

Lattanzio v A.O. Smith Water Prods. Co.

2019 NY Slip Op 32860(U)

September 25, 2019

Supreme Court, New York County

Docket Number: 190298/2017

Judge: Manuel J. Mendez

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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

PHILIP A. LATTANZIO and KATHLEEN LATTANZIO, Plaintiffs, - against - A.O. SMITH WATER PRODUCTS CO., et al., Defendants.

INDEX NO. 190298/2017 MOTION DATE 09/18/2019 MOTION SEQ. NO. 005 MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Rockwell Automation, Inc. as successor in interest to Allen-Bradley Company, LLC:

Table with 2 columns: PAPERS NUMBERED, and rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Rockwell Automation, Inc. as successor in interest to Allen-Bradley Company, LLC's (hereinafter "defendant") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff Philip A. Lattanzio was diagnosed with malignant mesothelioma in September of 2017 (Opp. Exh. 1). His alleged exposure to asbestos - as relevant to this motion - was from the use of defendant's asbestos containing Bakelite control breakers, backboards and housing material, as a career electrician, from approximately 1968 through 2010.

Mr. Lattanzio was deposed over the course of three days, December 12, 13 and 14, 2017 (Mot. Exh. D and Opp. Exh. 3). He testified that after taking a union course in the 1990's he found out that any Bakelite or what looked like plastic back panels contained asbestos (Mot. Exh.D, pg. 34). He stated that the control breakers would be installed into some kind of housing and sometimes in a motor control center or on a particular piece of equipment.

Mr. Lattanzio stated that defendant's asbestos containing control breakers were usually mounted on an insulating backboard with remote control that had terminals for low voltage. The larger control breakers were described as either pushed-in or bolted-in. He stated that the bolts were provided per phase if it were a three phase switch. Mr. Lattanzio stated that the defendant's breakers for 400-amp were eighteen inches wide by twelve inches high.

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

that the alteration would be done by drilling holes into the backboard to mount it to the housing. The breaker itself did not need to be altered (Mot. Exh. D, pgs. 224-225).

Mr. Lattanzio testified that non-control breakers controlling lighting in apartments were typically mounted on the defendant's panel. He described the panels as three or four feet high maybe six inches deep and two feet wide. Mr. Lattanzio claimed that although the defendant's 150-amp panel were typically snap and push-in, the 227 panels for lighting had screwed in breakers. He described the process as putting the breaker in and then screwing it into the bus (Mot. Exh. D, pgs. 226-229). He claimed that the defendant's residential breakers were almost always black although rarely they were brown. Mr. Lattanzio stated that there were times he had to modify or cut the breakers to install them. He claimed that to make the breaker fit he would "file" them or make a larger hole in the bus bar. He claimed that the backboard would only be changed on renovations. On those occasions when the existing bolts did not fit the new backboard, either new bolts were used to secure the backboard to the old housing or they would drill the backboard to make it fit (Mot. Exh. D, pgs. 230-232).

Mr. Lattanzio claimed that the electrical components were mounted on the defendant's asbestos containing Bakelite backboard. He described the backboard as black in color. He stated that usually the electrical components were pre-mounted but sometimes they were not. He testified that sometimes, when the backboard and housing were separate, he would have to modify the backboard. Mr. Lattanzio stated that he would modify the backboard to accommodate the housing and depending on the bolts drill the backboard to accommodate the bolts (Opp. Exh. 3, pgs. 143-146).

Plaintiffs commenced this action on October 6, 2017 (Mot. Exh. A and NYSCEF Docket No. 1). The summons and complaint were subsequently amended on October 10, 2017 and November 1, 2017 to add new defendants (Mot. Exh. A) Defendant served an Acknowledgment of Receipt on November 6, 2017 (Mot. Exh. B).

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

Defendant claims that even viewing Mr. Lattanzio's testimony in the light most favorable to him: (1) the reports of its six experts establish a lack of causation and any exposure plaintiff had to the Bakelite containing products would not have been sufficient to cause his mesothelioma; (2) that the Bakelite used by the defendant would only contain encapsulated chrysotile asbestos fiber and would not cause his mesothelioma; (3) Mr. Lattanzio identified other manufacturer's Bakelite products and was unable to quantify or specifically identify his use of defendant's products; and (4) Plaintiffs' expert witnesses are unable establish that any exposure plaintiff had to defendant's asbestos containing Bakelite products caused or contributed to Mr. Lattanzio's mesothelioma.

