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

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
SCOTT DECANIO as Administrator for the Estate of LOUIS R. DECANIO and FRANCES DECANIO
Plaintiff(s),

- against -

A.O. SMITH WATER PRODUCTS CO., *et al.*
Defendants.

INDEX NO. 190117/2016
MOTION DATE 3/13/2019
MOTION SEQ. NO. 003
MOTION CAL. NO.

FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 6 were read on Kohler Co.'s motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Kohler Co.'s, (hereinafter, "Kohler") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff-deceased, Louis Decanio, was diagnosed with mesothelioma on February 1, 2016. Plaintiffs commenced this action in New York County Supreme Court on April 18, 2016. Mr. Decanio was deposed on June 14th, 15th, and 16th of 2016 where he detailed his exposure to asbestos including while working on Kohler boilers. Defendant cross examined Mr. Decanio. Mr. Decanio testified that he was part of a clean-up crew that removed various boiler parts (after disassembly) from work sites (in New York City) from 1958 to 1966 as a general construction laborer in the Local 3A (*see* Aff. in Opp., Exh. 2 at 123-124; *see also* plaintiff's interrogatories, *id.*, Exh. 3 at 15). Mr. Decanio specifically remembers removing Kohler boilers from some of these work sites (*see* Aff. in Supp. Exh. B at 123-124). On cross examination, Mr. Decanio testified that he believes he was exposed to asbestos from frayed gaskets around the Kohler boiler parts he was carting away (*see id.* at 221). Mr. Decanio also testified to having observed the Kohler brand name on the outside of the boilers in question when he arrived on site and they were still in the process of being disassembled (*see id.*, Exh. B at 221-225). Plaintiffs now bring this action to recover for Mr. Decanio's personal injuries due to asbestos-exposure.

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]). A defendant cannot obtain summary judgment by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; *see also Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept 2016]). Regarding asbestos, a defendant must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.- Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]). The defendant must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520, 997 NYS2d 381 [1st Dept 2014]).

"Plaintiff is not required to show the precise causes of his damages, but only show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga. - Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285, 776 NYS2d 253 [1st Dept 2004]).

Kohler moves for summary judgment and argues that: (1) Mr. Decanio's removal of the Kohler boiler parts after dismantling is not a foreseeable use of the product, therefore, no duty is owed to Mr. Decanio; and (2) Mr. Decanio never testified to observing that the asbestos to which he alleges exposure came specifically from a Kohler boiler.

In response, plaintiffs argue that removing the parts from disassembled boilers in expectation of them being replaced or updated at the end of their practical service life is within the scope of foreseeable use of the boilers (over the life of the products). In other words, plaintiffs argue that it is foreseeable that, at some point, the boilers would have to be disassembled and carted away from the original site of installation. Plaintiffs also argue that Mr. Decanio properly testified to observing that the parts he was carting away (not personally disassembling) came off a Kohler boiler which was being disassembled.

Defendant cites the *Hockler v William Powell Company* and *Smith v A.O. Smith Water Prods.* decisions to argue that Kohler is not liable because Mr. Decanio's injuries did not result from foreseeable use or misuse of the Kohler

products in question (*Hockler v William Powell Co.*, 129 AD3d 463, 2015 NY Slip Op 04765 [1st Dept 2015]; *Smith v A.O. Smith Water Prods.*, 2015 NY Slip Op 31810[U] [Sup Ct, NY County 2015]). Defendant's reasoning in relation to the legal principles established by these two cases is unavailing.

Hockler stands for the proposition that salvage workers may generally not have a products liability claim for asbestos-exposure because of the way in which they end up being exposed to asbestos (*see Hockler*, *supra*). Specifically, the case establishes that salvage workers who would rip, cut, and smash pieces out of products that might contain asbestos have performed such work in a way beyond the scope of foreseeable use or misuse of these products (*see Hockler*, *supra*). This is because such rough and careless disassembly of these products would not have been within the scope of foreseeable use or misuse which the product manufacturers would have reasonably envisioned (*see Hockler*, *supra*).

William Powell Company and Smith v. A.O. Smith Water Prods. establishes that similar products liability claims are, however, valid and within the scope of foreseeable use or misuse when the products at issue are disassembled in a professional manner by someone skilled in such disassembly (*see William Powell Company and Smith*, *supra*). There has been no showing in this case that Mr. Decanio was a salvage worker or was involved in rough, demolition-like, disassembly of the products at issue. Therefore, Mr. Decanio has not been shown to be someone who disassembled these Kohler products in a way which constitutes unforeseeable use or misuse of the products. Rather, Mr. Decanio's testimony shows that he was part of a clean-up crew which removed various boiler parts after the boilers had been disassembled by other "trade workers" (*see* Aff. in Opp., Exh. 2 at 123-124 and Aff. in Supp. at 224).

It is not this Court's place to speculate whether these "trade workers," removed the products in a rough or unprofessional manner, either. Rather, it would be the role of a jury at trial to determine and weigh this issue. It is not the function of the Court deciding a summary judgment motion to weigh credibility issues or make findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). As such, Kohler's argument that it is not liable because what Mr. Decanio did in relation to the products in question was not a foreseeable use of these products is unavailing.

Mr. Decanio's testimony sufficiently identifies the products in question such as to satisfy the *Reid* standard (*see Reid v Ga. – Pacific Corp.*, *supra*). This is because his identification of the boilers from which he carted away parts "show[s] facts and conditions from which defendant's liability may be reasonably inferred" (*see Reid v Ga. - Pacific Corp.*, *supra*).

Plaintiffs have also "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*see Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, *supra*). Therefore, summary judgment is denied.

Accordingly, it is ORDERED that defendant Kohler Co.'s motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

ENTER: MANUEL J. MENDEZ J.S.C.

Dated: March 26, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** X **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**