

Kontogouris v A.O. Smith Water Prods., Co.
2019 NY Slip Op 31810(U)
June 24, 2019
Supreme Court, New York County
Docket Number: 190397/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13IN RE: NEW YORK CITY ASBESTOS LITIGATIONVENETIA KONTOGOURIS, as Administratrix for
Estate of ZORAN DJOKIC and VENETIA
KONTOGOURIS, Individually,

Plaintiffs,

- against -

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

Defendants.

INDEX NO. 190397/2014MOTION DATE 06/12/2019MOTION SEQ. NO. 012

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Steel Grip, Inc.:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 5</u>
Answering Affidavits — Exhibits _____	<u>6 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that Steel Grip, Inc.'s (hereinafter "Steel Grip") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is granted to the extent of dismissing plaintiffs' cause of action for spousal loss of consortium. The remainder of the relief sought is denied.

Plaintiff Zoran Djokic (hereinafter "decedent"), was diagnosed with peritoneal mesothelioma on September 22, 2014. Decedent passed away from disease related complications on December 14, 2014 (Mot. Exh. F and Opp. Exh. 3). Decedent's alleged exposure to hazardous asbestos - as relevant to this motion - was from the use of Steel Grip gloves and shoe coverings, while he was working at the U.S. Steel facility in Fairless Hills, Pennsylvania from 1966 through 1968.

Decedent was deposed on December 9, 2014. He testified that he worked at the U.S. Steel facility in close proximity to his brother Alexandre Djokic during the summers of 1966, 1967 and 1968 (Opp. Exh. 1, pgs. 28, 30, 62 and 160-161). Decedent stated that the tasks he performed at the U.S. Steel facility varied, he worked as a laborer, garbage collector, and lab worker, he worked in the coke ovens and soaking pits (Opp. Exh. 1, pgs. 62-63, 158-160 and 200). Decedent also testified that he worked on or near blast furnaces, boilers, hot tops, ladles, pumps and valves (Opp. Exh. 1, pgs. 64-65, 67, 70-73, 146, 148, 172-175).

Decedent testified that he used Steel Grip shoe covers that were provided by his foreman and they came in a white box with the logo in italicized lettering. He testified that he used the Steel Grip shoe covers in very hot environments about forty (40) percent of the time and that at U.S. Steel he worked in hot areas about ninety (90) percent of the time (Opp. Exh. 1, pgs. 193-194). Decedent believed he was exposed to asbestos from the Steel Grip shoe covers because he saw them break apart into small and large pieces. Decedent stated he saw white dust when the Steel Grip shoe covers broke apart (Opp. Exh. 1, pgs. 197-199). Decedent was given new Steel Grip shoe covers on every shift (Opp. Exh. 1, pg. 201).

Decedent identified the Steel Grip gloves from the box which he described as white with black print writing on the side and top (Opp. Exh. 1, pgs. 195-196).

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

Decedent testified that he was given the Steel Grip gloves from his foreman and used them about forty (40) percent of the time, usually when he was performing general cleanup or around hot surfaces (Opp. Exh. 1, pg. 196-197). He testified that he believed the Steel Grip gloves had asbestos in them because they were the same type of glove as the asbestos heating oven gloves (Opp. Exh. 1, pg. 111). He described Steel Grip gloves were used for cleaning and maintenance. Decedent stated that he also used Steel Grip mittens for heavier and hotter materials like pieces of red hot bricks (Opp. Exh. 1, pgs. 197-198). He testified that he usually had new gloves for every shift but that about five to ten percent of the time he worked with used gloves (Opp. Exh. 1, pg. 201).

After decedent died, his brother, Alexandre Djokic was deposed on January 15, 2015 (Opp. Exh. 2). Alexandre Djokic clarified decedent's testimony, stating that the Steel Grip gloves were a dark grey and that they were the same color and appeared to be made of the same material as the asbestos helmet linings, body aprons and protective boots worn by furnace workers. He testified that although they were not told that the Steel Grip gloves had asbestos, they were the same type of glove as used by the furnace workers because of the dull grey color and their feel or weight. Mr. Djokic further testified that the Steel Grip mittens would tend to fall apart, ripping easily at the seams and he believed that it released asbestos fibers that he and his brother (decedent) breathed in (Opp. Exh. 2, pgs. 110-112, 220-222 and pgs. 289-290).

