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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

HUGH DeHAVEN and JUDITH MARILYN DeHAVEN,

Plaintiffs,

- against -

AIR & LIQUID SYSTEMS CORPORATION, as , Successor to Merger to Buffalo Pumps, Inc., *et al.*,

Defendants.

INDEX NO. 190192/2018
MOTION DATE 10/23/2019
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on Gardner Denver Inc.'s motion for summary judgment and plaintiffs' cross-motion to compel the production of discovery:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 9

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Gardner Denver Inc.'s (hereinafter "defendant") motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims asserted against it is granted. Plaintiffs' cross-motion to compel the production of discovery is denied.

Plaintiff, Hugh DeHaven was diagnosed with mesothelioma in April of 2018 (Mot. Exh. C, Interrogatory 8). It is alleged that Mr. DeHaven was exposed to asbestos during his service in the United States Navy from 1962 through 1968. Mr. DeHaven's alleged exposure to asbestos - as relevant to this motion - was during the time he served on the U.S.S. Redfin (SS-272), a submarine, for about six months in 1963 (Mot. Exh. D, pgs. 37, 41, 53 and 56); the U.S.S. Intrepid (CVS-11) from 1965 through 1967 (Mot. Exh. D, pgs . 73 and 89); and on the USS Halfbeak (SS-352) from 1967 through December 23, 1968 (Mot. Exh. D, pgs. 89-91)

Mr. DeHaven was deposed over the course of two days on August 2 and 3, 2018 (Mot. Exh. D). His De Bene Esse deposition was conducted on August 14, 2018 (Mot. Exh. E). Mr. DeHaven testified that he served as a Machinist Mate Third Class in an Auxilliary Gang for six months on the U.S.S. Redfin (SS-272). He stated that his work on the submarine included repairing, replacing and maintaining pumps and valves. Mr. DeHaven testified that he was also responsible for doing the packing and gasket work on valves and pumps on the U.S.S. Redfin (SS-272) (Mot. Exh. D, pgs. 37, 41-43, 53 and 56, and Mot. Exh. E, pgs.19-20).

Mr. DeHaven testified that he was assigned to the U.S.S. Intrepid (CVS-11) from 1965 to 1967. Mr. DeHaven testified that he was present on the U.S.S. Intrepid (CVS-11) when it was brought into the Brooklyn Navy Yard in 1965, and he worked on the full overhaul over a period of six months. He stated that he was responsible for disassembling and identifying parts that needed to be replaced, repaired and serviced. Mr. DeHaven testified that he "tore the place apart. I saw asbestos floating around. It looked like a snow storm-type white out" (Mot. Exh. D, pgs. 89, 208-210, and Exh. E, pgs. 22-23 and 30).

Mr. DeHaven testified that on the U.S.S. Intrepid (CVS-11) he was part of the "evaporator gang" responsible for "making boiler make up feed water and potable water, and water for the steam catapults." He stated that the "evaporator gang" was also responsible for maintenance or repairs of valves, pumps and evaporators in the Forward Auxiliary Room (Mot. Exh. D, pgs. 73, 75, and 80). He testified that he worked on either the eighth or ninth level, and that "levels" are the number of decks below the main deck. Mr.

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

Dehaven stated he was an intermediate supervisor responsible for fourteen people and worked in three main rooms, the forward auxiliary room, the No. 3 Fire Room, and the aft auxiliary engineering spaces (Mot. Exh. D, pgs. 76-78, and 201). He stated that for pumps he supervised and re-did the work of others. Mr. DeHaven stated that he did the repacking work, and believed he was exposed to asbestos through the dry packing materials which were described as black and silver and compressed and looked like mica (Mot. Exh. D, pgs. 208-212). Mr. Dehaven claimed that he was also exposed to visible asbestos dust created by other men performing engine work in the same area of the engine room. He stated that he was in the presence of the other workers up to eight hours, minimum (Mot. Exh. D, pgs. 188-189).

Mr. DeHaven testified that he worked as part of the evaporator gang on the U.S.S. Halfbeak (SS-352) from 1967 through December 23, 1968. He stated that his rank was Machinist Mate Second Class while on the U.S.S. Halfbeak (SS-352) and he was generally assigned to the forward engine room and the trim manifold located in the control room during battle stations. Mr. DeHaven testified that the U.S.S. Halfbeak (SS-352) was dry docked in a Philadelphia shipyard for six months, that included the summer season, and that during that time period he disassembled, overhauled and reassembled purifiers, pumps and valves. He specifically recalled working on transfer pumps and on valves associated with the engine (Mot. Exh. D, pgs. 89-97)

Plaintiffs commenced this action on July 3, 2018 (NYSCEF Doc. # 1 and Mot. Exh. A). Issue was joined on August 14, 2018 by defendant filing its Verified Answer (NYSCEF Doc. # 30 and Mot. Exh. B).

Defendant's motion seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it.

Defendant claims that the decedent's inability to specifically identify any of the pumps he observed on board either the U.S.S. Redfin (SS-272), the U.S.S. Intrepid (CVS-11), and on the USS Halfbeak (SS-352) together with the affidavit of defense expert, Mr. Clancy Cornwall, establishes that there is no evidence that decedent was exposed to asbestos from defendant's pumps warranting summary judgment.

Defendant' s expert, Mr. Clancy Cornwall, is a former lieutenant in the U.S. Naval Reserve responsible for decommissioning surveys of the James River Reserve Fleet. He also holds a Second Assistant Engineers License, Diesel Propulsion, Unlimited Horsepower and Third Assistant Engineer License, Steam Propulsion, Unlimited Horsepower issued by the U.S. Coast Guard. Mr. Cornwall states in his affidavit that he reviewed documents pertaining to the U.S. Navy at the National Archives and Records Administration facility known as the Archives II, located in College Park, Maryland (Mot. Exh. H).

Mr. Cornwall's November 12, 2018 affidavit states that a review of naval record shows that the defendant did not provide any compressors or pumps to either the U.S.S. Redfin (SS-272), or the USS Halfbeak (SS-352). Mr. Cornwall states that on the U.S.S. Intrepid (CVS-11), the defendant provided two Fresh Water Booster Pumps driven by an electric motor installed on the Forecastle Deck at Frame 90 on the Starboard side; and two Emergency Fire Pumps driven by a diesel engine in the bow and stern of the ship in Emergency Diesel Fire Pump Rooms. He states that none of the defendant's pumps were installed in either the engine room or the fire rooms that Mr. Dehaven testified he worked in while aboard the U.S.S. Intrepid (CVS-11). Mr. Cornwall states that the defendant's pumps on the U.S.S. Intrepid (CVS-11) used fresh or salt water at the ambient temperature of the ocean, were made of bronze and did not require insulation (Mot. Exh. H).

Defendant alternatively argues that it is entitled to summary judgment on causation. In support of its argument, defendant provides the sworn affidavits and reports of its experts, Dr. Sheldon Rabinovits, Ph.D., CIH, a certified industrial hygienist with a doctorate in physiology and pharmacology, and Dr. James McCluskey, MD, MPH, Ph.D., FACOEM, board certified in occupational medicine with a doctorate in toxicology and risk assessment (Mot. Exhs. I and J).

Dr. Rabinovitz, reviewed Mr. DeHaven's deposition testimony, plaintiffs' response to defendant's interrogatories, Mr. Cornwall's affidavit, and refers to studies conducted by the United States Navy that showed workers would be exposed to less than 0.01 f/cc that are greater than five microns in length. Dr. Rabinovits states that those fibers have not been shown to have toxicity. He also refers to Occupational Safety and Health Administration's (OSHA) current standard of 0.1 f/cc. Dr. Rabinovits determines that Mr. DeHaven was not exposed to any asbestos from defendant's pumps and even if he had been exposed to asbestos it would not have been a sufficient dose to cause mesothelioma (Mot. Exh. I).

Dr. McCluskey reviewed Mr. DeHaven's medical records, deposition testimony, and Mr. Corwall's affidavit. He states that Mr. DeHaven had no evidence of pleural plaques or diffuse pleural thickening. He concludes that there is no objective evidence to suggest that Mr. DeHaven was exposed to a "significant" amount of asbestos from defendant's pumps or chrysotile containing packing materials. He further concludes that there is no scientifically reliable evidence to suggest that if there was asbestos in defendant's products, it either contributed to or caused Mr. DeHaven's mesothelioma (Mot. Exh. J).

Plaintiffs did not oppose or make any arguments on the issue of causation. Plaintiffs have not provided any expert testimony to raise an issue of fact, or produced other evidence on the issue of causation. Defendant has stated a prima facie case on the issue of causation with the reports of its experts Dr. Sheldon Rabinovits and Dr. James McCluskey (Mot. Exhs. I and J).

Plaintiffs cross-move to compel discovery pursuant to CPLR §3124, they seek to hold defendant's motion in abeyance or have it denied without prejudice pending the completion of discovery.

Plaintiffs argue that defendant's motion should be denied because of their failure to provide answers to their Product Identification Interrogatories dated July 25, 2018 (Cross-Mot. Exh. C). Plaintiffs claim that they are entitled to all of defendant's internal records for the ships decedent served on and any documents defense expert, Clancy Cornwall, relied on. Plaintiffs state that good faith efforts were made to obtain the discovery; as proof they provide a copy of a single e-mail sent to defense counsel on March 26, 2019, almost two months before plaintiffs filed the Note of Issue which was filed on May 23, 2019 (Cross-Mot. Exh. C and Mot. Exh. F). It is plaintiffs' contention that defendant "brazenly" filed this motion for summary judgment on July 8, 2019 without complying with discovery demands.

The Court may compel compliance with demands, pursuant to CPLR §3124, upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the discovery sought is "material and necessary" as legitimate subject of inquiry or is being used for purposes of harassment to ascertain the existence of evidence (Roman Catholic Church of the Good Shepard v. Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994] and Allen v. Crowell-Collier Publ.Co., 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]). CPLR §3101[a] permits full disclosure of all "material and necessary" matter in the prosecution or defense of an action" (MSCI Inc. v. Jacob, 120 A.D. 3d 1072, 992 N.Y.S. 2d 224 [1st Dept. 2014]).

Once the Note of Issue has been filed, disclosure is more limited, requiring the party seeking disclosure to establish "unusual or unanticipated circumstances" and the need to prevent "substantial prejudice (see 22 NYCRR 202.21(d) and Madison v. Sama, 92 AD 3d 607, 938 NYS 2d 802 [1st Dept. 2012]).

Plaintiffs' have not stated any "unusual or unanticipated circumstances" for their failure to obtain discovery prior to the filing of the Note of Issue and Certificate of Readiness for Trial on May 23, 2019, which indicated that all discovery is complete, and waiting until after the defendant filed this motion for summary judgment (NYSEF Doc. # 119 and Mot. Exh. F). The mere incompleteness of discovery is not an "unusual or unanticipated circumstance," warranting denial of plaintiff's cross-motion to compel (Di Maria v. Coordinated Ranches, Inc., 114 AD 2d 397, 494 NYS 2d 123 [2nd Dept., 1985]).

Plaintiffs refer to CMO Section IX (D), claiming it mandates the defendant's compliance with their product identification interrogatories and states that this is a basis to deny summary judgment pending the completion of discovery.

CMO Section IX(D) states in relevant part:

" Product Identification Interrogatories. Plaintiffs may serve on individual defendants standard product identification interrogatories with respect to particular worksites. Defendants shall respond to plaintiff's product identification interrogatories per the CPLR. The Special Master may extend the time to answer for good cause shown. A defendants objections to any such interrogatories shall be brought before the Special Master pursuant to Section III.C."

CMO Section III(C) states in relevant part,

" In the event of a discovery dispute the requesting party shall notify the Special Master without delay and request intervention. No motion to compel discovery shall be made without first seeking the assistance of the Special Master."

Plaintiffs have not shown that they complied with CMO Section III(C) which requires that they notify the Special Master of a discovery dispute "without delay" and request intervention. They provide no proof that they otherwise sought the assistance of the Special Master to compel the defendant's response to the Product Identification Interrogatories prior to filing the Note of Issue. Plaintiffs lack of diligence cannot be rewarded. Plaintiffs should have sought the requested discovery during the eight month period from July 25, 2018 through March 26, 2019 when a single email requesting discovery responses was sent to defense counsel (Cross-Mot. Exhs. C and Exh. D). They should have made additional demands for compliance with their Product Indentification Interrogatories, or sought the intervention of the Special Master before filing the Note of Issue on May 23, 2019 (Cross-Mot. Exh. F). Plaintiffs have not shown that the defendant should be forced to comply with CMO Section IX(D), after they also failed to comply with the provisions of the CMO Section III(C).

Pursuant to CPLR §3212(f), summary judgment may be denied or continued, if the summary judgment motion curtailed the discovery process and there is evidence the information is exclusively in the movant's possession (Maysek & Moran v. S.G. Warburg & Co., Inc., 284 AD 2d 203, 725 NYS 2d 546 [1st Dept., 2001] and Miller-Francis v. Smith-Jackson, 113 AD 3d 28, 976 NYS 2d 34 [1st Dept., 2013]). Summary judgment cannot be avoided by a speculative claim that discovery is needed, or the mere hope that discovery will produce relevant evidence giving rise to a triable issue of fact (DaSilva v. Haks Engineers, Architects and Land surveyors, P.C. , 125 AD 3d 480, 4 NYS 3d 162 [1st Dept., 2015]).

Plaintiffs delayed or voluntarily failed to act in pursuing discovery for eight months (from July 18, 2018 to March 26, 2019); on May 23, 2019 they filed a Note of Issue with a Certificate of Readiness for Trial indicating discovery is complete; they failed to seek the assistance of the Special Master, and they failed to file a motion seeking to compel the alleged outstanding discovery prior to the defendant filing this motion for summary judgment (see Cooper v. 6 West 30th Street Tenants Corp., 258 AD 2d 362, 686 NYS 2d 245 [1st Dept., 1999]). The cross-motion to compel discovery does not satisfy CPLR §3212(f), warranting denial of the relief sought.

Furthermore, to the extent plaintiffs seek discovery and production of the records relied on by the defendant's expert, Mr. Clancy Cornwall, his affidavit specifically states that he relied on naval documents located at the National Archives and Records Administration facility known as the Archives II, located in College Park, Maryland. Plaintiffs have not shown that copies of the relevant records are even in the defendant's possession or unavailble to the plaintiffs at the National Archives (Mot. Exh. H).

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied this standard, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]).

Defendant's expert, Clancy Cornwall, has stated that there were no compressors or pumps manufactured by the defendant on either the U.S.S. Redfin (SS-272), or the USS Halfbeak (SS-352). Mr. Cornwall states that the defendant's pumps on the U.S.S. Intrepid (CVS-11) during the time Mr. DeHaven served aboard the ship, used fresh or salt water at the ambient temperature of the ocean, were made of bronze and did not require insulation. In any case, Clancy Cornwall states Mr. DeHaven's deposition testimony established he did not work in the areas the pumps were located on the U.S.S. Intrepid (CVS-11) (Mot. Exh. H). Defendant has made a prima facie case of lack of liability through its expert, Clancy Cornwall.

Plaintiffs failed to raise issues of fact to defeat defendant's motion for summary judgment. They rely on Mr. DeHaven's deposition testimony which did not provide the names of any manufacturer of the pumps he worked on. Plaintiffs failed to provide any other evidence - including their own expert's search of records available at the National Archives and Records Administration facility known as the Archives II - to raise an issue of fact. Plaintiffs attempt to place the onus on the defendant for their own lack of diligence in obtaining responses to Product Identification Interrogatories, before filing the Note of Issue, is not a basis to deny or continue the defendant's motion. Plaintiffs also did not oppose or make any arguments on the issue of causation. Defendant has stated a prima facie case and is entitled to summary judgment.

ACCORDINGLY, it is ORDERED that defendant, Gardner Denver Inc.'s motion for summary judgment pursuant to CPLR §3212, to dismiss the plaintiffs' complaint and all cross-claims asserted against it is granted, and it is further,

ORDERED that the plaintiffs' claims in their complaint and cross-claims asserted against defendant Gardner Denver Inc. are severed and dismissed, and it is further,

ORDERED that all claims and cross-claims asserted against the remaining defendants, continue to be in effect, and it is further,

ORDERED that plaintiffs' cross-motion pursuant to CPLR 3124 to compel the production of discovery against defendant Gardner Denver, Inc. is denied.

ORDERED that defendant Gardner Denver Inc. serve a copy of this Order with Notice of Entry on the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER:

Dated: November 25, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE