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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
JOHN SWANSON and PATRICIA SWANSON,
Plaintiff(s),

- against -

AIR & LIQUID SYSTEMS CORPORATION,
as successor-by-merger to BUFFALO PUMPS,
Defendants.

INDEX NO. 190535/2012
MOTION DATE 09/19/2018
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion for summary judgment by American Biltrite, Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 2
Answering Affidavits — Exhibits	3 - 4
Replying Affidavits	5 - 6

Cross-Motion: ☐ Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendant American Biltrite, Inc.'s ("Amtico") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it is denied.

Plaintiff John Swanson was diagnosed with mesothelioma on September 16, 2012 and passed away on January 5, 2013 (Opposition Papers Exhs. 1 & 3). Mr. Swanson alleges that he was exposed to asbestos in a variety of ways during his service in the U.S. Navy from 1955-1957 and as a construction supervisor at MIT from 1960-1963 (Swanson dep. pgs. 43-49, 54-59, 70-77, 129-151). During his examination before trial, Mr. Swanson identified Amtico floor tiles as a source of his exposure during his years at MIT (Id., pg. 75-76, 145:2-22). Specifically, he testified that he was exposed to asbestos when he observed contractors "cutting the [Amtico] tiles, [and] placing them on the floor" (Id., pg. 72-75). When asked how he knew the Amtico tiles contained asbestos, he stated, "it said asbestos on the box" (Id. 152:10-22). Plaintiffs commenced this action on November 14, 2012 to recover for damages resulting from Mr. Swanson's exposure to asbestos.

Amtico now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it. Amtico contends that Plaintiffs failed to proffer any expert opinion establishing general and specific causation that Amtico floor tiles caused Mr. Swanson's mesothelioma.

Plaintiffs oppose the motion contending that Amtico failed to make a prima facie showing that its floor tiles could not have caused Mr. Swanson's disease, and in any event, contend that issues of fact remain as to whether Mr. Swanson's exposure to asbestos from Amtico floor tiles caused his mesothelioma.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583,

677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept. 2003]; see also *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.- Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995]). The defendant must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520, 997 NYS2d 381 [1st Dept. 2014]).

"Plaintiff is not required to show the precise causes of his damages, but only show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga.- Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" *(Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Amtico contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006] and *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014]) because Plaintiffs are unable to establish general and specific causation.

General Causation:

In toxic tort cases, an expert opinion must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (special causation) (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]).

Amtico contends that, unlike amphibole asbestos, no causal relationship exists between chrysotile asbestos and the development of mesothelioma, and thus Plaintiffs cannot establish general causation. In support, Amtico submits an expert affidavit and report from John W. Spencer, a certified industrial hygienist (Moving Papers Exh. B); an expert affidavit and report from Dr. James Crapo, a pulmonologist (Id. Exh. D); and an expert affidavit and report from Dr. Michael Graham, a pathologist (Id. Exh. E).

Dr. Spencer's report does not show a lack of causal relationship between chrysotile asbestos and mesothelioma (See Moving Papers Exhs. B, D & E). Tellingly, Dr. Spencer's report cites the EPA's Federal Register, "Asbestos: Manufacturing, Importation, Processing and Distribution in Commerce Prohibitions; Final Rule." July 12, 1989, which states:

> "Mesothelioma has been associated with occupational exposure to chrysotile, amosite, and crocidolite."
>
> "All commercial forms of asbestos have been shown to produce lung tumors and mesothelioma in laboratory animals with no substantial differences between the form of asbestos forms in carcinogenic potency."

> (54 Fed. Reg. 29469 [July 12, 1989]).
>
> "Available information indicates that the combined epidemiological and animal evidence fail to establish conclusively differences in mesothelioma hazard for the various types of asbestos fibers. In view of the inconsistencies and uncertainty regarding this issue, EPA believes that it is prudent and in the public interest to consider all fibers types as having comparable carcinogenic potency in its quantitative assessment of mesothelioma risk."
>
> (54 Fed. Reg. 29470 [July 12, 1989]).

Like Dr. Spencer's report, the reports by Drs. Crapo and Graham do not contest the causal relationship between chrysotile asbestos and mesothelioma. Instead, their opinions challenge Mr. Swanson's level of exposure-arguments which go towards contesting Plaintiffs' ability of establishing specific causation.

Amtico's argument that summary judgment is warranted under *Cornell v 360 West 51st Street Realty, LLC*, (22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014]) because Plaintiffs are unable to establish general causation is unavailing. In *Cornell*, the defendant-corporation established a prima facie case as to general causation. The defendant-corporation's expert, Dr. S. Michael Phillips, submitted an affidavit, establishing that it was generally accepted within the relevant community of scientists that exposure to mold caused disease in three ways, none of which plaintiff claimed. Dr. Phillips cited studies, and in particular, the American Academy of Allergy, Asthma & Immunology (AAAAI) report, to depict the current state of the art in support of his conclusions. Here, Amtico's own expert's report shows that the EPA recognizes a causal relationship between chrysotile asbestos and mesothelioma. In any case, Amtico cannot meet its prima facie burden by pointing to gaps in Plaintiffs' proof (Koulermos, *supra*).

Special Causation:

Amtico states that its floor tiles did not produce breathable dust to a level sufficient to cause Mr. Swanson's mesothelioma, and thus Plaintiffs are unable to establish special causation. In support, Amtico relies on the expert reports from Drs. Spencer, Crapo, and Graham.

In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (special causation)" (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]).

Dr. Spencer states that the EPA considers asbestos-containing floor tiles as non-friable materials. He states that nonfriable materials "are encapsulated products with asbestos fibers bound into a matrix material, a process that significantly reduces or eliminates the potential for release of fibers when damaged or disturbed" (Id. Ex. B, pg. 14). In support, he cites the National Emission Standards for Hazardous Air Pollutants (NESHAP); Asbestos NESHAP Revision rules from November 20, 1990. In relevant part, the rule states:

> "In 1973 when the asbestos NESHAP rules were first promulgated for the demolition of buildings, EPA's intention was to distinguish between materials that would readily release asbestos fibers when damaged or disturbed and those materials that were unlikely to result in the release of significant amounts of asbestos fibers. To accomplish this, EPA labeled as "friable" those materials that were likely to readily release fibers. Friable materials, when dry, could easily be crumbled, pulverized, or reduced to powder using hand pressure"
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> (55 Fed. Reg. 48408 [November 20, 1990]).

> "EPA stated in the January 10, 1989, Federal Register notice that certain nonfriable materials, such as floor tile[s] ... that are in good condition, can be left in buildings being demolished because fiber release from these materials, even if the materials are damaged, is relatively small compared to the fiber release from friable materials"
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> (55 Fed. Reg. 48409).
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> "Most nonfriable materials can be broken without releasing significant quantities of airborne asbestos fibers. It is only when the material is extensively damaged, i.e., crumbled, pulverized, or reduced to powder, that the potential for significant fiber release is greatly increased"
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> (Id).

Dr. Spencer states that OSHA has made the same distinction between friable and non-friable materials. He cites OSHA's Construction Asbestos Standards, where OSHA states:

> "The potential for asbestos-containing product to release breathable fibers depends largely on its degree of friability. Friable means that the material can be crumbled with hand pressure and is therefore likely to emit fibers" (29 CFR 1926.1101 Appendix H, subsection C).
>
> "Materials such as vinyl-asbestos floor tile ... are considered non-friable if intact and generally do not emit airborne fibers unless subjected to sanding, sawing and other aggressive operations" (Id).

Dr. Spencer states that the American Conference of Governmental Industrial Hygienists (ACGIH) and OSHA have established the occupational exposure limits for asbestos. Under 29 CFR 1926.1101 Appendix H, subsection D, OSHA established the permissible exposure level to asbestos, when it stated that the permissible "[e]xposure to airborne asbestos fibers may not exceed 0.1 fibers per cubic centimeter of air (0.1 f/cc) averaged over the 8-hour workday, and 1 fiber per cubic centimeter of air (1.0 f/cc) averaged over a 30 minute work period."

The Court of Appeals enumerated several ways an expert might demonstrate special causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin;" "[c]omparison to the exposure levels of subjects of other studies could be helpful provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker*, supra). In turn, the Appellate Division in *In re New York City Abestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

In making a comparative exposure analysis, Dr. Spencer cites a study performed by Environmental Profiles, Inc. (EPI) (see Moving Papers Exh. B, Footnote 45). EPI is a private entity and, like many of the relevant studies Dr. Spencer cites, it is not annexed to his report (Id., pgs. 22-25; see Spencer Report, Footnotes Nos. 45-59). Dr. Spencer also cites Amtico's former Vice President's affidavit, which is also not annexed to his report or to Amtico's motion papers.

Dr. Spencer estimates Mr. Swanson's cumulative exposure levels to Amtico floor tiles by conducting a mathematical modeling analysis (Id., pg. 26-27). In calculating Mr. Swanson's exposure, Dr. Spencer assumes that Mr. Swanson spent one hour a day supervising installations. He also assumes that Mr. Swanson began supervising Amtico floor tiles from 1961, based on Amtico's former vice president's affidavit. He assumes that Mr. Swanson supervised the installation of Amtico floor tiles in six occasions–based on Mr. Swanson's testimony that he also oversaw the installation of

Kentile tiles for a total of "at least a dozen times" (see Swanson dep. 74:14-18 and 75:10-16). He also draws a "concentration of 0.000224 f/cc as the exposure value" from the EPI study. From these assumptions and calculations, Dr. Spencer concludes that Mr. Swanson's "cumulative dose ... is 0.0000007 f/cc-yrs," an exposure level that is "definitively below allowable exposure levels according to the ATSDR, OSHA, USEPA, and WHO" (Id., pg. 27).

Dr. Spencer's report, however, fails to establish Amtico's prima facie burden as to special causation. Because Dr. Spencer cites studies that were not conducted by him and which are not annexed to his report, he does not "identify any text, scholarly article, or scientific study ... that approves of or applies this type of [mathematical] methodology, let alone a 'consensus' as to its reliability (see *Parker*, supra, and *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, 28 NYS3d 656, 48 NE3d 937 [2016]). Thus, Dr. Spencer's report is insufficient to establish Amtico's prima facie burden.

The reports by Dr. Crapo and Dr. Graham do not meet the foundational standards under *Parker* and *Cornell* to establish Amtico's prima facie burden as to special causation. Dr. Crapo and Dr. Graham's opinions are conclusory. They do not annex any studies showing a comparative analysis of Mr. Swanson's exposure levels, any mathematical modeling analysis taking into account Mr. Swanson's work history, or any other type of scientific analysis to establish special causation. Their reports are devoid "of any reference to a foundational scientific basis for its conclusions. No reference [is] made either to [Drs. Crapo's and Graham's] own personal knowledge acquired through [their] practice or to studies or to other literature that might have provided the [scientific] support for the[ir] opinions" (*Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589, 684 NE2d 19 [1997]). Their reports are devoid of the "scientific expression" requirement set by *Parker* and *Cornell*.

Even if Amtico were able to meet its prima facie burden, Plaintiffs raise issue of fact to be resolved at trial. At his deposition, Mr. Swanson sufficiently identified Amtico's floor tiles as a source of his exposure. He testified that he was exposed to asbestos from observing workers cutting and placing the floor tiles while he was a construction supervisor at MIT (See Swanson dep., pgs. 75-76, 145:2-22). He recalled that the Amtico tiles were nine by nine and twelve by twelve, and believed they were packaged 25 tiles in a box (Id., pg. 150). He also testified that he knew the tiles contained asbestos because "it said asbestos on the box" (Id., pg. 145). Thus, Plaintiffs' have shown "facts and conditions from which [Amtico's] liability may be reasonably inferred" (Reid, *supra*).

ACCORDINGLY, it is ORDERED that Defendant American Biltrite, Inc.'s ("Amtico") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it is denied.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: October 9, 2018

MANUEL J. MENDEZ
J.S.C.

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