

At a Civil Special Term, Part 33, of the Supreme Court, held in and for the Counties of Niagara and Erie, State of New York, on the 21st day of March , 2016

PRESIDING: HON. DEBORAH A. CHIMES

SUPREME COURT : STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In Re: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

EUGENE BLAMOWSKI, as Executor of the Estate of ANN M. BLAMOWSKI,

Plaintiff

vs.

DECISION AND ORDER
Index No. 808655/2014

AIR & LIQUID SYSTEMS CORP., et al.,

Defendants

Defendants: Air & Liquid Systems, Inc. , successor by merger to Buffalo Pumps, Inc. (Buffalo Pumps); Beazer East ,formerly known as Koppers Company(Beazer East); Frontier Insulation Contractors, Inc. (Frontier) ;and Riley Power, Inc. (Riley) move for summary judgment pursuant to CPLR §3212.¹

In support of its motion, defendant Buffalo Pumps submitted its Notice of Motion dated January 25, 2016, the Affirmation in Support of Jessica J. Burgasser, Esq., with attached exhibits, dated January 25, 2016 and the Reply Affirmation in Further Support of

¹ Defendants BW/IP, Inc., Goulds Pumps, Inc. and Foseco, Inc. have withdrawn their motions for summary judgment.

Jessica J. Burgasser, Esq., with attached exhibits, dated March 7, 2016.

In opposition to the motion , plaintiff submitted the Affirmation of Erik Jacobs, Esq, with attached exhibits, dated February 19, 2016.

In support of its motion, defendant Beazer East submitted its Notice of Motion dated January 25, 2016, the Affirmation in Support of Scott R. Jenette, Esq., with attached exhibits, dated January 25, 2016, the Affidavit of William Edgar, P.E., sworn to January 29, 2013 (filed in *Charles Streif v A.O. Smith Water Products Co., et al.*, Erie County Index No.2011-1120) ; the Supplemental Affidavit of Mary D. Wright, Esq., sworn to January 27, 2013 (filed in *Charles Streif*), the affidavit of William Edgar, P.E., sworn to March 16, 2012 (filed in *William C. Zimmerman v Air & Liquid Systems Corp.*, Erie County Index No.2011-880), the affidavit of William Thomas Birmingham, sworn to December (filed in *Robert Barker v Beazer East, Inc.*, Erie County Index No. I 2012-3873); the affidavit of William Thomas Birmingham, sworn to July 30, 2015 (filed in *Norbert Liebel v Beazer East, Inc.*, Erie County Index No. I 2012-3873); the Affidavit of Sheldon Rabinovitz, Ph.D., with attached exhibits, sworn to January 27, 2016 and the Reply Affirmation of Scott R. Jenette, Esq., with attached exhibits, dated March 4, 2016.

In opposition to the motion , plaintiff submitted the Affirmation of Erik Jacobs, Esq, with attached exhibits, dated February 19, 2016.

In support of its motion, defendant Frontier submitted its Notice of Motion dated January 25, 2016, the Affirmation in Support of Jason A. Botticelli, Esq., with attached exhibits, dated January 25, 2016 and the Reply Affirmation of Jason A. Botticeli, Esq., with attached exhibits, dated March 7, 2016.

In support of its motion, defendant Riley submitted its Notice of Motion dated January 21, 2016, the Affidavit of James W. Whitcomb, Esq., with attached exhibits, sworn to January 21, 2016 and the Reply Affidavit of James W. Whitcomb, Esq., with attached exhibit, sworn to March 7, 2016.

In opposition to the motion , plaintiff submitted the Affirmation of Erik Jacobs, Esq., with attached exhibits, dated February 19, 2016.

Background

Decedent Ann Blamowski died at age 74 of mesothelioma, survived by her husband Eugene Blamowski. Plaintiff alleges that decedent was injured by asbestos to which she was exposed while laundering and coming into contact with her husband's asbestos- laden clothes . Plaintiff husband's exposure to asbestos is alleged to have occurred in the course of employment as a laborer at the Bethlehem Steel Facility in Lackawanna, New York (Bethlehem). His dates of employment at Bethlehem were 1955- 1958; interrupted by Army service from 1958-1962. Plaintiff returned to Bethlehem in 1962 and worked at Bethlehem until 1984, when steelmaking ceased. Mrs. Blamowski passed away before she could testify, her husband was deposed on October 14, 2015. Throughout his career, according to his testimony, he worked as a laborer. He stated that most of his time was in the strip mill but he was also assigned clean-up and delivery duties, which took him throughout the plant, including the open hearth and coke oven departments.

The record show that Bethlehem was a very large facility, some 1500 acres in size containing a number of buildings.

Moving Defendants

Defendant Buffalo Pumps is a pump manufacturer; defendant Beazer East (f/k/a Koppers) is a coke oven manufacturer; defendant Frontier is an insulation contractor; and defendant Riley is a boiler manufacturer. The central argument made by all defendants in support of their motions is that plaintiff can not show he was exposed to any of their asbestos-containing products during his employment at Bethlehem. Hence, they assert, plaintiff can not demonstrate that decedent was exposed to or injured by their products and the complaint must be dismissed.

Procedural History

In accordance Section XII B. of the Eighth District's Case Management Order, each defendant had previously asked plaintiff to dismiss it from the case by sending "product identification" letters. In answering defendants, plaintiff responded he would not dismiss them, and identified the evidence upon which he expected to rely at trial as follows:

Buffalo Pumps- "As you know, you have provided interrogatory responses that place Buffalo Pumps at Bethlehem Steel Lackawanna. Further, William Zimmerman testified on 3/23/11 and 3/24/11 that there were Buffalo Pumps at Bethlehem Steel Lackawanna" .

Beazer East- "As you know, Koppers ovens were present at Bethlehem Steel Lackawanna, as evidenced by the voluminous documents that have been previously produced by defendant Riley Power".

Frontier- "We have invoices paid by Bethlehem Steel Lackawanna to Frontier for asbestos products used at this location during the 1960's and 1970's".

While the record does not contain any responses to the product identification letters submitted to plaintiff from defendant Riley, it is clear that, before making the motions, most defendants knew the evidence upon which plaintiff would rely.

Legal Standard

As has oft been held, it is well established in asbestos litigation that to go forward with a motion for summary judgment dismissing a complaint, a defendant must present admissible evidence establishing that the complaint has no merit (*see Diel v Flintkote Co.*, 204 AD2d 53 [1994]), or affirmatively establish the merit of its defense (*see Higgins v Pope*, 37 AD3d 1086 [2007]; *Refermat v A. C. AND S., Inc.*, 15 AD3d 928 [2005]; *Root v Eastern Refractories Co., Inc.*, 13 AD3d 1187 [2004]; *Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d 1002 [1998]; *Reid v Georgia-Pacific Corp.*, 212 AD 2d 462 [1995]). It has also been held that in summary judgment, the defendant must make a prima facie showing that its products or work could not have contributed to plaintiff's injuries. *Matter of*

New York City Asbestos Litigation [Comeau], 216 AD2d 79, 80 (1st Dept, 1995) citing *Reid v Georgia-Pacific Corp.*, 212 AD2d 462 (1st Dept, 1995)

" [T]he failure of plaintiffs to name [defendant] as a supplier in their response to interrogatories constitutes an admission that [defendant] was not a source of an asbestos-containing product to which plaintiff was exposed and [defendant] thus established that plaintiffs' action against it has no merit." (*Matter of Eighth Jud. Dist. Asbestos Litig. [Gorzka]*, 28 AD3d 1191, 1192 [2006] [internal citations omitted]). That failure shifts the burden to plaintiff to come forward with facts and conditions from which defendants' liability reasonably can be inferred. (see *Gorzka* ; *Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel]*, 269 AD2d 749 [2000] ; *Lang v Crane Co.*, Sup Ct, Erie County , March 30, 2015, Chimes, J. Index No. I 2012-202 ; *Dickman v Trane U. S. Inc.*, Sup. Ct, Erie County, September 16, 2010, Lane, J. Index No.2008-12697).²

Motions- General

In support of their motions, all defendants submitted the pleadings, plaintiff's answers to interrogatories and plaintiff's deposition testimony. The testimony failed to mention a single manufacturer's product or a single co-worker . The absence of such proof established the defendant's "facial non-liability and shifted to plaintiff the burden of demonstrating by admissible evidence the existence of a factual issue requiring a trial of the action or of tendering an acceptable excuse for his failure to do so (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967-968)" *Schiraldi v U.S. Mineral Products*, 194 AD2d 482, 483 (1st Dept, 1993). Additionally, although defendants Beazer East and Riley are mentioned in plaintiff's interrogatory answers , defendants have succeeded in

² Plaintiff has inserted all defendants, as named in the caption, in his answers to interrogatories dated August 29, 2014. (See response to question 17A , pp 11- 12). As these are corporate names only, not products, they do not function as product identification, and are insufficient to identify defendants as suppliers.

demonstrating an absence of proof of exposure to defendant's products sufficient to shift the burden to plaintiff. (see *Heim v Beazer East, Inc.*, [Sup. Ct, Erie County, August 16, 2012, Lane, JHO, Index No.2001-3588])

The record also reveals that plaintiff has failed to identify defendants Buffalo Pumps and Frontier in his Answers to Interrogatories³. This failure has also shifted the burden with respect to these defendants.

Plaintiff opposes all the motions herein with excerpts from plaintiff's deposition testimony, an affidavit of plaintiff sworn to December 23, 2009, deposition testimony of other Bethlehem employees, tailored to each motion, and in some cases, interrogatory answers filed in unrelated cases. Plaintiff's opposition to each category of defendants will be addressed separately.

Buffalo Pumps

Relevant to the motion made by Buffalo Pumps, plaintiff relies on his testimony that there were times, " he was in various buildings throughout the plant where there were turbines and boilers and pumps and valves that were insulated with asbestos, which he believed got in the air and on his clothing and made its way into his home and to his wife".

Buffalo Pumps argues that the evidence relied on by plaintiff is insufficient to sustain plaintiff's burden on the motion. Against Buffalo Pumps, the plaintiff submitted the testimony of a Bethlehem employee, William Zimmerman⁴, who attested that Buffalo Pumps were present at Bethlehem and worked on by millwrights, employee Harry Zlateff⁵ who

³ There are two sets of plaintiff's answers to interrogatories- the first is dated August 29, 2014 and verified by Ann Blamowski on September 3, 2014. The second is a one page supplement to the first, dated August 18, 2015, signed only by plaintiff's counsel.

⁴ That testimony was given in his case, *William Zimmerman v Air & Liquid Systems Corp.* (Erie County Index No. I 2011-880) on March 11, 2011.

⁵ That testimony was given in his case, *Harry Zlateff v Niagara Insulations, Inc.* (Erie County Index No. I 2009-13233) on February 4, 2010

stated there were thousands of pumps at that worksite and Frank Pasariello⁶ who testified that Buffalo Pumps were one of the brands of pumps used at Bethlehem.

While plaintiffs are not required to show the precise causes of the damages sought, but only required to show those facts and conditions from which defendant's liability can be reasonably inferred (*see Matter of Eighth Jud. Dist. Asbestos Litig. [Reynolds]*, 32 AD3d 1268 [2006]), plaintiff has failed to demonstrate any connection between Buffalo Pumps' products and plaintiff, let alone his exposure to asbestos as a result of working around or with defendant's pumps. As was noted by Buffalo Pumps, none of the Bethlehem workers' relied on by the plaintiff mentions plaintiff. Likewise, the plaintiff never mentioned any of the Bethlehem workers relied on in opposition and never identified any of the pumps he worked with or around, let alone that they were a source of exposure to asbestos.

It is insufficient to show that defendants' products were "... seen in the plant; it must be shown that plaintiff was exposed to asbestos fibers released from defendant's products " *Diel v Flintkote Co.*, 204 AD2d 53, 54 (1st Dept 1994). Here, plaintiff has failed to "...allege facts and conditions from which the defendant's liability may reasonably be inferred, that is, that plaintiff worked in the vicinity where defendant's products were used, and that plaintiff was exposed to defendant's product (*Cawein v Flintkote Co.*, 203 AD2d 105, 105-106). " *In re New York City Asbestos Litig.[Comeau]* , 216 AD 2d 79, 80 (1st Dept 1995).

The motion to dismiss made on behalf of Buffalo Pumps is, therefore granted.

The court notes that Buffalo Pumps also contends that plaintiff's complaint is barred by *Matter of New York City Asbestos Litig [Holdampf]*, 5 NY3d 486 (2005). In light of the decision on the product identification portion of the motion, the Court declines to reach this argument. However, the court notes that *In re: Eighth Judicial District Asbestos Litigation*

⁶ Frank Passariello's testimony was given in *Frank G. Anthony v Air & Liquid System Corp.*, (Erie County Index No. I 2010-4279) on August 10, 2011

[*Cuddihy*], (Index No. I2007-3580, Sup Ct, Erie County, April 18, 2008) Judge Lane had refused to extend *Haldampf* past its "premises owner" holding. The *Haldampf* court itself observed in footnote 4: "We have never considered whether a manufacturer or supplier of an asbestos-containing product is liable for injuries to third parties, or caused by so-called secondhand exposure" (*id.* at 498).

Beazer East

Beazer East designed and built coke oven batteries 2,3 and 4 at Bethlehem Steel. Beazer argues that as a service provider only, it is not liable to plaintiff under strict products liability principles; that as there is no evidence of professional negligence, and therefore it is not liable to plaintiff on the negligence cause of action; that it is not liable to plaintiff on the fifth cause of action, alleging violation of the Labor Law and that the breach of warranty claims in the second and fourth causes of action should be dismissed because the statute of limitations expired in 1956.

Beazer also asserts, as do the other defendants, that plaintiff has failed to satisfy its burden of proving decedent, Ann Blamowski, was exposed to asbestos from a product sold or supplied by Beazer. Defendant submitted the affidavit of William Edgar, P.E., stating that asbestos was used only in isolated parts of the Koppers coke ovens and that the asbestos was "encapsulated" , and an affidavit of its expert industrial hygienist, Sheldon Rabinovitz, opining, among other things, that "[t]here was no opportunity for Mr. Blamowski to be exposed to asbestos from just being in a coke oven battery during normal operations." In addition, Beazer maintains that neither plaintiff's deposition testimony nor the other evidence relied on by plaintiff show that plaintiff worked directly with asbestos-containing material in the coke department or that he worked in proximity to other workers who were doing so.

Regarding coke ovens, the plaintiff testified that sometimes he would go through other departments like the open hearth and coke ovens. He also testified that he believed

he was exposed when he went to the coke oven department, but did not recall why, as a laborer he went to that department. He also could not identify the source of any asbestos he may have been exposed to in the coke oven department. Plaintiff also relied on portions of the deposition testimony of William Ice in an Ohio case ⁷where the witness stated that "doors", (from later testimony he conceivably meant coke oven doors) would be insulated with asbestos rope until discontinued in the 1970's and that asbestos paper was used with expansion joints in the ovens. Plaintiff also relied on the testimony of Robert Schoenborn ⁸, who worked as a laborer and a brick layer in the coke oven area at Bethlehem and testified that he was exposed to asbestos-containing cement while repairing and working around coke ovens and to asbestos-containing dust from work on the coke ovens. Plaintiff also submitted a 1982 Koppers memo acknowledging asbestos use 'for gasketing in some services ...for coke oven door jam packing and for heat shielding for coke oven repair jobs.

Upon review of the plaintiff's submissions, the plaintiff failed not only to identify the source of any asbestos he was exposed to, but also failed to establish he was near other workers who may have disturbed the encapsulated asbestos. Hence, plaintiff failed to meet his burden and the claim is dismissed against Beazer East. In light of the decision on the product identification portion of the defendant Beazer East's motion, the Court declines to reach the defendant's remaining arguments.

Frontier

Frontier moves for summary judgment contending there is no evidence that plaintiff was exposed to asbestos-containing products used by Frontier or its employees, neither of which was mentioned in plaintiff's answers to interrogatories or in his deposition testimony.

⁷ *In re: All Baron & Budd Asbestos Cases*, Numbers 323629-323678, Court of Common Pleas, Cuyahoga County.

⁸ This testimony was given in his case, *Robert Schoenborn Air & Liquid Systems Corp.*, Erie County Index No. 800211/2012, on August 20, 2012.

Defendant maintains that plaintiff's reliance on testimony of former Bethlehem employee Harry Zlateff and two sales invoices from Frontier to Bethlehem is misplaced, arguing that this evidence does not fulfill plaintiff's obligation to "come forward with facts and conditions from which defendant's liability may reasonably be inferred".

Plaintiff opposes the motion, citing plaintiff's testimony that "outside contractors always came to the plant to apply asbestos insulation to the various pieces of equipment, piping furnaces and hearth and the asbestos insulation used by these workers got on his clothes and person and made its way to his home and his wife". Plaintiff also relies on the testimony of employee, Harry Zlateff, wherein he states that Frontier "sent men to the Bethlehem Steel mill to perform the removal and installation of asbestos insulation during the 1960's".

Although plaintiff established that Frontier was present at Bethlehem and installed and removed asbestos- containing insulation, this alone is insufficient to allow a reasonable inference that plaintiff was exposed to asbestos arising from the activities of Frontier or its employees. Frontier's motion is granted.

Riley

Finally, defendant Riley asserts that there is no evidence that plaintiff ever saw, worked with, on or near or was exposed to asbestos from a Riley boiler, nor did he ever testify that he worked in a boilerhouse, worked on any boiler or near anyone who worked on a boiler at Bethlehem. The defendant argues the plaintiff never mentions Riley at his deposition; that boilers were never mentioned at all until plaintiff's attorney asked what defendant terms a "leading compound question"⁹ as to which the plaintiff agreed, but gave no details. Defendant points out that "boilers" was mentioned two times in the deposition,

⁹ The question was " And throughout the plant were there many equipment areas where there were turbines and boilers and pumps and valves and other type of equipment throughout the plant in all the different buildings."

and the word "Riley" was never mentioned.

Plaintiff opposes the motion citing his deposition testimony that " he visited buildings throughout the plant where there were turbines and boilers and pumps and valves that were insulated with asbestos, which asbestos got on his clothing and made its way into his home and to his wife." Plaintiff also relies on the deposition testimony of a number of former employees of Bethlehem to wit : pipefitter Doug Chapple ¹⁰, that he worked on Riley boilers and was exposed to asbestos as a result ; Harry R. Zlateff that he worked in the boiler houses where Riley boilers were present and coated with asbestos insulation; laborer James Sebastiani¹¹ who also stated there were Riley boilers in the boiler houses and he was exposed to asbestos dust from cleaning up after a boiler tear-out and that this asbestos came from cements or bricks that were used with the boiler . Similar testimony from James Meyerhoefer ¹² and John Makai ¹³ was submitted, stating that there were Riley boilers present in the boilerhouses and that re-bricking or re-insulating the boilers created asbestos dust. Plaintiff notes that Riley was identified in plaintiff's answers to Interrogatories and relies on a partially legible contract which, he claims, shows that Riley had contracts with Bethlehem to supply boilers and specified that they be insulated with and contain asbestos.

Plaintiff's submissions do not sustain his burden. Evidence that asbestos dust was created when asbestos-containing materials were disturbed or replaced is insufficient to demonstrate that plaintiff was exposed to asbestos from or harmed by a Riley boiler.

¹⁰ Given on May 15,2104 and July 16, 2014 in his case, *Doug Chapple and Helen Chapple* (New York County Index No. 190007-09)

¹¹ Given on July 14, 2001, in his case, *In re: New York City Asbestos Litig. [Sebastiani]* , (NYCAL Index No. 02-113280);

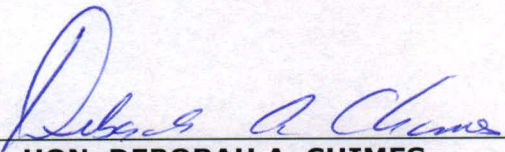
¹² Given on January 19, 2011,in *Emilio Paolini v A.O. Smith Water Products* (New York County Index Numbers 101192-99 and 124397-02)

¹³ Given in *John L. Mathis*, (New York County Index Nos. 122189/1999 and 109431/2000)

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Riley's motion is granted.

DATED: Buffalo, New York
May 26, 2016

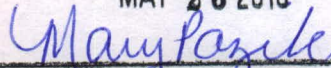


HON. DEBORAH A. CHIMES
Justice of the Supreme Court

GRANTED

MAY 26 2016

BY



MARY PAZIK
COURT CLERK