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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Justice

GLORIA VEGA

- v -

GEORGIA-PACIFIC

INDEX NO. 190409/11

MOTION DATE

MOTION SEQ. NO. 9

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 11.10.13

FILED

JAN 14 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1.10.13

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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GLENDA VEGA,

Plaintiff,

-against-

GEORGIA-PACIFIC, LLC, et al.,

Defendants.

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Index No. 190409/11
Motion Seq. No. 09

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Defendant Union Carbide Corporation ("UCC") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff Glenda Vega, born in 1973, was diagnosed with mesothelioma on July 11, 2011. She commenced this action on or about October 19, 2011 to recover for personal injuries arising out of her alleged exposure to asbestos-containing products. Ms. Vega was deposed but was unable to testify about events concerning her exposure which are alleged to have occurred when she was between the ages of one and four years old. Mr. Epifanio Villegas, the plaintiff's uncle, testified on her behalf. Mr. Villegas worked with Ms. Vega's father repairing the interiors of buildings in the Bronx and Manhattan from 1975 to 1977. Among other things, Mr. Villegas testified that he and Mr. Vega worked with Georgia-Pacific ("GP") joint compound and that Mr. Vega went home each day wearing his dust-covered work clothes. It is alleged that plaintiff was exposed to asbestos while her mother laundered these clothes in plaintiff's presence.

Ms. Vega's mother, Ms. Lydia Pizarro Correa, also testified on the plaintiff's behalf. She stated that the plaintiff stood in close proximity to her father while he performed remodeling work at the Vega family home in the Bronx in 1975. Ms. Correa testified that during such renovations Mr. Vega applied and sanded GP joint compound which caused asbestos fibers to be released into the plaintiff's immediate vicinity.

The defendant mined, milled, manufactured, and processed chrysotile asbestos at the Coalinga deposit in King City, California, and marketed it under the trade name "Calidria." UCC manufactured two primary Calidria lines. One, known as "SG-210", was designed for use in the manufacture of joint compound (plaintiff's exhibit 5). UCC does not dispute that it sold SG-210 to GP or that SG-210 was integrated into GP's joint compound products. Rather, UCC argues that it is entitled to summary judgment because it was one of at least three companies to have supplied asbestos to GP during the relevant time period, and there is no evidence that the GP joint compound to which plaintiff alleges she was exposed contained SG-210 Calidria as opposed to another form of asbestos. UCC also asserts that it had no duty to warn the plaintiff of the dangers associated with asbestos because it provided adequate warnings to GP, which in turn was in the best position to warn the plaintiff.

Plaintiff contends that all joint compound manufactured by GP in the northeastern United States during the relevant time period necessarily contained SG-210 Calidria asbestos. Plaintiff further argues that the adequacy of the warnings provided to GP regarding the dangers of asbestos presents a question of material fact that must be decided by a jury.

DISCUSSION

Summary judgement is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminante du Quebec, Ltee*, 297 AD2d 528,

528-529 (1st Dept 1995). In asbestos-related litigation, once the moving defendant has made a *prima facie* showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for the plaintiff to show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 205 (1st Dept 1990). The identity of a manufacturer of a defective product may be established by circumstantial evidence but such evidence cannot be speculative or conjectural. *See Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 (1996).

I. Calidria Content

UCC argues that the plaintiff's claims against it are speculative insofar as plaintiff cannot show whether the GP joint compound which is alleged to have caused her injuries contained SG-210 Calidria because GP used the products of a number of raw asbestos suppliers including Johns Manville and Phillip Carey.[1]

Plaintiff contends that the GP joint compound to which she was exposed would necessarily have contained SG-210 because UCC was GP's exclusive asbestos supplier for its Akron, New York manufacturing facility which supplied the entire northeastern United States during the relevant time period. In support, plaintiff submits the deposition testimony of C. William Lehnert, a GP corporate representative who testified in a 2001 case venued in Madison County, Illinois as the most knowledgeable person concerning GP's formulations of asbestos-containing joint compounds (see

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[1] Defendant submits plaintiff's proof of claim form (unsigned) to the Celotex Bankruptcy Trust which indicates that the GP joint compound to which she was exposed at times contained asbestos that had been supplied by Phillip Carey. Defendant's exhibit 15.

plaintiff's exhibit 9). Mr. Lehnert testified that all formulations of GP's joint compound manufactured at the Akron plant from September 1970 to May 1977 contained SG-210 Calidria, except the asbestos-free formulations which were first developed in 1976. *Id.* at 36-37. Mr. Lehnert confirmed these assertions two years later when he testified in another asbestos case venued in Travis County, Texas in 2003 (plaintiff's exhibit 7, pp. 107-108).