Plaintiffs commenced this action on October 15, 2014. The complaint incorporates Weitz & Luxenberg, P.C. Standard Asbestos Complaint For Wrongful Death No. 7 (filed under Index Number 400000/1988) (Mot. Exh. A and NYSCEF Docket No. 1). The complaint was subsequently amended two times to add additional parties (NYSCEF Doc. #s 47 and 48). Steel Grip served its Acknowledgment of Service on December 11, 2014 (Mot. Exh. B).

Steel Grip now seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it.

Steel Grip argues that the decedent: (i) was exposed to negligible amounts of respirable asbestos fibers from his use of the company's gloves and shoe covers and that it would not be enough to cause his mesothelioma; and (ii) decedent was exposed to sources of asbestos far greater than Steel Grips products; and (iii) that plaintiffs are unable to establish causation with reliance on a theory of cumulative 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]). It is only after the burden of proof is met that the burden switches to the non-moving party 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 by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

Plaintiffs argue that Steel Grip's motion is defective and should be denied because it relies on the affirmation of an attorney without an affidavit from a person with knowledge on behalf of the company.

In support of its motion for summary judgment Steel Grip relies on the affirmation of its attorney, the pleadings, decedent and his brother Alexander Djokic's deposition transcripts, expert affidavit and reports and prior Court decisions (Mot. Exhs. A, B, C, D, E, F, G, H and I).

An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (*Kase v. H.E.E. Co.*, 95 A.D. 3d 568, 944 N.Y.S. 2d 95 [1st Dept., 2012] citing to *Zuckerman v. City of New York*, 49 N.Y. 2d 557 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980]). A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge, such as plaintiff's deposition testimony (See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D. 3d 595, 20 N.Y.S. 3d 6 [1st Dept., 2015] and *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1st Dept. 2009]).

The attorney's affirmation in support of Steel Grip's motion is being used as a vehicle to submit admissible evidence, including deposition transcripts, and is sufficient to sustain this motion.

Steel Grip argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that its asbestos gloves, mittens and shoe guard products caused decedent's peritoneal mesothelioma. Steel Grip relies on the January 12, 2015 report of plaintiffs' expert, Dr. Kenneth R. Spaeth, M.D., M.P.H., Mocch (Mot., Exh. F), to support its argument that plaintiffs will not present any admissible evidence as to causation.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept., 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product did not contribute to the causation of plaintiff's illness (*Comeau v. W.R. Grace & Co. - Conn. (Matter of New York City Asbestos Litigation)*, 216 A.D. 2d 79, 628 N.Y.S. 2d 72 [1st Dept., 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *Di Salvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept., 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 2d 766 [3rd Dept., 2017]). Steel Grip must unequivocally establish that the decedent's level of exposure to its asbestos containing products, was not sufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Steel Grip's attempt to "point to gaps" in plaintiffs' evidence fails to establish a prima facie basis for summary judgment.

Steel Grip argues that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and *In the Matter of New York City Asbestos Litigation (Juni)*, 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], because plaintiffs are unable to establish general and specific causation. Steel Grip relies on the April 14, 2015 report of its expert Kyle B. Dotson, CIH, CSP, BCEE, an industrial hygienist (Mot. Exh. D), the May 20, 2015 report and the April 15, 2019 supplemental report of Dr. William Longo, Ph.D. prepared with William B. Egeland, M.S., P.G. to establish lack of causation (Mot. Exh. E and Mot. Mer Aff. Exh. B).

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, supra).

Steel Grip argues that no causal relationship exists between the negligible amounts of asbestos in its gloves, mittens and shoe guards and decedent's peritoneal mesothelioma, eliminating any general causation. Steel Grip claims that decedent's exposure to other manufacturer's products that contained much higher amounts of asbestos are the most likely cause of his peritoneal mesothelioma.

