SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **13**

Justice

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INDEX NO. 190270/2019

MOTION DATE

MOTION SEQ. NO. 001

ROBERTA GARTNER,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC, ARMSTRONG INTERNATIONAL, INC, ARMSTRONG PUMPS, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC,BRYANT HEATING & COOLING SYSTEMS, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, COLUMBIA BOILER COMPANY OF POTTSTOWN, CRANE CO, DAP, INC, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC, FLOWSERVE US, INC. INDIVIDUALLY AND SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC.,NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FULTON BOILER WORKS, INC, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULD ELECTRONICS INC, GOULDS PUMPS LLC,GRINNELL LLC,HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS, J-M MANUFACTURING COMPANY, INC, KAISER GYPSUM COMPANY, INC, KAMCO SUPPLY CORP, KOHLER CO, LENNOX INDUSTRIES, INC, MILWAUKEE VALVE COMPANY, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC,SUCCESSOR IN

DECISION + ORDER ON MOTION

INTEREST TO ABEX CORPORATION (ABEX), RHEEM MANUFACTURING COMPANY, ROCKWELL AUTOMATION, INC.,AS SUCCESSOR IN INTEREST TO ALLEN- BRADLEY COMPANY, LLC,SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SLANT/FIN CORPORATION, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, SUPERIOR BOILER WORKS, INC, TACO, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, THE NASH ENGINEERING COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC, WATTS WATER TECHNOLOGIES, INC. F/K/A WATTS INDUSTRIES, INC INDIVIDUALLY AND AS SUCCESSOR TO MUELLER STEAM SPECIALTY COMPANY, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC,YORK INTERNATIONAL CORPORATION, ANCHOR DARLING VALVE COMPANY, BIRD INCORPORATED, CLEAVER BROOKS COMPANY, INC.,COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC.,CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC.,IMO INDUSTRIES, INC.,NIBCO INC.,WARREN PUMPS, LLC,ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, FORT KENT HOLDINGS, INC.,F/K/A DUNHAM-BUSH, INC.,AS SUCCESSOR BY MERGER TO SILENT AUTOMATIC, A DIVISION OF SPACE CONDITIONING, INC.,FORT KENT HOLDINGS, INC.,FORMERLY KNOWN AS DUNHAM-BUSH, INC.,MUELLER STEAM SPECIALTY COMPANY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 280, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is hereby ordered that Defendant DAP, Inc.'s (hereinafter referred to as "DAP") motion for summary judgment is denied for the reasons set forth below.

Both individually and as administratrix for the estate of decedent Mr. James J. Scheriff, Plaintiff Roberta Gartner seeks compensation against DAP, premised upon decedent's alleged

exposure to asbestos as a result of his use of DAP caulk while working as a plumber. Decedent was diagnosed with Mesothelioma on October 8, 2019, and subsequently passed away from his illness on June 22, 2020. Prior to his death, decedent testified at his deposition that from approximately 1972 to 1979, he worked as a plumber in various locations in the Bronx, Queens, and Manhattan. During his employment, decedent used caulking products in bathrooms, and testified that he removed DAP caulk from various fixtures such as flue pipes, boiler chimneys, toilet bowls, tubs, and sinks. Decedent further testified that he did not use a protective respiratory mask. DAP moves for summary judgment, arguing that Plaintiff has failed to demonstrate that any caulking compounds Plaintiff was allegedly exposed to was manufactured by DAP. DAP also argues that Plaintiff cannot proffer sufficient evidence that the caulk used by Plaintiff in fact contained asbestos. DAP finally asserts that Plaintiff has failed to proffer evidence as to specific and general causation. Plaintiff opposes, arguing that DAP's motion for summary judgment must be dismissed, as DAP has failed to proffer evidence eliminating issues of fact regarding product identification, product content, and causation. *See* Affirmation In Opposition To Defendant DAP, Inc., K/N/A LA Mirada Products Co., Inc.'s Motion For Summary Judgment, p. 2, ¶ 4. DAP replies.

