Bartolone v Air & Liquid Sys. Corp.
2016 NY Slip Op 30306(U)
February 22, 2016
Supreme Court, New York County
Docket Number: 190398/2014
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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MARIA ROSA BARTOLONE, as personal representative of the Estate of GAETANO BARTOLONE,

Index 190398/2014
Motion Seq. 003

DECISION & ORDER

Plaintiff

-against-

AIR & LIQUID SYSTEMS CORPORATE, *et al.*

Defendants

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PETER H. MOULTON, J.S.C.:

In this asbestos personal injury action, defendant Union Carbide Corporation ("Union Carbide" or "defendant") moves, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff's complaint and any cross-claims against it based on the lack of product identification and the lack of any evidence or expert opinion that exposure to a Union Carbide product caused plaintiff's illness and death.[1] Plaintiff asserts that defendant is not entitled to summary judgment because defendant failed to meet its burden to demonstrate that plaintiff was not injured by Union Carbide's Calidria Asbestos or its asbestos-containing phenolic molding compound, and plaintiff has raised issues of fact for trial.

DEFENDANT'S ARGUMENTS

Union Carbide maintains that plaintiff's allegations that he was exposed to a Union Carbide asbestos-containing product are predicated on mere speculation. Although at his

[1]For convenience, the court refers to Gaetano Bartolone as plaintiff, even though his wife Maria Rose Bartolone is now personal representative of the estate of Gaetano Bartolone.

deposition plaintiff identified a Union Carbide product resembling black powder, defendant asserts that summary judgment is warranted because plaintiff did not identify the type of product or state that it contained asbestos.[2] Further, although plaintiff's co-worker Nick Campanella ("Campanella") described at his deposition white and black balls spilling from dusty paper bags at Brooklyn's Pier 39 where he worked with plaintiff for seven years, and black writing on the bags, summary judgment should be granted because Campanella did not testify that he saw "Union Carbide" or "asbestos" printed on any bag. Union Carbide also points to the fact that it made asbestos-free products.[3]

Thus, based on the "absence of evidence of exposure to asbestos from a Union Carbide product, Union Carbide has met its prima facie burden by demonstrating that the allegations against it amount to sheer speculation" and, plaintiff has failed to raise an issue of fact (Def. Mem. of Law at page 1). The "**mere possibility** that the unidentified product described by Mr. Bartolone is one of these two products" (Calidiria and asbestos-containing phenolic molding compound), as opposed to one of defendant's asbestos-free products, is not enough to raise an

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[2]In response to a question regarding whether plaintiff knew that he personally handled any asbestos materials, plaintiff testified that "[m]aybe today really I don't know which one got asbestos or which don't got it. But it could be possible because I handle a lot of chemical bags" and when the question was posed again, plaintiff responded "[n]o" (Deposition Transcript of Gaetano Bartolone 177:10-177:23). Plaintiff later answered "[s]ure" to a question regarding whether he believed that he personally encountered asbestos-containing products while working as a holeman at 39th Street Pier (Tr. 258:15-258:19) and "Well it could be possible" (Tr. 259:16). After describing dust on ships and on cargo, plaintiff stated that he didn't know what asbestos was, what asbestos means or what asbestos costs, among other things (Tr. pages 259-263) and later "I don't know" in response to whether he knew that the bags he handled contained asbestos (Tr. 288:2-3).

[3]Union Carbide proffers the affidavit of Susan Carrington ("Carrington"), a corporate representative, whose basis for her assertions is derived from her review of Union Carbide's repository of documents as well as her review of the depositions of other Union Carbide employees. She concludes that Union Carbide's phenolic resins never contained asbestos, were sold in 50 pound bags and were also available in black. She further states "some" of Union Carbide's phenolic molding contained asbestos, while "many" phenolic molding compounds did not.

issue of fact (*id.* at 10 [emphasis in original]). Additionally, because Union Carbide contends that plaintiff failed to identify a Union Carbide asbestos-containing product, plaintiff cannot meet his burden on summary judgment to establish specific causation under *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]). Plaintiff's expert Dr. Jacqueline Moline, defendant argues, does not establish any relationship between plaintiff's illness and his alleged exposure to a Union Carbide product or provide a "scientific expression" of an exposure level. Dr. Moline cannot establish general or specific causation, defendant argues, where the product cannot be identified.

PLAINTIFF'S ARGUMENTS

Plaintiff argues that Campanella's and plaintiff's own description of the products that they encountered while working together match the description of Calidria Asbestos and asbestos-containing phenolic molding compound. Putting aside the fact that Union Carbide must demonstrate that "its products unequivocally could not have produced Mr. Bartolone's injury" in order to prevail on summary judgment, plaintiff asserts that based on circumstantial evidence, he can prove that it is more than a reasonable probability that Mr. Bartolone developed mesothelioma from Union Carbide's products (Pl. Mem. of Law at 3-4). Additionally, plaintiff's expert should not be precluded under *Parker* (7 NY3d 434, *supra*) in light of the evidence of persistent, visible, dust. Unlike the benzine contained in gasoline at issue in *Parker*, plaintiff assertsobserves that the connection between asbestos dust and mesothelioma is well known (providing the basis for general causation). Additionally, plaintiff asserts that *Parker*'s holding regarding specific causation did not challenge, nor would it change, the numerous First Department decisions upholding jury verdicts based on expert causation testimony of regular exposure to asbestos dust, such as in *Lustenring v AC & S, Inc.* (13 AD3d 69 [1st Dept 2004]) and *Matter of New York Asbestos Litig.* (28 AD3d 255 [1st Dept 2006]).

A: CALIDRIA ASBESTOS

Plaintiff points out that Union Carbide was "the only source of pelletized asbestos" sold on the market (*see* Ex. 9, Plaintiff's Affirm in Opp., *Asbestos,* Featuring 'Calidria' Asbestos Pellets, Oct. 1971).[4] Union Carbide admits that pelletized Calidria "are friable," do not contain any sort of "binder," and "contain over 95% fiber, a significantly higher amount than any other short fiber Chrysotile [asbestos] product" (*id.*) [5]

Plaintiff asserts that Calidria Asbestos resembles "white balls" which look like Union Carbide's own pictures of that product. Union Carbide admits in its answer to interrogatories that Calidria Asbestos was packaged in 50 pound bags (*see* Ex. 16). Plaintiff asserts that the bags appear light brown in color and contain black lettering, thus matching Campanella's description (*see* Ex. 10; Pl. Mem. of Law at page 1-2). Union Carbide documents indicate that Calidria Asbestos was sold in "fibrous and pelletized forms," which appeared "grey (pelletized) or white fibrous in color and powdery in substance." (*see* Ex. 7 at 3). Plaintiff points out that Union Carbide characterized its pelletized Calidria Asbestos as perfect for use in "white or light-colored systems" due to its color, which is why Union Carbide specifically sold pelletized Calidria Asbestos as a "pigment" product (*see* Ex. 8 at 2, 10, 'Calidria Asbestos Low Cost Highly Effective').

Plaintiff also argues that there is evidence that Union Carbide shipped thousands of tons of pelletized Calidria Asbestos specifically to the Brooklyn docks during the time Campanella

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[4]Hereinafter, all references to exhibits are to the exhibits annexed to Plaintiff's Affirmation in Opposition.

[5]Union Carbide documents indicate that Calidria Asbestos "was a brand name of raw chrysotile asbestos" which was "sold by Union Carbide or its subsidiary from 1963 to June 30, 1985" after being mined from its source in California (*see* Ex. 7).

recalled seeing such a product up until 1985, a time frame that encompassed the vast majority of plaintiff's tenure as a longshoreman (*see* Ex. 12 at 3, 'Major tonnage sales are to the vinyl-asbestos floor tile industry and similar applications for short fiber asbestos'). Plaintiff points to 1980-1985 Calidria Asbestos sales orders shipped by U.S. Lines in various named ships such as the SS Astronaut, the SS Liberty, the SS Lynx, and the SS Aquarius to Kentile Floors, Inc. at 58 Second Avenue Brooklyn, located close to Pier 39 (*see* Ex. 15, 'Union Carbide Calidria Purchase Orders to Kentile Floors, Inc.').[6] Plaintiff also points out that Union Carbide maintained a Metuchen, New Jersey warehouse close to Pier 39 where it packaged "50 lb." bags of pelletized Calidria Asbestos for sale and transport, as reflected in a Calidria Asbestos price list (*see* Ex. 11, 'Calidria Asbestos Price List, Effective: July 1, 1971').