Mr. Dotson's April 14, 2015 report explains the difference between significant versus insignificant exposure to asbestos by referring to studies and reports of various areas throughout the country, including the Environmental Protection Agency (EPA) assessment of El Dorado Hills in California (Mot. Exh. D., pgs. 1-2). He states that available data does support the concept of any health hazard from Steel Grip's asbestos gloves, mittens or shoe coverings (Mot. Exh. D, pgs. 2-3). Mr. Dotson further explains the standard units of measure for asbestos exposure citing to the Occupational Safety and Health Administrations's (OSHA) Permissible Exposure Limit (PEL) as an 8-hour time weighted average of fibers per cubic centimeter greater than five microns (5u)in length (Mot. Exh. D, pgs. 4-8).

Mr. Dotson assesses the deposition testimony of the decedent, his brother Alexandre Djokic and plaintiff Venetia Kontogouris pertaining to Steel Grip's gloves relative to OSHA standards from 1971, 1972, 1976 and 1986. He states that the OSHA asbestso PEL standard was reduced in 1986 to 0.2 f/cc as an 8 hr-TWA, and remained the standard until 1994 when it was further reduced to 0.1 f/cc. Mr. Dotson concludes that decedent's exposure would not have resulted in any violation of a current or past OSHA standard and there was negligible, insignificant exposure to asbestos (Mot. Exh. D, pgs. 20-23 and 25). He further concludes that decedent's exposure was not above that of the ambient natural environment and would not be associated with asbestos-related disease. Mr. Dotson provides a very limited assessment of the decedent's alleged exposure to asbestos shoe covers, that basically consists of summarizing the deposition testimony (Mot. Exh. D, pgs. 26-27).

Dr. Longo's May 20, 2015 report summarizes the decedent's work history, and determines that the most significant overall asbestos exposure was during the three summers at the U.S. Steel facility. Dr. Longo assesses the various asbestos containing products the decedent alleges he was exposed to and determines that there would have been a background level of asbestos exposure in the plant ranging from 0.1 to 0.5 f/cc. He relies on a 1975 fiber release study by G. W. Gibbs and determines that decedent's exposure to airborne asbestos fibers in the gloves manufactured by both Steel Grip and Guard-line (another glove manufacturer) was in the 0.1 to 1.0 f/cc range, which is not significant compared to the overall exposure (Mot. Exh. E). The April 15, 2019 report of William Longo, Ph.D. and William B. Egeland, M.S., P.G., provides a more detailed description of the Steel Grip gloves and mittens, their distribution and the materials used in their manufacture. Dr. Longo and Mr. Egeland incorporate their own testing of asbestos containing gloves in 2001 and adopt the conclusion of the May 20, 2015 report that decedent's overall exposure to asbestos in Steel Grip safety apparel would have been insignificant compared to the rest of the exposure at the U.S. Steel facility (Mot. Mer Supp. Aff., Exh. B).

Plaintiffs in opposition rely on the January 12, 2015 and May 13, 2019 reports of Dr. Kenneth R. Spaeth, M.D., M.P.H., Mocch, a specialist in preventative and occupational medicine (Mot. Exh. F and Opp. Exh. 3).

Dr. Spaeth's January 12, 2015 report reviews decedent's clinical history, past medical history, family history, occupational exposure history and non-occupational exposure history. Dr. Spaeth references the EPA, the World Health Organization (WHO) and the Center for Disease Control as acknowledging that asbestos is the causative agent of mesothelioma, but does not cite to them (Mot. Exh. F).

Dr. Spaeth's May 13, 2019 report re-assesses plaintiff's clinical history, past medical history, family history, occupational exposure history and non-occupational exposure history. Dr. Spaeth relies on multiple studies and findings by governmental and non-governmental health agencies to demonstrate that asbestos fibers - including those in asbestos gloves and clothing - create a higher risk of developing mesothelioma, and can meet the criteria and attribution of asbestos to decedent's mesothelioma (Opp. Exh. 3, pgs. 4-5 and 8, footnotes 1- 15 and 71-73). He determines that "the causative relationship between asbestos and mesothelioma applies to not only amphiboles but chrysotile asbestos, as well, as universally agreed upon by the major public health and governmental agencies and demonstrated in abundant toxicological and epidemiological

literature" (Opp. Exh. 3, pg. 4-6 and footnotes 1-15 and 19-44). Dr. Spaeth concludes that decedent was exposed to asbestos on an ongoing basis at a level above the typical range of background and ambient levels. He further concludes that the cumulative exposure which included Steel Grip's asbestos gloves and protective clothing was a substantial contributing factor to decedent's peritoneal mesothelioma (Opp. Golanski Aff., Exh. 10, pg. 6 of 11). In support of his conclusion Dr. Spaeth relies on reports and fact sheets from OSHA, the EPA, and the WHO as well as international entities (Opp. Exh. 3, pgs. 4-5 and footnotes 2-15)

Steel Grip argues that summary judgment is warranted under *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] because plaintiffs are unable to establish general causation. In *Cornell*, 22 NY3d 762, supra, the defendant-corporation established a prima facie case as to general causation establishing generally accepted standards within the relevant community, of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiffs' expert Dr. Spaeth relies on some of the same scientists and scientific organizations as Steel Grip's expert, Mr. Dotson, in citing to scientific reports or studies in support of general causation.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Tr. Auth.*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

Steel Grips expert Mr. Dotson relies on governmental studies and reports to establish that there is no causal relationship between Steel Grip's asbestos gloves, mittens and shoe coverings and decedent's peritoneal mesothelioma because of the limited amount of exposure. Dr. Longo's and Mr. Egeland's reports do not reference or cite to governmental studies and mostly rely on only one report and their own testing. Plaintiffs' expert, Dr. Kenneth R. Spaeth, also relies on studies and reports in part from the same scientific organizations including, OSHA, and the EPA, to establish that plaintiff's exposure to asbestos in Steel Grip's glove, mitten and shoe covering products was above average, not ambient, and part of cumulative exposure that could have caused the peritoneal mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Special Causation:

Steel Grips argues that its asbestos products did not produce breathable dust to a level sufficient to cause decedent's mesothelioma, and it is therefore entitled to summary judgment on special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin;" "[c]omparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, supra at 448]). In turn, the Appellate Division in the case *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Mr. Dotson concedes that there are limited studies assessing exposure to asbestos from the use of asbestos gloves. Mr. Dotson cites to a 1981 peer reviewed study in a university classroom that assessed the personal breathing zone samples for the use

of well worn gloves as ranging from 0.05 f/cc to 0.61 f/cc for a normal work. The study did not specifically assess Steel Grip gloves. Mr. Dotson also cites to a 2001 study by Dr. Longo prepared for a different litigation using the OSHA method assessing exposure for the period of actual work as ranging from 0.022f/cc to 0.023f/cc. Mr. Dotson states the most recent articles suggest a concentration range of less than 0.06 to 0.55 fibers/cc for task duration exposures (Mot. Exh. D, pg. 19). Mr. Dotson concludes that decedent's exposure relying on his testimony of using Steel Grip gloves 40% of the time during his summer employment in 1966, 1967 and 1968 was de minimis or negligible, and well below the range of 0.12 to 0.23 fiber/cc-year for the natural environment cumulative exposure for Americans of similar age to the decedent (Mot. Exh. D, pg. 26).

The April 15, 2019 supplemental report of Dr. William Longo, Ph.D. prepared with William B. Egeland, M.S., P.G., states that Steel Grip gloves used asbestos cloth containing approximately 85% chrysotile asbestos and coated the outside surface with an acrylic type resin with a lining of wool or cotton (Mot. Mer Supp. Aff., Exh. B).

Dr. Longo and Mr. Egeland refer to the finding by Gibbs as showing similar safety apparel having exposure in the range of 0.3 and 5.0% but concludes this range would need to be reduced because decedent did not wear the additional asbestos protective clothing. They conclude that decedent was exposed to airborne asbestos fibers in the range of 0.1 to 1.0 f/cc. The April 15, 2015 supplemental report also relies on Dr. Longo's August of 2001 report prepared for another litigation assessing asbestos containing gloves while moving steel bars and bricks. In 2001, it was determined that air studies over a four hour period showed PCM fiber levels ranging from 0.022 to 0.023 fibers/cc. After eight hours it was determined to be 0.01 fibers/cc. Dr. Longo and Mr. Egeland state that in 2010 there was additional Transmission Electron Microscopy (TEM) performed on the 2001 sample, resulting in an exposure level of less than 0.001 f/cc (Mot. Mer Supp. Aff. Exh. B). The testing was not performed on the Steel Grip gloves used by decedent. The April 15, 2019 supplemental report states that the asbestos gloves that were tested did not appear to be coated over the asbestos cloth or lined with non-asbestos wool or cotton which would be the case with Steel Grip gloves. Dr. Longo and Mr. Egeland conclude that decedent's overall exposure to asbestos in Steel Grip safety apparel would have been insignificant compared to the rest of the exposure at the U.S. Steel facility (Mot. Mer Supp. Aff., Exh. B).

