SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190203/2012
LOGAN, JOHN
vs.
A.P. MOLLER-MAERSK, INC.,
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 190203/12

MOTION DATE _____

MOTION SEQ. NO. 002

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 6.17.13

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

Dated: 6.17.13

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

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

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

----------X

JOHN LOGAN and GAIL LOGAN

Index No. 190203/12
Motion Seq. No. 002

Plaintiffs,

DECISION & ORDER

-against-

A.P. MOLLER-MAERSK, INC., et. al.,

Defendants.

----------X

SHERRY KLEIN HEITLER, J.:

Defendant Georgia Pacific, LLC ("GP") has moved pursuant to CPLR 3212(b) for summary judgment in its favor on all claims and cross-claims asserted against it on the ground that there is no proof to show that plaintiff John Logan was ever exposed to asbestos fibers released from a GP product. Co-defendant Union Carbide Corporation ("UCC") cross-moves to join GP's motion for summary judgment on all claims and cross-claims asserted against it, also on the ground that there is no proof to show that plaintiff John Logan was ever exposed to asbestos fibers released from a UCC product. In addition to arguments that pertain to UCC's individualized defense in this action, UCC asserts its motion for the same reasons and on the same facts as set forth in the GP motion papers. At this writing, as between plaintiffs and GP, this action has been settled, and GP's motion is therefore denied as moot. This decision and order addresses only UCC's motion, which is still open.

BACKGROUND

Plaintiff John Logan was diagnosed with mesothelioma on March 5, 2012. This action was commenced on April 18, 2012 to recover for personal injuries allegedly caused by Mr. Logan's

exposure to asbestos. Mr. Logan was deposed over the course of three days on May 2, 3 and 4, 2012.[1]

In 1966 John Logan and his wife Gail Logan ("plaintiffs") moved into a single-family residence at 10 Lincoln Place, New Paltz, New York. In 1977, Mr. Logan personally began home renovations that would continue, on and off, until the mid-1990's. Relevant to this motion is the remodeling work Mr. Logan performed between 1977 and early 1978, which included the building of a small addition that doubled the size of the plaintiffs' dining room and enlarged a porch, and the installation of a full upstairs bathroom directly above the dining room. Mr. Logan testified that he installed sheetrock walls in these rooms and applied joint compound to seal the seams. He also testified that GP was one of the manufacturers of the joint compounds that he used. Between 1963 and 1985 UCC sold a proprietary form of raw chrysotile asbestos under the brand name "Calidria". One Calidria product line identified as "SG-210" was designed, marketed and sold for use in the manufacture of joint compound. It is undisputed that UCC sold SG-210 to GP and that SG-210 was integrated into GP's joint compound products.

GP's moving papers include a September 25, 2012 "expert report" by Drew R. Van Orden, PE, an engineer and senior scientist with the RJ Lee Group, Inc.,[2] who tested two samples identified as joint compound extracted from sheetrock walls constructed by Mr. Logan in his home during the relevant time period. Mr. Van Orden's analysis of the samples, which were collected by a colleague

---

[1] Mr. Logan's deposition testimony is submitted as GP's Exhibits B, C and D, and as plaintiffs' collective exhibit 2.

[2] Mr. Van Orden's report and his affidavit sworn to October 24, 2012 confirming his findings are annexed as Exhibits F and G, respectively, to GP's moving papers.

from a different company (AET, Inc.) on September 11, 2012, included polarized light microscopy, transmission electron microscopy, and x-ray powder diffraction. He concluded that the samples revealed no evidence of asbestos. In support of its request for summary judgment UCC relies on Mr. Van Orden's report as set forth in GP's papers.

UCC also argues that it is entitled to summary judgment because it was one of at least three companies which supplied asbestos to GP during the relevant time period, and that plaintiffs cannot show that the GP joint compound to which Mr. Logan allegedly was exposed contained SG-210 Calidria as opposed to another manufacturer's asbestos. UCC argues that GP ceased manufacturing asbestos-containing joint compound in May of 1977, before Mr. Logan began using the product in his home in the summer of 1977. UCC further asserts that it had no duty to warn Mr. Logan of the dangers associated with Calidria because it provided adequate warnings to GP.

Plaintiffs submit that apart from special orders and test shipments which were not available to the general public, all asbestos-containing joint compound manufactured by GP in the northeastern United States from 1970 until as late as 1977 contained only SG-210 Calidria and that Mr. Logan necessarily was exposed thereto while working with GP joint compound which he had to have purchased for the renovations to his home at least by the summer of 1977. Plaintiffs contend that the Van Orden sampling report is flawed because the results are not representative of the entire areas where Mr. Logan used the GP joint compound. Plaintiffs further argue that the actual test samples are unreliable because they are of improper depth and length. Plaintiffs assert that UCC had a duty to warn of the hazards associated with asbestos and that in this regard the adequacy of any warnings provided by UCC to GP is a question of material fact that must be decided by a jury.

DISCUSSION

Summary judgement is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). In asbestos-related litigation, if the moving defendant makes a *prima facie* showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for the plaintiff to show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 205 (1st Dept 1990). The identity of a manufacturer of a defective product may be established by circumstantial evidence which is not speculative or conjectural. *See Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 (1996).

In support of its motion, UCC relies primarily on the GP test results of the site inspection conducted on September 11, 2012 at the Logan home. As set forth above, two samples identified as joint compound were extracted from two of the walls that Mr. Logan erected there between 1977 and 1978. These samples were collected by an employee of another company, AET, Inc., and forwarded by FedEx to Mr. Van Orden to be tested for their asbestos content. The Van Orden report dated September 25, 2012, concludes that "[n]o asbestos (chrysotile or amphibole) was detected in either sample."

In light of the Van Orden conclusion, and in reliance on this court's decision in *Miceli v Anchor Packing Company et al.*, Index No. 190234/09 (Sup. Ct. NY Co. Mar. 13, 2012), UCC

claims it is entitled to summary judgment. In *Miceli, supra*, the plaintiff alleged that he was exposed to asbestos from GP joint compound while installing sheetrock during a home renovation. In support of its summary judgment motion, GP offered into evidence seven wall samples which were analyzed by Mr. Van Orden for their chemical composition and found to contain no asbestos. The *Miceli* plaintiff argued that Mr. Van Orden's findings were unreliable due to the methodology behind the collection of the samples. Nevertheless, in the circumstances of that case, this court ruled in favor of GP. In *Miceli*, plaintiff's submissions were limited and insufficient to call Mr. Van Orden's conclusions into question. *See id.* at 4. In this case, however, on November 13, 2012, plaintiffs had the opportunity to depose Mr. Van Orden wherein he testified that the samples taken from Mr. Logan's residence were not representative of the entire areas where Mr. Logan worked (plaintiffs' affirmation in opposition to GP's motion for summary judgment, Exhibit 4, pp. 10-11):

Q. Is it your understanding that representativeness in the field of bulk sample analysis means that you're able to take the results of a particular sample and generalize it to an area greater than just a small area that might have been sampled, as you generally understand it?

A. Yeah, that's a pretty good way of describing it.

Q. . . . Your report in this case reports the analysis done on two different bulk samples; does it not?

A. Yes, sir.

Q. Okay. And the report doesn't mention anything other than what the results of the two samples are. Is that fair to say?

A. That's correct.

Q. Are you taking the results of either one or both of the samples that you got and generalizing it to something greater than the samples themselves? . . .

A. Well, I'm taking the data and just saying, this is what we found in those samples.

Q. And nothing else? Not that that's not important. We're going to go over that. But you're not saying anything else other than that? . . .

