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

PRESENT: SHERRY KLEIN HEITLER PART 30
Justice

THOMAS NEUER,

Plaintiff,

- v -

AMERICAN OPTICAL, et al.,

Defendants.

INDEX NO. 190335/11

MOTION DATE

MOTION SEQ. NO. 001, 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing, it is ORDERED that Motion Sequence No.'s 001 and 002 are decided in accordance with the attached memorandum decision dated 11.9.12

FILED

NOV 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11.9.12

SHERRY KLEIN HEITLER *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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THOMAS NEUER,

Index No. 190335/11
Motion Seq. 001, 002

Plaintiff,

DECISION & ORDER

- against -

AMERICAN ART CLAY COMPANY, INC., *et al.*

Defendants.

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SHERRY KLEIN HEITLER, J.:

Motion Sequence numbers 001 and 002 are consolidated for disposition. Defendants Metro-North Commuter Railroad ("Metro-North"), the Metropolitan Transportation Authority ("MTA") (Seq. 001), Consolidated Rail Corporation ("Conrail"), and American Premier Underwriters, Inc. ("APU") (Seq. 002) (collectively, the "Defendants") move jointly pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them. The Defendants allege that plaintiff Thomas Neuer has failed to show that they are responsible for his asbestos-related injuries under the Federal Employers' Liability Act ("FELA") 45 U.S.C. § 51[1] et seq. for negligently creating an unsafe workplace.

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[1] 45 U.S.C. § 51 provides in relevant part: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . . ."

BACKGROUND

The plaintiff commenced this action on or about September 7, 2011. Mr. Neuer testified[2] that he started his railroad career in 1972 as a maintainer in the tunnels associated with Grand Central Station. He was employed by Penn Central Railroad (represented in this action through APU), which Conrail is alleged to have purchased in 1974. Mr. Neuer was promoted to signalman after approximately two years on the job. He worked for Conrail until the end of 1982 when it was acquired by Metro-North. He continued working for Metro-North and was soon promoted to foreman at which point he was transferred to the Mott Haven section of the Bronx for several years. Mr. Neuer returned to his post at Grand Central Station in the mid-1980s. He left the railroad industry altogether in June, 1989. Mr. Neuer testified that he was exposed to asbestos from working with steam lines and electrical equipment throughout his railroad career. He does not allude to asbestos exposure by reason of any other occupation.

Defendants assert that plaintiff has failed to satisfy the breach of duty and proximate cause elements of a negligence cause of action under FELA. Defendants argue that as a lay person Mr. Neuer is unable to quantify the amount of asbestos to which he was allegedly exposed while working for the railroads, and his deposition testimony is insufficient to prove that the Defendants breached their duty to him. Defendants criticize the plaintiff for failing to submit an expert liability report on his behalf, without which Defendants assert the plaintiff is unable to make a *prima facie* case under FELA. Plaintiff opposes on the ground that there are several questions of fact whether his exposure to asbestos-containing products as a railroad employee contributed to his injuries.[3] In support

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[2] Mr. Neuer was deposed on October 5, 2011. A copy of his deposition transcript is submitted as plaintiff's Exhibit 1.

[3] Plaintiff also relies on *Neff v A.W. Chesterton*, Index No. 190285/09 (Sup. Ct. NY Co. July 18, 2010) in which I denied APU and Conrail's motion for summary judgement in an

plaintiff submits an expert witness list which discloses that, among others, environmental consultant Dr. Barry Castleman will testify on Mr. Neuer's behalf at trial. Defendants reply that Dr. Castleman cannot opine with respect to the issue of causation because he is not an industrial hygienist and his research is not specifically related to the railroad industry.

DISCUSSION

In FELA cases brought in state courts, the general rule is that federal law governs the substantive aspects of these cases and that state procedural rules govern procedural matters. *St. Louis Southwestern Ry. Co. v Dickerson*, 470 U.S. 409 (1985). Thus, in New York, CPLR 3212 governs summary judgment motions. It is the Defendants' burden thereunder to establish their "cause of action or defense sufficiently to warrant judgment in [their] favor as a matter of law, and [they] must tender sufficient evidence to demonstrate the absence of any material issues of fact." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). Should the Defendants make a *prima facie* showing of their entitlement to summary judgment, the burden shifts to the plaintiff to demonstrate the existence of a factual issue requiring a trial. *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 (1986). "It is axiomatic that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact . . . or where such issue is even arguable . . . ." *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-29 (1st Dept 2002) (internal citations omitted); *see also Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

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unrelated yet factually similar asbestos personal injury action. Defendants MTA and Metro-North, who were not parties to *Neff*, argue that *Neff* is distinguishable because the court was asked to consider different arguments from those raised on the motion at bar. To the contrary, APU and Conrail made the same arguments in *Neff* as they do now.

