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

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MACHELLE MONIQUE MORALES, as Administratrix for the Estate of MILTON L. FORDHAM,

Index No. 190414/11
Motion Seq. 010

Plaintiff,

DECISION & ORDER

-against-

ABB LUMMUS CREST, et al.,

Defendants.

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SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant The William Powell Company ("Powell" or "Defendant") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it.[1] Defendant argues that there is no evidence to show that plaintiffs' decedent Milton Fordham was exposed to asbestos from its products and that it cannot be held liable for aftermarket asbestos-containing insulation manufactured by third parties. For the reasons set forth below, the motion is denied.

Mr. Fordham commenced this action on October 19, 2011. Although he died before his deposition could be completed,[2] Mr. Fordham had previously been deposed in connection with a former co-worker's asbestos personal injury case,[3] and among other things described how he was exposed to asbestos insulation associated with Powell pumps at several Long Island Lighting Company ("LILCO") power generating stations.[4]

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1 This is the second summary judgment motion brought by Powell in this case. The first was withdrawn without prejudice before it was fully submitted.

2 Plaintiff's exhibits C-E.

3 *Stumme v ABB Lummus Crest, et al.*, Index No. 106012/98 (Sup. Ct. NY. Co). See plaintiffs' exhibits' F-I.

4 Plaintiff's exhibit G, pp. 263-269.

Defendant's first summary judgment motion, filed on or about May 3, 2013, sought to discredit plaintiff's testimony as a matter of law by showing that it never manufactured pumps or external insulation. In support Defendant relied primarily on an affidavit from its corporate representative, Mr. William McClure[5] (McClure Affidavit, ¶ 2):

> Powell is not, and never has been, the manufacturer of any type of pumps, asbestos-containing or otherwise. Powell understands that plaintiff Milton Fordham testified that he was exposed to asbestos from external insulation which was applied to centrifugal pumps manufactured by Powell. I can state with certainty that neither the pumps nor the insulation could have been manufactured by Powell because Powell never manufactured, sold, distributed, or supplied such products.

In response plaintiff disclosed a portion of an American Standard catalog which depicts Powell "Lever Handle Oil Pumps" and an equipment manifest from one of the work sites identified by Mr. Fordham, LILCO's Far Rockaway Generating Station, which provides that Powell "Boiler Feedwater Pumps" had been installed there.[6] Defendant subsequently withdrew its motion.

Over a year later Defendant filed the instant motion grounded upon a second affidavit from Mr. McClure.[7] Therein he avers that the Powell product depicted in the American Standard catalog is "not a pump in the traditional sense of the word" but an "oiler, which was used on automobiles in the early days of automobile travel."[8] Significantly, Mr. McClure's affidavit does not address the LILCO manifest. Defendant's moving papers also take issue with Mr. Fordham's alleged inability to describe the Powell products he encountered in significant detail.

Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). In deciding a summary judgment

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5 See Affidavit of William J. McClure, sworn to March 27, 2013 ("McClure Affidavit"), submitted as plaintiff's exhibit J.

6 It is notable that the manifest identifies another piece of equipment as a Powell valve.

7 See Affidavit of William McClure, sworn to July 11, 2014 ("Supplemental Affidavit"), submitted as plaintiff's exhibit O.

8 *Id.* ¶ 3.

motion the court's role is to determine if any triable issues exist, not the merits of any such issues. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). In doing so, the court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013).

Here, Defendant has not unequivocally shown "that its product could not have contributed to the causation of plaintiff's injury . . .". *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). The court recognizes that it is difficult to prove a negative, but Defendant has not even met its *prima facie* burden, by, for example, submitting Powell catalogs or literature depicting its line of products. As such the McClure affidavits are entirely conclusory. Defendant's argument that the LILCO manifest is uncertified and therefore inadmissible is also unavailing. On a summary judgment motion the court may consider evidence that otherwise may be inadmissible at trial. *See Zimbler v Resnick 72nd St Assoc.*, 79 AD3d 620 (1st Dept 2010); *DiGiantomasso v City of New York*, 55 AD3d 502 (1st Dept 2008); *Oken v A.C.&S.*, 7 AD3d 285, 285 (1st Dept 2004); *Wertheimer v New York Prop. Ins. Underwriting Ass'n*, 85 AD2d 540, 541 (1st Dept 1981). In this same vein, Mr. Fordham's alleged failure to describe its products in detail at most presents a credibility issue for the trier of fact. *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . .The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony."); *see also Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986); *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002).

Defendant has also failed to establish, *prima facie*, that it had no duty to warn of the hazards associated with asbestos-containing aftermarket insulation applied to its products. As set forth in *Matter of New York City Asbestos Litig.* [*Dummit*], 2014 NY App. Div. LEXIS 4964 (1st Dept July 3, 2014), the "bare-metal" defense would only shield a manufacturer that has no "active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce". *Id.* at *33. But "where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product." *Id.* at *29. There is nothing in this record (i.e., product catalogs, product designs, specifications) that reveals Defendant's approach to asbestos components or show whether it specified and/or recommended asbestos-containing insulation.[9] By such failure Defendant has not met its burden for purposes of this summary judgment motion, and the court need not consider the sufficiency of plaintiff's opposition. *Reid, supra* (citing *Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851, 852 [1985]); *see also Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993).

Accordingly, it is hereby

ORDERED that the William Powell Company's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 12-3-14

SHERRY KLEIN HEITLER, J.S.C.

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[9] *But see Peraica v A.O. Smith Water Products Co.*, Index No. 190339/11, 2012 NY Misc. LEXIS 4204 (Sup. Ct. NY Co. Aug. 27, 2012, Heitler, J.). In *Peraica* the court granted summary judgment to a defendant pump manufacturer that provided product literature showing that it directed its customers not to insulate their pump brackets or motors.