

Linsky v Algoma Door, Inc.

2019 NY Slip Op 30341(U)

February 14, 2019

Supreme Court, New York County

Docket Number: 190149/2016

Judge: Manuel J. Mendez

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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

ALLISON LINSKY,

INDEX NO. 190149/2016

Plaintiff,

MOTION DATE 01/23/2019

- against -

MOTION SEQ. NO. 002

ALGOMA DOOR, INC., et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by American Biltrite, Inc.:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

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

Plaintiff Allison Linsky, was diagnosed with pleural mesothelioma on April 27, 2016. She was 58 years old at the time of her diagnosis. Ms. Linsky was deposed over a course of three days on June 14, 15 and 16, 2016 (Mot. Reinhardt Aff. Exhs. A, Opp. Comerford Aff. Exh. 6). It is alleged that the Ms. Linsky was exposed to asbestos in a variety of ways. Her exposure - as relevant to this motion - was from Amtico vinyl asbestos floor tiles manufactured by American Biltrite, Inc. (hereinafter referred to as "ABI").

Plaintiff alleges she was exposed to second hand asbestos dust during her work as an interior designer, draftperson and project manager for multiple employers from about 1978 through 1985. Ms. Linsky testified at her deposition that she was employed as a junior designer with Neville Lewis Associates from about 1978 through 1979. Plaintiff was employed as a junior draftsman or junior designer at J. Gordon Carr from about 1979 through 1981. She was employed as a project manager at Cioppa Planning and design starting about 1982 through 1985 (Mot. Reinhardt Aff., Exh. A, pgs. 67, 71, 73 -77, 110, 129, 136-138).

Plaintiff testified that her job duties frequently included visiting new and ongoing commercial construction sites to take measurements and ensure the work matched specifications provided by architects and customers (Opp. Comerford Aff., Exh. 6, pgs. 48, 55-56, 71, 82-83, 85-86, 88, 113, 118, 123-127, 129-133, 139-140, 146, 191-192, 214 and 218-219). Plaintiff identified Amtico vinyl asbestos floor tiles as one of six she observed while working at construction sites (Mot. Reinhardt Aff., Exh. A, pg. 116). Ms. Linsky recalled she first saw the name Amtico when she started working in 1978. She described the boxes as the size of a tile but ten inches high and heavy, with the name Amtico on it (Opp. Comerford Aff., Exh. 6, pgs. 209-210). She was aware that the Amtico vinyl asbestos tiles were used because her employer specified Amtico "VAT" (Vinyl Asbestos Tile) and there were "VAT" samples that plaintiff would cut or score and snap to place on boards for clients. At some point plaintiff claims that the tiles became "VCT" and there was no longer asbestos in them (Opp. Comerford Aff., Exh. 6, pgs. 189 and 196-199).

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

Plaintiff testified that she would observe people install floor tiles to ensure compliance with specifications. She testified that if there was a center line pattern, they would snap a center line and then cut the sides. She identified the tools used as knives, linoleum knives, or heavy duty mat knives, that were used to either cut the tile or score and snap it (Opp. Comerford Aff., Exh. 6, pg. 192). Plaintiff testified that when the workers snapped the tile the asbestos particles would come out. She was also exposed to asbestos through breathing in dust while observing the tile removal process (Opp. Comerford Aff., Exh. 6, pg. 192-194). Plaintiff claimed that the average floor installation for Amtico vinyl asbestos floor tile was between five and ten thousand feet per room, but that it could be substantially more, as much as 30,000 to 50,000 feet (Opp. Comerford Aff., Exh. 6, pg. 185). She was often in the room while ABI's Amtico vinyl asbestos floor tile was being laid, and testified that she would have to move around in the room while the contractors were working and cutting tile (Opp. Comerford Aff., Exh. 6, pgs. 215-217 and 219-220).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it.

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]).

ABI argues that plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that its product, Amtico asbestos vinyl floor tiles, caused decedent's mesothelioma. ABI's reliance on the reports of plaintiff's expert Dr. Brent Staggs, M.D. (Mot. Reinhardt Aff., Exh. F) in support of its argument that plaintiff will not present any admissible evidence of exposure to asbestos is unavailing.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept., 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product did not contribute to the causation of plaintiff's illness (*Comeau v. W.R. Grace & Co. - Conn. (Matter of New York City Asbestos Litigation)*, 216 A.D. 2d 79, 628 N.Y.S. 2d 72 [1st Dept., 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *Di Salvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept., 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 2d 766 [3rd Dept., 2017]). ABI must unequivocally establish that the plaintiff's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of her mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

ABI's attempt to "point to gaps," by alleging plaintiff has no evidence, fails to establish a prima facie case for summary judgment.

ABI 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 plaintiff is unable to establish general and specific causation. ABI argues that its three experts: John W. Spencer, CIH, CSP (a certified industrial hygienist), his report prepared with Marc Plisko (a certified industrial hygienist) (Mot. Reinhardt Aff. Exh. B), the report from Dr. James D. Crapo, M.D. (Mot. Reinhardt Aff. Exh. D), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. E), establish lack of causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered, to establish general causation (Parker v. Mobil Oil Corp., 7 NY3d 434, 448, supra).

ABI argues that, unlike amphibole asbestos, no causal relationship exists between encapsulated chrysotile asbestos used in their product and the development of mesothelioma, eliminating any general causation. ABI submits the expert affidavit and June 27, 2018 Summary Report of John W. Spencer, CIH, CSP, a certified industrial hygienist, and Marc Plisko, a certified industrial hygienist (Mot. Reinhardt Aff. Exh. B), an expert affidavit and report from Dr. David Crapo, M.D. (Mot. Reinhardt Aff. Exh. D), and an expert affidavit and report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. E), to establish the lack of general causation.

Mr. Spencer is employed as President of Environmental Profiles, Inc. ("EPI") and Mr. Plisko is a Senior Project Manager at EPI. Mr. Spencer's and Mr. Plisko's June 27, 2018 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and decedent's mesothelioma. They draw on multiple assumptions as to plaintiff's exposure from her deposition testimony and response to interrogatories. They also rely on multiple reports and studies of ABI's Amtico vinyl asbestos floor tile performed by EPI, for a risk and exposure assessment. The June 27, 2018 Summary Report explains the difference between friable and non-friable asbestos containing materials. It references materials and standards from the Environmental Protection Agency ("EPA"), World Health Organization ("WHO"), and Occupational Safety and Health Administration (OSHA), and states that encapsulated non-friable products such as ABI's Amtico floor tile poses a lesser potential of release of asbestos fibers associated with mesothelioma. They conclude that plaintiff's actual exposure to asbestos from her visits to construction sites was no greater than ambient exposure (See Mot. Reinhardt Aff. Exh. B).

Dr. James D. Crapo, M.D.'s report dated June 30, 2018 assesses the plaintiff's pathology, pulmonary function studies, chest radiographs and alleged asbestos exposure history. His report relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their June 27, 2018 Summary Report. Dr. Crapo relies on no other studies or reports but concludes that the encapsulated chrysotile in ABI's Amtico vinyl asbestos floor tile could not have contributed to the plaintiff's risk for the development of pleural mesothelioma. Dr. Crapo further concludes that plaintiff's exposure to thermal insulation products containing amphibole asbestos created a risk factor and was the likely cause of her mesothelioma. He cites to a study as establishing the possibility that plaintiff's mesothelioma might also be idiopathic or unrelated at all to asbestos exposure (Mot. Reinhardt Aff. Exh. D, pg. 3).

Dr. Geyer's report dated June 29, 2018 relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their June 27, 2018 Summary Report. Dr. Geyer prepared a table of published literature in support of his conclusion that chrysotile fibers unaccompanied by contamination with amphibole forms of asbestos, do not produce mesothelioma in humans (See Mot. Reinhardt Aff. Exh. E). The published literature Dr. Geyer relies on are not annexed to either his report or the motion papers. Dr. Geyer further concludes that because the encapsulated chrysotile fibers in Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone, rendering them unable to cause plaintiff's malignant mesothelioma. He opines that plaintiff's mesothelioma is more likely caused by exposure to amphibole asbestos found in the pipe covering/insulation materials that she was exposed to at the construction site (See Mot. Reinhardt Aff. Exh. D).

Plaintiff in opposition relies on the reports of Dr. Kenneth R. Spaeth, M.D., M.P.H., MoccH, a specialist in preventative and occupational medicine, and Brent C. Staggs, M.D. (Opp. Commerford Aff., Exhs. 7 and 8).

