

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____ x

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

**DONNA A. DANIELL and ROBERT
DANIELL,**

Plaintiff(s),

Index No.: 614799/2020

-against-

AMCHEM PRODUCTS INC et. al.,

**Motion Seq. No.: 003
Motion Submitted: 2/24/23**

Defendant(s).

_____ x

The following papers read on this motion:

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

Defendant, LuK Clutch Systems, LLC (LuK), moves this court for an order¹, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Plaintiffs, Donna A. Daniell (Donna) and Robert Daniell (Robert), oppose the motion.

This asbestos litigation matter was commenced by summons and complaint dated

¹LuK sought oral argument on this motion, but as it was thoroughly and expertly briefed, the court found that oral argument would have been superfluous.

December 21, 2020. LuK joined issue by service of an answer with cross claims dated March 1, 2021. The case certified ready for trial on January 27, 2022 and a note of issue was filed on February 28, 2022.

Donna alleges asbestos exposure from, *inter alia*, working near Robert, an auto mechanic, when he worked on LuK replacement clutches, among other asbestos-containing products. Donna further alleges she was exposed to asbestos dust by laundering Robert's work clothes. LuK alleges that if Donna were exposed to asbestos from LuK clutches, the exposure would have been minimal, and similar the ambient levels of asbestos in the air. LuK also points to Donna smoking cigarettes for over 40 years, as much as two packs a day. As such, LuK moves for summary judgment arguing its products were not the cause of Donna's illnesses.

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]).

In *Nemeth v. Brenntag North America*, 38 NY3d 336 (2022), the Court of Appeals re-affirmed the standard created in *Parker*, and most recently affirmed in *Matter of New York City Asbestos Litig [Juni]*, 32 NY3d 1116 (1st Dept 2017), that a plaintiff must establish that they were exposed to "sufficient levels" of asbestos from the defendant's product to have caused the disease. (*Juni* at 1118). The *Nemeth* court, while acknowledging that determining the quantity of asbestos to which a plaintiff was exposed is a difficult task, found that an exact amount is not required. However, a plaintiff's expert must be able to offer an quantity in more specific terms than "excessive" or "far

more” than the exposure tested in epidemiological studies. *Id.* Whatever measure a plaintiff relies upon must be generally accepted as reliable in the scientific community. (*Parker v Mobil Corp. supra*, at 448).

In support of their motion, LuK offers, *inter alia*, the expert report of Frederick W. Boelter, CIH, PE, BCEE, FAIHA, an industrial hygienist, and the affirmation and report of I. Allan Feingold, M.D. FRCP(C), FCCP, a physician licensed to practice law in New York. Both experts focus heavily on Donna’s cigarette smoking as the most likely cause of her lung cancer. According to Dr. Feingold’s report, and in referencing medical literature, he opined that “...lung cancer risk is increased by asbestos exposure, but only in those individuals who develop pulmonary parenchymal asbestosis or, at the least, have an asbestos fiber lung burden equivalent to asbestosis. Mrs. Daniell’s chest imaging neither showed asbestosis nor other evidence of heavy asbestos exposure such as pleural plaques.”

According to Mr. Boetler, studies, to which he cites, have determined that persons who contract asbestos-related diseases or asbestosis are exposed to high concentrations of asbestos of at least 25 f-yr/cc. He opines that higher rates are generally required to cause disease, but intense exposure to this level can cause asbestos-related diseases as well. In comparison, the ambient levels of asbestos in the air at all times, whether outside or in buildings, can be measured at 0.01 to 0.0001 f/cc, with 0.003 to 0.004 being a nationwide average. Mr. Boetler has conducted studies that would be comparable to Robert’s

description of the work he performed and the asbestos-containing items he used. Based on those studies, the amount of asbestos exposure Robert would have experienced would have been minimal, or in the range of what already existed in the air. As a result, Donna's exposure while being near Robert while he worked, or while laundering his clothes, would have been similar, or even lower than Robert's exposure. Therefore, Donna was not exposed to enough asbestos for that to have caused her illness, particularly when considering her cigarette smoking history.

Based upon the reports of Mr. Boetler and Dr Feingold, the court finds LuK has established entitlement to summary judgment as a matter of law. The burden shifts to Plaintiffs to raise a material issue of fact requiring a trial of the action.

Plaintiffs' opposition is deficient for a number of reasons. First, Plaintiffs not only ignore 22 NYCRR 202.8-b(c)² by failing to include a word count certificate, but their opposition papers far exceed the word count limit in subsection (a).

Next, Plaintiffs offer the expert reports of Mark Ellis Ginsburg, M.D. a thoracic surgeon, and Kenneth S. Garza, CIH, MS a Certified Industrial Hygienist. Mr. Garza's report is a meditation on all types of products that contain asbestos, but does not speak to the facts of this case in particular. Dr. Ginsburg discusses the facts of this case, and comes close to suggesting the amounts of asbestos Robert might have been exposed to, but never offers an opinion as to how much asbestos dust Donna was exposed to. He

²LuK also fails to include a word count certificate, but their papers are within the word count limit.

implies that any exposure is disease-causing, and that asbestos and tobacco have a “complex” relationship. As for manipulation of clutches, they have been shown to cause asbestos exposure at levels up to 3.5 f/cc. But the closest he comes to expressing how much asbestos Donna was exposed to, which does not even point to LuK clutches in particular, is as follows:

The presence of visible dust production during manipulation of an asbestos-containing product provides a semi-quantitative measurement of the respirable asbestos in the individual’s immediate environment. Johnson (53) specifically noted that “5 mppcf is invisible to the naked eye”, the threshold limit value (TLV) established by ACGIH in 1948 (52), which significantly exceeds the current OSHA PEL of 0.1 f/cc TWA (46)...

Asbestos is universally recognized as a carcinogen with a long latency period and exposure to asbestos alone is recognized as a substantial contributing cause of primary lung cancer. Tobacco use is also a risk factor in the development of lung cancer, and in combination with asbestos exposure is known to increase the risk of lung cancer.

It is therefore my opinion, to a reasonable degree of medical certainty, that Ms. Donna Daniell's smoking history was a contributing cause of his [sic] primary lung cancer. It is also my opinion, to a reasonable degree of medical certainty, that Ms. Donna Daniell's cumulative exposure to asbestos was also a substantial contributing cause of his [sic] primary lung cancer. It is my further opinion, to a reasonable degree of medical certainty, that the cumulative exposure to asbestos from each company's asbestos product or products, as well as the cumulative exposure to asbestos incurred at each worksite described in his [sic] deposition testimony, was a substantial contributing factor in the development of Ms. Donna Daniell's primary lung cancer. I base this conclusion on Ms. Donna Daniell's clinical and pathological evidence of primary lung

cancer, the history of repeated exposure to asbestos, and the appropriate latency period from the asbestos exposure until the development of primary lung cancer.

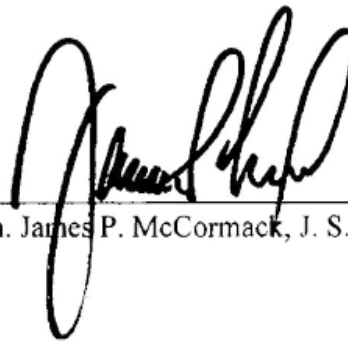
The court finds Plaintiffs have failed to raise an issue of fact. None of the evidence submitted, including the expert reports, meet the standard required by *Nemeth v. Brenntag North America, supra*, *Juni, supra* and *Parker v. Mobil Oil Corp, supra*.

Accordingly, it is hereby

ORDERED, that LuK's motion for summary judgment is GRANTED. The complaint is dismissed against LuK

This constitutes the Decision and Order of the Court.

Dated: April 5, 2023
Mineola, N.Y.

A handwritten signature in black ink, appearing to read 'James P. McCormack', is written over a horizontal line.

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