Mr. Lehnert was deposed again in a case venued in Harris County, Texas in 2007.[2] This time he testified that his earlier assertions were inaccurate because they were based solely on his review of handwritten notes that referenced some of GP's asbestos formulas but not others. He then concluded that only some of GP's joint compound products manufactured at its Akron plant during the relevant time period contained SG-210 Calidria (2007 Lehnert Deposition, pp. 828-29, 861-62).

Defendant also submits in reply the State of Ohio 2005 deposition testimony of Dr. William Dyson, an industrial hygienist who consults with and testifies on behalf of GP, who represented that joint compound products manufactured at GP's Akron plant did not contain SG-210 Calidria until March of 1974 and that between March 1974 and May 1977 there were joint compound formulas that contained asbestos supplied by companies other than UCC.[3] UCC thus claims that plaintiff's claims against it cannot be sustained.

The court's function on a motion for summary judgment is to determine whether there exist factual issues that require resolution at trial. *See Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997). In this case, the weight to be accorded to Mr. Lehnert's conflicting testimony should be decided by a jury. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The

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[2] Mr. Lehnert's March 7, 2007 deposition testimony is attached as Exhibit 1 to the defendant's Reply papers ("2007 Lehnert Deposition").

[3] Dr. Dyson's deposition testimony is attached as exhibit 2 to the defendant's Reply papers.

assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . . ."); *see also Schachat v Bell Atlantic*, 282 AD2d 329 (1st Dept 2001) (summary judgment should be denied where deposition testimony is inconsistent). Moreover, the only relevant documents submitted on this issue are Mr. Lehnert's handwritten note cards which plainly indicate that all GP joint compounds manufactured at its Akron plant during the relevant time period contained SG-210 Calidria. While both Mr. Lehnert and Dr. Dyson supported their later testimony with reference to formula sheets, which the defendant argues are the most accurate means by which to determine which supplier's asbestos was in GP's joint compound at any given time, no such formula sheets have been presented to substantiate this position. In light of the foregoing, there are questions of fact concerning the use of SG-210 Calidria at GP's Akron plant that require resolution at trial and militate against summary judgment in UCC's favor on this ground.

II. Duty to Warn

A plaintiff "may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product." *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992). A manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998).

The defendant submits that it had no duty to warn the plaintiff as an ultimate user of the hazards associated with asbestos because UCC was a bulk supplier of raw materials to GP, which, in turn, was fully aware of the dangers of asbestos. The cases cited by both parties on this issue reference three doctrines: the bulk supplier doctrine, the sophisticated intermediary doctrine, and the knowledgeable user doctrine. These doctrines "were developed to impose practical limitations upon the manufacturer's obligation to appropriately warn the ultimate consumer." *Polimeni v Minolta*

Corp., 227 AD2d 64, 66 (3d Dept 1997).

The bulk supplier doctrine is "premised on the theory that the immediate distributee is in a better position to warn the ultimate consumer of the dangers associated with the finished product and, further, that to require the bulk manufacturer to issue warnings through the entire chain of distribution would be too onerous a burden." *Id.*

Similarly, the sophisticated intermediary doctrine limits the supplier's duty to warn to the distributor as opposed to the remote ultimate consumer. *Polimeni, supra*, at 66-7. However, this doctrine has been applied in New York primarily to cases involving prescription drugs and medical devices on the theory that physicians are in the best position to have an informed discussion with their patients regarding the risks and benefits of using any particular medical product (*see e.g. Wolfgruber v Upjohn Co.*, 72 AD2d 59 [4th Dept 1979], *aff'd* 52 NY2d 768 [1980]).

The common thread between these two defenses is their dependence on whether the supplier adequately warned its immediate distributors and distributees in the stream of commerce of the dangers associated with its product. UCC supports its defense herein with reference to Justice Helen Freedman's decision in *Rivers v AT&T Tech., Inc.*, 147 Misc. 2d 366 (Sup. Ct. NY Co. 1990, Freedman, J.), in which the plaintiff's decedent's death was alleged to have been caused by her exposure to a chemical solvent contained in one of the component parts of a data phone located at her workplace. The defendant, DuPont, had manufactured the chemical since the 1930's and supplied approximately one half of the United States market with the compound. DuPont's normal practice was to deliver the chemical in railroad tank cars, tank trucks and 55-gallon steel drums to its distributors. The distributors then customarily sold the chemical to manufacturers to be used as an electrolytic industrial solvent in capacitors. One of such capacitors was used to build a data phone, which was sold to a telephone company, which then supplied it to the plaintiff's employer.

The plaintiff's decedent was critically injured due to exposure to the chemical's fumes which had leaked from the capacitor. Among other things, the court found that the defendant DuPont had no duty to warn the decedent of the toxicological characteristics of its product because she was "too remote in the chain of distribution" and further that DuPont had "provided extensive warnings to its immediate distributees." *Id.* at 372. The court found the distributors themselves were responsible intermediaries.

When *Rivers* was decided in 1990, there were no "New York appellate decisions . . . directly on point." *Id.* at 369. Since then, the Third Department has held that "[i]t is axiomatic that in all but the most unusual circumstances, the adequacy of a warning is a question of fact." *Polimeni, supra*, at 67. The Third Department's holding is consistent with the decisions of other courts that have considered this issue. *See In re Joint E. & S. Dist. Asbestos Litig.*, 827 F. Supp. 1014, 1055 (SDNY July 23, 1993) ("The latent quality of the defects in asbestos products makes the issues of the sophisticated intermediary and intervening negligence questions of fact for the jury to decide . . . ."); *Union Carbide Corp. v Kavanaugh*, 879 So. 2d 42, 45 (Fla. Dist. Ct. App. 4th Dist. 2004) ("it was for the jury to determine the adequacy of UCC's warnings to [GP] and whether, based on the sufficiency of the warnings given, UCC still owed [plaintiff] a duty"); *Conwed Corp. v Union Carbide Chems. & Plastics Co.*, 287 F. Supp. 2d 993, 996 (D. Minn. 2001), *aff'd on other grounds*, 443 F.3d 1032 (adequacy of UCC's warnings to manufacturers about the nature of Calidria and its duty to third parties are questions for the jury). Accordingly, in this case, whether UCC's warnings to its distributees were adequate in the first instance is a question of fact for the jury.

Also instructive is *McConnell v Union Carbide Corp.*, 937 So. 2d 148 (Fla. Dist. Ct. App. 4th Dist. 2006). The plaintiff, William McConnell, worked as a carpenter for drywall businesses in Florida and Alabama. His job involved applying GP joint compound onto drywall and then sanding

it after it had hardened. As in this case, Mr. McConnell alleged that the GP joint compound contained Calidria asbestos. The appellate court held that UCC could not rely on its intermediaries to provide adequate asbestos-related warnings. The *McConnell* court explained (*Id.* at 156);

> This is especially true when the burden involved in giving the warning is not unduly burdensome. There is almost no burden in imposing on Carbide the duty of contractually requiring its 'learned intermediaries' (like Georgia-Pacific) to affix to the end product an indelible warning of the existence of the asbestos in it and the very serious dangers in using it without proper precautions.

Notwithstanding, UCC claims that it is entitled to summary judgment because it satisfied its duty to warn as a matter of law and because GP knew of the dangers associated with asbestos during the relevant time period. In support UCC submits the affidavit of former employee John Myers, marketing manager for UCC's Calidria business, sworn to June 10, 2004 (defendant's exhibit 12). According to Mr. Myers, UCC placed a warning on bags of Calidria asbestos beginning in 1968 which stated, "WARNING: BREATHING DUST MAY BE HARMFUL. DO NOT BREATHE DUST". (Myers Affidavit ¶ 13). He attests that in 1972 UCC changed the warning on its bags to comply with OSHA regulations, which required that the warnings state: "CAUTION, CONTAINS ASBESTOS FIBERS, AVOID CREATING DUST, BREATHING ASBESTOS DUST MAY CAUSE SERIOUS BODILY HARM". (Myers Affidavit ¶ 14). Mr. Myers avers that UCC prepared asbestos toxicology reports for its customers beginning in 1969 that contained scientific articles regarding the health effects of asbestos inhalation. (Myers Affidavit ¶ 15-21).

However, it appears Mr. Myers had little if any knowledge about what information may have been specifically provided to GP regarding the hazards of asbestos. Subsequent to providing his 2004 affidavit, in 2005 Mr. Myers testified in an unrelated case venued in Harris County, Texas that UCC maintained files with respect to each of its customers but that he had not looked at the GP file in order to determine what, if anything, UCC sent to GP regarding the hazards of asbestos. He further testified that he had no direct dealings with GP in terms of customer relations (plaintiff's

exhibit 19, pp. 135, 140-42, 162).