Dr. Spaeth's September 4, 2018 report assesses plaintiff's medical history, family history, occupational exposure history and non-occupational exposure history. Dr. Spaeth

relies on multiple studies by “prestigious governmental and non-governmental health agencies” to demonstrate that all commercial asbestos fiber, including chrysotile fibers can by themselves cause mesothelioma (Opp. Commerford Aff., Exh. 7, pg. 5 of 9, and footnotes 1-11 on pg. 7 of 9). He concludes that plaintiff’s inhaling airborne asbestos fibers for an extended period of time on an ongoing basis during her visits to construction sites results in cumulative exposure - above background levels - and the cutting, scoring and snapping of ABI’s Amtico vinyl asbestos floor tiles led to plaintiff’s mesothelioma (Opp. Commerford Aff., Exh. 7, pg. 5 of 9). In support of his conclusion Dr. Spaeth relies on reports from WHO, OSHA, the EPA and the United States Department of Health and Human Services. He cites the Collegium Ramazzini’s release entitled “The Global Health Dimensions of Asbestos and Asbestos-Related Diseases,” 18th Statement (June 24, 2015) (Id. at pg. 4, n. 3). In relevant part, it states:

Since 1993, the Collegium Ramazzini has repeatedly called for a global ban on all mining, manufacture and use of asbestos. The Collegium has taken this position based on well-validated scientific evidence showing that all types of asbestos, including chrysotile, the most widely used form, cause cancers such as mesothelioma and lung cancer, and showing additionally that there is no safe level of exposure.

(Collegium Ramazzini, The Global Health Dimensions of Asbestos and Asbestos-Related Diseases, [http://www.collegiumramazzini.org/download/18_EighteenthCRStatement\(2015\).pdf](http://www.collegiumramazzini.org/download/18_EighteenthCRStatement(2015).pdf), 24 June 2015, at 1-2.)

Dr. Brent C. Staggs, M.D.’s December 11, 2016 report assesses plaintiff’s clinical history, radiology reports, pathology reports, pathology materials and asbestos exposure history (Opp. Commerford Aff. Exh. 8). He concludes that exposure to chrysotile and amphibole asbestos is known to cause malignant mesothelioma. He further concludes that plaintiff’s mesothelioma is from cumulative exposure to asbestos containing products including ABI’s Amtico vinyl asbestos floor tiles.

ABI’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*, 22 NY3d 762, supra, the defendant-corporation established a prima facie case as to general causation, establishing generally accepted standards within the relevant community of accepted scientists and scientific organizations that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiff’s expert Dr. Spaeth is relying on some of the same scientists and scientific organizations as the defendants experts in support of general causation.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

ABI’s experts John W. Spencer and Marc Plisko, Dr. Stanley Geyer, M.D., and Dr. David Crapo, M.D., rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos and mesothelioma. Plaintiffs’ expert, Dr. Kenneth R. Spaeth, also relies on studies and reports - in part from the same scientific organizations as ABI’s experts - to establish that plaintiff’s exposure to chrysotile asbestos fibers can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Specific Causation:

ABI argues plaintiff cannot establish specific causation because its Amtico vinyl asbestos floor tiles did not produce breathable dust on a level that is sufficient to cause her mesothelioma.

The Court of Appeals has enumerated several ways an expert might demonstrate specific 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*, 7 NY3d 434, supra at 448). 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" to establish special causation (see *Parker*, 7 NY3d 434, supra at 448). In turn, the Appellate Division in (*In re New York City Asbestos 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, the June 27, 2018 Summary Report by Mr. Spencer and Mr. Plisko cites their study performed at Environmental Profiles, Inc. (EPI). Mr. Spencer and Mr. Plisko rely on data from a six hour and 51 minute study of 161 linear feet of floor tile they conducted on ABI's Amtico vinyl asbestos floor tiles containing 14 -15 percent chrysotile asbestos, that was cut using "Guillotine cutter, utility knife, scribe score and snap break, shears (heat and cut, no heat and cut) and linoleum knife." They incorporate the results into a table showing area air sampling for PCM and TEM fiber concentrations (Mot. Reinhardt Aff., Exh. B, Table 6). They further calculate that plaintiff had 3.2% exposure to asbestos from Amtico vinyl asbestos floor tiles and that her total exposure was less than 0.00002 f/cc-year. The report states that plaintiff's cumulative exposure to asbestos is indistinguishable from most lifetime cumulative exposures to ambient asbestos (Mot. Reinhardt Aff., Exh. B).

Mr. Spencer and Mr. Plisko's report concludes that (1) plaintiff's exposure to asbestos containing drywall joint compound and thermal insulation is the most likely cause of her exposure to airborne asbestos, (2) any exposure plaintiff had from the manipulation of Amtico vinyl asbestos floor tile would have been negligible and would not have been considered by either OSHA or the EPA to present a risk, (3) plaintiff has not provided any scientifically reliable and relevant industrial hygiene exposure assessment, and (4) plaintiff's working exposure to asbestos from ABI's Amtico vinyl asbestos floor tile was well below the permissible exposure limit standards set by OSHA and WHO (See Mot. Reinhardt Aff. Exh. B).

Dr. James D. Crapo, M.D.'s report dated June 30, 2018 assesses the plaintiff's asbestos exposure history, pathology, chest radiographs and pulmonary function studies. His report relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their June 27, 2018 Summary Report. Dr. Crapo relies on no other studies or reports for his conclusion that the plaintiff has a history of exposure to amphibole forms of asbestos through thermal insulation products that would have caused her mesothelioma. Alternatively, Dr. Crapo states that for women most mesothelioma are ideopathic or unrelated to asbestos exposure. Dr. Crapo further concludes that plaintiff's exposure to chrysotile asbestos through ABI's Amtico vinyl asbestos floor tile was not significant or high enough to have caused her mesothelioma (Mot. Reinhardt Aff. Exh. D).

ABI's expert, Dr. Geyer, relies on decedent's pathology, occupational and exposure history obtained from her response to interrogatories, and deposition testimony, the June 27, 2018 Summary Report by Mr. Spencer and Mr. Plisko, and the reports and studies (not annexed to the motion papers) that he cites in a table. Dr. Geyer concludes that plaintiff's exposure to amosite asbestos - a form of amphibole asbestos - in pipe insulation, inside sheetrock, on ductwork and air conditioning units, is what that caused her mesothelioma. He further concludes that the encapsulated chrysotile asbestos in ABI's Amtico vinyl asbestos floor tile is not the cause of plaintiff's mesothelioma because her second hand exposure was not significant (Mot. Reinhardt Aff., Exh.E).

Plaintiff's expert, Dr. Kenneth R. Spaeth, M.D., states that outdoor background levels of asbestos can vary depending on the testing but a reasonable assessment is 0.0001 and 0.00001 fibers/ml inhaled fibers. Dr. Spaeth further states that individuals in settings that involve working with or around asbestos - including asbestos floor tiles - are "at a higher risk for developing all manifestations of asbestos related disease including

mesothelioma” (Opp. Commerford Aff. Exh. 7, pgs. 5-6 of 9 and 8 of 9). He concludes that plaintiff’s inhaling airborne asbestos fibers for an extended period of time, on an ongoing basis, resulted in plaintiff’s cumulative exposure to asbestos dust as the Amtico vinyl asbestos floor tiles were cut, snapped and unpacked in her presence, and the likely cause of her mesothelioma (Opp. Commerford Aff., Exh. 7, pg. 5 of 9). Dr. Spaeth’s report raises credibility issues and issues of fact on specific causation.

Dr. Brent C. Staggs, M.D.’s report concludes that exposure to chrysotile and amphibole asbestos is known to cause malignant mesothelioma, and that plaintiff’s cumulative exposure from each company’s product - which plaintiff contends includes ABI’s Amtico vinyl asbestos floor tile - is the substantial contributing factor resulting in a cumulative dose of asbestos that caused her malignant mesothelioma and pleural plaques (Opp. Commerford Aff., Exh. 8).

Plaintiff is not required to show the precise causes of her damages, only “facts and conditions from which defendant’s liability may be reasonably inferred,” and the opposition papers have provided sufficient proof to create an inference as to specific causation for ABI’s Amtico vinyl asbestos floor tile (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]).

Plaintiff identified ABI's Amtico vinyl asbestos floor tiles as a source of her exposure to asbestos and she described the manner of her exposure, specifically observing the tiles being cut, or scored and snapped, creating dust or being in the presence of the old tiles being removed over the course of about seven years (Opp. Commerford Aff., Exh. 7, pgs. 67, 71, 73 -77, 110, 129, 136-138, 175, 189, 192-194, 196-199, 215-217 and 219-220). Her testimony, when combined with the reports of Dr. Spaeth and Dr. Staggs, has shown “facts and conditions from which [ABI’s] liability may be reasonably inferred” (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), and is sufficient to raise issues of fact, warranting denial of summary judgment.

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

ENTER:

Dated: February 14, 2019



MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ
J.S.C.

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