FELA imposes on railroads "a general duty to provide a safe workplace." *McGinn v Burlington Northern R. Co.*, 102 F.3d 295, 300 (7th Cir.1996). Plaintiffs who assert a negligence claim under FELA "must establish the traditional common law elements: (1) duty; (2) breach; (3) forseeability; and (4) causation of injury." *Bruno v Metropolitan Transportation Authority*, 544 F. Supp. 2d 393, 396 (SDNY 2008); *see also McGinn, supra.*

Compared to tort litigation at common law, "a relaxed standard of causation applies under FELA." *Conrail v Gottshall*, 512 US 532, 543 (1994). The plaintiff still must "show that his injuries were due to failure of the defendant to do . . . what a reasonable and prudent man would have done . . . in the exercise of ordinary care under all the circumstances." *Tiller v Atlantic Coast Line R. Co.*, 318 US 54, 67 (1943). But if the employer's negligent act or omission played any part, however slight, in bringing about injury, the employer is liable. *See Rogers v Missouri Pac. R. Co.*, 352 US 500, 506 (1951); *Turner v CSX Transp.*, 72 AD3d 1597, 1598 (4th Dept 2010).

Here, Mr. Neuer's testimony, in and of itself, is sufficient to raise a triable issue of fact whether he was exposed to asbestos. *See Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999) (deposition testimony submitted in opposition to a summary judgment motion constitutes evidence in admissible form by someone with personal knowledge of the facts); *see also Reid, supra*, at 463 (plaintiff need only show that he was exposed to asbestos fibers to overcome summary judgment).

It is immaterial for purposes of this motion that Mr. Neuer has not quantified the amount of asbestos he was exposed to over the course of his railroad career. As with most cases involving toxic substances, it is extremely difficult to quantity a plaintiff's exposure. *Cornell v 360 West 51st Street Realty, LLC*, 95 AD3d 50, 59 (1st Dept 2012). As established by the Court of Appeals in *Parker v*

Mobil Oil Corp., 7 NY3d 434, 448 (2006), it is "not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community." So long as the plaintiff's experts provide a "'scientific expression' of plaintiff's exposure levels, they will have laid an adequate foundation for their opinions on specific causation." *Nonnon v City of New York*, 88 AD3d 384, 396 (1st Dept 2011) (quoting *Jackson v Nutmeg Technologies, Inc*, 43 AD3d 599, 602 [3rd Dept 2007]).

To this end, plaintiff relies on state-of-the-art expert Dr. Barry Castleman, a consultant to the governmental regulatory agencies who often testifies in asbestos-related personal injury cases. In his book, *Asbestos Medical and Legal Aspects*, Dr. Castleman opines that the railroads knew as early as 1937 that asbestos was hazardous, but chose, in light of this knowledge, to continue to allow the use of asbestos-containing products. Dr. Castleman proffers evidence of this knowledge through documentation from meetings of the American Railway Association, the Medical and Surgical Section for the years 1932, 1933, and 1935. (*See, e.g.*, plaintiff's exhibits 6-8).

Plaintiff also submits letters from Dr. Allison McLarty and Dr. Steven H. Dikman (plaintiff's exhibit 2), both of whom reviewed Mr. Neuer's deposition testimony and medical records. Dr. McLarty opines that Mr. Neuer "appears to have had significant occupational exposure to asbestos during his time working at the railroad." Both Dr. McLarty and Dr. Dikman then conclude, "with a reasonable degree of medical certainty" that Mr. Neuer's mesothelioma was caused by his exposure to asbestos. *Id.*[4]

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[4] Defendants' reliance on *Cleghorne v City of New York*, 2012 NY App. Div. LEXIS 6606 (1st Dept 2012), in this regard, is inapposite. In *Cleghorne*, the First Department granted the defendant summary judgment because the plaintiff could

I find that the record is sufficient to raise an issue of fact whether Mr. Neuer's asbestos exposure as a railroad employee caused his injuries. For one, the "link between asbestos and disease is well documented." *Wiegman v AC&S, Inc.*, 24 AD3d 375 (1st Dept 2005). Expert testimony has established that dust in the air from asbestos products can cause mesothelioma. *See Lustenring v AC&S, Inc.*, 13 AD3d 69, 70 (1st Dept 2004). Moreover, this is a motion for summary judgment, not a *Frye* hearing. The function of this court is therefore one of issue finding, not issue determination . . . ." *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dept 1996) (internal citations omitted). Thus, the Defendants' concerns regarding plaintiff's experts' methodologies and findings should be raised before at trial. *See Forte v Weiner*, 200 AD2d 421, 422 (1st Dept 1994) ("as the medical data require the interpretation of an expert, the issue of cause of death . . . must await resolution at trial").

Accordingly, it is hereby

ORDERED that the motions by Consolidated Rail Corporation, American Premier Underwriters, Inc., Metro-North Commuter Railroad, and the Metropolitan Transportation Authority for summary judgment are denied in their entirety.

This constitutes the decision and order of the court.

FILED
NOV 20 2012
COUNTY CLERK'S OFFICE
NEW YORK

DATED: November 9 2012

SHERRY KLEIN HEITLER
J.S.C.

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not, among other things, identify her exposure to a specific toxin or allergen, nor quantify the level of exposure. In this case, as in *Parker, supra*, a specific toxin is identified, i.e., asbestos, and the exposure has been medically linked to the injury.