SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART 12M**

Justice

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GIUSEPPE SAVERINO,

Plaintiff,

- v -

METRO-NORTH RAILROAD,

Defendant.

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INDEX NO. 161353/2019

MOTION DATE 07/07/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 39, 40, 41, 42
were read on this motion and cross-motion to/for JUDGMENT - SUMMARY.

Defendant Metro-North Railroad moves for an order granting it summary judgment pursuant to CPLR 3212 and dismissing plaintiff's complaint pursuant to the Federal Employer's Liability Act ("FELA") (45 USC § 51). Plaintiff Giuseppe Saverino opposed the motion and cross-moved for an order denying defendant's motion and granting him summary judgment pursuant to CPLR 3212. Defendant submitted a reply. For the following reasons, defendant's motion is granted in its entirety, and plaintiff's cross-motion is denied in its entirety.

Factual Background

Plaintiff commenced this FELA action on November 21, 2019 (NY St Cts Elec Filing [NYSCEF] Doc No. 17, Complaint). He began working for defendant in April 1997 as a coach cleaner (NYSCEF Doc No. 18, tr at 49-50). He cleaned the inside of the coaches in the train yard in Brewster, New York, and once a week in Danbury, Connecticut (*id.* at 50-51). He used chlorine tablets and another tablet to clean the coaches (*id.* at 51). He does not know the brand name or the manufacturers of the tablet but called it "Miracle Mike" (*id.*). There is no documentation showing plaintiff worked with "Miracle Mike" (*id.* at 52). He started working as a conductor for defendant

in July 1998 (*id.* at 60). His job entailed collecting fares (*id.* at 61). Additionally, he did passenger runs from Grand Central to Poughkeepsie where he was working behind the engine and claims it ran on diesel the entire trip (*id.* at 99-101). He claims that when collecting fares, the windows were always open while the train was running (*id.* at 69). Additionally, while doing passenger runs, he would watch the platform for passengers when the door was open, or would look out the window (*id.* at 101). Plaintiff does not have any documentation or witnesses showing trains running on diesel in Grand Central or how many diesel runs he would make while working for defendant (*id.* at 102). Plaintiff was diagnosed with Hodgkin's Lymphoma in November 2016 (*id.* at 12). He did not have a prior history of cancer (*id.* at 70). His doctors are not aware of what caused his lymphoma (*id.*).

Parties' Contentions

Defendant's Motion

Defendant first contends that plaintiff cannot prove that defendant breached its duty to provide him a reasonable safe place to work (NYSCEF Doc No. 21, Memorandum of Law in Support, Colin P. Bé, Esq. (memo) at 5). Plaintiff neither has knowledge of the actual product names with which he allegedly worked or worked around, nor does he have any knowledge or information regarding the ingredients of the same (*id.* at 7). Plaintiff's allegation that the unspecified cleaning products were in any way hazardous to his health, or required him to wear personal protective equipment, or whether defendant was required to provide alternative cleaning products is pure speculation (*id.*). Plaintiff does not have any evidence showing he worked around diesel trains (*id.*). Additionally, plaintiff has not served any liability expert reports to opine that his alleged use of unspecified cleaning products or being around diesel trains created an unreasonably safe workplace (*id.*).

Second, defendant argues that plaintiff cannot establish both general and specific causation (*id.* at 9). The sole evidence of any alleged connection between plaintiff's use of cleaning products and work around diesel trains and plaintiff's Hodgkin's Lymphoma is plaintiff's own testimony (*id.* at 11). Plaintiff failed to identify with specificity any of the cleaning products he claimed to have used (*id.*). He failed to present any expert evidence demonstrating that any of the unidentified cleaning chemicals or plaintiff's work around diesel trains are capable of causing Hodgkin's Lymphoma (*id.*). Plaintiff testified that none of his treating providers advised him of what they believed caused his Hodgkin's Lymphoma (*id.*). Plaintiff does not have any expert testimony or expert evidence demonstrating that his alleged exposures to cleaning products and work around diesel trains were sufficient to cause his Hodgkin's Lymphoma (*id.* at 13). Defendant submitted plaintiff's deposition transcript, where he testified that he neither knew the name of the cleaning product he used to clean the inside of the coaches, nor does he have any pictures or documentation of the product (NYSCEF Doc No. 18 tr at 51-52). He was diagnosed with Hodgkin's Lymphoma in November 2016, however, none of plaintiff's physicians or specialists told him what they believed caused it (*id.* tr at 12).

Defendant further states it has presented affirmative expert evidence demonstrating that plaintiff's Hodgkin's Lymphoma was not caused by his work with unidentified cleaning products and around diesel trains. With its moving papers, defendant submitted an affidavit by James Shea ("Shea Affidavit"), a Certified Industrial Hygienist and Safety Professional (NYSCEF Doc No. 19). Shea opined that chlorine-based cleaning products are reasonably safe with low health risk, and any adverse health effects include mild to strong irritation of the eyes, nose, throat, respiratory tract, skin, dermatitis, headaches, nausea and vomiting (*id.* ¶ 11). The International Agency for the Research of Cancer (IARC), the National Toxicology Program (NTP), American Conference of

Governmental Industrial Hygienists (ACGIH) and the Occupational Safety and Health Administration (OSHA) have not characterized this as a cause of any type of cancer, including Hodgkin's Lymphoma (*id.* ¶ 12). Shea further asserts that the cleaner plaintiff described is either alkaline-based or acid based and both types are considered reasonable safe with low health risk (*id.* ¶¶ 14, 16). Shea opined that plaintiff's coach cleaning duties would not have exposed plaintiff to levels of cleaners' constituents "anywhere near the OSHA 8-hour time weighted average (TWA) permissible exposure limits (PELs) or anything that was not commonly experienced by others whose jobs are of the custodial/janitorial type" (*id.* ¶¶ 15, 17). He further opined that cleaning the inside of passenger cars, as described by plaintiff, would not, in any way, have exposed him to the use of products that represent an unreasonable risk of harm (*id.* ¶ 18). Additionally, plaintiff's alleged exposures to diesel exhaust would have been in the range of ambient levels found in many urban areas through the country, the same levels to which the public was exposed (*id.* ¶ 19). The mere presence of diesel exhaust does not indicate that an unreasonable risk of harm exists (*id.* ¶ 20). Shea cited to several exposure assessment reports which concluded there was no relationship between diesel exhaust and cancer, no significant exposure, and no finding of exhaust at toxic levels (*id.* ¶ 26). He further cited that the Federal Railroad Administration (FRA) published a report indicating that diesel exhaust inside of locomotive cabs did not present a health problem to train and engine crews (*id.* ¶ 27). This was based upon FRA locomotive cab air testing in the lead and second locomotives of a running train (*id.* ¶ 28). Mr. Shea concluded that plaintiff would not have been exposed to concentrations of diesel exhaust constituents that were near the OSHA 8-hour TWA PELs (*id.* ¶ 32).

Plaintiff's Cross-Motion and Opposition

Plaintiff first contends that defendant breached its duty to provide a reasonably safe place to work (NYSCEF Doc No. 25, Memorandum of Law in Opposition and in Support, Hanna H. Shoshany, Esq. (opp memo), at 9). In support, plaintiff addresses his expert, Dr. Paul E. Rosenfeld's[1] report that outlined the historical state of knowledge about adverse health effects of diesel exhaust (*id.*). Per the report, defendant was aware of the air contaminants in the New York City Underground Stations and placed plaintiff in an area where he was exposed to diesel fumes on a daily basis without being given any protective equipment (*id.*).

Second, plaintiff contends that he has established both general and specific causation (*id.*, at 10). Plaintiff submitted an expert report of Dr. Robert Peter Gale ("Gale Report") (NYSCEF Doc No. 30). As to general causation, Dr. Gale opined that

> "Hodgkin Lymphoma like other B-lymphocyte lymphomas and other cancers in humans, are associated with the accumulation of mutations. Several of these mutations are like those caused, directly or indirectly, by exposure to carcinogens such as diesel engine exhaust and its components including, but not limited to, benzene, dioxin and formaldehyde to which [plaintiff] was occupational exposed" (*id.*, at 20).

As to specific causation, Dr. Gale opined that

> "[plaintiff] is estimated to have worked for 19.25 years at an average rate of 5 days per week for 50 weeks per year. His estimated average dose by inhalation of diesel particulate matter ranged from 4.50 micrograms per cubic meter air. This daily dose of diesel particulate matter for 19.25 years using a cancer potency factor diesel particulate matter assigned to or be used by regulatory agencies results in an estimated excess cancer risk of 1567 to 2121 (upper boundary of the 95 percent confidence interval) excess cancers per million people. The diesel engine exhaust cancer potency factor is applied to cancer at any site including B-lymphocyte lymphomas (including Hodgkin lymphoma). This estimated excess risk is not trivial" (*id.*, at 24).

[1] Dr. Rosenfeld's background and expertise is unknown as plaintiff failed to submit his report with his moving papers.

Lastly, plaintiff contends that he established economic loss resulting from his impairment (NYSCEF Doc No. 25, at 11). In support, plaintiff submitted an appraisal report by Sobel Tinary Economics Group ("Appraisal Report") (NYSCEF Doc No. 31). Pursuant to the appraisal report, the economic loss to plaintiff was valued at $3,829,619.00 (*id.* at 2).

Defendant's Reply

In reply, defendant argues that plaintiff did not set forth admissible evidence in opposition to its motion and in support of his cross-motion (NYSCEF Doc No. 35, Memorandum Reply of Colin P. Bé, Esq. (reply memo), at 1). Plaintiff submitted unsworn, unaffirmed reports that are inadmissible to rebut defendant's affirmative evidence (*id.* at 2). Second, plaintiff did not cite to any expert report/studies that defendant knew or should have known that plaintiff's work around diesel was capable of causing Hodgkin's Lymphoma (*id.* at 4). Plaintiff only cited unsupported, conclusory opinions from his industrial expert, Dr. Rosenfeld, and did not attach such report to his motion (*id.* at 5). Plaintiff failed to establish general causation, and the medical causation report only cites studies regarding an association between and other lymphomas/diseases, but not Hodgkin's Lymphoma, and does not cite to studies that benzene, dioxin and formaldehyde in diesel exhaust can cause Hodgkin's Lymphoma (*id.* at 7). Defendant's evidence shows that studies conducted in the 1950s through 1970s found no associated health risks/cancers to diesel exposures (*id.*). Additionally, plaintiff did not establish specific causation, because he did not present expert evidence demonstrating that plaintiff's alleged exposures to diesel exhaust were sufficient to cause his Hodgkin's Lymphoma (*id.* at 8). Specifically, his proof failed to establish the level of toxin sufficient to cause the particular injury and failed to demonstrate level of exposure in the manner alleged (*id.*). Lastly, defendant argues that plaintiff's economic loss claims should be denied as the

claim was submitted untimely, and the relief is not identical to defendant's motion on breach and causation (*id.* at 12).

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[F]ailure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Ayotte*, 81 NY2d at 1063 [internal quotation marks and citation omitted]). "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 act which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *see also American Home Assur. Co. v Amerfold Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]). On a summary judgment motion, "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

FELA provides that operators of interstate railroads shall be liable to their employees for on-the-job injuries resulting from the railroad's negligence (45 USC § 51). "The FELA imposes

on railroads a general duty to provide a safe workplace" (*McGinn v Burlington Northern R.R. Co.*, 102 F3d 295, 300 [7th Cir 1996]). "In an action under FELA, the plaintiff must prove the traditional common-law elements of negligence: duty, breach, damages, causation and foreseeability" (*Stephney v MTA Metro-N. R.R.*, 173 AD3d 572, 572 [1st Dept 2019] [internal quotation marks and citations omitted]). "However, these elements are substantially relaxed and negligence is liberally construed to effectuate the statue's broadly remedial intended function" (*id.* [internal quotation marks and citations omitted]). "One who claims under [FELA] must, however, establish negligence of the railroad company and causal connection between such negligence and the injury" (*Healy v Erie R.R. Co.*, 259 NY 40, 46 [1932], *cert denied* 287 US 628 [1932]). "A claim under FELA must be determined by the jury if there is any question as to whether employer negligence played a part, however small, in producing plaintiff's injury" (*Stephney*, 173 AD3d at 572 [citations omitted]). "A case is deemed unworthy of submission to a jury only if evidence of negligence is so thin that on a judicial appraisal, the only conclusion that could be drawn is that negligence by the employer could have played no part in an employee's injury" (*id.* [citations omitted]). "The test to determine if there is an issue of fact for the jury is whether employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought" (*Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 219 [1st Dept 2005] [internal quotation marks and citations omitted]).

"[Defendant] breached [its] duty if it knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees" (*Ulfik v Metro-North Commuter R.R.*, 77 F3d 54, 58 [2d Cir 1986] [citations omitted]). "[A]n employer may be held liable under FELA for risks that would otherwise be too remote to support liability at common law" (*id.*). "[FELA] provides injured employees with a statutory negligence

action that is significantly different from the ordinary common-law negligence action" (*Bailey v Grand Trunk Lines New England*, 805 F2d 1097, 1106 [2d Cir 1986, Van Graafeiland, J., concurring], *cert denied* 484 US 826 [1987]). FELA does not make an employer strictly liable for workplace injuries, and therefore, requires that employees must at least present some evidence that could support a finding of negligence (*O'Hara v Long Island R.R.*, 665 F2d 8, 9 [2d Cir 1981]).

Under the foregoing relaxed standard, plaintiff herein failed to establish that defendant breached a duty to him. Plaintiff as a matter of law did not demonstrate that defendant knew, or in the exercise of a reasonable diligence should have known, that workplace exposures to certain chemicals were potential causes of his Hodgkin's Lymphoma when he was diagnosed in 2016, and while working for the railroad from 1997 through 2018. "The essential element of reasonable foreseeability in FELA actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury" (*see Grano v Long Island R.R. Co.*, 818 F Supp 613, 618 [SD NY 1993] [citations omitted]. The admissibility of expert evidence is generally a matter left to the sound discretion of the trial court (*see Dufel v Green*, 84 NY2d 795, 797-798 [1995]). Although plaintiff addresses the alleged findings of Dr. Rosenfeld in the attorney affirmation, an attorney affirmation, alone, is hearsay that may not be considered, and does not support prima facie entitlement to summary judgment (*see Kase v H.E.E. Co.*, 95 AD3d 568, 569 [1st Dept 2012]). The hearsay affirmation of plaintiff's counsel is sufficient to preclude summary judgment (*see Zuckerman*, 49 NY2d at 560). The unauthenticated expert report of Dr. Rosenfeld which plaintiff failed to attach to his motion papers is not admissible for purposes of supporting his request for summary judgment (*see Feuerman v Marriott Intl., Inc.*, 201 AD3d 566, 567 [1st Dept 2022] [motion for summary judgment was denied because the expert report did not constitute admissible evidence as it was not sworn to under penalty of perjury]. Additionally, plaintiff testified that he

never made any complaints about his working conditions to his union representatives as a coach cleaner (NYSCEF Doc No. 18, at 63), nor did he make any complaints to his supervisors or union representatives as a conductor (*id.*, at 65-66). "Even under the low and liberal standard applicable to FELA cases, plaintiff's evidence is insufficient as a matter of law, without total speculation to permit the inference that any negligence act on [defendant's] part caused his injuries" (*Curley v Consolidated Rail Corp.*, 81 NY2d 746, 748 [1992], *rearg denied* 81 NY2d 835 [1993], *cert denied* 508 US 940 [1993] [internal quotation marks and citations omitted]). Based on the foregoing, plaintiff failed to establish that defendant had knowledge of a potential hazard in his workplace (*see Syverson v Consolidated Rail Corp.*, 19 F3d 824, 826 [2d Cir 1994]).

Additionally, plaintiff failed to establish a causal connection between the alleged negligence and injury (*see Healy*, 259 NY at 44). Under New York law, "it is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (*Nemeth v Brenntag N. Am.*, 38 NY3d 336, 342-343 [2022], quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). Dr. Gale's report is insufficient to establish whether plaintiff was exposed to toxic substances on the job even under the lenient evidentiary standards of FELA. He cited several cases which state that benzene, dioxin, and formaldehyde are associated with non-Hodgkin lymphoma, but there were no cases indicating those substances are associated with Hodgkin's lymphoma (NYSCEF Doc No. 30, at 14-18). His opinion that Hodgkin lymphoma like other B-lymphocyte lymphomas is associated with carcinogens such as diesel engine exhaust is insufficient to establish general causation as "[a]n association does not necessarily mean that there is a cause-effect relationship" (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 783 [internal quotation marks, citation and emphasis

omitted], *rearg denied* 23 NY3d 996 [2014]). Furthermore, Dr. Gale's report does not meet the burden of proof on specific causation, as he fails to state any amount or level of diesel fumes plaintiff was exposed to. "[T]here must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of the agent that are known to cause the relevant harm" (*Pomponi v A.O. Smith Water Prods. Co.*, 207 AD3d 417, 417 [1st Dept 2022] [internal quotation marks and citations omitted]). Dr. Gale description of plaintiff's exposure to diesel fumes as "daily dose" is not scientific evidence to establish an exposure level (*see Parker*, 7 NY3d at 449-50 ["expert's conclusion that plaintiff's exposure was 'frequent' or 'excessive' could not be characterized as a 'scientific expression' of exposure level"]). Dr. Gale's finding that plaintiff was exposed to diesel engine exhaust for 19.25 years is conclusory as he did not provide any correlation between the alleged exposure and any amount inhaled by plaintiff sufficient to cause plaintiff's cancer (*see Pomponi*, 207 AD3d at 418 ["[plaintiff's expert] did not provide any correlation between the asbestos fiber levels to which plaintiff may have been exposed and the amount of inhaled asbestos that would have caused decedent's lung cancer"] [citations omitted]).

Defendant established its prima facie entitlement to judgment as a matter of law by setting forth plaintiff's failure to adduce evidence of his exposure to diesel fumes in the course of his employment. "[E]ven if the condition is presumed hazardous, there is no evidence to establish that defendant had actual or constructive knowledge of such condition to impose liability under the Federal Employers' Liability Act" (*McClinchy v National R.R. Passenger Corp.*, 198 AD2d 126, 126 [1st Dept 1993], *lv dismissed and denied* 83 NY2d 942 [1994] [citations omitted]). Defendant has met its burden as there is no evidence that defendant's actions played any part in producing plaintiff's alleged injuries, and plaintiff failed to raise an issue of fact in opposition to the motion (*see Bready v CSX Transp., Inc.*, 19 NY3d 834, 836 [2012]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 8, 2024

ENTER:

HON. LESLIE A. STROTH J.S.C.

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify** _____ **)**