SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 190463/2018

MOTION DATE

MOTION SEQ. NO. 006

WILLIAM THEOPHIL,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC.,AMERICAN BILTRITE INC, ARCONIC, INC, ARMSTRONG INTERNATIONAL, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BEAZER EAST, INC.,BLACKMER, BMCE INC.,BURNHAM, LLC,BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC.,CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, CLYDE UNION, INC, CONSOLIDATED EDISON COMPANY, COURTER & COMPANY INCORPORATED, CRANE CO., CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, CROLL REYNOLDS ENGINEERING CO., INC, CROSBY VALVE LLC,CROWN BOILER CO., CUPPLES PRODUCTS CORPORATION, DANA COMPANIES, LLC,DOMCO PRODUCTS TEXAS, INC.,ELECTROLUX HOME PRODUCTS, INC.,FLOWSERVE US, INC.,FMC CORPORATION, FORT KENT HOLDINGS, INC.,FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC.,GOULDS PUMPS LLC,GRINNELL LLC,H.H. ROBERTSON COMPANY, HACON, INC.,IMO INDUSTRIES, INC, ITT LLC., KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LENNOX INDUSTRIES, INC, MARIO & DIBONO PLASTERING CO., INC, MILTON ROY COMPANY, MORSE DIESEL, INC.,NORTHROP GRUMMAN CORP. AS SUCCESSOR, O'CONNOR CONSTRUCTORS, INC.,OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RESEARCH-COTTRELL INCORPORATED, RILEY POWER INC, SEQUOIA VENTURES, INC.,SLANT/FIN CORPORATION, SPIRAX SARCO, INC.,SUPERIOR BOILER WORKS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN LIQUIDATING CORP., TISHMAN REALTY & CONSTRUCTION CO., INC, TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UNITED CONVEYOR CORPORATION, VIKING PUMP, INC.,WARREN PUMPS, LLC,WEIL-MCLAIN, A DIVISION OF THE MARLEY-

DECISION + ORDER ON MOTION

WYLAIN COMPANY, YUBA HEAT TRANSFER LLC,PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 430, 433, 434, 435, 436, 437, 449, 450, 451, 460

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is hereby ordered that Defendant Mario & DiBono Plastering Co. Inc.'s (hereinafter referred to as "M&D") motion for summary judgment is denied for the reasons set forth below.

The case at bar is premised upon Plaintiff William Theophil's (hereinafter referred to as "Plaintiff") alleged exposure to asbestos, resulting in his diagnosis of mesothelioma. Plaintiff, a steamfitter, contends that he was exposed to spray-on asbestos while working for three months at the World Trade Center in 1968. Plaintiff testified at his deposition that he was exposed to asbestos while in the presence of sprayers. *See* Plaintiff's Opposition To Defendant Mario & DiBono's Motion For Summary Judgment, Exh. 3, Depo. Tr. of William Theophil dated July 7, 2020, p. 120, ln. 14 – 24. Plaintiff further testified that he worked on the seventh floor of tower one. *See Id.* at p. 121, ln. 20 – p. 122, ln. 3. Plaintiff contends that M&D used asbestos spray at the World Trade Center when Plaintiff was present. Plaintiff relies upon expert witness Dr. David Y. Zhang, arguing that there are triable issues of fact as to specific causation. Conversely, M&D argues, *inter alia,* that Plaintiff cannot prove specific causation such that M&D is entitled to summary judgment as a matter of law. M&D relies upon various expert witnesses as well, who opine that Plaintiff was not exposed to asbestos levels sufficient to cause his illness. M&D further contends that they could not have been responsible for Plaintiff's exposure to asbestos, as "Mario & DiBono entered into a contract for the application of spray-on fireproofing at the

World Trade Center with the Port of New York Authority in March 1969, several months after Mr. Theophil claimed to have worked there." Memorandum Of Law In Support Of Mario & DiBono Plastering Co. Inc.'s Motion For Summary Judgment, p. 3. M&D moves for summary judgment. Plaintiff opposes, and M&D replies.

Pursuant to CPLR 3212(b), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he 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 demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers'". *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

Preliminarily, it is undisputed that Plaintiff testified he was within the proximity of sprayers at the time he worked at the World Trade Center for Courter. Although M&D argues discrepancies in Plaintiff's testimony, the Appellate Division, First Department has consistently held that "[t]he 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". *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dept 1996). Although M&D argues that their employees were not

present at the time Plaintiff was working at the World Trade Center in 1968, "[t]he assessment of the value of a witness' 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". *Id.* Moreover, Plaintiff has proffered his Social Security Earnings Report that shows Plaintiff worked for Courter in both 1968 and 1971. *See* Plaintiff's Opposition, *supra,* Exh. 4. In providing the benefit of every favorable inference to the Plaintiff, the Plaintiff has raised an issue of fact as to his presence at the World Trade Center when M&D conducted their operations.

In the instant matter, both Plaintiff and M&D proffer expert witnesses who opine on Plaintiff's exposure to asbestos fibers. "It is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)". *Parker v Mobil Oil Corp.,* 7 NY3d 434, 448 (2006). Plaintiff's expert witness, Dr. Zhang, provides a detailed analysis on specific causation, referencing studies which investigate asbestos fiber concentrations in various situations that apply to the Plaintiff. *See* Plaintiff's Opposition, *supra,* Exh. 2, Report of Dr. Zhang, dated October 3, 2019, p. 14. Dr. Zhang concludes with a reasonable degree of medical certainty that Plaintiff's mesothelioma was caused by asbestos exposure while working in the vicinity of other workers who handled asbestos containing materials. *See Id.* at p. 17 – 18. Conversely, M&D relies upon industrial hygiene expert Dr. Sheldon Rabinovitz, who "opined that even if Mr. Theophil had been present at the World Trade Center when Mario & DiBono used asbestos-containing spray-on fireproofing, this work could not have caused him to have been exposed to levels of asbestos fibers sufficient to cause his disease." Memorandum Of Law In Support, *supra,* at p. 3. M&D

also relies upon expert witness Dr. Stanley Fiel, who "states that assuming Mr. Theophil was exposed to the .0006 f/cc years of chrysotile asbestos Dr. Rabinovitz characterized as the maximum amount of potential exposure he could have had as a result of Mario & DiBono's work at the World Trade Center, this could not have been sufficient to substantially cause his development of mesothelioma." *Id.* at p. 5.

In his report, Dr. Rabinovitz bases his opinion on the inverse square law, which "states that a specified physical quantity is inversely proportional to the square of the distance from the source of that physical quantity." Notice Of Motion, Exh. M, Expert Report Of Dr. Rabinovitz, p. 10. Dr. Rabinovitz claims to have "used the inverse square law to determine the concentration of asbestos fibers that could have possibly occurred in the center of floor seven of Tower One of the World Trade Center while Mr. Theophil was working". *Id.* at p. 11. Dr. Rabinovitz utilizes his position on the inverse square law, and has "taken a worst case situation that may have occurred." *Id.* However, the Appellate Division, First Department, has held that such theoretical assumptions are insufficient for summary judgment motions. In *Dyer v Amchem Products Inc.*, 207 AD3d 408, (1st Dept, 2022), the Appellate Court held that the Defendant therein met its burden on summary judgment by proffering an industrial hygiene expert as a witness who tendered a study regarding decedent's exposure to asbestos, which "involved a worker and a helper who cut, scored/snapped Amtico tiles in an isolation test chamber, simulating an eight-hour shift. . . Based upon the results of the 2007 EPI study and their review of other materials, publications and decedent's deposition, [Defendant]'s experts concluded that the decedent's time weighted average exposure to chrysotile asbestos was below the OSHA eight-hour permissible exposure limit (PEL) of 0.1 f/cc, and also indistinguishable from 0.00000033 f/cc the lifetime cumulative exposure that the general public is exposed to in the ambient air that we all breathe."

Unlike the case at bar, the study relied upon in *Dyer* established specific levels of respirable asbestos with regards to the specific moving defendant's product in the specific work environment of the plaintiff at issue therein. Here, Dr. Rabinovitz's assumption of Plaintiff's level of asbestos exposure through a worst-case scenario is insufficient for M&D to establish its prima facie case on specific causation pursuant to the Appellate Division, First Department holdings.

M&D's reliance upon the affidavit of Dr. Fiel, who based his opinion upon Dr. Rabinovitz's insufficient report, similarly fails. As such, M&D has failed to meet its burden to establish entitlement to summary judgment as a matter of law, such that the instant motion is denied.

Accordingly, it is

ORDERED that Defendant Mario & DiBono Plastering Co. Inc.'s motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the court.

9/1/2022
DATE

ADAM SILVERA, J.S.C.

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