

<b>Prange v Anchor Packing Co.</b>
2011 NY Slip Op 32038(U)
July 18, 2011
Supreme Court, New York County
Docket Number: 190226/10
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 190226/2010

PRANG, WILHELM

vs

AB VOLVO (Ford Motor Co)

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

190226/10

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, It is ordered that this motion

JUL 22 2011

is decided in accordance with the memorandum decision dated 7.18.11

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7.18.11

7.18.11

HON. SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

----- X  
WILHELM PRANGE and ROSEMARY PRANGE,

Index No. 190226/10  
Motion Seq. 001

Plaintiffs,

**DECISION AND ORDER**

-against-

ANCHOR PACKING COMPANY., et al.,

**FILED**

Defendants.

**JUL 22 2011**

----- X  
**SHERRY KLEIN HEITLER, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Ford Motor Company ("Ford") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims asserted against it. For the reasons set forth below, the motion is denied.

**BACKGROUND**

This asbestos-related action was commenced by Wilhelm Prange and his wife Rosemary Prange to recover for personal injuries allegedly caused by Mr. Prange's exposure to a myriad of asbestos-containing products over the course of his more than fifty-year career as a mechanic. Plaintiff's allege that he worked with asbestos-containing gears, diesel and automobile engines, gaskets, brakes, pipe-coverings, cloth, cement, packing, and pipe and engine insulation. A long-term smoker, Mr. Prange has been diagnosed with lung cancer, which he attributes to his exposure to such products.

Relevant to this motion are plaintiffs' allegations that Mr. Prange was exposed to asbestos from brake pads manufactured and/or sold by defendant Ford. Mr. Prange testified<sup>1</sup> that he changed

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<sup>1</sup> Mr. Prange was deposed over three days on June 23, 24, and 25, 2010. Copies of his deposition transcripts are submitted as defendant's exhibit D.

the brakes on two Ford trucks as part of his duties as a mechanic while serving in the German Army between 1961 and 1963. Mr. Prange could not recall who manufactured the brakes that he removed from these Ford-manufactured German Army trucks, but he did recall that he replaced them with asbestos-containing Bendix brakes. Plaintiff also testified that he performed several brake jobs on his own Ford cars many years later, namely a 1964 Ford Mustang and a 1989/90 Ford passenger van. Mr. Prange testified that at some point he removed the original Ford-installed brakes from each vehicle. He was unable to recall the brand name of the replacement brakes he used on those vehicles.

Defendant does not dispute that Mr. Prange was exposed to asbestos from brakes which were installed by Ford on its vehicles. What defendant argues is that Mr. Prange's alleged exposure to asbestos from products manufactured or sold by Ford was so "de minimis" that Mr. Prange's testimony is insufficient to create a triable issue as to the proximate cause of his lung cancer given his alternative occupational exposures and substantial smoking history.

Plaintiffs contend that Mr. Prange's testimony is enough to raise triable issues of fact sufficient to defeat this motion. Plaintiffs argue that Ford designed its cars to include asbestos brake pads, that it knew that these brake pads would have to be replaced, and that it failed to warn of the dangers associated with such replacements.

### DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 [1st Dept 2002]; *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]. To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the

absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Mere boilerplate and conclusory allegations will not suffice. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. Should the moving party fail to present a *prima facie* case, the court need not consider the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].

Here, defendant has failed to establish *prima facie* its entitlement to summary judgment insofar as it simply argues that Mr. Prange's exposure to asbestos-containing brakes manufactured or sold by Ford could not have caused his lung cancer. In support, defendant relies on several trial court decisions which purportedly stand for the proposition that de minimis levels of exposure in asbestos-related lung cancer cases cannot survive summary judgment. *See Thompson v A.C&S, et al.*, Index No. 111186/99 [Sup. Ct. NY. Co., Nov. 4, 1999]; *Stephens v. A.P. Green Industries, et al.*, Index No. 100785/00 [Sup. Ct. NY. Co. Dec. 12, 2000]; *Natalie v. A.C&S, et al.*, Index No. 111188/99 [Sup. Ct. NY. Co. Nov. 30, 1999]; *Klink v A.C.&S., et al.*, Index No. 107369/99 [Sup. Ct. NY. Co. Nov. 1, 1999]. However, these decisions are inconsistent with prevailing Appellate authority and provide no facts to show that they are consistent with this case. *See Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995] [plaintiff need only demonstrate that he was exposed to asbestos fibers released from the defendant's product; *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994] [it is sufficient for plaintiff to show facts and conditions from which defendant's liability may be reasonably inferred]; *Lincoln v Consolidated Edison Co., et al.*, 46 AD3d 1176 [3d Dept 2007] [Workers' Compensation Board erred in concluding that there could be no causal connection between plaintiff's exposure to asbestos and his lung cancer where physician opined that plaintiff's exposure was a significant cause of such cancer]).

While causation may be determined by the court as a matter of law, this court should not entertain such a request where multiple conclusions can be drawn from the record. *C.f. Derdarian v Felix Contractor Corp.*, 51 NY2d 308, 315-316 [1980]. In this case, Ford does not dispute that Mr. Prange was exposed to asbestos from brakes pads which were installed by Ford on its cars, trucks, and passenger vans. *See Reid, supra; Cawein, supra.* Moreover, in Mr. Prange's pathology report, submitted herein as plaintiffs' exhibit 1, Dr. James A. Strauchen opines "to a reasonable degree of medical certainty that asbestos exposure was a substantial contributing cause of [his] lung cancer."

Overall, the court believes that these issues will necessarily require a jury to weigh competing evidence and reflect on the credibility of expert witnesses, notwithstanding Mr. Prange's alternative occupational exposures and smoking history. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]; *Markowitz v S.C. Johnson & Sons, Inc.*, 182 AD2d 742 [2d Dept 1992].

**FILED**

Accordingly, it is hereby

ORDERED that Ford's motion for summary judgment is denied.

**JUL 22 2011**

This constitutes the decision and order of the court.

NEW YORK  
COUNTY CLERK'S OFFICE

DATED: July 18, 2011

  
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 SHERRY KLEIN HEITLER  
 J.S.C.