| **Smeal v Air & Liquid Sys. Corp.** |
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| 2019 NY Slip Op 33444(U) |
| November 22, 2019 |
| Supreme Court, New York County |
| Docket Number: 190145/2018 |
| 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**

GORDON SMEAL and PATRICIA SMEAL,

Plaintiffs,

- against -

AIR & LIQUID SYSTEMS CORPORATION, Sucessor to Merger to Buffalo Pumps, Inc., *et al.*,

Defendants.

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| INDEX NO. | 190145/2018 |
| MOTION DATE | 10/23/2019 |
| MOTION SEQ. NO. | 005 |
| MOTION CAL. NO. | |

The following papers, numbered 1 to 8 were read on Gardner Denver Inc.'s motion for summary judgment:

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 - 4 |
| Answering Affidavits — Exhibits | 5 - 6 |
| Replying Affidavits | 7 - 8 |

**Cross-Motion:** ☐ Yes X No

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

Plaintiff, Gordon Smeal, was diagnosed with mesothelioma on April 12, 2018 (Mot. Exh. C, Interrogatory 8). It is alleged that Mr. Smeal was exposed to asbestos in defendant's pumps during his service as a United States Navy Aviation Storekeeper during a period of about three years and eight months (Mot. Exh. D, pgs. 212- 213). Mr. Smeal's alleged exposure to asbestos - as relevant to this motion - was during the time he served on the U.S.S. Intrepid (CVS-11) for about four months starting in March of 1957 (Mot. Exh. D, pgs . 45-47); and on the U.S.S. Wasp (CVS-18) from July 1957 through December of 1960 (Mot. Exh. D, pgs. 54-55 and 59).

Mr. Smeal was deposed over the course of seven days on October 3, 4, 5, 15, 23, 24 and 25, 2018 (Mot. Exh. D). His De Bene Esse deposition was conducted on March 15, 2019 (Mot. Exh. D and Opp. Exh.B).

Mr. Smeal testified that when he boarded the U.S.S. Intrepid (CVS-11) in March of 1957 it was in dry dock in the Brooklyn Navy Yard. He stated that his responsibilities as an Aviation Storekeeper were to clean up dust and dirt and to stock the storerooms. Mr. Smeal testified that the dust and dirt was a result of the rehaul of the U.S.S. Intrepid (CVS-11) and came from the repairing and replacing of equipment, and that he cleaned up every day for a couple of hours. He stated that cleaning up took place all over the ship, which included the boiler rooms and the engineering spaces. He testified that he observed contractors all over the ship removing covers, and the old gaskets from pumps by scraping them out using putty knives and sandpaper, and that this created dust he breathed in. He also recalled seeing insulating material on top of the pumps being removed and that also created dust. Mr. Smeal stated that he did not actually perform any of the work on the motors or pumps, he only assisted in the clean-up. He testified that when the U.S.S. Intrepid (CVS-11) was at sea his clean-up work was limited to the storerooms. He stated that the U.S.S. Intrepid (CVS-11) sailed to Cuba as a trial, it was a "shakedown cruise," that blew the engine and some other parts. He stated that the U.S.S. Intrepid (CVS-11) sailed from Cuba to the Norfolk Naval Shipyard, where he de-boarded and was sent by train to the Boston Navy Yard dry dock, where he was reassigned to the U.S.S. Wasp (CVS-18) (Mot. Exh. D, pgs. 44-48, 459-461 and 471 and Opp. Exh. B, pgs. 41-44).

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

Mr. Smeal testified that while assigned to the U.S.S. Wasp (CVS-18) from 1957 to 1960, it was twice in dry dock. He remained a United States Navy Aviation Storekeeper with the same clean up and storeroom duties on the U.S.S. Wasp (CVS-18) as on the U.S.S. Intrepid (CVS-11). Mr. Smeal testified that during the periods the U.S.S. Wasp (CVS-18) was in dry dock he was exposed to asbestos while he cleaned up all over the ship, including the boiler rooms and the engineering spaces. He testified that just like in the U.S.S. Intrepid the workers were removing and replacing gaskets and insulation material from pumps and that created asbestos dust that he breathed in. Mr. Smeal stated that his exposure to asbestos dust was further exacerbated when he was required to clean up the materials that had been removed (Mot. Exh. D, pgs. 54-55, 458-459 and Opp. Exh. B, pgs. 43, and 45-47).

Plaintiffs commenced this action on May 4, 2018 (NYSCEF Doc. # 1 and Mot. Exh. A). Issue was joined by the defendant with the filing of its Verified Answer on June 12, 2018 (NYSCEF Doc. # 9 and Mot. Exh. B).

Defendant's motion seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it. Defendant argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation.

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 (*Alvarez v. Prospect Hospital*, 68 NY 2d 320, 501 NE 2d 572, 508 NYS 2d 923 [1986]). 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 (*Jacobsen v. New York City Health and Hospitals Corp.,* 22 NY 3d 824, 11 NE 3d 159, 988 NYS 2d 86 [2014]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*Vega v. Restani Construction Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012] and *De Lourdes Torres v. Jones*, 26 NY 3d 742, 47 NE 3d 747, 27 NYS 3d 468 [2016]).

Defendant argues that plaintiffs' expert Dr. Steven B. Markowitz, M.D., DrPH, an expert in epidemiology and occupational and preventative medicine will not establish general and specific causation (Opp. Exh. M).

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). Defendants must unequivocally establish that Mr. Smeal's level of exposure to asbestos used in its 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]).

Defendant's attempt to "point to gaps" in plaintiffs' evidence, fails to establish a prima facie basis for summary judgment. The initial burden of proof rests with the Defendant's evidence and the defense expert reports of Dr. Sheldon Rabinovits, Ph.D., CIH, a certified industrial hygienist with a doctorate in physiology and pharmacology, and Dr. James McCluskey, MD, MPH, PhD, FACOEM, board certified in occupational medicine with a doctorate in toxicology and risk assessment (Mot. Exhs. F and G). It is only after defendant tenders sufficient evidence to make a prima facie showing of lack of causation that the burden shifts back to the plaintiffs to provide evidence-including their experts' report- to raise any issues of fact (See *Alvarez v. Prospect Hospital*, 68 NY 2d 320 at 324).

Defendant's argument that the supplemental report of Dr. Markowitz (NYSCEF Doc. # 416, Opp. Amended Exh. M) is defective and should not be considered by this Court, is unavailing, as defendant submitted a similarly defective and corrected report of defense expert Dr. McCluskey (NYSCEF Doc. # 354, Mot. Amended Exh. G). There was no showing of prejudice to either party by the use of the amended expert reports.

Defendants argue that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006] 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. Defendant contends that the expert reports of Drs. Sheldon Rabinovits and James McCluskey (Mot. Exhs. F and Amended Exh. G), are sufficient to establish lack of causation.

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 there was no asbestos gaskets or insulation used on its pumps located on either the U.S.S. Intrepid (CVS-11) or the U.S.S. Wasp (CVS-18). Alternatively, unlike amphibole asbestos, no causal relationship exists between the chrysotile asbestos that may have been used with their pump products on the U.S.S. Intrepid (CVS-11) or the U.S.S. Wasp (CVS-18) during the relevant time period and the development of Mr. Smeal's mesothelioma, eliminating any general causation.

Dr. Rabinovitz refers to his own experience as a manager for the U.S. Environmental Protection Agency (EPA), private studies and testing on rats, that show a lower risk of exposure to asbestos related disease from chrysotile asbestos. He claims there would be a lower exposure from asbestos components in defendant's pumps. Dr. Rabinovits refers to Occupational Safety and Health Administration's (OSHA) current standard of 0.1 f/cc. Dr. Rabinovits determines that Mr. Smeal was not exposed to any asbestos from defendant's pumps and even if he had been exposed to asbestos it would not have been a sufficient dose to cause mesothelioma (Mot. Exh. F).

Dr. McCluskey reviewed Mr. Smeal's medical records, deposition testimony, and the report of defendant's naval expert Mr. Clancy Cornwall which is only annexed to the reply papers. He states that Mr. Smeal did not specifically identify defendant's pumps, however if there were asbestos gaskets or packing materials they would have contained only chrysotile asbestos fibers. Dr. McClusky states that any asbestos packing or gaskets associated with defendant's pumps would not have been manufactured by the defendant. Dr. McClusky concludes that there is no objective evidence to suggest that Mr. Smeal was exposed to a "significant" amount of asbestos from defendant's pumps or chrysotile containing gaskets and packing materials. He further concludes that there is no scientifically reliable evidence to suggest that if there was asbestos in defendant's products, either contributed to or caused Mr. Smeal's mesothelioma (Mot. Amended Exh. G).

Plaintiffs in opposition rely on Dr. Markowitz's report which cites to a series of privately conducted epidemiological studies and reports as establishing that all asbestos fiber types, including chrysotile, can cause mesothelioma. Dr. Markowitz cites to reports of various governmental agencies as also establishing that chrysotile asbestos can cause mesothelioma (he specifically refers to The World Health Organization (WHO), OSHA and the EPA). Dr. Markowitz also cites to private studies assessing the release of asbestos fibers from gaskets and insulation related to pumps as significant and sufficient to be capable of causing mesothelioma. Dr. Markowitz concludes that the plaintiff's exposure to asbestos in defendant's products was a substantial contributing factor to the development of Mr. Smeal's mesothelioma (Opp. Exh. M).

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. Markowitz, is relying on some of the same scientists and scientific organizations as the defendants' experts in support of the arguments on 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 Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

Defendant's experts rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos in their gaskets and packing associated with its pumps and mesothelioma. Plaintiffs' expert, Dr. Markowitz also relies on studies and reports in part from the same scientific organizations, OSHA and the EPA, to establish that Mr. Smeal's exposure to asbestos fibers in dust from the removal of asbestos gaskets and packing can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Specific Causation:

Defendants argue that repair, installation and maintenance work performed on their pumps during renovation of the U.S.S. Intrepid (CVS-11) and U.S.S. Wasp (CVS-18) did not produce breathable dust to a level sufficient to cause Mr. Smeal's mesothelioma, and thus plaintiffs are unable to establish 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;" "[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 1114 [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, In re New York City Abestos Litigation, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] states that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

In making a comparative exposure analysis, Dr. Rabinovits refers to studies conducted by the U.S. Navy on asbestos emissions from various products - including gaskets - that determine exposure to asbestos fibers would be less than 0.01 fibers per cubic centimeter (f/cc), that are greater than five microns in length. He states that there is no toxicity in fibers that are less than five microns in length like chrysotile asbestos fibers that would have been found in gaskets and packing materials associated with defendant's pumps. Dr. Rabinovits refers to several private studies to determine exposure, while replacing asbestos containing gaskets, that found no harmful levels of asbestos in breathing zones and area samples that were less than 0.1 f/cc asbestos fibers. He also refers to a 1946 study of shipyard insulators showing no increased risk in insulators with exposure lower than 5 mppcf, which is below the current OSHA standard of 0.1 f/cc.

Dr. McClusky refers to various private studies related to encapsulated gasket and packing materials and states that the products "would not have been expected to release a significant dose of "free" asbestos fibers, or result in a biologically significant inhaled dose of fibers." He states that the low dose of asbestos would occur regardless of manipulation. Dr. McClusky also refers to studies that show that during the period relevant to Mr. Smeal's service in the U.S. Navy there was exposure to high levels of amphibole asbestos fibers from pipe insulation, covering and lagging materials found in the engineering spaces due to its resistance to seawater. He claims that although the actual cause of Mr. Smeal's mesothelioma is unclear, partially because there was no evidence of asbestos exposure as in pleural plaques or thickening, the most likely cause was not from defendant's pumps or related gaskets, packing or insulation (Mot. Amended Exh. G).

Plaintiff's expert, Dr. Markowitz, relies on a published study showing that the release of asbestos containing dust into the air from the manipulation of gaskets, similar to Mr. Smeal's exposure on the U.S.S. Intrepid (CVS-11) and U.S.S. Wasp (CVS-18), has been reported as ranging as high as 24.0 fibers/cc, which is substantially higher than the OSHA standard of 0.1 f/cc. He states that the study also reported a higher asbestos fiber exposure for bystanderrs. He refers to another private study that found release of visible asbestos fibers as dust in the air from the active removal of insulation in naval settings ranging as high as 26.3 fibers/cc with a mean of 8.9 f/cc. He further refers to a study of air concentrations of asbestos fibers from sweeping up after gasket removal in workplace simulations that found a range of exposure as high as 5.5 fibers/cc. Dr. Markowitz concludes that Mr. Smeal's bystander and sweeping exposure to asbestos fibers from insulation and gaskets associated with defendant's pumps during his time on the U.S.S. Intrepid (CVS-11) and U.S.S. Wasp (CVS-18) , which created visible asbestos dust, was a substantial contributing factor to his mesothelioma (Mot. Amended Exh. M).

Plaintiffs are not required to show the precise causes of their damages as a result of Mr. Smeal's exposure to defendant's pumps and related gaskets and insulation, only "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 from defendant's pumps (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. Smeal's deposition testimony, when combined with the other admissible evidence provided by plaintiffs, including defendant's naval records and defendant's responses to interrogatories in an unrelated action conceding the existence of encapsulated chrysotile asbestos gaskets used with some of their pumps, creates "facts and conditions from which [defendant's] liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 AD 2d 462, supra). Giving the plaintiffs the benefit of all favorable inferences as the non-moving party, they have sufficiently raised issues of fact, warranting denial of summary judgment.

Defendant attempts to include the Affidavit and Report of its expert, Mr. Clancy Cornwall, and his findings after reviewing documents pertaining to the U.S. Navy at the National Archives and Records Administration facility known as the Archives II, located in College Park, Maryland (Reply Exh. C), for the first time in its reply papers. Defendant claims that Mr. Smeal's inability to specifically identify any of the pumps he observed on board either the U.S.S. Intrepid (CVS-11) or the U.S.S. Wasp (CVS-18), together with the affidavit of defense expert Mr. Clancy Cornwall, establishes that there is no evidence of exposure to asbestos from defendant's pumps, warranting summary judgment. Defendant is presenting new evidence and arguments for the first time in reply papers to support its prima facie case on the issue of liability.

New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept.,2012], In re New York City Asbestos Litigation (Konstantin), 121 A.D .3d 230, 990 N.Y.S. 2d 174 [1st Dept., 2014] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]).

The expert evidence and related arguments made for the first time in defendant's reply papers, deprive the plaintiffs of the opportunity to respond to the assertions being made with their own expert reports, and are improperly before this Court. Plaintiffs provided other evidence as part of the motion papers that raise an issue of fact as to defendant's liability, warranting denial of summary judgment.

ACCORDINGLY, it is ORDERED that Defendant, Gardner Denver Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims asserted against it is denied

ENTER:

Dated: November 22, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

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