SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 13**

Justice

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EILEEN LOVE, as Administratrix for the Estate of MICHAEL A. LOVE and EILEEN LOVE, Indivdually,

Plaintiff,

- v -

AERCO INTERNATIONAL, INC., et. Al.,

Defendants.

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INDEX NO. 190351/2018

MOTION DATE 11/05/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for DISMISS.

Before the Court is defendant CSC Scientific Company, Inc.'s, ("CSC") motion for summary judgment, pursuant to CPLR 3212, granting summary judgment in favor of CSC dismissing Plaintiff's Complaints and all cross-claims against CSC; (2) in the alternative, awarding CSC partial summary judgment dismissing all claims and cross claims against CSC for potential liability arising out of alleged asbestos exposure occurring prior to July 31, 1976 and after April 17, 1979. Plaintiffs oppose the motion.

CSC's motion contends that plaintiffs have failed to identify a CSC product as a source of decedent's asbestos exposure over a period from 1976 to 1979 or at any other time. The case at issue arises from plaintiff Michael Love's ("Decedent"), July 31, 2018, diagnosis of mesothelioma, which led to his death on November 9, 2019. Plaintiff alleges that Decedent's disease was caused by his exposure to asbestos when he worked with asbestos gloves and asbestos boards purchased from CSC throughout his career in the stained-glass industry.

Here, upon motion for summary judgment, CSC alleges that it's potential liability is limited to the time period of July 31, 1976 to 1979 and that plaintiff has failed to identify CSC's product as a source of decedent's asbestos exposure at any other time.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). A defendant seeking summary judgment in a products liability case involving asbestos must make a prima facie case that its product could not have contributed to the causation of the plaintiff's injury (*Reid v Georgia-Pacific Corp.,* 212 AD2d 462 [1st Dept 1995]). An opinion on causation in a toxic tort should set forth: (1) a plaintiff's exposure to a toxin; (2) that the toxin is capable of causing the particular illness, or "general causation"; and (3) that plaintiff was exposed to sufficient levels of the toxin to cause the illness, or "specific causation" (*Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]).

"It is not enough for a plaintiff in a toxic tort action for damages to show that a certain agent sometimes causes the kind of harm that he or she is complaining of; at a minimum, there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered" (*Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 784 [2014] quoting *Wright v. Willamette Indus., Inc.,* 91 F.3d 1105, 1107 [8th Cir.1996]).

Here, Defendant argues that the absence of evidence of Decedent's exposure to CSC's products establishes CSC's freedom from liability, and shifts to plaintiff the burden of demonstrating, by admissible evidence, the existence of a factual issue requiring a trial of the action, or of tendering an acceptable excuse for plaintiff's failure to do so. CSC argues that to

meet this burden, plaintiff must first establish that Decedent was exposed to the defendant's product, which requires identification of the specific defendant-manufacturer of the offending product (*Cawein v. Flintkote Co*., 203 A.D.2d 105, 106 [1st Dept 1994]; *Diel v. Flintkote Co*., 204 AD2d 53, 611 NYS2d 519 [1st Dep't 1994] [finding that "[i]n order to succeed on their claim, the plaintiffs had to establish that the decedent was exposed to the defendant's product and that it was more likely than not that this exposure was a substantial factor in his injury"]).

According to CSC, plaintiff has not presented evidence creating a reasonable inference that Decedent breathed in respirable asbestos fibers from CSC products between 1976 and 1979 and, thus, proximate cause cannot be established. Defendant notes that the present case involves a similar set of facts as that in *Cawein* and *Diel* and should be decided in the same manner. Defendant contends that plaintiff in the instant case has not presented evidentiary proof creating a reasonable inference that Mr. Love inhaled asbestos fibers from actually working with CSC products. Defendant argues that plaintiff cannot defeat the present motion with unsupported, speculative, or conclusory allegations and that the mere presence of the defendant's asbestos-containing products at a worksite is insufficient to overcome a summary judgment motion (*Healy v. Firestone Tire and Rubber Company*, 87 NY2d 596 [1996]).

Defendant argues that Decedent could not identify the manufacturer of any of the asbestos gloves or boards. Decedent testified that gloves ordered from Fisher Scientific, Thomas Scientfic, Dick Blick, Triarco, and Cenco [CSC] were identical and that since Decedent did not unpack the box of gloves he had no way of knowing if the gloves came from any of the companies mentioned (Mot Exh F at 259-260). Further, defendant notes "Decedent recalled seeing a box of boards from Cenco [CSC]. However, he offered no testimony whatsoever that he ever actually performed the scoring, snapping or scraping work on a board supplied from Cenco"

(Mot at 5). Thus, defendant argues that the product identification in Decedent's testimony is insufficient to establish CSC's liability.

Defendant notes that even if it's Cenco products contained asbestos, CSC cannot be held liable for any exposure to asbestos from Cenco products which may have occurred before July 31, 1976 and after April 17, 1979. Defendant attaches an Acquisition Agreement dated July 31, 1976 in which CSC acquired all of Cenco Incorporated's assets and an Asset Purchase Agreement dated April 17, 1979, in which it sold all Cenco assets to EBB Corporation (Mot, Exh G & H). Accordingly, defendant argues that it cannot be held liable under any product liability theory relating to a Cenco product outside of the time frame of July 31, 1976 and April 17, 1979.

Defendant notes that the issue of limitations as to product liability, arising out of alleged asbestos exposure from Cenco products was litigated and resolved before the United States District Court in *CSC Scientific Company, Inc. v. Manorcare Health Services, Inc*. 867 F.Supp.2d 368 [SDNY 2011]). In an Opinion and Order dated September 28, 2011, the Honorable Richard K. Eaton found that between 1957 and 1987, three separate entities owned the assets of Central Scientific business which included products sold under the Cenco brand and that the assets and liabilities for Cenco products were held by CSC from July 31, 1976 to April 17, 1979 (*id.*).

In opposition, plaintiff argues that there may be more than one proximate cause of an injury and that the plaintiff is not required to demonstrate "that the precise manner in which the accident happened, or the extent of the injuries was foreseeable" (*Derdiarian v Felix Contr. Corp*., 51 NY2d 308, 315 [1980]). A plaintiff need not demonstrate the precise cause of his/her damages, but only facts and conditions from which defendant's liability can be reasonably inferred (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). Plaintiff argues that

defendant has failed to meet its burden to show that its product could not have contributed to the causation of plaintiff's asbestos-related injuries (*In re New York City Asbestos Litig.: DiSalvo v. A.O. Smith Water Prods*., 123 AD3d 498, 499 [1st Dept 2014]).

Here, plaintiff claims to have demonstrated the existence of triable questions of fact that require trial. Plaintiff notes that testimony and documents demonstrate that Decedent used and was exposed to Cenco products throughout his career, including the period between July 31, 1976 and April 17, 1979, for which plaintiff avers, CSC acknowledges responsibility. Plaintiff argues that Decedent and his wife plaintiff Eileen Love both identified Cenco asbestos gloves and boards, and recalled using them. A plaintiff must allege facts and conditions from which the defendant's liability may be reasonably inferred; specifically, the plaintiff must provide sufficient evidence to show that he not only worked in the vicinity of the defendant's products, but also that he was exposed to asbestos as a result of the use of the defendant's product (*Comeau v. W. R. Grace & Co. – Conn.*, 216 A.D.2d 79, 80 [1st Dep't 1995][citing *Cawein*, 203 A.D.2d at 105-06]).

Decedent identified Cenco boards and gloves at Payne's Studio where he worked (Aff in Op, Exh 3 at 255, ¶8-12; 259, ¶8-12). Decedent further noted that the scraping and cutting of the asbestos boards, as well as handling the asbestos gloves, both created dust which decedent breathed in throughout his career (*id.* at 757-758). Eileen Love testified that she helped unpack product at Payne's Studio and identified Cenco boards and gloves at Payne's Studio while her husband worked there (Aff in Op, Exh 4 at 30, 46, 176-177, 180, 182). Plaintiff has presented evidence creating a reasonable inference that Decedent breathed in respirable asbestos fibers from CSC products between 1976 and 1979 and, thus, proximate cause can be established.

As such, plaintiff has raised an issue of fact barring summary judgment on the issue of CSC's liability for its sale and distribution of Cenco products. However, the Court notes that CSC should not be held liable for Cenco products sold before July 31, 1976 and after April 17, 1979. The Court agrees with defendant's argument that the issue of limitations as to product liability, arising out of alleged asbestos exposure from Cenco products was already litigated and resolved before the United States District Court in *CSC Scientific Company, Inc*. Defendant should not be held liable for Cenco products that were manufactured, sold, and distributed by other entities before and after CSC held interest in Cenco.

Thus, the branch of defendant's motion for summary judgment, pursuant to CPLR 3212, granting summary judgment in favor of CSC dismissing Plaintiff's Complaints and all cross-claims against CSC is denied and the branch of defendant's motion awarding CSC partial summary judgment dismissing all claims and cross claims against CSC for potential liability arising out of alleged asbestos exposure occurring prior to July 31, 1976 and after April 17, 1979 is granted.

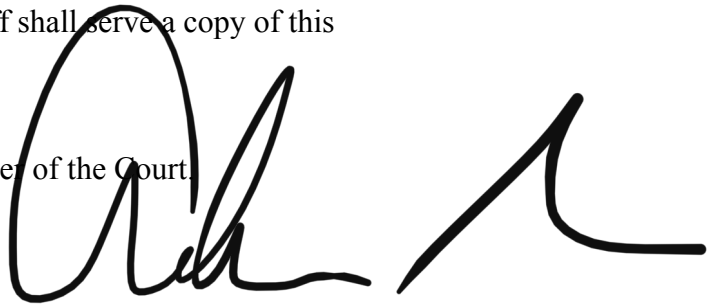
Accordingly, it is

ORDERED that the branch of defendant's motion for summary judgment, pursuant to CPLR 3212, granting summary judgment in favor of CSC dismissing Plaintiff's Complaints and all cross-claims against CSC is denied; and it is further

ORDERED that the branch of defendant's motion awarding CSC partial summary judgment dismissing all claims and cross claims against CSC for potential liability arising out of alleged asbestos exposure occurring prior to July 31, 1976 and after April 17, 1979 is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



2/4/2021
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE