SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
GEORGE BENSON AND SUSAN BENSON,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS, Co., *et al.*,

Defendants

INDEX NO. 190150/2014
MOTION DATE 1/23/2019
MOTION SEQ. NO 002
MOTION CAL. NO

The following papers, numbered 1 to 5 were read on this motion by Defendant Barnes & Jones Incorporated's for leave to renew its motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Barnes & Jones, Incorporated's motion pursuant to CPLR §2221(e), seeking leave to renew its motion for summary judgment under CPLR Section §3212 is denied.

Plaintiffs George Benson and Susan Benson commenced this action on April 17, 2014 to recover for Mr. Benson's injuries due to asbestos exposure. At his deposition, Plaintiff Mr. Benson testified that from the summer of 1965 until 1980, he worked for a fuel oil company called Master Fuel, delivering fuel, repairing burners, and installing and replacing boilers throughout Nassau and Suffolk counties (Defendant's Affirmation in Support at 2). Mr. Benson testified that while working in this capacity, he encountered Barnes & Jones steam traps on some commercial premises (*see id.* at 2). Specifically, Mr. Benson alleged that he was exposed to asbestos from replacing asbestos-containing flange gaskets on Barnes & Jones steam traps, which he described as having flanged pipe connections (*see id.* at 2).

In response to Mr. Benson's allegations regarding his work with Barnes & Jones flanged steam traps, Barnes & Jones' current vice-president, William Nesbitt, reviewed all of the Barnes & Jones product catalogs found at the company's headquarters in Randolph, MA to determine whether Barnes & Jones ever manufactured the style of steam traps described by Mr. Benson (*id.* at 3). Considering his review of the product catalogs and his 38-year career with Barnes & Jones, Mr. Nesbitt concluded that Barnes & Jones never manufactured a flanged-end steam trap; therefore, no Barnes & Jones steam trap could have ever utilized flange gaskets (*id.* at 4). As such, Barnes & Jones filed its original motion for summary judgment and submitted with it all the product catalogs reviewed by Mr. Nesbitt in preparing his affidavit (*id.* at 4).

Following oral argument, this Court denied Barnes & Jones' motion holding that Mr. Nesbitt's affidavit failed to establish Barnes & Jones' prima facie burden because the catalogs reviewed by Mr. Nesbitt showed that Barnes & Jones manufactured flanged steam traps (*id.* at 5). In coming to this conclusion, this Court referenced two catalogs wherein steam trap styles "L" and "V" are described as having a "heavy duty flanged cover" and a "bolted steel cover." (*id.* at 5). Therefore, this court concluded that Mr. Nesbitt's affidavit catalogs were inconclusive concerning whether Barnes & Jones manufactured steam traps (*id.* at 4).

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR §2221(e)(2)) and the application "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR §2221(e)(3)). A motion for leave to renew is addressed to the sound discretion of the court (*Hamlet At Willow Creek Development Co., LLC v Northeast Land Development Corp.*, 64 AD3d 85, 878 NYS2d 97 [2nd Dept. 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Renna v Gullo*, 19 AD3d 472, 797 NYS2d 115 [2nd Dept. 2005] citing *Rubinstein v Goldman*, 225 AD2d 328, 638 NYS2d 469 [1st Dept. 1996]). "Renewal is granted sparingly ... ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Henry v Peguero*, 72 AD3d 600, 900 NYS2d 49 [1st Dept. 2010] citing *Matter of Weinberg*, 132 AD2d 190, 522 NYS2d 511 [1987], lv dismissed 71 NY2d 994, 524 NE2d 879, 529 NYS2d 277 [1988]). A motion for leave to renew must be based on additional material facts existing at the time the prior motion was made, but the material facts were not known to the party seeking leave to renew (*Nassau County v Metropolitan Transp. Authority*, 99 AD3d 617, 953 NYS2d 183 [1st Dept. 2012] citing *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept. 1979]).

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech.*, Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]).

In support of its motion, Defendant claims that this Court's prior decision denying Barnes & Jones' motion for summary judgment was based on facts not offered by either party on the prior motion, but instead was raised sua sponte by this Court.

Essentially, Defendant argues that Plaintiffs did not raise reference to steam trap styles "L" and "V" in their opposition to Barnes & Jones' original summary judgment motion (Defendant's Affirmation in Support at 5). Rather the Court, sua sponte, identified these steam trap styles in its decision as being "flanged steam traps" (*id.* at 5). As such, Barnes & Jones did not have an opportunity to address what this Court considered to be Barnes & Jones' failure to establish its prima facie burden (*id.* at 5).

Defendant further argues that this Court overlooked critical issues such as Plaintiff, George Benson's testimony regarding his alleged exposure to asbestos attributable to Barnes & Jones. Defendant claims that based on Mr. Benson's description of his alleged exposure and the evidence it puts forth in its motion, Mr. Benson could not have been exposed to asbestos due to contact with Barnes & Jones steam traps; therefore, the instant renewal for summary judgment motion should be granted and upon granting renewal, Defendant argues that summary judgment should be granted in its favor because Barnes & Jones has met its burden to obtain this relief.

Defendant's motion to renew is denied because it does not present any new facts that were unknown at the time the Defendant's original summary judgment motion was denied. Furthermore, this case is not similar enough to the *Bevona* or *Esa* cases to warrant granting renewal under these circumstances (*Matter of Bevona* (Superior Maintenance Co.), 204 AD2d 136 [1st Dept 1994]; *Esa v New York Prop. Ins. Underwriting Ass'n*, 89 AD2d 865 [2d Dept 1982]).

Bevona involved a situation where the defendant was putting forth evidence later-on which it could have but did not previously raise (*see Bevona, supra*). In the instant case, however, the defendant is just rehashing the same evidence and, essentially, arguing that the court has misunderstood or misinterpreted that evidence. In other words, Barnes & Jones raises no new evidence in this motion; rather Barnes & Jones appears to make an invalid attempt to reargue (*see generally* Defendant's Motion Papers).

In *Esa*, the court in its initial summary judgment determination, sua sponte seized on an issue which neither of the parties had ever raised (*Esa, supra*). This is not the case here. Instead, this case involves the court drawing a conclusion from evidence presented in the initial summary judgment motion papers. This court did not raise an entirely new issue which neither of the parties had ever discussed in their motion papers, i.e., whether Plaintiff could have worked on Barnes & Jones steam traps

featuring flanges (*cf. Esa*, *supra*, where the Plaintiff in his opposition papers "did not raise the issue of insufficiency of service of the demand for proofs of loss;" but the *Esa* court did, in fact, raise this issue sua sponte). Therefore, this case does not present sufficiently similar circumstances to *Esa* so as to warrant granting the instant motion to renew.

Finally, because Defendant does not present any new evidence or establish proper grounds to reargue, there is no basis to reconsider the reasoning or outcome of this Court's previous denial of Defendant's motion for summary judgment.

ACCORDINGLY, it is ORDERED that Defendant Barnes & Jones, Incorporated's motion to renew its motion for summary judgment under CPLR §2221(e) and CPLR §3212 is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: January 28, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE