary judgment as a matter of law. The motion will be denied regardless of the sufficiency of the opposition papers.

PERKINS’ MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 008)

Perkins’ makes two arguments in support of its motion for summary judgment. The first is that Perkins gaskets could not have caused Frank’s cancer, and the second is

that Frank has not established causation.

In support of the argument that Perkins' gaskets could not have caused Franks' cancer, Perkins relies on the affidavit of Michael E. Reinhart. Mr. Reinhart states that he had spent more than 40 years working for "the world's largest and most recognizable manufacturers and distributors of industrial engines", but does not name any of them. During that time he worked in engine sales, marketing, operations and manufacturing. From 1997 to 2000, he worked in sales for Perkins. The crux of his affidavit is his statement that Perkins did not sell gaskets for gasoline engines, and those were the types of engines Frank said he worked on which led to his exposure. Despite Mr. Reinhart's 40 years of experience, he offers no support for this statement. He does not explain exactly which Perkins products he sold, or how doing so gave him the knowledge regarding their gaskets. Further, Frank testified to working on Perkins gaskets and at times having to cut holes in them to make them fit. Mr. Reinhart does not explain whether or not Perkins gaskets, while not made for gasoline engines, could be modified to be used with gasoline engines. The court therefore finds Mr. Reinhart's affidavit does not establish entitlement to summary judgment as a matter of law.

Perkins also argues that Frank cannot establish causation, and does so by challenging the report of Dr. Brent C. Staggs, one of Plaintiffs' experts. Perkins does not submit its own expert report. The court finds Perkins's causation arguments fail to establish entitlement to summary judgment as a matter of law. Dr. Staggs' report,

together with Frank's deposition testimony, both of which are annexed as exhibits to Perkins' motion, raise issues of fact as to causation. Therefore, Perkins' motion will be denied.

Accordingly, it is hereby

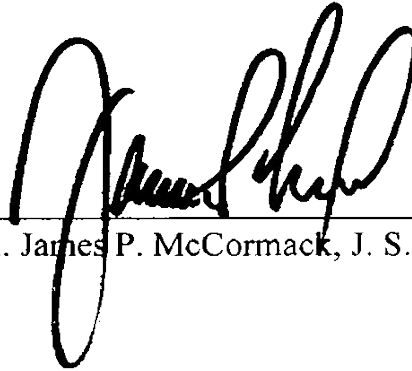
ORDERED, that ArvinMentor's motion for summary judgment (Motion Seq. 004) is DENIED; and it is further

ORDERED, that Cleaver-Brooks' motion for summary judgment (Motion Seq. 005) is DENIED; and it is further

ORDERED, that Perkins' motion for summary judgment (Motion Seq. 008) is DENIED.

. This constitutes the Decision and Order of the Court.

Dated: November 17, 2021
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.