

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 12/09/2015

TIME: 08:20:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM: Leah Tommela

CASE NO: **56-2014-00458073-CU-AS-VTA**

CASE TITLE: **Robert Denyer vs AB Electrolux**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Asbestos

EVENT TYPE: Motion for Summary Judgment

MOVING PARTY: Rheem Manufacturing Company

CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment and/or Adjudication, 10/20/2015

APPEARANCES

Stephen M. Fishback, counsel, present for Plaintiff(s).

Fred Lee, specially appearing for counsel Claire C Weglarz, present for Defendant(s).

ANN I PARK, counsel, present for Defendant(s).

At 9:02 a.m., court convenes in this matter with all parties present as previously indicated.

Counsel have received and read the court's written tentative ruling.

Matter submitted to the Court with argument.

The Court finds/orders:

Matter taken under submission.

Off the record, court and counsel discuss scheduling. The Court states that court rules must be signed and turned into the court today.

After further consideration of submitted matter, the Court rules as follows:

The court's ruling is as follows:

Defendant Rheem Manufacturing Company ("Rheem") moves for summary judgment on Plaintiffs Gertrude Denyer, Edward Lawrence Denyer, and Elizabeth Denyer Hoggan's 1st Amended Complaint or, alternatively, summary adjudication of four specified Issues. Plaintiffs oppose Defendant Rheem's motion.

The Court denies Defendant Rheem Manufacturing Company's motion for summary judgment. The Court also denies Defendant Rheem's motion for summary adjudication of (i) Plaintiffs' third cause of action for false representation; (ii) Plaintiffs' fourth cause of action for intentional tort; (iii) Plaintiff Gertrude Denyer's seventh cause of action for loss of consortium; and (iv) Plaintiffs' request for punitive damages.

Grant Plaintiffs Gertrude Denyer's, Edward Lawrence Denyer's and Elizabeth Denyer Hoggan's request for judicial notice.

Overrule Plaintiffs' evidentiary objections to the declaration of Fred B. Lee.

Sustain all of Plaintiffs' evidentiary objections to the declaration of Richard Fuhrman.

Find that: (i) Defendant Rheem's Material Facts Nos. 1, 3, 4, 7, and 27 are undisputed and established; (ii) Rheem's Material Facts Nos. 6, 9-12, 16, 18, 21, 22, 23-26, 28, and 29 are disputed and established; (iii) Rheem's Material Facts Nos. 2, 5, 8, 13-15, 17, 19, 20, 30-35, 67, and 68 are disputed and not established; (iv) the remainder of Rheem's Material Facts are mere repetitions of the Material Facts addressed above; (v) Plaintiffs' Additional Material Facts Nos. 11, 12, 14-18, and 23 are supported by the cited-to evidence and established; (vi) Plaintiffs' Additional Material Fact No. 1 is supported by the cited-to evidence and established as to the first sentence, and not supported and not established as to the second sentence; and (vii) the remainder of Plaintiffs' Additional Material Facts are not supported and not established, either due to overbroad citations to supporting evidence, or due to the fact that they consist of legal conclusions and/or arguments.

Discussion:

Defendant Rheem's Request for Summary Judgment:

On June 30, 2015, Plaintiffs filed their 1st Amended Complaint for wrongful death, alleging various causes of action and damages against Rheem including strict liability, negligence, false representation and intentional cause of action and punitive damages for the wrongful death of Decedent caused by his exposure to Rheem's asbestos-containing products. Plaintiffs allege that Decedent worked with and around Rheem's asbestos-containing equipment including furnaces, insulation, heaters, boilers, air-conditioners, heaters, chillers, and compressors during his career throughout the 1960s and 1970s, which exposed him to Rheem's asbestos-containing gaskets, packing, insulation, and other materials.

Defendant Rheem contends that it is entitled to summary judgment because Plaintiffs lack evidence of Decedent Robert Denyer's "threshold exposure" to asbestos attributable to Rheem. Rheem correctly notes the rule that the plaintiff in an asbestos case bears the burden of proving exposure to the defendant's asbestos-containing product. (See, e.g., *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103.) However, on a motion for summary judgment/adjudication, the initial burden is on Rheem as moving party to demonstrate that Plaintiffs cannot establish an element of their case. (See *McGonnell v. Kaiser Gypsum Co.*, supra, 98 Cal. App. 4th at pp. 1102-1103.)

Plaintiffs' Objection Based on the Undernoticing of the Motion

Plaintiffs concede that the parties stipulated to a 50-day notice period for the present motion, rather than the 75-day statutory notice period provided by Code of Civil Procedure §437c(a). However, Plaintiffs contend that Rheem's motion was still undernoticed because it was served by electronic service rather than personal service, thus requiring Rheem to give an additional two court days of notice.

