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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190516/2011
RUFF, JOHN
vs.
A.O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT (American Premier)

INDEX NO. 190516/11

MOTION DATE

MOTION SEQ. NO. 006

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the memorandum decision dated 3/8/13

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

Dated: 3-8-13

HON. SHERRY KLEIN HEITLER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

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

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JOHN RUFF,

Plaintiff,

- against -

A.O. SMITH WATER PRODUCTS, *et al.*

Defendants.

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Index No. 190516/11
Motion Seq. 006

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Defendants American Premier Underwriters, Inc. and American Financial Group, Inc. move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them. The defendants allege that plaintiff John Ruff has not shown 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.

Plaintiff John Ruff was diagnosed with asbestos-related lung cancer in or about October of 2011. He commenced this action on or about December 27, 2011. Mr. Ruff was deposed on June 27, 2012 and June 29, 2012 and testified that he worked at the Sunnyside Railroad Yard in Queens, New York from 1946 through 1991. Plaintiff alleges that he was exposed to asbestos during the

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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 . . . ."

course of his employment on a daily basis over a 30 year period from 1946 to 1976. In this regard, Mr. Ruff testified that from 1949 to 1951 he was responsible for, among other things, covering pipes with asbestos insulation. Thereafter he worked primarily as a mechanic repairing valves located in the tunnels and steam lines along the tracks at the train yard. Mr. Ruff testified that he often repaired several valves each day. In 1968, Mr. Ruff started working with gaskets and water pumps. Two years later, Mr. Ruff was transferred to the train yard's boiler house where he repaired pumps, valves, and boilers on a daily basis until 1976.

The defendants, who appear to be the successors-in-interest to Mr. Ruff's then employers, criticize the plaintiff for not producing a "liability expert report" indicating that such employers breached a duty to him and that such breach was a proximate cause of his injuries. Plaintiff argues that his own testimony and the expected testimony of his experts are sufficient to raise a triable issue of fact as to the defendants' liability. In reply, the defendants argue that Mr. Ruff is unable to distinguish between asbestos containing and asbestos free products and that as a lay person he cannot accurately quantify the amount of asbestos fibers that he was exposed to.

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*. The law is well-settled that an employer "breaches its duty under FELA 'if it knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees.'" *Williams v Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999) (quoting *Ulfik v Metro-North Commuter R.R.*, 77 F.3d 54, 58 [2d Cir 1996]).

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. *Rogers v Missouri Pac. R. Co.*, 352 US 500, 506 (1951); *see also Turner v CSX Transp.*, 72 AD3d 1597, 1598 (4th Dept 2010).

Whether the defendants "used reasonable care in furnishing its employees a safe place to work is normally a question for the jury." *Gallose v Long Island R. Co.*, 878 F.2d 80, 85 (2d Cir. 1989). "As with all factual issues under the FELA, the right of the jury to pass on this issue must be liberally construed." *Id.* A FELA case "must not be dismissed at the summary judgment phase unless there is absolutely no reasonable basis for a jury to find for the plaintiff." *Syverson v Consolidated Rail Corp.*, 19 F.3d 824, 828 (2d Cir. 1994).

This court addressed similar issues in *Neuer v American Art Clay Co., Inc.*, Index No. 190335/11 (Sup. Ct. NY Co. Nov. 9, 2012, Heitler, J.). Among other things, I held that it was immaterial whether the plaintiff quantified his alleged exposure so long as an expert laid a scientific foundation with regard to same. *See 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.")

In this case, the plaintiff's expert list was disclosed to the defendants on or about September 20, 2012. (Plaintiff's exhibit B). Dr. Barry Castleman is plaintiff's state-of-the-art expert. Through his affidavit, sworn to October 9, 2012 (plaintiff's exhibit J), plaintiff argues that the dangers of

asbestos exposure were well known in the railroad industry as early as the 1930's. Dr. Castleman avers that the railroad industry trade group, the Association of American Railroads (the "Association"), discussed the dangers of occupational asbestos exposure at their annual meetings. Dr. Castleman refers to the proceedings of Association's 1935 meeting, which provide that asbestosis was a major concern to industry doctors. The transcript further provides that the defendants' predecessors were members of the Association and attended the meeting. (See, e.g., plaintiff's exhibits K-N). Plaintiff also submits a copy of the Association's 1937 proceedings, during which it appears the attendees discussed guidelines to prevent asbestos exposure, including wetting-down methods, respirators, and warnings. (Plaintiff's exhibit L, p. 17-22). Mr. Ruff testified that he was never given a mask, respirator, or other protective equipment while performing his duties. Nor does it appear that the defendants informed him that asbestos was hazardous to his health.

Plaintiff also submits an affidavit from Dr. Jacqueline Moline, who is plaintiff's designated expert on causation. In her affidavit,[2] Dr. Moline opines as to the scientific literature linking visible asbestos dust to disease. After reviewing the plaintiff's deposition and medical records, Dr. Moline concludes, "to a reasonable degree of medical certainty, that Mr. Ruff's exposure to asbestos while employed as a mechanic . . . between 1946 and 1976 was a substantial contributing factor to his lung cancer." (Plaintiff's exhibit O, ¶ 10). This basic theory of causation has been consistently upheld by the Appellate Division, First Department. *See Penn v Amchem Prods.*, 85 AD3d 475, 476 (1st Dept 2011); *Lustenring v. AC&S, Inc.*, 13 AD3d 69, 70 (1st Dept 2004).

Taken together, the evidence suggests that the defendants knew or should have known that asbestos presented significant dangers to the plaintiff's health and failed to warn him of same, and

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[2] Dr. Moline's affidavit, sworn to November 28, 2012, is submitted as plaintiff's exhibit O.

further raises an issue of fact whether Mr. Ruff's occupational asbestos exposure was a substantial cause of his injuries.

The court has considered the defendants' remaining contentions and finds them to be without merit.

Accordingly, and it is hereby

ORDERED that the motions by American Premier Underwriters, Inc. and American Financial Group, Inc for summary judgment are denied in their entirety.

This constitutes the decision and order of the court.

DATED: 3.8.13

SHERRY KLEIN HEITLER
J.S.C.