A. Not that I can think of.

The problem created by such a limited result is exacerbated by the fact that only two samples, one from each room, were collected from the Logan house. According to Mr. Van Orden, Environmental Protection Agency protocols for bulk sampling recommend that depending on the size of the area in question as many as nine samples should be taken, but where it is cost prohibitive to do so, a *minimum* of three samples should be taken for each area measuring less than 1,000 square feet. In this case, adherence to the minimum EPA guidelines would have resulted in a total of six samples being tested, not two.

Plaintiffs have also shown that the two samples delivered to Mr. Van Orden for testing were themselves unreliable. In this regard, Mr. Van Orden reviewed video tapes of the collection process and testified that the samples extracted by AET, Inc., lacked the proper depth and length (plaintiffs' Exhibit 4, *supra*, pp. 34-35):

Q. . . . Is it fair to say that Mr. Celentano did not take the four to five inches of sampling that you had requested be taken? . . . From either one of the samples?

A. Certainly didn't -- the sample I got wasn't what I was expecting.

Q. Okay. And in what way?

A. Well, I was expecting pieces of wallboard more or less intact with joint compound in between. And this was more, let me chip out a seam.

Q. A gouging type of job?

A. Chip out the seam type of thing, yes.

Q. RJ Lee has done sampling in the past for joint compound. Correct?

A. Yes, sir.

Q. And I know you or your group has used, at times, something called a hole saw, s-a-w. And a hole saw takes a nice, clean sample that can be analyzed properly. Is that fair to say?

A. Yeah. We've used, in the past, like a circular hole cutting saw -- it's about three,

four inches in diameter -- that makes it nice and easy to do. We've also used, on other occasions, regular wallboard saws, you know, to cut squares out. So it's part preference and part convenience.

Q. But the goal, whether you're using the wallboard saw or the hole saw, is to, in essence, try to extract the layers as they exist on the wall rather than poking around and mixing it all together and putting it in the bag. Right?

A. The goal is to get full samples of all the joint compound, what's in between the board, what's on the surface. . . .

Mr. Van Orden then explained that a proper bulk sample contains distinct layers of wallboard, tape and joint compound. Otherwise there is a risk of sampling only wallboard and paint, but not joint compound.

In light of this testimony, insofar as UCC's motion is based on the site test of the Logan home and the Van Orden report, it is denied.

UCC also argues that plaintiffs' claims against it are speculative and that plaintiffs cannot show whether the GP joint compound alleged to have caused Mr. Logan's injuries contained SG-210 Calidria as opposed to another supplier's asbestos. Plaintiffs assert that the GP joint compound in this case necessarily contained Calidria because during the period relevant hereto UCC was the exclusive supplier of asbestos to GP's Akron, New York manufacturing facility which in turn supplied the entire northeastern United States, including New York where Mr. Logan's exposure is alleged to have occurred. Plaintiffs submit the deposition testimony of Charles W. Lehnert, manager of the GP group responsible for research and development of joint compounds at GP from 1965 to 1990. On two separate occasions, first in 2001 in a case venued in Madison County,

Illinois[3] and again in 2003 in a case venued in Travis County, Texas,[4] Mr. Lehnert testified, based on his review of all available records, that all formulations of GP's joint compound manufactured at the Akron plant between September 1970 and May 1977 contained some SG-210 Calidria (plaintiffs' Exhibit 6 at 107), except generally for the one gallon asbestos-free formulations first made available to the public in 1976 (*Id.* at 37).

In 2007 in an unrelated case venued in Harris County, Texas,[5] Mr. Lehnert testified that his previous testimony was inaccurate because it relied solely on handwritten notes from 2001 that referenced some of GP's asbestos formulas but not others.[6] He then testified that there were actually between 300 and 400 GP Ready-Mix joint compound formulations in use across all of GP's facilities, but that in preparing his 2001 notecards he considered only those formulas that contained Calidria asbestos. UCC contends that Mr. Lehnert's 2001 and 2003 testimony should not be considered because it failed to account for any of GP's asbestos-containing formulations that did not utilize Calidria and that the court should therefore rely on his 2007 testimony since it explains and corrects, rather than contradicts, Mr. Lehnert's previous oversight.

UCC's argument is that Mr. Lehnert's earlier testimony should not automatically "forever

---

3 Mr. Lehnert's October 3, 2001 deposition testimony is attached as Exhibit 8 to the plaintiffs' opposition papers.

4 Mr. Lehnert's October 14, 2003 deposition testimony is attached as Exhibit 6 to the plaintiffs' opposition papers.

5 Mr. Lehnert's March 7, 2007 deposition testimony is attached as Exhibit 11 to the defendant's moving papers.

6 Mr. Lehnert's handwritten notes are attached as Exhibit 9 to plaintiffs' opposition papers.

haunt this litigation".[7] That being said, I find that the evidence on the record fails to eliminate a critical question of fact. The handwritten notes upon which Mr. Lehnert relied in 2001 and 2003 in concluding that all formulations of GP's joint compound manufactured between September 1970 and May 1977 in Akron, New York contained Calidria show that SG-210 was used in every version of joint compound listed over that time period. By comparison, the formula sheets submitted by the defendant which purport to reinforce Mr. Lehnert's 2007 testimony do not similarly correspond to the time period of Mr. Logan's alleged exposure and are therefore not relevant to this motion.[8] Defendant maintains that the contents of Exhibit 1 establish the existence of numerous asbestos-containing formulas in use at GP's Akron, New York facility between September 1970 and May 1977 that did not utilize any Calidria. Significantly, these formula sheets are all dated in March or May 1970, months earlier than September 1970 and years before Mr. Logan made his GP joint compound purchases. Also, while the contents of Exhibit 2 may establish the existence of asbestos-free formulas in use at GP's Akron, New York facility in 1977, such evidence is in accordance with Mr. Lehnert's 2001 and 2003 testimony that certain asbestos-free formulations became available in 1976. Distilled to their essence, defendant's documentary evidence reinforces Mr. Lehnert's 2001 and 2003 testimony wherein he stated that up until September 1970 virtually all joint compound formulas had Phillip Carey's 7RF-9 asbestos, but from September 1970 forward all asbestos-containing formulas used SG-210 Calidria. As such, UCC's motion on this ground is also denied.

The defendant further submits that it had no duty to warn Mr. Logan of the hazards

---

[7] UCC's Reply Memorandum of Law, dated January 17, 2013, p. 5.

[8] Calidria-free Ready Mix formulas that contain asbestos and asbestos-free Ready Mix formulas produced at GP's Akron, New York facility are attached as Exhibit 1 and Exhibit 2 respectively to defendant's reply papers.

associated with asbestos because it was a bulk supplier of raw materials to GP which, as the manufacturer with control over the characteristics, packaging and use of the final product, was in a better position to warn ultimate users.

This court addressed near-identical issues in *Vega v Georgia Pacific, LLC, et. al.,* Index No. 190409/11 (Sup. Ct. NY Co. January 10, 2013), and in *Macek v CBS Corp., et. al.,* Index No. 190085/11 (Sup. Ct. NY Co. March 22, 2013). In those cases I held that while UCC had an affirmative duty to warn its customers of the dangers associated with Calidria asbestos, the adequacies of any such warnings were questions of fact to be determined by the jury. In addition, I held that UCC could not free itself of its duty to warn in light of evidence which indicated that UCC may have withheld highly relevant information from its customers regarding Calidria's health effects. As in *Vega* and *Macek,* the submissions on this motion show that UCC may not have provided GP with relevant information regarding health concerns associated with its asbestos product, and as such UCC's motion on this ground is denied.

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

Accordingly, it is hereby

ORDERED that Union Carbide Corporation's cross-motion for summary judgment is denied in its entirety, and it is further ordered that GP's motion for summary judgment is denied as moot.

This constitutes the decision and order of the court.

DATED: 6.17.13

SHERRY KLEIN HEITLER
J.S.C.