SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In Re Eighth Judicial District Asbestos Litigation

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SUSAN C. RINDFLEISCH and
WARREN RINDFLEISCH ,

Plaintiffs

-v-

DECISION AND ORDER
Index No. 2003/5955

ALLIED SIGNAL, INC., et al.,

Defendants

BEFORE: HON. JOHN P. LANE
Judicial Hearing Officer

APPEARANCES: LIPSITZ & PONTERIO, LLC
Attorneys for Plaintiffs
By: Michael A. Ponterio, Esq. and Keith R. Vona, Esq.

OSBORN, REED & BURKE, LLP
Attorneys for Defendants Molin Auto Parts, Inc. and Molin-Taylor, Inc.
By: Bernadette Weaver-Catalana, Esq.

The Court has considered the following papers: notice of motion by defendants Molin Auto Parts, Inc. and Molin-Taylor, Inc., for summary judgment dismissing the complaint; affirmation of Bernadette Weaver-Catalana, Esq., dated September 26, 2006; affidavit of Kim E. Molin, sworn to September 21, 2006 ; affidavit of Donald E. Marano, PE, CIH, sworn to September 25, 2006; affidavit of Michael A. Ponterio, Esq., sworn to November 6, 2006; affidavit of Keith R. Vona, Esq., sworn to November 2, 2006; affidavit of Susan Rindfleisch, sworn to November 2, 2006; affidavit of Warren Rindfleisch, sworn to November 2, 2006; affirmation of Jerrold L. Abraham, M.D., dated November 2, 2006; affidavit of Richard Hatfield, sworn to November, 3, 2006; reply affirmation of Bernadette Weaver-Catalana, Esq., dated November 14, 2006; supplemental affidavit of Donald E. Marano, PE, CIH, sworn to November 15, 2006.

In this action, plaintiff Susan C. Rindfleisch seeks to recover for injuries resulting from malignant mesothelioma she allegedly contracted as a result of exposure to asbestos while laundering her husband plaintiff Warren Rindfleish's work clothes. Mrs. Rindfleisch maintains that his work clothes were contaminated by asbestos released when he installed replacement brake parts in vehicles owned by his family and friends during 1984-1991. Mr. Rindfleisch alleges a derivative cause of action.

Defendants Molin Auto Parts, Inc. and Molin-Taylor, Inc. (jointly "Molin"), which owned and operated a retail auto parts business known as Parts Plus, move for summary judgment dismissing the complaint contending that plaintiffs can not prove that Susan Rindfleisch was exposed to and injured by asbestos-containing products sold or distributed by Molin. They argue also plaintiffs cannot establish that brake products purchased from Molin and installed by Mr.

Rindfleisch contained asbestos. In the alternative, Molin maintains that even if Mrs. Rindfleisch was exposed to asbestos from brake linings purchased from Parts Plus, such exposure was either de minimus and therefore insufficient to support plaintiffs' causes of action, or Mrs. Rindfleish's exposure was not a substantial factor in bringing about her alleged asbestos-related cancer.

It is well established in asbestos litigation that to go forward with a motion for summary judgment, a defendant must make a prima facie showing that its product could not have contributed to the causation of the plaintiff's injury (*see Refermat v A. C. AND S., Inc.*, 15 AD3d 928 [2005]; *Root v Eastern Refractories Co., Inc.*, 13 AD3d 1187 [2004]; *Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d 1002 [1998]; *Reid v Georgia-Pacific Corp.*, 212 AD 2d 462 [1995]). A moving party cannot meet its burden by "noting gaps in its opponent's proof" (*see Allen v General Elec. Co.*, 32 AD3d 1163 [2006], *quoting Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [1995]; *Edwards v Arlington Mall Assocs.*, 6 AD3d 1136 [2004]). For example, a defendant seeking summary judgment cannot use the absence of information in its opponent's deposition testimony as proof of a fact (*see Romanowski v Yahr*, 5 AD3d 985 [2004], *citing Feldman v Dombrowsky*, 288 AD2d 605 [2001]). Only if a defendant moving for summary judgment meets its burden must a plaintiff come forward with facts and conditions from which defendant's liability may reasonably be inferred (*see Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel]*, 269 AD2d 749 [2000]; *see also Matter of New York City Asbestos Litig. [Diedrich]*, 7 AD3d 285 [2004]; *Reid*), that is, plaintiffs must come forward with facts revealing a triable issue of fact (*see, Matter of Eighth Jud. Dist. Asbestos Litig. [Gorzka]*, 28 AD3d 1191 [2006]. *Root*; *Heckel*).

Molin's submissions fail to meet the prima facie showing required by *Reid* and its progeny.

The affidavits of Kim E. Molin , president of Molin, clearly show that Molin sold both asbestos and non- asbestos brake products. Plaintiffs assert that each purchased brake linings from Molin. In his affidavit, Mr. Rindfleisch estimates that he purchased linings from Molin at the Parts Plus store in Hamburg, New York on at least five separate occasions and later installed those linings. He also states that he purchased and installed brake linings from Molin on other occasions. In her affidavit, deposition and video-taped trial testimony, Mrs. Rindfleisch states she purchased brake parts including Bendix or Abex brake linings for her husband's use from Molin at least fifteen times. The testimony of both plaintiffs, as well as their affidavits, is sufficient to demonstrate how Mrs. Rindfleisch 's exposure occurred, how her husband worked with the brake products sold by Molin, how asbestos dust was emitted and how Mrs. Rindfleich was exposed to that dust while doing laundry (*compare Tronolone v Lac D'Amiante Du Quebec LTEE*, 297 AD2d 528, 529 [2002]; *affd* 99 NY2d 647 [2003]). Mr. Molin denies that defendants sold Bendix and Abex brake linings, thus framing a triable issue of fact.

Defendants urge the court to find that Mrs. Rindfleisch's exposure to asbestos was de minimus or not a substantial factor in causing her mesothelioma In support of this argument, they rely upon the expert opinion of Donald E. Marano, an engineer and certified industrial hygienist. Mr. Marno's opinion concerning causation is unpersuasive because he relies in part on scientific theories which are not generally accepted in this state (*see Berger v. Amchem Prods.,* 13 Misc.3d 335 [2006]). In ruling upon motions made by friction defendants asserting positions similar to those made here, i.e., that exposure to asbestos-containing dust from brakes is not associated with

an increased risk of developing mesothelioma , Justice Helen Freedman reviewed recent cases and the state of the science and held

> "As the First Department has stated, it is not novel science that exposure to asbestos causes mesothelioma.
>
> "Moreover, defendants have not shown that it is not generally accepted by a significant number of well-credentialed scientists and physicians that exposure to friction products can be a cause or contributing factor to the development of mesothelioma or other signature asbestos related diseases"

Berger (at 346 *citing Gayle v Port Auth. of N. Y. & N. J.*, 6 AD3d 183 [1st Dept 2004]).

Plaintiffs counter defendants' causation related claims with their own experts, Richard Hatfield, a senior consultant who has conducted studies on asbestos-containing brake linings, and Dr. Jerrold Abraham, a medical doctor and anatomic pathologist. Suffice it to say that whether a quantified exposure to asbestos is sufficient to cause the plaintiff to develop mesothelioma will almost always be an issue for the trier of fact. Here the conflict between the parties' experts supports that conclusion.

Defendants' argument that de minimus exposure warrants summary judgment finds no clear support in New York law. Defendants' reliance on *Lohrmann v Pittsburgh Corning Corp.*(782 F2d 1156 [4th Cir 1986]) is misplaced. In *Lohrmann*, the Fourth Circuit followed the Maryland rule of substantial causation, requiring a plaintiff in an asbestos case to show "exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked "(782 F2d at 1163). However, the Maryland standard has not been adopted by either New York State courts or the Second Circuit (*see In re Joint Eastern and Southern Districts Asbestos*

Litigation, 798 F Supp 925 [US Dist Ct, ED and SD NY1992], *rev'd on other grounds* 995 F2d 343 [2d Cir 1993]). Defendants' assertion that the First Department adopted the *Lohrman* rule in *Tronlone* is mistaken. I decline defendants' invitation to apply the Maryland rule in this case,.

Defendants motion is denied (*see Zuckerman v City of New York,* 49 NY2d 557 [1980]).

SO ORDERED.

Dated: Buffalo, New York
March 23, 2007

John P. Lane
Judicial Hearing Officer

GRANTED

MAR 23 2007

BY Patricia A. Aiello
PATRICIA A. AIELLO
COURT CLERK