

Kriz v Air & Liquid Sys. Corp.
2021 NY Slip Op 33555(U)
August 18, 2021
Supreme Court, Rockland County
Docket Number: Index No. 035037/2019
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
BARBARA W. KRIZ, Individually and as Administratrix
Of the Estate of RICHARD E. KRIZ, deceased,

Plaintiffs,

DECISION AND ORDER

(Motions # 6, 8-18)

-against-

Index No.: 035037/2019

AIR & LIQUID SYSTEMS CORPORATION, et al,

Defendants.

-----X
Sherri L. Eisenpress, J.

The following papers, numbered 1 to 40, were reviewed in connection with (i) Defendant Eaton Hydraulics, LLC's unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the Complaint against it (**Motion #6**); (ii) Defendant Riley Power Inc.'s unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment and dismissal of the Complaint and all cross-claims against it (**Motion #8**); (iii) Defendant Foster Wheeler's unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting it summary judgment and dismissal of Complaint and all cross-claims (**Motion #9**); (iv) Defendant Viacomcbs Inc.'s unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting it summary judgment and dismissal of the Complaint (**Motion #10**); (v) Defendant General Electric Company's unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the Complaint against it (**Motion #11**); (vi) Defendant Spence Engineering Company's unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the Complaint against it (**Motion #12**); (vii) Defendant Fisher Scientific Company LLC's ("Fisher") Notice of Motion for an Order, pursuant to Civil

Practice Law and Rules § 3212, granting summary judgment and dismissal of the Complaint and all cross-claims against it (**Motion #13**); (viii) Defendant GEA Mechanical Equipment U.S. Inc.'s unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting it summary judgment and dismissal of Complaint and all cross-claims (**Motion #14**); (ix) Defendant FMC Corporation's unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting it summary judgment and dismissal of the Complaint (**Motion #15**); (x) Defendant Armstrong International, Inc.'s ("Armstrong") opposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the Complaint against it (**Motion #16**); (xi) Defendant Velan Valve Corp's unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the Complaint against it (**Motion #17**); (xii) Defendant Neles-Jamesbury, Inc's unopposed Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the Complaint against it (**Motion #18**):

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Motion #18

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-H/
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Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The instant action was commenced by Plaintiff Barbara W. Kriz against the various defendants on September 5, 2019, on behalf of herself and her deceased husband, Richard Kriz. The Complaint alleges that Richard Kriz developed mesothelioma and died prior to commencement of this action, on July 1, 2017, as a result of his exposure to asbestos while working at Lederle Laboratories in Pearl River, New York, from 1962 to 1979. The defendants filed answers, the parties engaged in and completed discovery, and the aforementioned summary judgment motions were timely filed. The Court notes that Plaintiff has only opposed the motions brought by Defendant Fisher Scientific Co. ("Fisher") and Defendant Armstrong International Inc. ("Armstrong"). As such, the unopposed motions are hereby granted as the moving Defendants set forth prima facie showings of entitlement to summary judgment and no triable issue of fact were shown in response thereto.

Factual Allegations

Because Mr. Kriz died before commencement of this action, Decedent's co-worker and former roommate, Sig DeTora, testified regarding product identification and potential exposure by Mr. Kriz. Mr. DeTora met Richard Kriz right out of college when they both began working at Lederle Laboratories, a pharmaceutical company, in June 1962. Both began working in the "student training program" three weeks after graduation, which involved learning the process of refining antibiotics and developing new methods to do so in an effort to improve the yield recovery. For an approximate six-month period in 1962 and 1963, Mr. Kriz and Mr. DeTora's desks were approximately six feet apart in a large room that maintained different, unassigned work areas. They utilized equipment for experiments including those involved in the processes of mixing, filtration, and pumping.

Mr. DeTora testified that Bunsen burners and filters were used in the final steps of these tests and stated that the "screens above the Bunsen burners" contained asbestos for

heat dissipation, and there were 30 or 40 screens in the lab used in both the vent hoods and the lab benches. Mr. DeTora further testified that he specifically observed the technicians in the general lab using the screens "multiple times" during the first six months of his and decedent's employment, since there was always work going on in the lab, including when he was there with decedent. He further testified that he personally handled these screens several times. Mr. DeTora testified that in addition to using these screens in the general lab, they were used in the refining pilot plant in the vent hoods, which he and decedent both observed and personally used while working in the pilot plant, using two to three screens per week. Thus, Mr. DeTora testified that decedent personally worked with the screens in the pilot plant and was a bystander to the technicians using these screens in the general lab.

With respect to product identification, Mr. DeTora testified that with respect to the asbestos screens, "most of them were all purchased from Scientific, Fisher Scientific." Mr. De Tora testified that he observed the packaging for the screens, and more specifically, that when he would go to his supervisor's office to retrieve screens, he observed his supervisor remove them from the box bearing Fisher Scientific's name. Additionally, he testified that all the screens came from one source and that the Fisher Scientific asbestos screens did not have an asbestos warning.

After the six-month period that Mr. Kriz and Mr. DeTora participated in the training program, they did not work together at Lederle. Mr. Kriz worked in the solvent recovery program and Mr. DeTora worked in the production refining area for seven months as an assistant to the department engineer, and then worked as the department engineer of the fermentation area for the remainder of his time at Lederle, ending in 1967. In the production refining area, antibiotics were manufactured using fermenters and Mr. DeTora noted that there were two separate rooms: one for preparation in the basement that was approximately 30 feet by 30 feet, and the filtration portion on the upper floor which was 40 feet by 60 feet.

The "steam traps" in the production area were asbestos-containing and were repaired in his presence. More specifically, Mr. DeTora observed maintenance men working on the steam traps by opening them, replacing the small gasket which involved scraping, and brushing it off. He was between five and ten feet from the workers when they did this. Mr. DeTora identified Defendant Armstrong as one of only two manufacturers of the steam traps in the production area, and as the primary manufacturer of the steam traps in the fermentation area. Mr. DeTora testified that he was aware the gaskets had asbestos, as conceded by Thomas Grubka- Armstrong's President in charge of its steam trap division, and De Toro confirmed that the steam traps had no attendant asbestos warnings.

Even though Mr. DeTora and decedent no longer worked together after the training program, from 1962 through 1967, Mr. DeTora and Mr. Kriz were roommates in an apartment. Mr. DeTora testified that he wore his work clothes to and from the apartment each day, and during the first few months, they drove to and from work together. Mr. DeTora testified that at the end of the workday, his clothes would be "soiled." Also, since they were in their early 20s, after work, decedent and Mr. DeTora would go directly to socialize or play golf still wearing their work clothes.

The Parties' Contentions

Defendant Fisher moves for summary judgment and argues that there is no evidence that Mr. Kriz was exposed to any asbestos from any of its products. More specifically, Fisher argues that Mr. DeTora testified that he never ordered any products from Fisher; he never ordered any Bunsen burner screens; he had no knowledge that Lederle had any contract or purchasing agreement; he could not identify what company supplied the Bunsen burner screens used in the laboratories because they were generic and unbranded and kept in the lab without product packaging. Fisher asserts that Mr. DeTora's testimony that he saw the screens stored in boxes marked Fisher" in an office outside of the laboratories fall short of Plaintiff's product identification burden since Mr. DeTora had no "knowledge that

Mr. Kriz acquired any of the Bunsen burner screens he used from these boxes." Fisher asserts that any claim that Kriz used the Bunsen burner screens that Mr. DeTora saw in boxes outside of Mr. Kriz's laboratory is unsubstantiated speculation.

In opposition, Plaintiff claims that Defendant Fisher has failed to meet its prima facie burden on summary judgment. In support of this argument, Plaintiff cites to Mr. DeTora's testimony that most of the screens he personally saw Mr. Kriz work with, and be exposed to as a by-stander when technicians used the screens, were "purchased from Scientific, Fisher Scientific." Mr. DeTora would go to his supervisor's office to retrieve the screens, where he personally observed his supervisor remove them from a box bearing Fisher's name. Additionally, Plaintiff notes that Fisher admitted it sold asbestos-containing "screens" (i.e. wire gauze") during Mr. Kriz' exposure period. Thus, Plaintiff argues that Defendant Fisher failed to demonstrate that Mr. Kriz could not have been exposed to asbestos from its product.

Defendant Armstrong moves for summary judgment on the ground that Armstrong had no duty to warn plaintiff decedent of any potential hazards associated with its product; Plaintiff has not offered evidence that decedent was exposed to any asbestos from an asbestos -containing product manufactured, supplied or distributed by Armstrong; and because there is not enough evidence to draw a casual connection between any Armstrong product and decedent's asbestos related disease. More specifically, Armstrong argues that it had no ability to identify and warn someone who never encountered its products and that a roommate was outside the reasonable scope of duty as compared to a spouse or child. It contends that this is because there is no evidence of intimate contact and argues that to find a duty with respect to Mr. DeTora's roommate is analogous to finding Armstrong owed a duty to a person who lived in the same building or rode the same elevator as Mr. DeTora.

Additionally, Armstrong argues that decedent never worked on an Armstrong steam trap; decedent was never present when mechanics worked on steam traps; and decedent never worked with Mr. DeTora when mechanics worked on Armstrong steam traps.

Lastly, Armstrong argues that it is entitled to summary judgment because Plaintiff is not able to offer evidence quantifying decedent's exposure, his proximity to the dust allegedly found on Mr. DeTora's clothes or the duration of exposure.

In opposition to Armstrong's motion, Plaintiff argues that a product manufacturer like Armstrong owes innocent persons injured from its defective product, like decedent, a clear duty to warn under New York law, especially in "take-home" asbestos exposure cases. Additionally, Plaintiff asserts that Armstrong failed to meet its initial burden on the issue of whether Mr. Kriz was exposed to asbestos from Armstrong steam traps, and even if it did, Plaintiff has raised clear issues of fact. Plaintiff notes that in addition to Mr. DeTora's testimony and plaintiff's expert, Dr. Markowitz' report, Defendant admits that its steam traps utilized asbestos gaskets, and that defendant directly sold the same as aftermarket replacement parts. With respect to lack of causation, Plaintiff points out that defendant failed to submit competent expert evidence in admissible form. Plaintiff notes that Defendant's use of Plaintiff's expert reports are not admissible, as they are unsworn and not in affidavit form.

Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711

N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

With respect to asbestos cases, 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 New York City Asbestos Litigation), 216 A.D.2d 79, 628 N.Y.S.2d 72, 73 (1st Dept. 1995). Indeed, an asbestos defendant's own failure, in the first instance, to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury requires denial of its motion for summary judgment. Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463, 622 N.Y.S.2d 946 (1st Dept. 1995); Berensmann v. 3M Co., 122 A.D.3d 520, 521, 997 N.Y.S.2d 381 (1st Dept. 2014). Moreover, a defendant cannot satisfy its burden by merely pointing to gaps in plaintiff's proof. Picart v. Brookhaven Country Day School, 37 A.D.3d 798, 832 N.Y.S.2d 51 (2d Dept. 2007). "Stated another way, a defendant cannot prevail on a motion for summary judgment merely by correctly arguing that the record before a court on the motion would be one which, if presented at trial, 'would fail to [satisfy a plaintiff's] burden of proof and the court would be required to direct a verdict for defendant.'" O'Connor v. AERCO Intern, Inc., 152 A.d.3d 841, 842-843, 57 N.Y.S.3d 766 (3d Dept. 2017).

In asbestos cases, a plaintiff need "only show facts and conditions from which defendants' liability may be reasonably inferred" and is not required to show the precise causes of his damages. Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463, 622 N.Y.S.2d 946 (1st Dept. 1995). Moreover, the testimony of a witness identifying a defendant as a source of

decedent's asbestos exposure may be sufficient to raise issues of fact, and "the assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the evidence." Dollas v. Grace & Co., 225 A.D.2d 319, 321, 639 N.Y.S.2d 323 (1st Dept. 1996).

Turning first to Defendant Fisher's summary judgment motion, the Court finds that it has failed to meet its burden on summary judgment by demonstrating that its product could not have contributed to the causation of Plaintiff's injury. Based upon the testimony of Mr. DeTora, it can be inferred that Mr. Kriz was exposed to asbestos in the laboratories by screens manufactured and/or supplied by Fisher. More specifically, when Mr. De Tora went to obtain the screens, he personally observed his supervisor remove the screens from a box labeled Fisher and give them to him. Mr. DeTora testified that in addition to using these screens in the general lab, they were used in the refining pilot plant in the vent hoods, which he and decedent both observed and personally used while working in the pilot plant, using two to three screens per week. Thus, Mr. DeTora testified that decedent personally worked with the screens in the pilot plant and was a bystander to the technicians using these screens in the general lab. As such, summary judgment must be denied as to defendant Fisher.

With respect to Defendant Armstrong, as an initial matter, the Court finds that Armstrong owed decedent a duty. It is well-settled that privity is not required to establish a duty under strict products liability. Heller v. U.S. Suzuki Motor Corp., 64 N.Y.2d 407, 410, 488 N.Y.S.2d 132 (1985) Thus, in Codling v. Paglia, 32 N.Y.2s 330, 342, 345 N.Y.S.2d 461 (1973), the Court of Appeals held that "under the doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the

person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.”

In New York, Courts have recognized a duty to warn in “take-home” asbestos exposure cases. See Telcide v. American Honda Motor Co., Inc., 2018 WL 1627241 (Sup. Ct. New York County 2018)(duty owed to wife where husband exposed to asbestos during removal of gaskets in his presence, combined with wife’s testimony that she hugged Mr. Diaz when he returned from work and washed his dusty clothes on a regular basis.); Cuddihy v. Builders Supply Lumber, Inc., 2008 WL 11265633 (Sup Ct. New York County 2008). Here, the Court does not find it too tenuous to extend a duty to a roommate, as opposed to a spouse, who lives in close quarters and who traveled to and from work together on a regular basis.

Having found the existence of a duty, the Court finds that Defendant Armstrong failed to set forth a prima facie case of entitlement to summary judgment, as it has not shown that decedent could not have been exposed to asbestos due to its product. Mr. DeTora testified that at the end of the day his work clothes were “soiled” and he explicitly identified removing and replacing gaskets in Armstrong steam traps as a source of asbestos within the very rooms he worked. Defendant Armstrong, who has the burden on summary judgment, failed to demonstrate a lack of proximate cause, particularly given the failure to submit an expert affidavit that Plaintiff could not have been exposed to asbestos from its product, in light of the manner of alleged exposure in this case. As such, Defendant Armstrong’s summary judgment motion is denied.

Accordingly, it is hereby

ORDERED that the Notice of Motion (#6) filed by Defendant Eaton Hydraulics LLC is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#8) filed by Defendant Riley Power is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#9) filed by Defendant Foster Wheeler is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#10) filed by Defendant ViacomCBS is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#11) filed by Defendant General Electric is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#12) filed by Defendant Spence Engineering Co. is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#13) filed by Fisher Scientific is DENIED in its entirety, and it is further

ORDERED that the Notice of Motion (#14) filed by Defendant GEA Mechanical Equipment is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#15) filed by Defendant FMC is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#16) filed by Armstrong International Inc. is DENIED in its entirety, and it is further

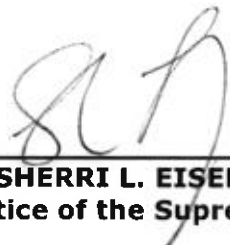
ORDERED that the Notice of Motion (#17) filed by Defendant Valen Valve Corp. is GRANTED in its entirety, and it is further

ORDERED that the Notice of Motion (#18) filed by Defendant Neles-Jamesbury Inc. is GRANTED in its entirety, and it is further

ORDERED that the remaining parties are to appear for a settlement conference on **FRIDAY, OCTOBER 29, 2021 at 10 a.m.**, via Microsoft Teams. Counsel is directed to have settlement authority and be available to speak with adjusters and/or clients if necessary.

The foregoing constitutes the Decision and Order of this Court on Motion #6,
8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

Dated: New City, New York
August 18, 2021



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via e-filing