Plaintiff's expert, Dr. Kenneth R. Spaeth, M.D., determines that the weight of epidemiological evidence indicates that asbestos exposure, regardless of chrysotile or amphibole, is a risk factor for development of mesothelioma. He states that outdoor background levels of asbestos can vary depending on the testing but a reasonable assessment is 0.0001 and 0.00001 fibers/mL inhaled fibers (Opp. Exh. 3, pg. 4). Dr. Spaeth concludes that although there are multiple factors contributing to decedent's peritoneal mesothelioma, the presence of visible dust resulting from the manipulation of asbestos containing material are well above established regulatory thresholds and increase the risk of asbestos related disease. Dr. Spaeth further concludes that decedent's cumulative exposure to asbestos generated at levels above background, including from the use of Steel Grips asbestos gloves and protective gear caused his peritoneal mesothelioma (Opp. Exh. 3, pg. 4 -5). Dr. Spaeth's report raises credibility issues and issues of fact on specific causation.

Plaintiffs are only required to show "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference as to specific causation for Steel Grip's asbestos glove, mitten and shoe covering products (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]).

Plaintiffs cite to decedent's deposition testimony, as showing that he identified Steel Grip gloves, mittens and shoe coverings as a source of his exposure to asbestos. He also described the manner of his exposure (Opp. Exh. 1, pgs.111, 193-194, 197-199 and 200-201). Decedent's deposition testimony, when combined with his brother Alexander Djokic's deposition testimony and the report of Dr. Spaeth, has created "facts

and conditions from which [Steel Grip's] liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 A.D. 2d 462, supra), and raise issues of fact. 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]). Steel Grip and its experts present testimony that is not specifically a result of testing on the manufacturer's products and contradictory to plaintiff's experts, creating credibility issues and issues of fact as to causation, warranting denial of summary judgment.

Steel Grip seeks to dismiss plaintiffs' seventh cause of action (See Standard Complaint No. 7) for spousal loss of consortium asserted against it, arguing that the decedent's alleged injuries from his work at the U.S. Steel facility from 1966 through 1968 occurred before he was married to his wife (See *Holmes v. Maimonides Medical Center*, 95 A.D. 3d 831, 943 N.Y.s. 2d 573 [2nd Dept. 2012] citing to *Anderson v. Eli Lilly & Co.*, 79 N.Y. 2d 797, 588 N.E. 2d 66, 580 N.Y.S. 2d 168 [1991]). The decedent testified that he married his wife, plaintiff Venetia Kontogouris, on August 16, 1982, after his alleged exposure (Opp. Exh. 1, pg.19). Plaintiffs did not provide evidence to raise an issue of fact or otherwise sustain the seventh the cause of action for loss of consortium and those claims brought on behalf of Venetia Kontogouris individually, warrants summary judgment.

To the extent Steel Grip seeks the alternative relief of a Frye hearing to determine the admissibility of plaintiffs' experts regarding causation, that relief is premature on this pre-trial motion for summary judgment and that application should be made by a motion in limine before the trial judge. Plaintiff has provided evidence of causation, and the conflicting expert testimony warrants denial of summary judgment.

Accordingly, it is ORDERED, that Steel Grip, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is granted only to the extent of dismissing plaintiffs' seventh cause of action for spousal loss of consortium and those claims asserted by plaintiff Venetia Kontogouris, individually, and it is further,

ORDERED that plaintiffs' claims asserted against Steel Grip, Inc. in the seventh cause of action for spousal loss of consortium and plaintiff Venetia Kontogouris, individually, are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied, and it is further,

ORDERED that all remaining claims and cross-claims asserted against Steel Grip, Inc., remain in effect, and it is further,

ORDERD that the clerk of the Court enter judgment accordingly.

ENTER:

Dated: June 24, 2019


MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE