SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 190380/2018

MOTION DATE

MOTION SEQ. NO. 002

JANE E. WIXTED, AS EXECUTRIX FOR THE ESTATE OF THOMAS N. WIXTED, AND JANE E. WIXTED, INDIVIDUALLY,

Plaintiff,

- v -

A:O. SMITH WATER PRODUCTS CO., AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC.,ARMSTRONG PUMPS, INC.,ATWOOD & MORRILL COMPANY, BLACKMER, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC.,CRANE CO., CROSBY VALVE LLC,ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC. SOLELY AS 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, FOSTER WHEELER, L.L.C., GARDNER DENVER, INC.,GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC,GRINNELL LLC,IMO INDUSTRIES, INC.,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., MILTON ROY COMPANY, RHEEM MANUFACTURING COMPANY, RILEY POWER INC, SUPERIOR BOILER WORKS, INC.,TACO, INC.,THE NASH ENGINEERING COMPANY, WARREN PUMPS, LLC,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY.

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

The instant matter was commenced by Plaintiff Jane Wixted, as Executrix for the Estate of decedent Thomas N. Wixted, and Jane Wixted, individually. Plaintiff claims that decedent was exposed to asbestos as a result of Milton Roy's pumps. Decedent worked at the Suffolk State School between 1964 and 1976, holding various positions. Decedent, a senior stationary engineer, hired Mr. Daniel Stoffel as a fireman for the Suffolk State School in 1967. Mr. Stoffel testified that all pumps were coated with asbestos, and that Decedent was present when work started on a pump, which included the removal and replacement of gaskets. Mr. Stoffel further testified that he would use tools such as chisels, scrapers, hacksaws and wire brushes to remove the existing gaskets from the flanges. Mr. Stoffel identified the pumps as Milton Roy, as the name was written on the pump itself. Milton Roy argues, *inter alia,* that Plaintiff cannot establish exposure to Milton Roy's pumps caused Plaintiff's illness and death. Plaintiff opposes, arguing that Milton Roy's motion should be denied because it failed to meet its prima facie burden on causation. Milton Roy 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, Milton Roy contends that no evidence has been proffered to suggest that Decedent was exposed to asbestos from Milton Roy's pumps. More specifically, "[t]here is no evidence in this record – nor can Plaintiffs adduce such evidence – that Decedent was exposed to asbestos from a Milton Roy pump at the Suffolk State School." Memorandum Of Law In Support Of Defendant Milton Roy, LLC's Motion For Summary Judgment, p. 5. Further, Milton Roy relies upon *Nemeth v Brenntag N. Am.,* 38 NY3d 336, 344 (2022), where the Appellate Division, First Department, held that Plaintiff "failed to prove that exposure to asbestos in defendant's product was a proximate cause of decedent's illness." Conversely, Plaintiff argues that Milton Roy attempts to circumvent the standards of summary judgment where the movant has the initial burden of proffering scientific evidence demonstrating lack of causation. *See* Affirmation In Opposition To Milton Roy Company's Motion For Summary Judgment, p. 16 – 17, ¶ 29. In the case at bar, Milton Roy's reliance on *Nemeth* is misplaced. It is well settled that on a motion for summary judgment, Milton Roy, as moving defendant, must first establish entitlement to summary judgment before the burden shifts to the nonmoving party to demonstrate genuine issues of facts. Rather than proffering affidavits, documents, or other admissible evidence to demonstrate that summary judgment should be granted, Milton Roy argues that "Plaintiffs' evidence in this case does not raise a question of fact for a jury as to whether Decedent was

exposed to an asbestos from the. . . pump manufactured by Milton Roy." Affirmation In Support, *supra,* at p. 5. "However, pointing 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). Milton Roy may not use Plaintiff's alleged failure to proffer evidence in order to demonstrate entitlement to judgment as a matter of law.

In addition, Milton Roy proffers the affidavit of industrial hygienist James Carling, who attests that according to his review of the Milton Roy equipment shipped to Suffolk, the pumps decedent was exposed to utilized National Pipe Tapered threaded or socket welded connections, and not flange gaskets or seals. *See* Notice Of Motion, Affidavit Of James B. Carling, Dated May 9, 2022, p. 3. ¶ 9. Milton Roy also argues that Plaintiff's reliance on the testimony of Decedent's former co-worker Daniel Stoffel, does not raise a question of fact for a jury as to whether Decedent was exposed to asbestos by Milton Roy's pumps. *See* Memorandum Of Law In Support, *supra,* at p. 5. Conversely, Plaintiff argues that the Affidavit of James B. Carling does not meet the requirement pursuant to CPLR § 3212(b) that a motion for summary judgment be supported by an affiant with personal knowledge. Furthermore, Plaintiff argues that Mr. Stoffel, "unequivocally identifies Milton Roy pumps that contained asbestos and had external asbestos insulation, at the Suffolk State School, pumps Mr. Wixted was exposed to asbestos from work done by stationary engineers and firemen, in his presence." Affirmation In Opposition, *supra,* at p. 13, ¶ 19. "To support summary judgment, affidavits must recite material facts from affiants having knowledge of those facts". *Republic Nat'l. Bank of New York v Luis Winston, Inc.,* 107 AD2d 581, 582 (1st Dept 1985). An affidavit does not fulfill this requirement when the affidavit is "obtained either from unnamed and unsworn employees or from unidentified and unproduced work records." *Id.* In their reply, Milton Roy contends that Mr. Carling's affidavit

identifies his vast experience with Milton Roy as the basis of his personal knowledge. *See* Reply Affirmation, p. 3 - 4, ¶ 10. However, Mr. Carling attests that he was employed by Milton Roy in 1980. Decedent's exposure period began in, at least, 1967. Thus even with Mr. Carling's alleged vast experience, it is unclear how he has personal knowledge of the relevant facts without the review of work records or documents which are unidentified.

It is important to note that "[t]he court's role in deciding a motion for summary judgment is issue finding, not issue determination". *De Paris v Women's Nat. Republican Club, Inc.*, 148 AD3d 401, 403 (1st Dept 2017). In the instant matter, Mr. Stoffel testified that all pumps were coated with asbestos and Mr. Wixted would always be there and he was always at the site when we started a new job on a new pump problem. *See* Affirmation In Opposition, *supra,* Exh. 1, Depo. Tr. Of Daniel Stoffel, Dated Feb 4, 2020, p. 440, ln. 24, - p. 441, ln. 3. In 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 a reasonable trier of fact may conclude that issues of fact exist. It is settled law that moving defendant has the burden "to unequivocally establish that its product could not have contributed to the causation of Plaintiff's injury." *Reid v Georgia-Pac., Corp.,* 212 AD2d 462, 463 (1st Dept 1995). Here, Milton Roy has failed to proffer sufficient proof to establish that its pump could not have caused Plaintiff's injury. Moreover, Mr. Stoffel's testimony demonstrates that decedent may have been exposed to asbestos as a result of Milton Roy's pumps. As such, Milton Roy's motion is denied.

Accordingly, it is

ORDERED that Defendant The Milton Roy, LLC's motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the Court.

1/3/2022
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