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]).

Defendant argues that plaintiffs failed to proffer any expert opinion or other evidence establishing that exposure from its Bakelite products caused Mr. Lattanzio's mesothelioma. Defendant relies on the January 17, 2018 report of plaintiffs' expert, Dr. Sanford Ratner, M.D., F.A.C.P., F.C.C.P., that states that a pleural biopsy reveals malignant mesothelioma and opines that Mr. Lattanzio's malignant mesothelioma is a result of exposure to asbestos (Mot. Exh. E). Defendant also relies on the April 2, 2018 report of plaintiffs' expert, Dr. David Y. Zhang, M.D., Ph.D. M.P.H., a pathologist specializing in occupational medicine, that summarizes plaintiff's Occupational History and Asbestos Exposure, smoking history, pertinent clinical findings, pathology reports and findings (Mot., Exh. F).

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]). Defendant must unequivocally establish that the plaintiff'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]).

To the extent defendant relies on Dr. Ratner's January 17, 2018 report and Dr. Zhang's April 2, 2018 report to support its argument that plaintiffs will not present any admissible evidence as to causation, defendant is attempting to "point to gaps" in plaintiffs' evidence and fails to establish a prima facie basis for summary judgment.

In support of its motion for summary judgment defendant does not provide an affidavit from a corporate representative and relies solely on the affirmation of its attorney.

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]).

Plaintiffs' argument that defendant's motion should be denied because it relies on the hearsay affirmation of an attorney is unavailing. The attorney's affirmation in support of defendant's motion is being used as a vehicle to submit evidence in admissible form - including Mr. Lattanzio's deposition testimony - and is sufficient to sustain this motion.

Defendant 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 plaintiff is unable to establish general and specific causation. Defendant relies on the reports of its experts to establish lack of causation (Mot. Exhs. H, I, J, K, L and M).

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*).

Defendant argues that no causal relationship exists between the encapsulated chrysotile asbestos in its Bakelite control breakers, backboards and housing materials and Mr. Lattanzio's mesothelioma, eliminating any general causation. To establish lack of causation defendant relies on the May 13, 2018 report of its expert Dr. Mary Beth Beasley, M.D. an anatomic and clinical pathologist (Mot. Exh. H); the June 27, 2017 report of Dr. A. Jeffrey Giacomini, Ph.D., P.E., a professor of chemical, mechanical and materials engineering at Queens University in Kingston, Ontario, Canada (Mot. Exh. I); the April 16, 2017 report of Mr. Michael K. Peterson, M.E.M., D.A.B.T., a board certified toxicologist with a Master's degree in Environmental Management (Mot. Exh. J); the April 12, 2018 report of Dr. Steven Richard Smith, M.D., F.A.C.O.E.M., F.A.C.P.M. board certified in occupational and environmental medicine (Mot. Exh. K); the April 13, 2018 report of Dr. Charles F. Redinger, Ph.D., M.P.A., a certified industrial hygienist with a doctorate degree in Industrial Health (Mot. Exh. L); and the April 16, 2018 report of Dr. Gregory B. Diette, M.D., M.H.S., a medical doctor specializing in pulmonary and internal medicine, (Mot. Exh. M).

Dr. Beasley's May 16, 2018 report relies on her review of Mr. Lattanzio's pathology materials and medical records, interrogatory responses and plaintiffs' expert reports (Mot. Exh. H). Dr. Beasley provides a pathology review and summary. Dr. Beasley cites to no studies, reports, or agency standards in support of her opinion that amphibole asbestos fibers are a more potent carcinogen than chrysotile asbestos fibers. She also cites to no studies reports or agency standards in support of the conclusion that there no showing of increased incidence of mesothelioma even with higher exposure levels to chrysotile asbestos fibers and that Mr. Lattanzio's alleged exposure to defendant's asbestos containing Bakelite control breakers, backboards and switches did not cause his mesothelioma. Dr. Beasley's May 16, 2018 report does not establish a lack of general causation.

