

## Avakian v Aerco Intl., Inc

Supreme Court of New York, New York County

October 1, 2023, Decided

INDEX NO. 190036/2018

### Reporter

2023 N.Y. Misc. LEXIS 6396 \*; 2023 NY Slip Op 33386(U) \*\*

**[\*\*1]** LAURA AVAKIAN, Plaintiff, - v- AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC. AMERICAN BILTRITE INC, BMCE INC., BORGWARNER MORSE TEC LLC, BRIGGS & STRATTON CORP, CARRIER CORPORATION, CERTAINTEED CORPORATION, COMPUDYNE CORPORATION, CROWN BOILER CO., DANA COMPANIES, LLC, DOMCO PRODUCTS TEXAS, INC, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC. HONEYWELL INTERNATIONAL, INC., ITT LLC, KARNAK CORPORATION, KOHLER CO., MANNINGTON MILLS, INC, NISSAN NORTH AMERICA, INC, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, RHEEM MANUFACTURING COMPANY, SEARS, ROEBUCK AND CO, SLANT/FIN CORPORATION, STANDARD MOTOR PRODUCTS, INC, TECUMSEH POWER, TECUMSEH PRODUCTS COMPANY, TENNECO AUTOMOTIVE OPERATING COMPANY INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TOYOTA MOTOR SALES U.S.A., INC., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, FEDERAL - MOGUL **ASBESTOS** PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO., Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### Core Terms

summary judgment motion, causation, renew, summary judgment, exposure, instant motion, supplemental, unequivocal, documents, prior determination, **asbestos** exposure, **asbestos** fiber, expert report, fail to prove,

issue of fact, fail to meet, prior motion, lung cancer, new law, cumulative, decisions, caselaw, e-filed, opposes, updated

**Judges:** **[\*1]** HON. ADAM SILVERA, J.S.C.

**Opinion by:** ADAM SILVERA

### Opinion

#### **DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385

were read on this motion to/for REARGUMENT/RECONSIDERATION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

**[\*\*2]** Upon the foregoing documents, it is ordered that the instant motion for renewal is decided for the reasons set forth below.

Here, defendant Mannington Mills, Inc. ("Mannington") moves for renewal of its motion for summary judgment arguing that the Court of Appeals' decision in [Nemeth v Brenntag N. Am.](#), [38 NY3d 336](#), [173 N.Y.S.3d 511](#), [194 N.E.3d 266 \(2022\)](#) and its related "floor tile" decisions in the First Department changed the law such that this Court's prior Decision/Order, dated Nov. 16, 2020, must be reversed. See Memorandum of Law in Support of Mannington Mills, Inc.'s Motion for Leave to Renew Argument On Its Prior Motion for Summary Judgment, p. 2. Defendant Mannington argues that plaintiff's report

does not quantify asbestos exposure to the [\*2] standard necessitated by these ' decisions and that this Court did not require a specific quantification from plaintiff as to the amount of asbestos exposure incurred herein. See *id.* at p. 4-5.

Plaintiff opposes, noting that defendant Mannington's initial motion did not "proffer [] [any] expert medical witness on the issue of the specific causation of Mr. Layton's lung cancer." See Affirmation in Opposition to Mannington's Motion for Leave to Renew, and in Support of Plaintiff's Cross-Motion for Leave to Submit Supplemental Expert Analysis, p. 2. Plaintiff further notes that defendant Mannington's expert makes no unequivocal statements about the risk of lung cancer at low doses of exposure and acknowledges that research is varied on the risk at low cumulative exposure. See *id.* at p. 4. Plaintiff also cross-moves to include a supplemental expert report in light of the updated caselaw.

[CPLR § 2221\(e\)](#) permits a party to move for leave to renew a decision to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination". [CPLR § \[\\*\\*3\] 2221 \(e\)](#). Here, the Court notes that defendant Mannington has [\*3] failed to show how their motion would be decided differently under *Nemeth* and its progeny.

Defendant Mannington has misstated plaintiff's burden in opposing a summary judgment motion as the standard set forth in *Nemeth v Brenntag, supra*, which represents an extraordinary post-trial remedy to set aside a jury verdict, rather than the well-settled burden on a motion for summary judgment. Moving defendant incorrectly states that plaintiff failed to prove specific causation in the original motion. At summary judgment, plaintiff's opposition need only raise a triable issue of fact concerning specific causation. Further, the appropriate standard in a motion for summary judgment for moving defendant can be found in [Dyer v Amchem Products Inc., 207 AD3d 408, 409, 171 N.Y.S.3d 498 \(1st Dep't 2022\)](#). In *Dyer*, defendants were granted summary judgment not by "simply argu[ing] that plaintiff could not affirmatively prove causation" but by "affirmatively prov[ing], as a matter of law, that there was no causation." *Id.* Defendant Mannington fails to meet their burden on summary judgment as set forth in *Dyer*. Moving defendant has offered no evidence upon which to base their claim that there was affirmatively no causation.

Contrarily, in the initial motion, plaintiff's opposition papers provided [\*4] clear and unequivocal expert testimony regarding exposure history to Mannington products, the level of asbestos fibers at issue, and an opinion on causation based on cumulative exposure thereto. See the initial motion, Affirmation in Opposition to Defendant Mannington Mills, Inc.'s Motion for Summary Judgment, dated August 18, 2020, Exh. 8, Report of Mark Ellis Ginsburg, MD, dated June 30, 2020. This is more than sufficient to raise issues of fact as to causation. Plaintiff's supplemental expert report further addresses the concentration of asbestos fibers at issue pursuant to the updated caselaw, but is unnecessary to the instant motion. See Affirmation in [\*4] Opposition, dated November 14, 2022, *supra*, Exh. 1, Ginsburg Report, dated November 13, 2022.

It is undisputed that there is "new" law available regarding defendant Mannington's underlying motion for summary judgment, however, defendant has failed to prove that such new law would change the outcome of the initial motion. In fact, the new law in [Dyer, supra](#), has unequivocally set the standard for moving defendants on a motion for summary judgment; a standard which defendant Mannington has failed to meet. As such, the instant motion to renew [\*5] is denied.

Accordingly, it is

ORDERED that defendant Mannington's motion to renew their summary judgment motion is denied in its entirety; and it is further

ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

**10/01/2023**

**DATE**

/s/ Adam Silvera

**ADAM SILVERA, J.S.C.**

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