Pursuant to CPLR 3212(b), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets

this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers'". *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

First, DAP argues that Plaintiff cannot establish that decedent used a DAP product during his work with caulking compounds. According to DAP, when questioned as to whether decedent could differentiate between DAP or another brand, decedent testified that he can't really say. *See* Memorandum Of Law In Support Of Defendant DAP, Inc.'s Motion For Summary Judgment, p. 10. Conversely, Plaintiff argues that Decedent's testimony clearly identified DAP's caulk as the product which resulted in his exposure to asbestos. Plaintiff refers to Decedent's deposition testimony, where decedent testified that the tube he used was manufactured by DAP, since the manufacturer's name was written on the side. *See* Affirmation In Opposition, *supra,* Exh. 1, Depo. Tr. of James J. Scheriff, dated January 30, 2020, p. 596, ln. 12 – 18. Plaintiff also referred to Decedent's vast experience with his use of caulk, in which decedent testified that he "did caulking a lot of different places". *Id.* at p. 593, ln. 9 - 10.

Here, "[a] court's function on a motion for summary judgment involves issue finding rather than issue determination". *Farias v Simon,* 122 AD3d 466, 468 (1st Dept 2014). At issue herein is not whether Plaintiff affirmatively identified DAP as the manufacturer of the caulk he used during his employment. Rather, on the instant motion for summary judgment, the Court must determine whether the moving defendant met its burden to establish entitlement to summary judgment as a matter of law, and whether an issue of fact exists. "[P]ointing to gaps in

an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment". *Koulermos v A.O. Smith Water Products*, 137 AD3d 575, 576 (1st Dept 2016). DAP has failed to produce any evidence on product identification other than Decedent's failure to affirmatively identify DAP as the manufacturer.

Next, DAP argues that Plaintiff has not proffered sufficient evidence demonstrating that decedent used a DAP product which contained asbestos. DAP relies upon *Diel v Flintkote Co.*, 204 AD2d 53, 54 (1st Dept 1994), arguing that the mere possibility of exposure to asbestos by DAP's caulk does not satisfy Plaintiff's burden to prove that DAP's product was the cause of Plaintiff's injury. DAP further argues that it has proffered sufficient evidence establishing that "none of the caulking compounds manufactured by DAP. . . contained the word 'asbestos' on. . . [it, and] during the [relevant] time period . . . [DAP] manufactured caulks that were both asbestos and non-asbestos containing." Memorandum Of Law In Support, *supra,* at p. 13 (internal emphasis omitted). DAP refers to the affidavit of Mr. Ward Treat, an employee of DAP Inc., who avers, among other things, that "[n]one of the caulking compounds manufactured by DAP ever contained the word 'asbestos' on the label and / or packaging at any time." Notice Of Motion, Exh. C, Affidavit Of Ward Treat, dated September 16, 2009, ¶ 6. Conversely, Plaintiff argues that DAP does not provide any evidence such as documents or an affidavit by a person with first-hand knowledge demonstrating that DAP's products did not contain asbestos at the time of Plaintiff's exposure. More specifically, that "Mr. Treat's affidavits. . . fail to demonstrate the affiant's personal knowledge of any fact relevant to this matter especially as these affidavits were prepared for other cases with different fact patterns." Affirmation In Opposition, *supra,* at p. 10, ¶ 33.

Here, DAP's reliance on the affidavit of Mr. Treat is misplaced. Mr. Treat attests that he has acquired knowledge about DAP products throughout his employment and that he has personal knowledge of the facts set forth herein. Pursuant to CPLR § 3212(b), "[a] motion for summary judgment shall be supported by affidavit. . . by a person having knowledge of the facts". "A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden". *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-85 (2005). The First Department, Appellate Division has held "that affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief". *Castro v New York Univ.*, 5 AD3d 135, 136 (1st Dept 2004) (internal citations omitted). Mr. Treat's affidavit fails to assert, with any specificity, the information he has acquired through his personal knowledge or experiences with DAP. Further, Mr. Treat has failed to detail whether he worked with DAP caulking compounds. Importantly, not one document was identified by Mr. Treat to form the basis of his personal knowledge. Therefore, Mr. Treat's affidavit is merely conclusory and insufficient to support the instant motion for summary judgment.

Lastly, at issue herein is whether DAP is entitled to summary judgment on the issue of causation. The Court of Appeals in *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 (2006), has held "[i]t is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)". DAP contends that Plaintiff has failed to demonstrate the asbestos within DAP's caulk is known to cause pleural mesothelioma, and that Decedent was exposed to sufficient levels of asbestos from the caulk itself to have caused his disease. Conversely, Plaintiff argues, *inter alia,* on the

issue of general causation, medical causation expert Dr. David Zhang opines that there is no reasonable dispute that the exposure levels to workers, such as decedent, are significantly higher when handling asbestos-containing materials. *See* Affirmation In Opposition, *supra,* at p. 16. Further, Plaintiff argues that Dr. Zhang's report concludes with a reasonable degree of medical certainty that decedent's exposure to asbestos while working with DAP caulk was a substantial contributing factor to his mesothelioma. *See Id.*

As to general causation, Plaintiff refers to the epidemiological evidence cited by Dr. Zhang, in which he states "[r]epeated studies have shown that all levels of exposure increase the risk of mesothelioma. Moreover, unlike many other cancers, for which there are multiple, well-documented causal factors, mesothelioma is overwhelmingly caused by only one agent, asbestos." Affirmation In Opposition, Exh. 3, Report of Dr. David Y. Zhang, dated January 31, 2020, p. 13. DAP argues that "the mere association between a toxin and an effect is insufficient to establish general causation." Memorandum Of Law In Support, *supra,* at p. 15 (internal emphasis omitted). However, the Court of Appeals in *Nemeth v Brenntag N. Am.,* 38 NY3d 336, 343 (2022), citing *Parker, supra,* held that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community". Plaintiff has proffered evidence generally accepted within the scientific community which provides that a toxin (asbestos) is capable of causing the illness (pleural mesothelioma). Namely, Dr. Zhang refers to the National Institute for Occupational Health and Safety, which states "all levels of asbestos exposure studied to date have demonstrated asbestos-related disease." Affirmation In Opposition, Exh. 3, *supra,* at p. 8. Thus, Plaintiff's expert's report is sufficient to raise genuine issues of fact as to general causation.

As to specific causation, Plaintiff contends that the report provided by Dr. Zhang provides the quantitative and qualitative analysis that the Court of Appeals requires for cases involving toxic torts. More specifically, Dr. Zhang cites several studies examining the kind of work decedent engaged in, each type of asbestos containing product decedent was exposed to, and how the visibility of asbestos fibers serves as a proxy for intensity and amount of exposure. *See* Affirmation In Opposition, *supra,* at p. 17, ¶ 51 – p. 18, ¶ 53. Conversely, DAP proffers the affidavit of industrial hygienist Mr. Robert Adams, who states that studies involving the removal of caulk demonstrated that "the 8-hour time-weighted average (TWA) and 30-minute short-term exposure level (STEL) personal breathing zone samples, as well as room area samples, were all below the limit of quantification (LOQ) and far less than the current OSHA Permissible Exposure Limit (PEL) of 0.1 f/cc and the 30-minute Excursion Limit (EL) of 1.0 f/cc." Notice Of Motion, Exh. I, Affidavit Of Robert C. Adams, Dated November 24, 2020, p. 3, ¶ 9. In *Dyer v Amchem Products Inc.*, 207 AD3d 408, 411 (1st Dept 2022), the Appellate Court held that defendant therein met its burden on summary judgment by, *inter alia,* proffering an industrial hygiene expert as a witness who tendered a study regarding decedent's exposure to asbestos, which "involved a worker and a helper who cut, scored/snapped Amtico tiles in an isolation test chamber, simulating an eight-hour 'shift'. . . Based upon the results of the 2007 EPI study and their review of other materials, publications and decedent's deposition, [Defendant]'s experts concluded that the decedent's time weighted average exposure to chrysotile asbestos was below the OSHA eight-hour permissible exposure limit (PEL) of 0.1 f/cc, and also indistinguishable from 0.00000033 f/cc the lifetime cumulative exposure that the general public is exposed to in the ambient air that we all breathe." The study referenced by the defendants in *Dyer* established specific levels of respirable asbestos with regards to the specific moving defendant's product in

the specific work environment of the plaintiff at issue. Here, DAP has failed to proffer sufficient evidence to establish the specific levels of respirable asbestos that plaintiff would have been exposed to from the specific asbestos containing caulk manufactured by DAP. Notably missing from the moving papers is the Environ International Corporation report dated March 7, 2014 which is relied upon by DAP.

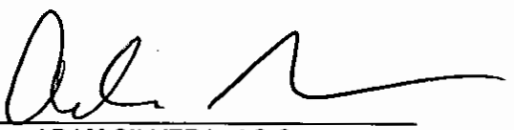
As such, the instant motion for summary judgment is denied.

Accordingly, it is

ORDERED that the defendant DAP Inc.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry, Plaintiffs shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision / order of the Court.



11/28/2022
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE