SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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THOMAS HOLZ,

Plaintiff,

- v -

CONSOLIDATED RAIL CORPORATION, METRO-NORTH RAILROAD

Defendant.

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INDEX NO. 161482/2018

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 77, 85

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents and for the reasons set forth below, the Court denies the motion for summary judgment by defendant Consolidated Rail Corporation ("Defendant").

This case is brought under the Federal Employers' Liability Act ("FELA"). *See* 45 USC § 51 *et seq.*, as added by Pub L 60-149, 35 US Stat 65. FELA suits may be brought in either federal or state court. *See BNSF Ry. Co. v Tyrrell*, 581 US 402, 405 (2017). FELA suits brought in state court, as here, "are subject to state procedural rules" and federal "substantive law."[1] *St. Louis Southwestern Ry. Co. v Dickerson*, 470 US 409, 411 (1985). The instant motion is for summary judgment. Although substantive law is used to determine whether a movant is entitled to summary judgment (i.e. to obtain summary judgment, a movant must show entitlement to judgment as a matter of the applicable *substantive* law), the legal standard for summary

[1] This Court recognizes that distinguishing between procedure and substance is challenging, especially in the asbestos context generally. And it is even more challenging in this case, in which state procedural law applies along with federal substantive law. In the standard case, involving both New York procedure and substance, courts need not be as attuned to the distinction, since New York law governs both procedure and substance. In this case, however, only New York procedure applies, as FELA governs substance. Thus, in spite of the challenges, it is especially important to carefully distinguish procedure and substance in a case like this, so as to not inadvertently apply New York substantive law.

judgment (i.e. the mechanics of the burden-shifting framework) is a procedural, not substantive, matter. *See Celotex Corp. v Catrett*, 477 US 317, 327 (1986); *Merritt Hill Vineyards, Inc. v Windy Heights Vineyard, Inc.*, 61 NY2d 106, 110 (1984); *News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 149 (1st Dep't 2005). As such, summary judgment motions made in FELA suits brought in state court "are subject to" the forum state's (in this case, New York's) procedural summary judgment standards. *Dickerson*, 470 US at 411.

In New York, 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). When a defendant in a toxic tort case is the movant, "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 defendant moving for summary judgment 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 causation of [the] plaintiff's injury"). The movant's failure to meet its initial burden requires denial of the motion without probing the sufficiency of the opponent's papers. *See Reid*, 212 AD2d at 463. 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). 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).

As for substance, FELA makes "operators of interstate railroads … liable to their employees for on-the-job injuries resulting from the railroad's negligence." *Stephney v MTA Metro-N. R.R.*, 173 AD3d 572, 572 (1st Dep't 2019). To make a claim "under FELA, 'the plaintiff must prove the traditional common-law elements of negligence: duty, breach, damages, causation[,] and foreseeability.'" *Id.*, quoting *Hyatt v Metro-N. Commuter R.R.*, 16 AD3d 218, 218 (1st Dep't 2005). But "these elements are 'substantially relaxed' and 'negligence is liberally construed to effectuate the statute's broadly remedial intended function.'" *Id.*, quoting *Hyatt*, 16 AD3d at 218-219. The elements are so relaxed, in fact, that "'if there is any question as to whether employer negligence played a part, however small, in producing [the] plaintiff's injury,'" then the case should be turned over to the jury, not decided on summary judgment. *Id.*, quoting *Hairston v Metro-N. Commuter R.R.*, 2 AD3d 127, 128 (1st Dep't 2003).

Here, Defendant moves to dismiss this action on the grounds that the plaintiff, Thomas Holz ("Plaintiff"), has not established (i) that Defendant breached its duty of care under FELA and (ii) that Defendant caused Plaintiff's cancer. *See* Memorandum of Law in Support of Defendant Consolidated Rail Corporation's Motion for Summary Judgment at 3-9. More specifically, Defendant claims that FELA is not a strict liability statute; that, as such, employers need only guard against unreasonable risks of harm in the workplace; and that Plaintiff has not adduced evidence that Defendant breached its duty of care by acting unreasonably. *See id.* at 3-4. Defendant also claims that Plaintiff cannot prove causation because Plaintiff did not introduce evidence as to the levels of diesel exhaust or creosote to which he was exposed or as to any link between such exposure and kidney cancer. *See id.* at 6-9. Since Plaintiff allegedly cannot establish a prima facie case, Defendant argues that it deserves summary judgment. *See id.* at 4.

In opposition, Plaintiff claims (i) that its expert reports show that Defendant knew of the adverse health effects of exposure to diesel exhaust and creosote; (ii) that, despite this knowledge, Defendant did nothing to protect Plaintiff; and (iii) that Defendant's inaction was a cause of Plaintiff's cancer. *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 3-6. At the very least, according to Plaintiff, factual questions exist as to whether Defendant breached the duty of care it owed Plaintiff and, if so, as to whether such breach caused Plaintiff's cancer. *See id.*

Defendant confuses who has the burden of proof at the summary judgment stage, arguing that Plaintiff has failed to prove his prima facie case. But it is Defendant, as the movant, who has the prima facie burden "to unequivocally establish that its product could not have … caus[ed]," in the FELA causation sense, "[P]laintiff's injury." *Reid*, 212 AD2d at 463. It has not met this burden. At bottom, Defendant is "pointing to gaps in [Plaintiff's] evidence," which is insufficient to warrant summary judgment. *Koulermos*, 137 AD3d at 576.

In any event, the parties' "competing causation evidence" is the "classic 'battle of the experts,'" sufficient to raise a question of fact and, thus, to preclude summary judgment. *Sason v Dykes Lbr. Co., Inc.*, 221 AD3d 491, 492 (1st Dep't 2023), quoting *Shillingford v New York City Tr. Auth.*, 147 AD3d 465, 465 (1st Dep't 2017). It is the jury's job, not the Court's, to "'pass on issues of credibility.'" *Garcia*, 180 AD2d at 580, quoting *Dauman*, 168 AD2d at 204. As Defendant has failed to meet its initial burden on a motion for summary judgment, and issues of fact exist, 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.

3/11/2025
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