Dr. Giacomini's June 27, 2017 report states that he conducted Energy Dispersive Spectroscopy (hereinafter "EDS") of defendant's asbestos containing resinous components including the hood, coil, coil cover, contact carrier and hood cover. Dr. Giacomini states that Bakelite (a generic name for phenolic molding compound) requires a firm bonding as a necessary condition for the load to be transmitted from the phenolic or polyester matrix to the asbestos fibers. He claims that the firm bonding reinforces the asbestos fibers, making it unlikely that they would be released and, to the extent a fiber was released, it would be coated with plastics rendering it unharmed. Dr. Giacomini refers to his use of scanning electron microscopy and EDS to examine the broken and unbroken surfaces of the molded plastic components of defendant's products and states that he found plenty of glass fibers but not asbestos fibers. He does not provide a copy of his testing results with his report. Dr. Giacomini does not cite to studies, or agency records in support of his opinions. He provides a bibliography with twenty two (22) citations but none are incorporated into his report (Mot. Exh. I). Dr. Giacomini's report does not establish a lack of general causation.

Mr. Peterson's April 16, 2017 report provides a toxicology and causation analysis citing to the U.S. Environmental Protection Agency (EPA) standard since 1986 that the cancer risk estimates only represent an upper bound estimate of possible human risk and in fact the number could be much lower, as low as zero. Mr. Peterson concludes that the use of regulatory assessment and toxicity criteria in causation analysis may not provide an effective benchmark. Mr. Peterson provides descriptions of amphibole and chrysotile asbestos fibers and of their structural and biological effect differences. He cites to studies by the International Agency for Research on Cancer (IARC) and the EPA classifying asbestos as a known human carcinogen. He refers to several factors as affecting the risk of asbestos related disease: exposure concentration, exposure duration, exposure frequency, the size, shape and chemical makeup of the asbestos fibers; and

exposure to other toxic substances. Mr. Peterson states that studies by the EPA show that amphibole asbestos fibers have a higher carcinogenicity (Mot. Exh. J).

Mr. Peterson assesses the encapsulated chrysotile asbestos in defendant's Bakelite products citing to privately conducted studies of testing specific tasks such as: pulling wire, installing conduit, connecting wire to various types of equipment, performing preventative maintenance and repairing motors. He claims that in performing their work electricians are potentially exposed to asbestos from other sources such as pipe insulation. Mr. Peterson cites to Occupational Health and Safety Administration (OSHA) reports and standards for friable and non-friable asbestos. He states that OSHA considers asbestos fibers encapsulated within resins, cement or other matrices as non-friable and having limited ability to become airborne. Mr. Peterson refers to private testing on defendant's asbestos containing Bakelite products, animal study summaries, electrician epidemiology studies and Mr. Lattanzio's medical and exposure history. Mr. Peterson concludes that Mr. Lattanzio's mesothelioma was most likely caused by exposure to amphibole asbestos in products such as fireproofing spray and thermal insulation on boilers and pipes. He further concludes that the chemical and physical characteristics and lower relative toxicity of chrysotile asbestos fibers that are encapsulated within Bakelite or plastic components manufactured by the defendants could not have caused or contributed to Mr. Lattanzio's mesothelioma (Mot. Exh. J).

Dr. Smith's April 12, 2018 report assessed Mr. Lattanzio's medical history, family medical history, history of tobacco use and employment history. He refers to private epidemiological studies confirming the non-mesotheliogenicity of pure chrysotile asbestos fibers. He further cites to private testing using the EPA standards on encapsulated chrysotile asbestos products that found no causation, and this would apply to defendant's asbestos containing Bakelite products. Dr. Smith concludes that there is no valid scientific evidence to support an assertion that the encapsulated chrysotile asbestos used to reinforce some of the hardened plastic components of defendant's products caused Mr. Lattanzio's mesothelioma. Dr. Smith further concludes that the more likely cause is direct and indirect exposure to amphibole asbestos fibers (Mot. Exh. K).

Dr. Redinger's April 13, 2018 report assesses Mr. Lattanzio's background and work history summary, potential exposure to asbestos, and testimony related to the defendant. Dr. Redinger concludes that Mr. Lattanzio may have had significant exposure to amosite asbestos in spray and thermal insulation materials. Dr. Redinger further concludes that there is no evidence Mr. Lattanzio worked with or was around others working with defendant's asbestos containing products but to the extent he did, his cumulative exposure would have been de minimis and would not create a risk of asbestos related disease. Dr. Redinger does not directly cite to reports of studies, or agency records in support of his opinions. He provides a "Select References list with citations but none are incorporated into his report (Mot. Exh. L). Dr. Redinger's report does not establish a lack of general causation.

Dr. Diette's April 16, 2018 report assesses Mr. Lattanzio's background and employment history, with emphasis on selected work history applying to work as a plumber's helper and as an electrician before and after he joined the union. Dr. Diette refers to Mr. Lattanzio's potential use of defendant's products during the course of his career. Dr. Diette also assesses Mr. Lattanzio's tobacco exposure, selected medical records, past medical history, past surgical history, social history and family history. He explains potential causes of mesothelioma and cites to toxicology studies and human observational studies showing low-level chrysotile asbestos exposure does not appear to cause mesothelioma (Mot. Exh. M).

Dr. Diette states that chrysotile asbestos is much less potent than amphibole asbestos in predicting the risk of mesothelioma and cites to private studies of insulation workers exposed to amphibole asbestos and the link to asbestos related disease. Dr. Diette cites to private studies and reports as showing that there is no realistic means by which a worker using defendant's encapsulated chrysotile asbestos containing products could be exposed to respirable asbestos particles. He refers to a study showing that even

after drilling, sawing and sanding encapsulated resin material containing 31% chrysotile asbestos the level of exposure would not exceed occupational exposure limits.

Dr. Diette incorporates the reports of Dr. Ratner and Dr. Redinger. He concludes that there was no potential for significant fiber release from Mr. Lattanzio's work with defendant's asbestos containing Bakelite products and even if there was exposure to asbestos it would not have increased the risk of developing mesothelioma. Dr. Diette further concludes that Mr. Lattanzio's exposures to amphibole asbestos from friable materials in insulation are possible causes of his mesothelioma (Mot. Exh. M).

Plaintiff's expert Dr. David Y Zhang, M.D. (a pathologist that also specializes in occupational and environmental medicine) issued a report dated April 10, 2018 that assesses Mr. Lattanzio's occupational history of asbestos exposure and smoking history. His report summarizes pertinent clinical findings, image study reports, pathology reports and pathology findings. Dr. Zhang concludes that Mr. Lattanzio's cumulative exposure to each company's asbestos containing products significantly contributed to his mesothelioma (Mot. Exh. F).

Plaintiffs further rely on Dr. Zhang's supplemental report dated August 28, 2019 (Opp. Exh. 6) where Dr. Zhang discusses asbestos mineralogy and cites to OSHA and the EPA as highly regulating the use of asbestos. He cites the World Health Organization (the WHO) and the IARC as recognizing that all types of asbestos fibers including chrysotile can cause mesothelioma in humans. Dr. Zhang discusses the various forms of asbestos exposure related diseases. He cites to recent private studies (Feder et al.) as showing that chrysotile fibers can persist in the human lung from four (4) to up to twenty-two (22) years after exposure. He further cites to the WHO, and other private testing, as recognizing that chrysotile asbestos is a carcinogen, and that chrysotile asbestos fibers were the sole cause of malignant tumors in 73% of the cases. Dr. Zhang concludes that Mr. Lattanzio's cumulative asbestos exposure to other workers handling asbestos containing equipment including boilers, pumps, generators, chillers and electrical equipment as well as from his own work with asbestos containing products caused his mesothelioma.

Defendant 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. Zhang relies on some of the same scientists and scientific organizations as defendant's experts 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]).

Defendant's experts Mr. Peterson and Dr. Smith rely on governmental studies and reports to establish that there is no causal relationship between defendant's asbestos containing Bakelite products and Mr. Lattanzio's mesothelioma because of the limited amount of exposure. Plaintiffs' expert, Dr. Zhang, also relies on studies and reports in part from the same scientific organizations including OSHA and the EPA, to establish that Mr. Lattanzio's exposure to asbestos in defendant's asbestos containing Bakelite products was above average, not ambient, and part of the cumulative exposure that could have caused his mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Specific Causation:

Defendant argues that Mr. Lattanzio's exposure to asbestos in its asbestos containing Bakelite products was minimal, below ambient level, insufficient to cause mesothelioma, and it is therefore entitled to summary judgment on specific causation.

The Court of Appeals has enumerated several ways an expert might demonstrate specific 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;" "[comparison 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]). 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.

Dr. Beasley's and Dr. Redinger's reports do not provide mathematical modeling or comparison. They make assumptions based on Mr. Lattanzio's deposition testimony and his medical records. Dr. Beasley and Dr. Redinger do not establish lack of specific causation (Mot. Exhs. H and L).

Dr. Giacomini's report is also generalized, and does not make a specific association to the plaintiff. Dr. Giacomini provides a detailed chemical analysis of Bakelite and encapsulated chrysotile asbestos fibers but does not establish lack of specific causation (Mot. Exh. I).

Mr. Peterson cites to a review he co-authored. He states that "we concluded that all electrician exposure studies reported 8-h Time Weighted Average (TWA) values below the current OSHA Permissible Exposure Limit (PEL) of 0.1 f/cc for all asbestos types combined. Because even the grinding or drilling of products containing encapsulated chrysotile results in negligible exposures to chrysotile asbestos fibers, most electrician' exposures were likely to be amphibole asbestos from other sources" (Mot. Exh. J). Mr. Peterson also cites to a study that evaluated encapsulated chrysotile asbestos in Bakelite that determined a maximum TWA exposure level ranging from 0.01-0.08 f/cc which would require 2,600 years of exposure to achieve cumulative exposure at a sufficient level to cause mesothelioma. Mr. Peterson further provides a Table identifying the necessary steps to establish Mr. Lattanzio had chrysotile asbestos exposure from defendant's products. Mr. Peterson concludes that Mr. Lattanzio either does not establish the required elements or there are allegations with no documented proof and concludes there is no causation from defendant's encapsulated chrysotile asbestos containing Bakelite products (Mot. Exh. J, Table 9.2)

Dr. Smith states that the cumulative chrysotile asbestos exposure dose level for malignant mesothelioma, below which no increased incidence of malignant mesothelioma will occur, was in the range of 15 fibers per cc-yrs. to 500 fibers per cc-yrs., a level which he states is thousands of times greater than any hypothetical cumulative chrysotile asbestos exposure dose Mr. Lattanzio would have possibly been exposed to. Dr. Smith cites to another updated report finding the range was 208 fibers per cc-yrs. To 415 fibers per cc-yrs. and states that this revision remains thousands of times greater than any hypothetical cumulative chrysotile asbestos exposure dose Mr. Lattanzio would have possibly been exposed to (Mot. Exh. K). Dr. Smith does not attempt to assess Mr. Lattanzio's actual exposure.

Dr. Diette's report relies on studies on phenolic resin material containing 31% chrysotile asbestos to determine fiber release from sawing, drilling and sanding the material and cleaning up as demonstrating a worst case exposure based on 8 hour TWA of 0.006 to 0.08 f/cc. Dr. Diette states that based on Mr. Lattanzio's deposition testimony and the lack of actual manipulation of phenolic materials associated with defendants asbestos

containing Bakelite products he would not have had enough exposure to increase the risk of mesothelioma (Mot. Exh. M).

Dr. Zhang's report cites to studies that reported the average fiber concentrations for electricians were 28-100 f/cc for cable installation, 0.01-02.5 f/cc for removal and installation of light fixtures and 0.14 f/cc for band sawing Bakelite. Dr. Zhang states that electricians have an increased risk for developing mesothelioma and lung cancer. Dr. Zhang relies on these studies as indicating that defendant's asbestos containing Bakelite products used by Mr. Lattanzio were capable of causing exposure levels that were capable of mesothelioma (Opp. Exh. 6, pg. 15). Dr. Zhang refers to Mr. Lattanzio's deposition testimony about his exposure and states that Mr. Lattanzio inhaled a significant amount of asbestos fibers in multiple environments (Opp. Exh. 6).

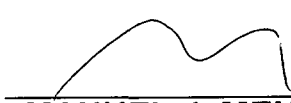
Plaintiffs are only required to show "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an issue of fact that there is specific causation of plaintiff developing mesothelioma from defendant's asbestos containing Bakelite 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]). Mr. Lattanzio's deposition testimony, combined with plaintiffs' other evidence creates "facts and conditions from which [defendant's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, supra), and raises 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, supra [1st Dept. 2004]). Plaintiffs' expert report, creates credibility issues and issues of fact as to causation, warranting denial of summary judgment.

Accordingly, it is ORDERED, that Rockwell Automation, Inc. as successor in interest to Allen-Bradley Company, LLC's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:

Dated: September 25, 2019


MANUEL J. MENDEZ
J.S.C.

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