

SUPREME COURT - STATE OF NEW YORK

**PRESENT: Honorable James P. McCormack
Justice**

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**FRANK RANDAZZO and CHRISTINE
RANDAZZO,**

Plaintiff(s),

-against-

**AMCHEM PRODUCTS, n/k/a RHONE
POULENC AG COMPANY, n/k/a BATER
CROPSCIENCE INC., et. al.,**

Defendant(s).

_____ x

**TRIAL/IAS, PART 8
NASSAU COUNTY**

Index No.: 608412/18

**Motion Submitted: 2/2/23
Motion Seq.: 012**

The following papers read on these motions:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition/Supporting Exhibits.....X
- Reply Affirmation.....X

Defendant, Perkins Engines, Inc. (Perkins), moves this court, pursuant to CPLR §2221, for leave to renew the November 17, 2021 order of this court that denied its motion for summary judgment. Plaintiffs, Frank Randazzo and Christine Randazzo, oppose the motion.

A motion for leave to renew or reargue is addressed to the sound discretion of the

Supreme Court (see *Matter of Swingearn*, 59 AD3d 556 [2d Dept. 2009]). A motion for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221[e] [2]). There is no statutory limit to the time within which a litigant can file a motion to renew based upon facts not offered on the prior motion that would change the prior determination pursuant to CPLR § 2221[e]. While this motion was timely filed, the Supreme Court has jurisdiction to reconsider its prior order "regardless of statutory time limits concerning motions to reargue" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; see *Aridas v Caserta*, 41 NY2d 1059 [1977]; cf. *Matter of Huie [Furman]*, 20 NY2d 568 [1967]; *Johnson v Incorporated Vil. of Freeport*, 303 AD2d 640 [2d Dept. 2003]).

To prevail upon a motion to renew, a party must proffer both "new facts not offered on the prior motion that would change the prior determination . . . and . . . reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221 [e] [2], [3]; see *New York Cent. Mut. Fire Ins. Co. v Caddigan*, 15 AD3d 581 [2d Dept. 2005], *JP Morgan Chase Bank, N.A. v Malarkey*, 65 AD3d 718, 719-720 [3d Dept. 2009]; *Johnson v Title N., Inc.*, 31 AD3d 1071, 1071-1072 [3d Dept. 2006]).

In support of its motion, Perkins refers to a number of Appellate Division, First Department cases, as well as the Court of Appeals Decision in *Nemeth v. Brenntag N. Am.*, 38 NY3d 336 [2022], all of which were decided in 2022, after this court issued its

decision. While a change in the law can be the basis of a motion to renew (*Opalinski v. City of New York*, 164 AD3d 1354 [2d Dept 2018]), the *Nemeth* decision, and the First Department cases, did not change the law. Instead, *Nemeth* re-affirmed, and perhaps clarified, its prior ruling in *Parker v. Mobil Oil Corp.*, 7 NY3d 434 [2006], regarding the standard required for a plaintiff to establish causation in an asbestos case.

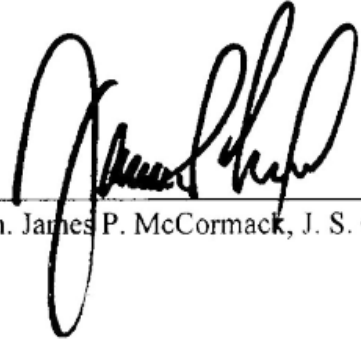
In the prior order in this case, the court denied Perkins' motion because it failed to meet its burden. Regarding causation, Perkins did not offer the opinion of an expert who claimed that Frank Randazzo was not exposed to enough asbestos from Perkins' products to hold Perkins responsible for Frank Randazzo's cancer (*Cf. Dyer v. Amchem Products Inc.*, 207 AD3d 408 [1st Dept 2022]). Perkins attempts to remedy that insufficiency by including expert affidavits on this motion to renew. However, Perkins fails to explain why these affidavits, which are dated prior to the filing of the prior motion, were not included in the prior motion, other than citing to *Nemeth* and the First Department cases. As those cases did not change the law, those cases are not a valid basis for Perkins submitting evidence for the first time a motion to renew that was available at the time the prior motion was made.

Accordingly, it is hereby

ORDERED, that Perkins' motion for leave to renew the November 17, 2021 order of this court is DENIED.

This constitutes the order of the court. The court has considered the remaining arguments of the parties and finds them to be without merit.

Dated: March 21, 2023
Mineola, N.Y.



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