SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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GIOVANNI RUSSO

Plaintiff,

- v -

METRO-NORTH RAILROAD,

Defendant.

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INDEX NO. 159201/2019

MOTION DATE 05/31/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for DISMISSAL.

In this Federal Employers' Liability Act (FELA)[1] action in which plaintiff alleges that he developed Hodgkin's lymphoma due to his exposure to harmful chemicals while employed by defendant, defendant moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint.

BACKGROUND

Plaintiff began working for defendant-railroad in February of 2007, starting as a coach cleaner (NYSCEF Doc No 36, pp. 46-47). In March of 2008, plaintiff became a car inspector, which involved inspecting and repairing diesel trains and operating a diesel "shuttle wagon" (*id.*, pp. 58, 72-72). In July of 2013, plaintiff became a locomotive engineer, which involved operating both electric and diesel trains, and working around fuel pads (*id.*, pp. 80-87, 114-15).

[1] The Federal Employers' Liability Act provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier" (45 USC § 51).

Plaintiff alleges that during his employment, he "was exposed to excessive and harmful amounts of chemicals and cancer causing substances and materials" (i.e., diesel exhaust), and this exposure "directly caused and resulted in plaintiff to develop Hodgkin's Lymphoma, for which he was diagnosed on or about July 2017" (NYSCEF Doc No 1 ¶¶ 22-23). After plaintiff's diagnosis, he continued to work intermittently for several years and ultimately stopped working in September of 2021 (NYSCEF Doc No 36, pp. 119-20).

Defendant's Expert Reports

Dr. Michael Grossbard, MD, is a professor of medicine at NYU, director of a hematologic malignancies clinical program, and section chief of hematology at NYU Langone and the Perlmutter Cancer Center (NYSCEF Doc No 37). He opines that "the available clinical and epidemiological literature does not support the claim that [Hodgkin's lymphoma] is caused by exposure to diesel fuel, diesel exhaust, and benzene, formaldehyde and dioxin in diesel exhaust and fuel" (*id.*, pp. 3-5 ["For virtually all cases of [Hodgkin's lymphoma], there is no identified etiology for the disease"]). He further posits that, "[e]ven if one accepts that any of these exposures could contribute to the etiology of Hodgkin's disease, it is impossible to state that exposure to these products is a cause of *Mr. Russo's* Hodgkin's disease" (*id.* [emphasis provided]). Dr. Grossbard instead suggests that plaintiff's "history of obesity represented a substantial contributing factor in the cause of his lymphoma" (*id.*, p. 6).

James V. Shea Jr., MSc, CIH, CSP, has extensive training and experience in the collective health and safety sciences (NYSCEF Doc No 38, p. 2). Shea concludes that "[it] is highly improbable that Mr. Russo was regularly exposed to diesel exhaust constituents that came anywhere near the contemporaneous occupational exposure limits" (*id.*, pp. 18, 27 [stating that plaintiff's exposure was likely "comparable to ambient levels found in many urban areas, to

which the general public would be exposed"]). He further opines that defendant "provide[d] Mr. Russo with a *reasonable safe workplace, regarding* his potential exposure to diesel exhaust," taking precautions proportionate to the risk presented (*id.* [emphasis in original]).

Plaintiff's Expert Reports

Dr. Robert Peter Gale, MD, PhD, DSc, is a physician and scientist specializing in cancer biology and therapy (NYSCEF Doc No 82). He opines that "diesel engine exhaust and its constituents, especially benzene, dioxin and formaldehyde are a cause of lymphomas in humans including Hodgkin lymphoma" (*id.*, p. 24 ["Several studies report an association between exposure to diesel engine exhaust and lymphomas"]). Taking into account plaintiff's exposure to diesel exhaust, the "temporality between [his] exposures and lymphoma diagnosis," the "strength of evidence associating [diesel exhaust constituents] with cancer," and the absence of "other possible exposures which might alternatively explain [plaintiff's] developing lymphoma," he concludes that "it is more likely than not" that plaintiff's exposure to same "was a cause of his lymphoma" (*id.*, pp. 27-30). Additionally, in an article titled "Lymphoma Nomenclature – What's in a name?," published by the *British Journal of Hematology* on January 6, 2022, Dr. Gale "suggests that lymphomas no longer be dichotomized into Hodgkin and non-Hodgkin lymphomas" because doing so "is no longer conceptually useful, makes little biologic sense and results in a loss of valuable information" (NYSCEF Doc No 83).

Dr. Hernando Perez, PhD, MPH, CIH, CSP, is an experienced industrial hygiene and occupational health consultant (NYSCEF Doc No 80). He asserts that "Mr. Russo's [] work settings were representative of environments associated with elevated risk of occupationally related cancer" (*id.*, p. 9). He further states that though "the railroad industry had been aware for decades of several of the health risks diesel exhaust exposure posed to employees [at] the time

that Mr. Russo began his railroad career in 2007," defendant "neglected to take appropriate action to prevent exposure" (*id.*, pp. 13-14). Specifically, Dr. Perez states that defendant failed to conduct air monitoring, provide plaintiff with respiratory protective equipment, implement controls to prevent exhaust exposure, and warn and train plaintiff as to the hazards (*id.*, p. 15).

Dr. Andrew Salmon, MA, DPhil, CChem, MRSC, is a toxicologist with experience studying industrial chemicals and conducting cancer risk assessments (NYSCEF Doc No 81). Following risk assessment guidelines developed by regulatory agencies, he estimates that plaintiff was exposed to a higher risk of cancer due to the diesel exhaust (*id.*, p. 8). His report concludes that "more likely than not, the 10.4 years of exposure to toxins which Mr. Russo experienced in the railyards where he worked was a cause of his lymphoma" (*id.*, p. 6).

DISCUSSION

"It is well settled that 'the 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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility"

(*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

"The Federal Employers' Liability Act (FELA) (45 USC § 51 *et seq.*) provides that operators of interstate railroads shall be 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 Dept 2019]). A "plaintiff must prove the traditional common-law elements of negligence: duty, breach, damages, causation and foreseeability"; "[h]owever, these elements are substantially relaxed under FELA, and negligence is liberally construed to effectuate the statute's broadly remedial intended function" (*Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218-19 [1st Dept 2005]). "A claim under FELA [] must be determined by the jury if there is any question as to whether employer negligence played a part, however small, in producing plaintiff's injury" (*Hairston v Metro-North Commuter R.R.*, 2 AD3d 127, 128 [1st Dept 2003]). "A case is deemed unworthy of submission to a jury only if evidence of negligence is so thin that on a judicial appraisal, the only conclusion that could be drawn is that negligence by the employer could have played no part in an employee's injury" (*Pidgeon v Metro-North Commuter R.R.*, 248 AD2d 318, 319 [1st Dept 1998]).

Defendant argues that plaintiff failed to demonstrate that defendant failed to provide him with a reasonably safe place to work, since "Plaintiff does not have evidence that he was exposed

to diesel fumes above [] occupational exposure limits" or that defendant failed to comply with railroad industry standards (NYSCEF Doc No 33, p. 8). Defendant argues that plaintiff has not established that working in/around diesel powered trains can cause or contribute to the development of Hodgkin's lymphoma (general causation), as plaintiff's expert reports do not cite studies indicating that diesel fumes are capable of causing Hodgkin's lymphoma as opposed to other cancers and lymphomas, and evidence of an association is insufficient to establish causation (*id.*, pp. 12-13). Defendant further asserts plaintiff failed to show that his alleged exposure to diesel fumes while working for defendant was sufficient to cause or contribute to his Hodgkin's lymphoma (specific causation) because his expert reports "failed to provide an amount of diesel fumes Plaintiff was exposed to and that amount [caused or contributed to his] Hodgkin's Lymphoma" (*id.*, pp. 13-15).

Plaintiff argues that Dr. Perez did, in fact, find that defendant failed to take adequate precautions, and that Dr. Salmon used scientifically sound methods to calculate plaintiff's diesel particulate matter (DPM) exposure and estimate the risk that exposure posed (NYSCEF Doc No 52, pp. 12-13 [also noting that "Defendant's convenient failure to monitor the level of exposure of Mr. Russo's diesel exhaust while working [] should not prevent Plaintiff's expert from [] offering an opinion"]). Plaintiff asserts that general causation has been established by Dr. Gale's report, which "cites numerous studies that support an association between diesel exhaust exposure and lymphoma"; Dr. Gale also "suggest[s] that lymphomas no longer be dichotomized into Hodgkin and non-Hodgkin lymphomas," so it is irrelevant that an association has not been established with Hodgkin's lymphoma, specifically (*id.*, p. 14). Plaintiff avers that "Dr. Gale specifically identifies the data that he considers in forming his opinion regarding specific causation of Mr. Russo's lymphoma, including the Industrial Hygienist report and Toxicologist

report," which allowed him to rule out alternative causes, and argues that "[t]he issue of whether Dr. Gale should or should not consider Plaintiff's obesity or lack of obesity as a factor possibility suspected to be associated with lymphoma is a question of fact for the jury to consider" (*id.*, p. 15).

Here, defendant has met its initial prima facie burden by submitting evidence "that it is generally accepted within the relevant community of scientists . . . that exposure to" diesel fumes is not a known cause of lymphomas (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 [2014]; NYSCEF Doc No 37, p. 3 [Dr. Grossbard states "the available clinical and epidemiological literature does not support the claim that [Hodgkins lymphoma] is caused by exposure to diesel fuel, diesel exhaust, and benzene, formaldehyde and dioxin in diesel exhaust and fuel"]; NYSCEF Doc No 38 [Shea noting that the International Agency for the Research of Cancer "did not classify diesel exhaust as a substance known to cause Hodgkin's lymphoma in humans, much less any lymphomas"]). Thus, "[t]he burden then shifted to [plaintiff] to raise a triable issue of fact with respect to general causation" (*Cornell*, 22 NY3d at 782).

"It 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)" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). As the court in *Parker* noted, "[o]ne problem with establishing causation in toxic tort cases is that," as here, "a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value" (*id.* at 447). While "it is not always necessary for a plaintiff to quantify exposure levels precisely," there are other "acceptable ways to demonstrate causation," such as "estimat[ing] [a plaintiff's

exposure] through the use of mathematical modeling by taking [his] work history into account" and demonstrating that his exposure was of a sufficient level to cause his illness (*id.* at 449).

Dr. Perez provides an exposure estimation based on plaintiff's work history. But while he reports that plaintiff "was chronically exposed to diesel exhaust over the course of his Metro-North employment," he goes on to specify that plaintiff's exposure levels during this period ranged only from levels "consistent with ambient background concentrations" to "the upper quartile of the low range" (NYSCEF Doc No 80, p. 8). Plaintiff fails to rebut defendant's claim that "[t]here is no excess risk of harm at such low levels" (NYSCEF Doc No 38, p. 27), as he does not demonstrate that diesel exhaust exposure in the "low range" is sufficient to cause or contribute to the development of lymphomas. Plaintiff asserts in his moving papers that his experts "opine that above background ambient level of exposure to diesel fumes . . . is attributed to contracting Hodgkin's lymphoma" (NYSCEF Doc No 52), but this opinion is not reflected in the reports (NYSCEF Doc No 80, p. 9 [Dr. Perez asserts that such low levels present excess risks of lung cancer, but not lymphomas]; NYSCEF Doc No 81, p. 8 [Dr. Salmon states that "it is not possible to directly relate [plaintiff's exposure] measurements to the levels of diesel exhaust particulate which are needed for the cancer risk estimate"]). In other words, while plaintiff's experts conclude that plaintiff's exposure crossed over a certain threshold into a dangerous zone, they do not set forth what that threshold is. Nor has plaintiff established that defendant should have foreseen that a low range of diesel exhaust could put its employees at risk of lymphomas (NYSCEF Doc No 52, p. 13 [noting that "Dr. Perez opines that since at least 1955, 'the railroad industry has been aware of the risk and potential harm to employees exposed to diesel exhaust'" generally, but not that ambient levels of exhaust comparable to those in urban areas may cause lymphomas to develop]).

Furthermore, while Dr. Gale references "[s]everal studies [that] report an association between exposure to diesel engine exhaust and lymphomas" (NYSCEF Doc No 82, pp. 18-21 [also noting studies showing "correlations" or "links" between diesel components and non-Hodgkin's lymphomas]), general causation cannot be established by showing an association, alone (*Cornell*, 22 NY3d at 783 ["[a]n association does not necessarily mean that there is a cause-effect relationship"]). Plaintiff attempts to distinguish *Cornell* by emphasizing that whereas "the expert in *Cornell* [] cited essentially [] only a single study to [] establish his general causation opinion," here, "Dr. Gale relies on several studies reporting an association between exposure to diesel engine exhaust and lymphomas" (NYSCEF Doc No 78, pp. 2-3). However, Dr. Gale's report still "do[es] not establish that the relevant scientific community generally accepts that [exposure to diesel exhaust] *cause[s]*" lymphomas (*Cornell*, 22 NY3d at 782-83 [emphasis in original]). Rather, Dr. Gale relies on studies reflecting general acceptance that an association exists between diesel exhaust and lymphomas (NYSCEF Doc No 82, pp. 18-21 [repeatedly referring to studies which only show "associations," "links," and "correlations"]) to support his independently asserted theory that diesel exhaust causes lymphomas.[2]

Therefore, plaintiff failed to raise a material issue of fact as to whether defendant was negligent in failing to take preventative measures even where employees are only exposed to a low range of diesel exhaust, that diesel exhaust exposure causes lymphomas, or that plaintiff's estimated diesel exposure rose to a sufficient level to cause his illness.

Accordingly, defendant's motion for summary judgment dismissing the complaint will be granted.

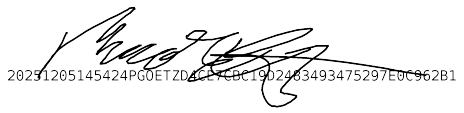
[2] Plaintiff argues that Hodgkin's lymphoma and non-Hodgkin's lymphomas are essentially interchangeable in this context because they appear to have "identical risk factors" (NYSCEF Doc Nos 82, 83). However, since plaintiff fails to establish causation between exposure to diesel and *any* form of lymphoma, the distinction is irrelevant.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant's motion is granted, and plaintiff's complaint is dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly with costs and disbursements to defendant as taxed by the clerk.



12/5/2025
DATE

PAUL A. GOETZ, J.S.C.

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