

**Schaefer v Kolmar Laboratories, Inc.**

2024 NY Slip Op 34110(U)

November 14, 2024

Supreme Court, New York County

Docket Number: Index No. 190187/2020

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA**

**PART**

**13**

*Justice*

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**INDEX NO.** 190187/2020

LINDA SCHAEFER, CARL SCHAEFER,

**MOTION DATE** \_\_\_\_\_

Plaintiff,

**MOTION SEQ. NO.** 002

- v -

KOLMAR LABORATORIES, INC., REVLON, INC., BRENNTAG NORTH AMERICA AS SUCCESSOR-IN-INTEREST TO MINERAL PIGMENT SOLUTIONS, INC., AS SUCCESSOR-IN-INTEREST TO WHITAKER CLARK & DANIELS, INC., BRENNTAG SPECIALTIES, INC., AS SUCCESSOR-IN-INTEREST TO MINERAL PIGMENT SOLUTIONS, INC., AS SUCCESSOR-IN-INTEREST TO WHITAKER CLARK & DANIELS, INC., CHANEL, INC., CYPRUS AMAX MINERALS COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHARLES MATHIEU, INC., METROPOLITAN TALE CO., AMERICAN TALC CO. AND RESOURCE PROCESSORS, INC., CYPRUS MINES CORPORATION INDIVIDUALLY AND AS SUCCESSOR TO CHARLES MATHIEU, INC., METROPOLITAN TALE CO., AMERICAN TALE CO. AND RESOURCE PROCESSORS, INC., JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER COMPANIES, INC., WHITTAKER CLARK & DANIELS, INC., WHITTAKER CLARK & DANIELS, INC., AS SUCCESSOR IN INTEREST TO AMERICAN TALC COMPANY, METROPOLITAN TALC COMPANY INC., CHARLES MATHIEU, INC., AND RESOURCE PROCESSORS, INC., JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS), REVLON CONSUMER PRODUCTS CORPORATION, REVLON RESEARCH CENTER, INC.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 259, 261, 262, 263, 264, 265, 429, 430, 431, 432

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons set forth below, the Court denies the motion for summary judgment by defendant Kolmar Laboratories, Inc. (“Defendant”), pursuant to CPLR § 3212.

A court must grant summary judgment if the movant establishes its claim “as a matter of law” and no “issue of fact” warranting trial remains. CPLR § 3212(b). The movant has the initial burden to show “entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant’s failure to meet its initial burden requires denial of the motion without probing the sufficiency of the opponent’s papers. *See id.* Furthermore, even if the movant makes a prima facie showing of entitlement to judgment as a matter of law, the court must deny a summary judgment motion if the opponent’s papers present admissible evidence establishing that a “material issue[] of fact” remains. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

“In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep’t 1992), quoting *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dep’t 1990). The court’s role centers on “issue-finding, [not] issue-determination.” *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957), quoting *Esteve v Abad*, 271 AD 725, 727 (1st Dep’t 1947) (internal quotation marks omitted). As a result, and because it is a “drastic remedy,” *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012), summary judgment is rarely granted in negligence actions unless no conflict exists in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

In toxic tort cases, as here, a plaintiff must show that he was exposed to a toxin by the defendant, “that the toxin is capable of causing a particular illness (general causation) and that [he] was exposed to sufficient levels of the toxin to cause the illness (specific causation).” *Dyer v Amchem Prods. Inc.*, 207 AD3d 408, 410 (1st Dep’t 2022), quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 (2006). When a defendant moves for summary judgment in these cases, “the burdens of proof are virtually reversed.” *Lopez v Gem Gravure Co., Inc.*, 50 AD3d 1102, 1108 (2d Dep’t 2008, Lifson, J.P., dissenting). Thus, for the moving defendant to meet its initial burden on summary judgment, it must do more than “point[] to gaps in [the] opponent’s evidence”; it must “affirmatively demonstrate the merit” of its position. *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 (1st Dep’t 2016), quoting *Dalton v Educ. Testing Serv.*, 294 AD2d 462, 463 (2d Dep’t 2002); *see also Dyer*, 207 AD3d at 409 (noting that a summary judgment movant does “not meet its prima facie burden by merely pointing to gaps or deficits in [the] plaintiff’s case”); *Reid v Georgia-Pac. Corp.*, 212 AD2d 462, 463 (1st Dep’t 1995) (denying summary judgment when the defendant “fail[ed] ... to unequivocally establish that its product could not have contributed to the ... plaintiff’s injury”).

Here, Defendant argues that plaintiff Linda Schaefer (“Mrs. Schaefer,” and together with plaintiff Carl Schaefer [“Mr. Schaefer”], “Plaintiffs”) has not established that it is reasonably probable that she was exposed to any asbestos-containing product manufactured by Defendant; that, even if she has established exposure, she has not established that any such product caused her cancer; and that, even if she has established exposure and causation, Defendant still bears no liability because any such product was manufactured per the specifications of co-defendant Johnson & Johnson (“J&J”), which Defendant was contractually obliged to follow. *See*

Memorandum of Law in Support of Motion for Summary Judgment by Kolmar Laboratories, Inc. at 15-25.

In opposition, Plaintiff argues that Defendant has not met its summary judgment burden. More specifically, Plaintiff argues that Defendant failed to prove (i) that Plaintiff could not have been exposed to its product and (ii) that its product could not have caused Plaintiff's cancer. *See* Plaintiffs' Memorandum [sic] of Law in Opposition to Defendant Kolmar Laboratories, Inc.'s Motion for Summary Judgment at 26-40. Moreover, Plaintiff alleges that Defendant cannot use the contract specification defense to escape liability, especially in light of its close business relationship with J&J with respect to the product at issue. *See id.* at 40-44.

At bottom, Defendant is "pointing to gaps in [Plaintiff's] evidence," which is insufficient to warrant summary judgment in its favor. *Koulermos*, 137 AD3d at 576. Defendant's arguments focus largely on Plaintiff's inability to pinpoint how much, if any, of Defendant's product she used. But, at this stage, Plaintiff need only raise a triable issue of fact concerning specific causation. Defendant has confirmed that it manufactured a product at issue during the period of Plaintiff's exposure, and there is conflicting evidence as to the extent of Defendant's involvement with, and as to Defendant's knowledge of the dangers of, the product. Thus, Defendant has failed "to unequivocally establish that its product[s] could not have contributed to the ... [P]laintiff's injury." *Reid*, 212 AD2d at 463. At the very least, "material issues of fact" remain. *Alvarez*, 68 NY2d at 324 (1986). Thus, summary judgment must be denied.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry Plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.



11/14/2024

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE