IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JO ANN RELYEA, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
	:	Transferred from the Southern District of New York (Case No. 12-03564)
v.	:	
BORG WARNER CORPORATION, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:12-60171-ER
Defendants.	:	

O R D E R

AND NOW, this **30th** day of **September, 2014**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Nissan North America, Inc. (Doc. No. 37) is **GRANTED.**[1]

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[1] This case was transferred in July of 2012 from the United States District Court for the Southern District of New York to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that Jo Ann Relyea ("Ms. Relyea" or "Decedent") was exposed to asbestos while working part-time as an office manager and bookkeeper at an automotive repair shop in New York. Defendant Nissan North America, Inc. ("Nissan") manufactured automobiles, which Plaintiff alleges were supplied with - and, at all times relevant to this action, used - asbestos-containing brakes and clutches. Ms. Relyea developed mesothelioma and died in November of 2012.

Plaintiff brought claims against various defendants. Defendant Nissan has moved for summary judgment, arguing that there is insufficient evidence to establish causation with respect to any product for which it can be liable.

The parties agree that New York law applies.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

The parties agree that New York substantive law applies. Therefore, this Court will apply New York substantive law in deciding Defendant's Motion for Summary Judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Product Identification/Causation Under New York Law

To establish proximate cause for an asbestos injury under New York law, a plaintiff must demonstrate that he was exposed to the defendant's product and that it is more likely than not that the exposure was a substantial factor in causing his injury. See Diel v. Flintkote Co., 611 N.Y.S.2d 519, 521

(N.Y. App. Div. 1994); Johnson v. Celotex Corp., 899 F.2d 1281, 1285-86 (2d Cir. 1990). Jurors are instructed that an act or omission is a "substantial factor ... if it had such an effect in producing the [injury] that reasonable men or women would regard it as a cause of the [injury]." Rubin v. Pecoraro, 141 A.D.2d 525, 527, 529 N.Y.S.2d 142 (N.Y. App. Div. 1988). A particular defendant's product need not be the sole cause of injury. However, a plaintiff "must produce evidence identifying each [defendant]'s product as being a factor in his injury." Johnson, 899 F.2d at 1286.

New York law requires a defendant seeking summary judgment in an asbestos case "to unequivocally establish that its product could not have contributed to the causation of the plaintiff's injury." Reid v. Georgia-Pacific Corp., 622 N.Y.S.2d 946, 947 (N.Y. App. Div. 1995)(citing Winegrad v. New York Univ. Med Ctr., 64 N.Y.2d 851 (N.Y. 1998)); see also In re New York City Asbestos Litig. ("Comeau"), 628 N.Y.S.2d 72, 73 (N.Y. App. Div. 1995); In re Eighth Judicial District Asbestos Litig. ("Takacs"), 679 N.Y.S.2d 777, 777 (N.Y. App. Div. 1998); Shuman v. Abex Corp. ("Shuman 1"), 700 N.Y.S.2d 783, 784 (N.Y. App. Div. 1999); Shuman v. Abex Corp. ("Shuman 2"), 698 N.Y.S.2d 207, 207 (N.Y. App. Div. 1999). Summary judgment in favor of a defendant is warranted when there is no evidence in the record to create a reasonable inference that the plaintiff inhaled asbestos fibers from the defendant's product. See Cawein v. Flintkote Co., 610 N.Y.S.2d 487, 487 (N.Y. App. Div. 1994)(summary judgment granted where the only evidence pertaining to defendant's product was testimony that the plaintiff saw an unopened package of the product); Diel, 611 N.Y.S.2d at 521 (same); see also Lustenring v. AC&S, Inc., 786 N.Y.S.2d 20, 21 (N.Y. App. Div. 2004); Penn v. Amchem Products, 925 N.Y.S.2d 28, 29 (N.Y. App. Div. 2011).

A defendant is not entitled to summary judgment merely because there are inconsistencies in a plaintiff's evidence regarding exposure to the defendant's product. Taylor v. A.C.S., Inc., 762 N.Y.S.2d 73, 74 (N.Y. App. Div. 2003). Nor is summary judgment in favor of a defendant warranted based on evidence presented by the defendant that its product could not have caused the plaintiff's injury, so long as there is conflicting evidence presented by the plaintiff. In re New York City Asbestos Litig. ("Ronsini"), 683 N.Y.S.2d 39 (N.Y. App. Div. 1998).

In Ronsini, a plaintiff pipe-fitter testified that he saw a 50- to 60-pound bag of the defendant's product onboard a Navy ship (with the company name "Atlas" on it) and that the

defendant's cement insulation was the only such product that he recalled seeing onboard the ship. Defendant Atlas Turner presented testimony that it did not sell its insulating cement in the United States and was prohibited by statute from doing so. The Appellate Division (First Department) upheld a jury verdict imposing liability upon the defendant, stating that "the jury merely acted within its province in resolving conflicting testimony on this issue." 683 N.Y.S.2d 39 (N.Y. App. Div. 1998). In doing so, the court distinguished Cawein and Diel, noting that, in those cases, "the person identifying the product did not see an open bag of the subject product or know that its contents had actually been used." 683 N.Y.S.2d at 40.

D. Bare Metal Defense Under New York Law

Previously, in August of 2010, when faced with the issue of the so-called "bare metal defense" under New York law, this Court remanded the issue to the transferor court, which it noted has more experience and familiarity with the application of New York substantive law. Curry v. Am. Standard, No. 09-65685, 2010 WL 3221918 (E.D. Pa. Aug. 12, 2010) (Robreno, J.). Since that time, the only appellate authority from a New York court that has addressed the issue is In re New York City Asbestos Litigation, - N.Y.S.2d - , 2014 WL 2972304, at *13 (N.Y. App. (1st Dept.) July 3, 2014). In this decision, the Appellate Division (First Department) considered numerous issues on appeal after a jury verdict in favor of numerous defendants, including Crane Co., which challenged the trial court's use of the word "foreseeability" in its instructions to the jury. The Appellate Division upheld the verdict and found that, while "mere foreseeability is not sufficient," it remains that "[t]here is a place for the notion of foreseeability in failure to warn cases where, as here, the manufacturer of an otherwise safe product purposely promotes the use of that product with components manufactured by others that it knows not to be safe." Id. In doing so, it explicitly rejected Crane Co.'s assertion of the "component parts doctrine." Id.

II. Defendant Nissan's Motion for Summary Judgment

A. Defendant's Arguments

Nissan contends that Plaintiffs' evidence is insufficient to establish causation with respect to any product for which it can be liable.

B. Plaintiff's Arguments

Plaintiff contends that she has evidence of exposure by Decedent to asbestos from brakes and clutches manufactured and supplied by Defendant. She also contends that Defendant is liable under New York law for contributing to the foreseeable use of asbestos-containing replacement components with its products by manufacturing them with these hazardous original components.

In support of her assertion that she has identified sufficient evidence to support a finding of causation on the part of Defendant under New York law, Plaintiff cites to the following evidence, summarized in pertinent part:

- Deposition of Ms. Relyea
  Ms. Relyea provides testimony that for approximately five (5) years, from 1986 until 1991 or 1992, she worked part-time at the automotive repair shop. She explains that she worked in an area that had a window into the mechanics' area and that she would sometimes go into the mechanics' area. She states that she does not recall ever handling an asbestos-containing product, but that she believes she may have been exposed to asbestos from the products onsite due to the lack of ventilation, which trapped dust in the facility.

  (Pl. Ex. 2, Doc. No. 46-2.)

- Deposition of Co-Worker Alan Weitlich
  Mr. Weitlich provides testimony that Ms. Relyea would periodically come into the mechanics' area, where they were performing repair work on automobiles. He states that Nissan vehicles were among those being repaired, were one of the most common types of vehicles repaired there, and was one of only three foreign vehicles commonly brought to the shop. He provides testimony that brake and clutch repairs were routinely done at the shop, with brake jobs occurring two (2) or three (3) times per day, and clutch jobs occurring one (1) or two (2) times per month. He also states that the brakes in the 1980s were mostly drum brakes, which contained asbestos. He testifies as to how the brake and clutch maintenance and repair process released dust into the air.

(Pl. Ex. 4, Doc. No. 46-4.)

- Various Documents
  Plaintiff points to various documents, which she contends, generally, indicate that (1) all brakes and clutches at the time contained asbestos, and (2) information regarding the hazards of asbestos was published and available to Defendant at the time of the alleged exposure (and before).

  (Pl. Exs. 5-14, Doc. Nos. 46-5 through 46-14.)

C. Analysis

Defendant contends that Plaintiff's evidence is insufficient to establish causation with respect to any product for which it can be liable. Plaintiff contends that Defendant is liable for asbestos-containing brakes and clutches it manufactured and supplied, as well as, under New York law, for contributing to the foreseeable use of asbestos-containing replacement components with its products by manufacturing them with these hazardous original components. Plaintiff has presented evidence that, during her part-time work for approximately five (5) years, Ms. Relyea regularly breathed in air from the work area where mechanics were performing automotive repair work, including clutch and brake repair jobs. She has presented evidence that brake jobs were done two (2) to three (3) times per day, and that clutch jobs were done one (1) or two (2) times per month. She has also presented evidence that she contends indicates that all clutches and brakes at the time contained asbestos. Finally, she has presented evidence that Nissan automobiles were among the most common type of automobile worked on at the shop.

Importantly, however, there is no evidence that Ms. Relyea was ever exposed to respirable asbestos from brakes or clutches on any Nissan automobile (whether original to the automobile or as a replacement component). As such, no reasonable jury could conclude from the evidence that Ms. Relyea was exposed to asbestos from an asbestos-containing component of a Nissan automobile (whether an original or replacement part) such that it was "more likely than not" a "substantial factor" in the development of her illness because any such finding would be impermissibly conjectural. See Diel, 611 N.Y.S.2d at 521; Rubin, 529 N.Y.S.2d 142; Johnson, 899 F.2d at 1285-86. In short, the nature of Plaintiff's evidence is too vague and speculative to

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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support a finding of causation against Defendant. This is particularly true in light of the fact that it is undisputed that numerous types of automobiles other than Nissan were also routinely worked on at the shop. Accordingly, summary judgment in favor of Defendant is warranted. Anderson, 477 U.S. at 248-50. This is true regardless of whether (and to what extent) New York law recognizes the so-called "bare metal defense."

D. Conclusion

Defendant's motion for summary judgment is granted on grounds of insufficient evidence of product identification/ causation.