It was also well known to Union Carbide, plaintiff observes, that Calidria Asbestos produces dust. Plaintiff points to Union Carbide's Material Safety Data Sheet for pelletized Calidria Asbestos which warns Union Carbide workers that "Bag damage and dusting should be minimized and dust inhalation avoided" since "Prolonged overexposure may result in lung damage" (*see* Ex. 18 at 1-2, 'Union Carbide Material Safety Data, Sept. 1, 1972'). Moreover, Union Carbide "required" that its workers use "whole body covering" in the event that ceiling airborne concentrations of it product are reached (*id.* at 2). Plaintiff further notes that Union Carbide acknowledged that exposure to dust could occur from the normal movement of pallets holding the Calidria Asbestos bags: "When a bottom layer pallet was moved across the floor of

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[6]Plaintiff points out that Calidria Asbestos was also shipped internationally by ship and rail (*see* Ex. 8 at 4). A Union Carbide document reflected that it "made a concentrated effort to develop export markets because of the more negative effect in the U.S. of asbestos & health adverse publicity and regulatory activity" (*see* Ex. 13 at 2). Plaintiff also points out that by 1980, export sales of Calidria Asbestos accounted "for 30% of total tons and 46% of total dollars" (*id.*).

the car and up the corrugated loading ramp, the cardboard vibrated and put up considerable visible dust" (Ex. 20, 'Report of Call, H.B. Rhodes with H.R. Thompson, July 8, 1975').

B: PHENOLIC MOLDING COMPOUND

Plaintiff notes that Union Carbide manufactured asbestos-containing Bakelite from approximately 1939 until mid-1974 (*see* Ex. 7 at 3).[7] Union Carbide manufactured three classes of Bakelite that contained asbestos, primarily ranging from 12% asbestos to 50% asbestos as noted in a October 4, 1989 letter to the EPA (*id.* at 4-5). Plaintiff points out that Union Carbide described this asbestos-containing material as appearing in "coarse granular (sand-like) form" (*id.* at 3) consistent with plaintiff's description of this product as appearing similar in dimension to "sugar" (Bartolone Tr. 348:6-16). Additionally, plaintiff highlights that this "granular" product also contained an added pigment "to give it a black appearance" (*see* Ex. 7 at 5) which is again consistent with Mr. Bartolone's testimony.

Plaintiff also points to the testimony of Union Carbide's corporate representative and former associate director of research and development, Carlo Martino ("Martino"), to advance the argument that Union Carbide's phenolic molding compound is consistent with plaintiff's descriptions (*see* Ex. 25, 10/1/08 Dep. of Carlo Martino, *Bird v. 3M, et. al*). As plaintiff notes, beginning in 1960 and ending in 1973, Martino was responsible for Union Carbide's asbestos-containing phenolic molding compounds (*id.* at 10:03-11:4). Even after he switched positions, Martino remained involved in Union Carbide's Bakelite plastics division until he retired (*see* Ex. 22, Dep. of Carlo Martino, May 4, 2001 at 9:23-10:6). Plaintiff highlights that Martino has previously testified that Union Carbide's bags of phenolic molding compound were packaged in

[7]Bakelite was a trade name that referred to both phenolic resins and phenolic molding compounds (*see* Friesz Aff in Support of Defendant's Motion at ¶ 30 and 33).

50 pound paper bags (*see* Ex. 22, Dep. of Carlo Martino, May 4, 2001, at 55:22-56:8; Ex. 26, 4-24-70 Phenolic Molding Compound Bag Label).

Plaintiff further argues that Union Carbide has long acknowledged that "[t]hese molding compounds are in themselves quite dusty" (*see* Ex. 23 at 1, 'Union Carbide Internal Correspondence, Subject: Calidria Asbestos Potential Liability - Chemicals and Plastics Operations/Bound Brook, New Jersey, Sept. 30, 1982'; *see also* Ex. 24 at 1, 'June 29, 1972 Confidential Memo, Subject: Colored/Specialty Molding Materials' [noting production facility being in "gross violation" of OSHA limits "on airborne nuisance dust and asbestos fiber contamination"]).

While Union Carbide claims that only "some" of its asbestos-containing phenolic molding compounds contained asbestos, plaintiff argues that internal Union Carbide documents reflect that asbestos-containing Bakelite made up as much as 60% of its total production (*see* Ex. 27 at 1, 3, 'Memo, R.E. Nicolson, Asbestos Filler Used In Phenolic Molding Compounds, Nov. 22,1972' [letter developing Union Carbide strategies for the "future regarding the use of asbestos in phenolic molding compounds" suggesting among other things, "[d]iscontinue manufacture of all products containing asbestos (60% of current product mix"]).

DEFENDANT'S REPLY ARGUMENTS

In reply Union Carbide reiterates it arguments. It also contends that it is entitled to summary judgment because plaintiff failed to produce records of shipments of pelletized Calidria Asbestos and phenolic molding to Brooklyn Piers 2, 5 or 39 where plaintiff worked during the relevant time period. The fact that some records indicate that Union Carbide shipped Calidria Asbestos and phenolic molding internationally, and the fact that Union Carbide owned a warehouse in Metuchen New York very near to Pier 39 does not provide a sufficient link. Nor

does the presence of a Union Carbide Calidria Asbestos customer close to Pier 39, Kentile Floors, Inc., provide that link. Union Carbide discounts the Calidria Asbestos sales invoices reflecting transport by ship from Union Carbide's California address to Kentile Floors, Inc. near Pier 39 because the invoices do not reflect a stop at Pier 39. Union Carbide also discounts the invoices because Campanella (who saw the white balls in the bags) finished working at Pier 39 in 1979 and the invoices are from the period 1980-1985. Further, defendant argues that Calidria Asbestos is gray in color, not white. Defendant also observes that plaintiff's description of black powder fits a description of its asbestos-free resin product, which was available in a black color.

THE TESTIMONY

Plaintiff began his career as a longshoreman in approximately 1963 (*see* Deposition Transcript of Gaetano Bartolone, 116:13 -117:23, 131:6-21). While working as a longshoreman, plaintiff worked at various piers in Brooklyn, starting first as a "holeman" in cargo ships, both loading and discharging materials (Tr. 140:10-142:1, 149:12-150:1,167:24-168:17). Plaintiff described the storage areas in the ships he worked in during his career as being roughly 200 yards by 150 yards and poorly ventilated (Tr. 157:25-158:10,160:17-161:9). After working for approximately nine years primarily at Pier 2 in Brooklyn, plaintiff worked for roughly 20 years at the 39th Street Pier beginning in 1972 (Tr. 211:23-212:2). During that time, plaintiff continued to work as a holeman, but also began working as a "deckman." In this capacity, plaintiff was required to operate a crane or winch (Tr. 255:22-256:1). While employed as a deckman, plaintiff worked on cargo ships, which required him to load pallets and other materials 20 feet below the deck (Tr. 293:17-295:1). On the job, plaintiff testified that he handled and stacked products manufactured by Union Carbide:

> Q: But, is it fair to say that Union Carbide, you just mentioned you don't know what would have been in those containers, correct?
>
> A: No container. I say nothing about container. Container -- talking about pallets full of those bags.
>
> * * *
>
> Q: So, when you were bringing that material on, it came on in pallets?
>
> A: Naturally on pallets. A lot of times they load -- it doesn't have to be that pallet. They load pallets. They bring it down with pallets. You take it off from the pallet and you stack them.
>
> (Tr. 179:25 to 180:18)

Plaintiff later described the Union Carbide products he handled as being packed in "a brown bag," an "about three-feet…fifty-pound bag" (Tr. 344:9-346:14-19). When asked to describe whether the labeling on the bags, plaintiff testified as follows:

> Q: Do you recall anything written on these bags of Union Carbide black powder?
>
> A: Just Union Carbide, that's it.
>
> Q: Anything else, sir?
>
> A: No.
>
> Q: Was the Union Carbide actually printed into the bag or was it on the label and the label was attached to the bag or something else?
>
> A: On the bag it was printed.
>
> Q: It was printed on the bag?
>
> A: Yeah.
>
> Q: Do you recall the color of the letters that it was printed?

A: The color was black.

Q: Black letters?

A: Yeah.

(Tr. 346: 7-22)

Plaintiff further testified that the Union Carbide bags he encountered contained "[s]ome kind of powder that was in those bags. There was some kind of powder, black powder" (Tr. 215:3-17). He further described the powder as not being a "fine powder," but rather a powder that had a consistency akin to "sugar" or "salt" (Tr. 215:3-17; 348:6-16).

During the entirety of his career as a longshoreman, plaintiff explained that he frequently loaded and unloaded bags labeled "Union Carbide," and that when those bags would break, the dust from broken bags "got all over the ship, the bags" (Tr. 194:12-150:10; 214:22-215:5; Tr. 342:13-20). Bags would break "sometimes in a day maybe break a bag ten, twelve, thirteen, fourteen times" (Tr. 422:18-422:19). Plaintiff testified that Union Carbide bags would break from falling off skids during loading and unloading:

> A: When we discharging these bag, a lot of bag, a lot of those break, sometimes they break because they fall off from the skids. When they reach the ground, they break it. And somebody got to pick it up. And they bring a broom or they bring a shovel and pick it up and replace with another bag, and they ship them out and that's it.
>
> (Tr. 286:7-287:3)

He also testified that sometimes the "guy with the hi-lo machine not too careful" and "three, four, six, even eight bags they could break it because they – you know, its not easy to. Then somebody got to sweep" (Tr. 291:9-291:16). Plaintiff further testified that he was instructed to clean up the broken bags:

Q: Did you ever clean up any broken bags in the hole?

A: Me?

Q: Yes.

A: Before, when I was a worker in the hole, I used to do that, too.

Q: So, any hole man could pick up the broken bags?

A: Well, the hole man, sometimes the hatch boss say, come here, pick this up, get all this dust over here, all the - - you know, put them over there, the bag, because sometime when they ship them out, broken bag, and sometimes they bring it back and say fix it.

Q: So sometimes you had to clean up the contents of a broken bag, correct?

A: If the hatch boss tell me, I do.

(Tr. 403:18 -404:11).

Even when others were ordered to do the clean-up of broken Union Carbide bags, plaintiff testified that he would be in close proximity (Tr. 426:4-6). Once plaintiff moved to the 39th Street Pier in 1972, he testified to loading Union Carbide bags up to 40 times a month (Tr. 288:12-20). As plaintiff explained, the Union Carbide bags were stacked onto a loaded skid about six feet high, "more than forty bags at least" (Tr. 420:3-421:22). Plaintiff testified that because Union Carbide bags were not secured, when they broke "sometimes ten, sometimes nine, sometimes maybe twenty, maybe forty" at a time, large amounts of dust was generated that plaintiff would breathe as he performed clean-up duties (Tr. 268:9-25; 423:15- 424:8; 426:15-19; 433:23-434:4). He also testified that the bags broke "most of the time it happen if some bag they break most of the time" because of mistakes (Tr. 424:5-424:12). In response to a question regarding whether he breathed dust, plaintiff stated "[a]ll the time" (Tr. 397:12) and "[w]ho breathe it first, I breathe it" (Tr. 407:17-407:18). When he cleaned dust with a broom and shovel or dropped a bag, he breathed the dust and "you going to get dust no matter what" (Tr. 426:13-

426:19). Plaintiff also described a procedure of putting dust back into the broken bag and tapping it shut (Tr. pages 434-437). Dust would "bounce all over" from lowering cargo into the ship and he would breathe in that dust (Tr. 268:9-25).

Campanella worked as a longshoreman with plaintiff at Pier 39 in Brooklyn starting around 1970 until 1979 (*see* Deposition Transcript of Nick Campanella pages 33-34). His work with plaintiff overlapped at Pier 39 for seven years. During that time, Campanella testified that testified that he "was always working steadily at Pier 39…even seven days a week" (Tr. 41:5-9-45:1). Campanella testified that he spent the majority of his career as a deckman, loading cargo down onto specified areas of ships using a winch (Tr. 43:20– 45:1). The winch itself was located above the surface of the boat, and was not isolated by a cabin or other enclosed area, but was fully open with no enclosure (Tr. 45:20-46:20). Campanella and plaintiff worked as part of the same "gang" or crew of longshoremen at Pier 39, known as the "Hogan gang" (Tr. 54:9-15, 49:25-50:29). As members of the same team, plaintiff and Campanella worked together every day (Tr. 66:13-17).[8] Campanella stated that during the entirety of their time working together, plaintiff worked inside the ships, and Campanella worked above on deck on the winch (Tr. 31:17-19, 54:24-55:3).

Campanella testified that he saw "everything that came in and [that he put] on the boat" during this time (Tr. at 59:6-11). Specifically, Campanella recalled loading "paper bags," "light brown in color" down into the boat, and that he "always began by putting the bags on the boat and that was followed by other types of cargo" (Tr. 59:18-60:3, 109:3-8). Just as plaintiff described, Campanella stated that the paper bags containing these materials weighed 50 pounds

[8]Plaintiff testified that he was a member of the Hogan gang (Deposition Transcript of Gaetano Bartolone 252:1-253:17).

(Tr. 110:12-16). He recalled that his team loaded these bags "hundreds of times" (Tr. 106:17-22), and, due to the number of bags that would be loaded, the workers took days to load them:

> A: When a ship came when we loaded these paper bags into the ship, we often did two or three days of loading these bags and there was a lot of dust and when the bags broke there were **thousands and thousands of bags that were being loaded and dozens and dozens of these bags broke,** and from certain bags, small white balls came out and from other bags small black balls came out, and dust came out also.
>
> (Tr. 105:6-19 [emphasis added]).

From his vantage point above the hull of the ship where plaintiff worked, Campanella testified:

> A: That when they loaded these bags they were full of dust and [plaintiff] worked always at loading the bags, two days always at loading the bags, and thousands and thousands of bags, and while this work was being done, many of the bags broke, dozens and dozens of them. And when they broke, little, little white balls came out, sort of like plastic, and some of them were white, and sometimes some black objects came out of the bags also and much dust came out. ... Yes, yes. Yes. I was at the winch and I did see bags break and the contents come out.
>
> (Tr. 32:2-33:1).

Campanella testified that the bags broke or arrived broken and balls and dust would come out (Tr. 118:14-121:24). He testified that he personally saw plaintiff move these broken bags, and that he also witnessed him cleaning up the dust and spilled contents from the bags using a broom (Tr. 122:10-123:25). He additionally testified that plaintiff's clothes were "[f]ull of dust, white and black. He came out extremely dirty from there" (Tr. 143:15-19). Campanella described the Union Carbide bags as containing white-colored "balls" mixed with loose dust:

> A: The balls that were in the bags would not stay next to each other because there was dust in there.
>
> Q: Do you know where this dust came from?
>
> A: It was something that came out of the bag. It was white, but I don't know of what it was made.
>
> (Tr. 121:18-122:4).

Campanella also testified that the bags themselves were coated with dust (Tr. 110:19-21). He testified that "without a doubt the greatest portion of the dust came from these bags" (Tr. 127:04-127:06). Campanella further testified that the contents of the bags were never mixed. According to him, each bag contained either white or black colored "balls" mixed with dust (Tr. 114:3-8). Campanella averred that the bags did not come from separate sources, but "all of the bags were loaded together" (Tr. 114:14-15). Campanella additionally testified that the bags themselves contained black writing on them (Tr. 111:25-112:5). Other than that, Campenalla "could not distinguish what was written on the bag[s]" as he could not read or write English (Tr. 110:23- 111:12).

DISCUSSION

CPLR § 3212[b] provides, in relevant part:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

When moving for summary judgment, a defendant must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, *supra*). An affidavit from a corporate representative which is "conclusory and without specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig. (DiSalvo)*, 123 AD3d 498 [1st Dept 2014]). Additionally, a defendant cannot obtain summary judgment merely by "pointing to gaps in plaintiffs' proof" (*see Torres v. Industrial Container*, 305 AD2d 136, 136 [1st Dept. 2003] [summary judgment denied because chemical manufacturer did not provide "affirmative evidence that the metal drum in question, which bore a label reading 'sodium sulfide,' was not involved in the accident, did not contain sodium sulfide or was not manufactured by it"]). Therefore, the motion must be denied regardless of the sufficiency of plaintiff's opposing papers (*id.*). It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]).

To defeat summary judgment, a plaintiff's evidence must create "[a] reasonable inference" that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*), 216 AD2d 79 [1st Dept. 1995]). Issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st Dept. 1996] [internal citations omitted]).

Because assessment of credibility is a jury function, summary judgment must be denied even where plaintiff's testimony is equivocal. In *Berensmann v 3M Co* (122 AD3d 520 [1st Dept. 2014]), the First Department affirmed the trial court's denial of defendant's motion for summary judgment where the plaintiff identified the moving defendant's product by testifying that "It might've been" a brand that he used, then testified "No I can't remember" then testified "it's likely that I did, but that's the best I could do" and ultimately, that he did not even believe the product contained asbestos (*Berensmann*, 2013 NY Slip Op 33137 (U) [Sup Ct, New York County 2013]).[9] The First Department held that, except as to the wallboard product which "undisputedly" never contained asbestos, summary judgment was properly denied because the evidence demonstrated that the moving defendant manufactured joint compound containing asbestos at the relevant times, and failed to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Berensmann v 3M Co* (122 AD3d 520, 521 [1st Dept 2014] [citing *Reid*, 212 AD2d at 463, *supra*]). Moreover, a defendant's contention that a plaintiff's description of the asbestos-containing product differs from the true description of that product merely raises issues of credibility for the jury (*see Penn v Amchem Products*, 85 AD3d 475 [1st Dept 2011]).

In order for a defendant to eliminate issues of fact, the First Department has also stated that where a defendant manufactures both an asbestos-free and asbestos-containing product, it

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[9]Thus, while plaintiffs in many cases identify that the product contains asbestos, as *Berensmann* illustrates, a defendant is not entitled to summary judgment merely because a plaintiff does not do so (*see also Kestenbaum v Durez Corp.*, 2013 NY Slip Op 33497(U) [Sup Ct., New York County 2014] [rejecting Union Carbide's argument that it was entitled to summary judgment because, among other arguments, plaintiff had no personal knowledge that the Bakelite sheets contained asbestos] *aff'd, Matter of New York City Asbestos Litig*, 116 AD3d 545 [1st Dept 2014]). Products are often not affixed with a label that they contain asbestos. Asbestos-containing Bakelite for example "can only be distinguished from phenolics with asbestos or other non-asbestos, mineral filler (as opposed to wood flours) by an ash chemical analysis" (*see* Ex. 7).

must eliminate the possibility of a plaintiff's exposure to its asbestos-containing product (*see Matter of New York City Asbestos Litig. (Berensmann)*, 122 AD3d 520 [1st Dept. 2014]["Although the record shows that defendant began to manufacture and ship asbestos-free joint compound around the time that plaintiff purchased defendant's product, issues of fact exist as to whether asbestos-free joint compound was available in Manhattan where plaintiff made his purchase of the subject product"]; *see also Berkowitz v. A.C. & S, Inc.*, 288 AD2d 148 [1st Dept. 2001][issue of fact raised by defendants' admission that products sometimes used asbestos]; *Kestenbaum v Durez Corp.*, 2013 NY Slip Op 33497(U) [Sup Ct., New York County 2014] [rejecting Union Carbide's argument that it was entitled to summary judgment because Union Carbide made an asbestos-free resin product] *aff'd*, *Matter of New York City Asbestos Litig*, 116 AD3d 545 [1st Dept 2014]).

Union Carbide has failed to met its burden to demonstrate that Calidria Asbestos or its asbestos-containing phenolic molding (which it concedes that it sold during the relevant times) "could not have contributed to the causation of plaintiff's injury" (*Berensmann v 3M Co.*, 122 AD3d at 521, *supra*; *Reid*, 212 AD2d at 463, *supra*; *Matter of New York City Asbestos Litig. (DiSalvo)*, 123 AD3d 498, *supra*]).

Even assuming that Union Carbide met its burden of proof based on Carrington's affidavit concluding that Union Carbide's phenolic resin never contained asbestos and that only "some" of Union Carbide's phenolic molding compounds contained asbestos, plaintiff raises issues of fact for trial. Union Carbide's Calidria Asbestos product was "sold by Union Carbide or its subsidiary from 1963 to June 30, 1985," a period of time that mirrors plaintiff's work history (Ex. 7). As early as 1971, Union Carbide described itself as "the only source of pelletized asbestos" (*see* Ex. 9). Union Carbide admits in its answer to interrogatories that Calidria Asbestos was packaged in 50 pound bags (*see* Ex. 16), and plaintiff and Campanella

described seeing 50 pound brown bags. Additionally, plaintiff's and Campanella's testimony that they saw bags with black lettering lends further support for plaintiff's position in light of Union Carbide's pictures of Calidria Asbestos, which is depicted as packaged in brown bags with black lettering. Union Carbide further admits to selling Calidria Asbestos in "fibrous and pelletized forms" that appeared gray and white in color, and "powdery" (*id.*). A jury might reasonably find that this description comports with Campanella's description of small white balls. Union Carbide further acknowledges that pelletized Calidria Asbestos was "friable" and created dust (*id.*), comporting with plaintiff's and Campanella's description of a dusty environment at Pier 39. Additionally, plaintiff's and Campanella's testimony that the bags often broke and the evidence that Calidria Asbestos bags were fragile and often broke further supports this Court's conclusion that issues of fact exist for trial.

The evidence further indicates that Calidria was repeatedly shipped to Kentile Flooring, Inc., at a location near Pier 39 in early 1980-1985, at a time when plaintiff was still working at Pier 39. Defendant's argument that such records carry no weight, since Campanella (who saw the bags with the white balls) stopped working at Pier 39 in 1979, is for the jury to weigh. Moreover, the jury can consider the fact that Union Carbide's Metuchen New Jersey warehouse, where defendant packaged 50 pound bags of pelletized Calidria Asbestos for sale and transport, is near Pier 39 (*see* Ex. 11, 'Calidria Asbestos Price List, Effective: July 1, 1971').

With respect to phenolic molding, issues of fact are raised by plaintiff's and Campanella's testimony. Plaintiff and Campanella described seeing 50 pound brown bags, and plaintiff recalled seeing the words "Union Carbide" on the bags (Tr. 344:9-346:14-19; Tr. 59:18-60:3, 109:3-8). In a separate action, Union Carbide's witness Martino testified that Union Carbide's bags of phenolic molding compound were packaged in 50 pound paper bags (*see* Ex. 22, Dep. of Carlo Martino, May 4, 2001, at 55:22-56:8; Ex. 26, 4-24-70 Phenolic Molding

Compound Bag Label). Additionally, molding compounds, by Union Carbide's own admission, were in a "coarse glandular (sand-like) form" that is arguably consistent with plaintiff's description of the product having a texture like "sugar" or "salt." The product also at times contained a pigment "to give it a black appearance" that again is arguably consistent with plaintiff's descriptions.

To the extent that Union Carbide wishes to challenge plaintiff's and Campanella's descriptions, defendant's assertions merely go to the weight to be afforded to the testimony. It is not for this court to reconcile those factual issues. Rather, such issues are best left within the province of a jury (*see Berensmann v 3M Co*, 122 AD3d at 521, *supra*; *see also Penn v Amchem Products*, 85 AD3d 475, *supra*).

The fact that Union Carbide manufactured asbestos-free products that might match plaintiff's descriptions does not eliminate the possibility of that plaintiff was exposed to Union Carbide's asbestos-containing product (*see Matter of New York City Asbestos Litig. (Berensmann)*, 122 AD3d 520, *supra*). Union Carbide previously sought, and was denied, summary judgment in a different action based on Carrington's deposition testimony that the plaintiff there encountered only Union Carbide's asbestos-free phenolic resin (*Kestenbaum v Durez Corp.* (2013 NY Slip Op 33497 (U), *supra*). Justice Heitler found that Union Carbide's argument, that plaintiff was really describing an asbestos-free phenolic resin, did not warrant summary judgment, and her decision to do so was affirmed on appeal. She also pointed out, as plaintiff does here, that Union Carbide witness Martino testified that approximately 40 percent of phenolic resin contained asbestos in 1969.[10]

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[10]Defendant attaches Martino's deposition to its Reply Affirmation. Defendant implies that Martino was speaking to total asbestos products and not resin. The question asked was "In 1969, how many products did Union Carbide manufacture in the phenolic resin part of the business that actually had asbestos in it?" Martino's answer was "In 1969, I can't say the number without going back to the records, but my estimate was about 40 percent of our production contained

Finally, Union Carbide's argument that Dr. Moline cannot establish general or specific causation under *Parker*, because the product cannot be identified, is unpersuasive. Contrary to defendant's argument, *Parker* would not have changed the holdings in cases like *Lustenring v AC & S, Inc.* (13 AD3d 69), *supra* and *Matter of New York Asbestos Litig.* (28 AD3d 255, *supra*). *Parker* is in fact consistent with such cases. *Parker* acknowledges that "often, a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value" (7 NY3d at 447). Therefore, *Parker* holds that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (*id.* at 448). *Parker* also notes that things such as the intensity of the exposure may be more important than the cumulative dose, and plaintiff's work history can be considered in order to estimate the exposure (*id.* at 449). Here, contrary to defendant's argument, Dr. Moline is entitled to state her opinion based on the evidence indicating that Calidria Asbestos contains 95% asbestos and phenolic molding compounds contain 12% to 50% asbestos, along with the evidence of plaintiff's continuous exposure to dust during his long career working on docks.

Accordingly, it is hereby ORDERED that Union Carbide's motion for summary judgment is denied in its entirety.

Dated: February 22, 2016

HON. PETER H. MOULTON
J.S.C J.S.C.

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asbestos" (Martino Deposition 44:2-44:8).