Howard Schutte, a former Vice President, Strategy and New Product Development for Georgia-Pacific Gypsum, LLC, has testified that he was unable to locate any documents that UCC claims to have provided to GP (plaintiff's exhibit 13, p. 20). Mr. Schutte also testified that GP did not receive any information from UCC regarding the need to put warnings on its Calidria-containing joint compound products (*Id.* pp. 92, 107):

> Q And through your own personal involvement and through those conversations do you recall ever being advised of any information that was imparted to anybody at Georgia-Pacific concerning the potential health hazards from Union Carbide Corporation?
>
> A I don't recall getting any documents, and the individuals I've talked to, Mr. Lehnert and people he's talked to, no one recalls getting any documents from suppliers.
>
> * * * *
>
> Q Okay. Could you tell me what information was being imparted to Georgia-Pacific by its suppliers of asbestos, such as Union Carbide Corporation, regarding the need or necessity to put a warning label on that product?
>
> A I've not seen any information or documents to that effect

Raising the knowledgeable user doctrine, UCC argues that any alleged inadequacy of its warnings does not give rise to an issue of fact because GP knew of the potential hazards associated with exposure to its own products. The knowledgeable user doctrine has been held to "relieve[] a manufacturer of liability on a failure to warn theory where the purchaser or user knows or has reason to know of the dangerous propensities of the product independent of the information supplied to him by the manufacturer or distributor" *Billsborrow v Dow Chemical*, 177 AD2d 7, 16, n. 2 (2d Dept 1992). As an example, UCC cites to *Steuhl v Home Therapy Equipment, Inc.*, 51 AD3d 1101 (3d Dept 2008), in which a hospital patient was injured when the head of her bed suddenly dropped flat. The evidence showed that two pins were not installed properly when the bed was assembled. The court held that since the technician who assembled the bed knew that such pins were required, the

manufacturer's failure to warn was not a proximate cause of the plaintiff's injury. Similarly, in *Travelers Insurance Co v Federal Pacific Electric Co*, 211 AD2d 40 (1st Dept 1995), *lv. app. den.*, 86 NY2d 712 (1995), a group of electricians were deemed to be knowledgeable users of circuit breakers under wet conditions such that the circuit breaker manufacturer had no duty to warn of the danger of failing to test the operation of a wet switchboard before putting it into use.

In opposition, plaintiff has presented evidence to show that UCC may have withheld highly relevant information from its customers regarding Calidria's health effects, raising questions as to the extent of GP's knowledge.

Plaintiff's exhibit 20 is a 1966 study commissioned by UCC which revealed that rats had a more "severe reaction" to Calidria asbestos that had been mined by UCC in California than asbestos that had been mined in Canada by Johns Manville. It is undisputed that this study was marked confidential and was not disclosed to UCC's customers. Plaintiff also submits a December, 1967 report prepared by I.C. Sayers, an employee in UCC's United Kingdom division, entitled "Asbestos as a Health Hazard in the United Kingdom." (Plaintiff's exhibit 21). One member of UCC's medical staff interpreted this report to mean that Calidria was potentially more hazardous than other forms of chrysotile asbestos. (Plaintiff's exhibit 22). There is also evidence that UCC minimized these health concerns to its customers and neglected to provide them with specific information regarding its own product. A Report of Call dated November 30, 1971 describes a meeting among UCC representatives and customer Glidden-Durkee regarding the toxicological effects of Calidria asbestos (Plaintiff's exhibit 25):

> . . . [Glidden-Durkee marketing manager] went on to say that to date the only information that Carbide has furnished him with regard to this subject in print is our Asbestos Toxicology report and some information concerning methods and equipment for determining dust levels. He said that our Asbestos Toxicology report he found atrocious and rather than answering questions actually posed them. He felt that should such a report fall into the hands of their production people, it would cause considerable concern

> to say the least. Exemplifying his point he noted that we make reference only to crocidolite and yet neglect to identify our own asbestos which is chrysotile. This obviously on the basis of the report would be to our favor. He also felt that we should be more specific in our recommendations for safe practice.

Further underscoring the notice issues between UCC and its customers, plaintiff submits a UCC internal memorandum dated June 22, 1972 which shows that the company instructed its salespersons to use aggressive tactics when faced with questions about OSHA standards on asbestos exposure (Plaintiff's exhibit 26):

> Controlling the conversation is paramount. Assure the customer that the new law is reasonable and within the limits of practicality . . . . If the customer is persistent and threatens to eliminate asbestos - a certain amount of aggressiveness may be effective. Words and catch phrases such as 'premature', 'irrational', or 'avoiding the inevitable' will sometimes turn the table. The main objective is to keep the customer on the defensive, make him justify his position.

CONCLUSION

On this record, the court cannot determine as a matter of law that the bulk supplier, sophisticated intermediary, or knowledgeable user doctrines relieve UCC of liability. The submissions raise too many material questions regarding the adequacy of UCC's warnings, if any, to its customers, and GP's own knowledge of the dangers associated with UCC's product.

The court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that Union Carbide Corporation's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 1.10.13

SHERRY KLEIN HEITLER
J.S.C.