Rheem's motion was served by electronic mail on October 20, 2015, exactly 50 calendar days (i.e., the notice period stipulated to by the parties) prior to the December 9, 2015 hearing date. Plaintiffs are correct that, as a result of electronic service, Rheem was required to give an additional two court days notice. (See Code of Civil Procedure §1010.6(a)(4).) However, Plaintiff has filed a substantive opposition to Rheem's motion, failed to request a continuance of the hearing, and failed to show any prejudice as a result of Rheem's slight undernoticing of the motion. Accordingly, the Court will deem Plaintiff to have waived any objection based on the undernoticing of the motion. (See *Carlton v. Quint* (2000) 77 Cal. App. 4th 690, 697-698.) Accordingly, the Court overrules Plaintiffs' objection based on the fact that Rheem's motion was undernoticed.

Rheem's "Reply" Evidence

For this first time with its reply papers, Rheem submits the supplemental declaration of its counsel Fred Lee and attached Exhibits A through F. The general rule is that the Court will normally not consider "reply" evidence submitted in support of a motion for summary judgment/adjudication in the absence of exceptional circumstances which might justify consideration of this "reply" evidence. (See *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn.8; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316; *Nazir v. United Airlines, Inc.*, supra, 178 Cal.App.4th at p. 252.) Here, Lee's supplemental declaration statements and the verifications attached as Exhibit A to Lee's "reply" declaration are directly in response to Plaintiffs' arguments regarding the undernoticing of the motion and the lack of verification of Plaintiffs' discovery responses, and therefore are merely supplemental in nature and thus will be considered. However, Exhibits B and C (portions of the deposition transcript of Edward Lawrence Denyer and Elizabeth Denyer Hoggan) and D through F (copies of depositions of Rhee's witness Richard Fuhrman taken in other actions) appear to be entirely new evidence, and Lee fails to demonstrate any exceptional circumstances justifying consideration of this evidence. Accordingly, the Court declines to consider Exhibits B through F of Rhee's "reply" evidence.

General Rules Applicable to Motions for Summary Judgment/Adjudication

Summary adjudication is granted where a moving party establishes a right to adjudication of an issue in its favor as a matter of law. (See Code of Civil Procedure §437c(c).) The purpose of a motion for summary judgment/ adjudication is to penetrate evasive language and adept pleading to ascertain the existence or absence of triable issues of material fact. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 873.) The material issues on the motion are framed by the pleadings, and the motion can neither be granted nor denied on a ground not properly raised therein. (*Tsemetzin v. Coast Fed. Sav. & Loan Ass'n* (1997) 57 Cal.App.4th 1334, 1343; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382.)

On a defendant's motion for summary judgment/adjudication, the defendant as moving party bears the initial burden of persuasion that there is no triable material fact as to one or more elements of that claim, or as to a complete defense thereto. (Code of Civil Procedure §437c(p)(2); see also, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) This burden of persuasion is perhaps more accurately as a burden of production: namely, the burden of producing evidence sufficient to make a prima facie showing of the nonexistence of any material fact. (*Id.*) If the moving party satisfies its or her initial burden, then and only then the burden shifts to the opposing party to make a prima facie showing of the

existence of a triable issue of material fact. (*Id.*)

In determining whether a triable issue of material fact exists, the moving party's evidence is construed strictly and the opposing party's evidence liberally. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.) Moreover, the trial court cannot assess the credibility of the parties on a motion for summary judgment/adjudication. (Code of Civil Procedure §437c(e); *AARTS Productions, Inc. v. Aetna Life Ins. Co.* (1986) 179 Cal.App.3d 1061, 1064.) In ruling on a motion for summary judgment/adjudication, the trial court must consider not only the evidence submitted but the reasonable inferences deducible from such evidence. (*Binder v. Aetna Life Ins. Co.*, *supra*, 75 Cal.App.4th at p.840.) Conflicting reasonable inferences must be resolved in favor of the party opposing the motion. (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1397, n.4.)

Request for Judicial Notice

Plaintiffs request that judicial notice be taken of 20 U.S. C.A. §3601. The Court grants Plaintiffs' request for judicial notice pursuant to Evidence Code §451(a).

Evidentiary Objections

Plaintiffs have submitted written objections to portions of the original declaration of Rheem's counsel Fred Lee and the declaration of Rheem employee Richard Fuhrman submitted in support of Rheem's motion. The Court overrules Plaintiffs' evidentiary objections to the declaration of Fred B. Lee. The Court sustains all of Plaintiffs' evidentiary objections to the declaration of Richard Fuhrman. (See discussion, *infra*.)

Defendant Rheem's Request for Summary Judgment

Defendant Rheem contends that it is entitled to summary judgment because Plaintiffs lack evidence of Decedent Robert Denyer's "threshold exposure" to asbestos attributable to Rheem. Rheem correctly notes the rule that the plaintiff in an asbestos case bears the burden of proving exposure to the defendant's asbestos-containing product. (See, e.g., *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103.) However, on a motion for summary judgment/adjudication, the initial burden is on Rheem as moving party to demonstrate that Plaintiffs cannot establish an element of their case. (See *McGonnell v. Kaiser Gypsum Co.*, *supra*, 98 Cal. App. 4th at pp. 1102-1103.)

Rheem contends that it satisfies its initial burden of demonstrating that Plaintiffs cannot establish Decedent's "threshold exposure" to asbestos in a Rheem product based on the declaration statements of Rheem employee (Lab Technician/Produce Development Specialist/Lab Manager/Product Engineer) Richard Fuhrman to the effect that none of Decedent's work with or around a Rheem furnace placed him in contact with a asbestos-containing product that Rheem manufactured/supplied/sold. (See Moving Brief, 7:27-8:8.)

Rheem's contention lacks merit because Plaintiffs' evidentiary objections to Fuhrman's declaration statements are well-taken due to Fuhrman's statement in ¶11 that he "make[s] this affidavit based upon the deposition testimony, my personal knowledge, my review of historical documents and information available to me." This statement indicates that his declaration statements are based – at least in part – on unspecified hearsay "historical documents" and "information available"- and Fuhrman fails to specify which statements in his declaration are based on personal knowledge and Decedent's deposition testimony, and which are based in whole or in part on hearsay. Moreover, Fuhrman fails to state facts establishing that any exception to the hearsay rule applies.

In a summary judgment proceeding, inadmissible hearsay and other inadmissible material in an expert's declaration cannot be considered in determining whether triable issues of material fact exist. (Code Civ. Proc., § 437c, subds. (c), (d); Evid. Code, § 1200; Hayman v. Block (1986) 176 Cal.App.3d 629, 639.) "[A]ny material that forms the basis of an expert's opinion testimony must be reliable." (People v. Gardeley (1996) 14 Cal.4th 605, 618; see also Evid. Code, § 801.) Further, "it is settled that an expert's report . . . 'cannot be used to prove the existence of facts set forth therein,'" and, if the report is offered for such purpose, the report is inadmissible hearsay. (Eddins v. Redstone (2005) 134 Cal.App.4th 290, 317, fn. 24; see also Evid. Code, § 1200.) This rule is to be distinguished from the fact that an expert may rely upon inadmissible hearsay if it is deemed reliable and of the type commonly relied upon by experts in the field. Furman's declaration does not provide the court with information from which it can be concluded that the hearsay he considered is reliable or of the type commonly relied upon by experts in the field.

Additionally, Fuhrman fails to identify himself as an expert, fails to identify any area of expertise, and fails to demonstrate his qualifications to provide expert opinions on that area. An expert declaration must contain evidence of his competency to testify; i.e., statements showing that he has the training, experience or skill that would qualify him to render an opinion on the particular matter in controversy. (See Salasguevara v. Wyeth Laboratories, Inc. (1990) 222 Cal. App. 3d 379, 386, 271 Cal. Rptr. 780; Evid. Code, § 801.) Assuming *arguendo* that Fuhrman qualified as an expert, as noted above, expert testimony based on hearsay sources is only admissible when there is some showing of the reliability of the hearsay sources. (See *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal. App. 4th 1516, 1523-1524 ["If, for example, an expert is using hearsay to support his opinion, it should be considered an improper matter unless the elements of necessity and indications of reliability are present. If there is no necessity for the use of hearsay and there is little indication of trustworthiness, a finding against reasonable reliance by an expert is justified."] Where is the showing that the hearsay information relied upon by Fuhrman is of the type reasonably relied upon by professionals in the field in forming opinions? (*Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th at p. 1524 "[H]earsay information of a type reasonably relied upon by professionals in the field in forming an opinion on the subject may be used to support an expert opinion.") Here, Fuhrman fails to sufficiently identify the historical documents and other "available information" on which his statements are based, much less demonstrate that these sources are reliable and/or of a kind reasonably relied on by professions in the field in rendering expert opinions.

Based on the above, Fuhrman's declaration statements are based in part on hearsay sources which taint his entire declaration and renders it inadmissible because (a) it is impossible to tell which statements in his declaration are based on such records; and (b) Fuhrman fails to specify the hearsay sources in question or make any showing of reliability. Accordingly, Rheem's critical Material Fact No. 30 (Decedent's work did not place him in contact with or proximity to any asbestos-containing product manufactured/sold/distributed by Rheem), which is supported solely by a citation Fuhrman's declaration, is not supported by admissible evidence. As such, Rheem fails to make an affirmative showing on the threshold issue of exposure.

Furthermore, Rheem's attempt to rely on Plaintiffs' "factually devoid" discovery responses to satisfy its initial burden on the issue of threshold exposure fails because the identified discovery responses are not factually devoid on their face, and Rheem fails to demonstrate that they are mere regurgitations of Plaintiffs' allegations in the 1st Amended Complaint or are otherwise factually deficient. (See Material Fact No. 31 [disputed and not established].) Nor do the other Material Facts set forth in Rheem's

Moving Separate Statement that are supported by admissible evidence and established for the purposes of this motion, either individually or collectively, appear sufficient to establish that Plaintiffs cannot satisfy their burden of proof at trial on the issue of threshold exposure. Accordingly, Rheem fails to establish its initial burden as moving party on this issue, the burden does not shift to Plaintiffs to demonstrate the existence of a triable issue of fact as to threshold exposure, and Rheem's request for summary judgment based on threshold exposure is therefore denied.

Defendant Rheem's Requests for Summary Adjudication

In the alternative, Rheem requests summary adjudication of four specified Issues: (i) Plaintiffs' third cause of action for false representation; (ii) Plaintiffs' fourth cause of action for intentional tort; (iii) Plaintiff Gertrude Denyer's seventh cause of action for loss of consortium; and (iv) Plaintiffs' request for punitive damages.

As to Issue No. 1 (false representation claim), Rheem relies on Material Facts Nos. 32 and 33 in support of its requests for summary adjudication of this claim, but both of these Material Facts are disputed and not established. In particular, Material Fact No. 32 is an attempt to rely on factually devoid discovery responses to shift the burden on Plaintiff; however, this Material Fact is not established for the purposes of this motion and, Rheem's reliance on Plaintiffs' factually devoid discovery responses is misplaced both because the discovery responses are not, on their face, factually devoid, and because the subject discovery responses contained multiple objections, creating the possibility that Plaintiffs were withholding information based on those objections and arguably precluding, under *Gaggero v. Yura* (2003) 108 Cal.App.4th 884 at pages 891-893, any conclusion that Plaintiffs' responses indicate they cannot prove an essential element of their claim. "For summary judgment purposes, a deposition objection and instruction not to answer are not the equivalent of a factually devoid response, and therefore cannot be used to shift the burden from the moving defendant to the plaintiff under Code of Civil Procedure section 437c, subdivision (p)(2)." (*Gaggero v. Yura*, supra, 108 Cal. App. 4th at p. 893.) Accordingly, Rheem's request for summary adjudication of Issue No. 1 should be denied.

As to Issue No. 2 (Intentional Tort), the analysis is similar. Rheem cites to Material Facts Nos. 34 and 35 in support of these claim, both of which are disputed and not established. Once again, as to Material Fact No. 34, Rheem fails to satisfy its initial burden by referencing Plaintiffs' discovery responses since the responses themselves are not on their face factually deficient, and because the responses contain numerous objections which render their import uncertain. Accordingly, Rheem's request for summary adjudication of Issue No. 2 is denied.

As to Issue No. 3 (Loss of Consortium), Rheem contends that loss of consortium damages are not recoverable in wrongful death cases and are subsumed in the damages sought in a wrongful death action. However, this contention appears to lack merit, because wrongful death damages do not include damages incurred prior to the wrongful death, and therefore would not allow Plaintiff Gertrude Denyer to recover for loss of consortium which she suffered prior to Decedent's death. More specifically, there appears to be no legal impediment to joining a claim for loss of consortium with a claim for wrongful death, as Plaintiff had done here. (See, e.g., *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 802-803.) The fact that the claims are joined in the same action will, as a practical matter, defeat any possibility of double recover for the same damages. Accordingly, Rheem is not entitled to summary adjudication of the loss of consortium claim.

Finally, as to Issue No. 4 (punitive damages), Rheem's request for summary adjudication is again based

on two Material Facts, Material Facts Nos. 68 and 69, both of which are disputed and not established. In particular, Rheems' reliance on Plaintiffs' factually devoid discovery responses to satisfy its initial burden as moving party as to punitive damages fails because Plaintiffs' responses are not factually devoid on their face, and because the responses contain objections which render their import unclear.

Based on the above, Rheem fails to establish that it is entitled to summary adjudication of any of Issues Nos. 1 through 4, and its alternative request for summary adjudication is denied.

Notice to be given by clerk.