

Marzigliano v Amchem Prods., Inc.
2019 NY Slip Op 30457(U)
February 19, 2019
Supreme Court, New York County
Docket Number: 190134/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

MICHAEL N. MARZIGLIANO and SHERRY P. MARZIGLIANO, Plaintiffs, - against - AMCHEM PRODUCTS, INC., et al., Defendants.

INDEX NO. 190134/2017
MOTION DATE 01/23/2019
MOTION SEQ. NO. 003
MOTION CAL. NO.

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 (hereinafter referred to as "ABI") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff, Michael N. Marzigliano was diagnosed with pleural mesothelioma on May 3, 2017. Mr. Marzigliano was deposed over a course of three days on July 10, 11, and 12 of 2017 (Mot. Reinhardt Aff. Exh. A and Opp. Weinstein Aff. Exh. 1). It is alleged that Mr. Marzigliano was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from his work with his father who was flipping houses from 1965-1967, work for a construction company and his own contracting company (Mot. Reinhardt Aff., Exh. A, pgs. 117-120, 169, 174-180 and 673-682).

Mr. Marzigliano testified that he worked with multiple asbestos floor tiles, including ABI's Amtico vinyl asbestos floor tile (Mot. Reinhardt Aff., Exh. A, pgs. 673-677 and 680-684). He testified that he worked with Amtico asbestos floor tiles in covering about two hundred square feet per job. He also testified that he used floor tile in the late 1960's that he identified as containing the name American Biltrite or Biltrite on the box, that were red or multicolored and came in a cardboard flitop box. He did not identify the Biltrite tile as "Amtico," and testified that he used Biltrite tiles about two times (Mot. Reinhardt Aff., Exh. A, pgs. 692-698 and 701-704).

He did not remember seeing any other language on the box that contained ABI's Amtico asbestos floor tile. Mr. Marzigliano recalled that the Amtico asbestos floor tiles were black on the bottom with sporadic multicolor on the top, and that they were about 8x8 or 9x9 inches. He recalled that there were about fifteen tiles in a cardboard box and that the box was opened through a seam (Mot. Reinhardt Aff., Exh. A, pg. 705-706 and 708). Mr. Marzigliano testified that he believes that the Amtico floor tiles he used had asbestos. He testified that Amtico floor tile emitted dust when cutting them with a sheetrock knife or a saw, and when sanding off the edges. He claims the tile emitted pieces of brittle parts that would break off and created dust that he inhaled (Mot. Reinhardt Aff., Exh. A, pgs. 672, 674-675 and 700-701).

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

Plaintiffs commenced this action on April 20, 2017 to recover for damages resulting from Mr. Marzigliano's exposure to asbestos (See NYSCEF Doc. # 1).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. ABI contends that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that Amtico floor tiles caused Mr. Marzigliano's 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 NYS 2d 184 [1st Dept. 1997]).

ABI argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that its product, Amtico asbestos vinyl floor tiles, caused Mr. Marzigliano's mesothelioma. ABI's reliance on the reports of plaintiffs' experts, and Dr. David Y. Zhang, M.D., Ph.D. and M.P.H. and Dr. Mark Ellis Ginsburg, M.D. (Mot. Reinhardt Aff., Exhs. E and F), in support of its argument that plaintiff will not present any admissible evidence as to causation, 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 Mr. Marzigliano's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of his 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," in plaintiffs' evidence, fails to establish a prima facie basis 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 plaintiffs are unable to establish general and specific causation. ABI argues that its 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), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. D), 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 and the development of mesothelioma, eliminating any

general causation. ABI submits the expert affidavit and July 9, 2018 Summary Report of John W. Spencer, CIH, CSP, a certified industrial hygienist, and his report prepared with Marc Plisko, a certified industrial hygienist (Mot. Reinhardt Aff. Exh. B); an expert affidavit and report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. D), to establish lack of 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 July 9, 2018 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and Mr. Marzigliano's mesothelioma. They draw on multiple assumptions as to plaintiff's exposure from his deposition testimony and responses to interrogatories. They also rely on reports and studies, including those performed by EPI, of ABI's Amtico vinyl asbestos floor tile for a risk and exposure assessment. The July 9, 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, pose a lesser potential of release of asbestos fibers associated with mesothelioma. They conclude that plaintiff's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, well below a working lifetime at OSHA and the WHO permissible exposure limits, and well below lifetime cumulative exposure at the EPA clearance limit following an asbestos abatement action (See Mot. Reinhardt Aff. Exh. B).

Dr. Geyer's report relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their July 9, 2018 Summary Report. Dr. Geyer also prepared a table of published literature in support of his conclusion that chrysotile fibers unaccompanied by contamination with amphibole forms of asbestos, or some mixture of both chrysotile and amphiboles, did not produce mesothelioma in humans (See Mot. Reinhardt Aff. Exh. D, pg. 3 of 6). Dr. Geyer further concludes that because 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 claims that Mr. Marzigliano's exposure to amphibole asbestos fibers was from other sources, including asbestos insulation and asbestos pipe covering, and are the more likely causes of plaintiff's mesothelioma (See Mot. Reinhardt Aff. Exh. D, pg. 4 of 6).

Plaintiffs in opposition rely on the reports of Dr. David Y. Zhang, M.D., Ph.D., M.P.H., a specialist in pathology and occupational therapy, and Dr. Mark Ellis Ginsburg M.D., Associate Director of General Thoracic Surgery at Columbia University College of Physicians and Surgeons. Both reports are annexed to the defendants motion papers (See Mot. Reinhardt Aff. Exhs. E and F).

Dr. Zhang provides Mr. Marzigliano's occupational history of asbestos exposure, medical history, summary of pertinent clinical findings, summary of image study reports, summary of pathology reports, and pathology findings. Dr. Zhang cites to his own research as demonstrating that malignant mesothelioma is caused by inhalation of asbestos fibers that results in a higher incidence of malignant mesothelioma. He claims that mesothelioma has a long latency period, generally fifteen to twenty years after exposure. Dr. Zhang concludes that Mr. Marzigliano had "a history of significant level of asbestos exposure." He further concludes, "...the cumulative exposure to each company's asbestos containing products significantly contributed to the development of his (Mr. Marzigliano's) malignant mesothelioma." (Mot. Reinhardt Aff. Exh. E). It is plaintiffs' contention that Dr. Zhang is including ABI's Amtico vinyl asbestos floor tile as part of the cumulative exposure.

Dr. Ginsburg's September 9, 2017 report assesses Mr. Marzigliano's medical history, past medical history, medications, family history, occupational and environmental exposure, pathology reports and radiology reports. Dr. Ginsburg relies on studies and reports from multiple entities - that includes WHO, OSHA and the EPA -

as demonstrating that all asbestos fiber, including chrysotile fibers can increase the likelihood of developing mesothelioma. He concludes that chrysotile has been independently found to cause mesothelioma, and that there is no safe minimal level of asbestos exposure (Mot. Reinhardt Aff., Exh. F, Ginsburg Report, "Summary," footnotes 8-27, 30, 37, 38, 40-50, and 61-63). He further concludes that Mr. Marzigliano's cumulative exposure to asbestos from each company's asbestos product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tiles, caused his mesothelioma (Opp. Reinhardt Aff., Exh. F).

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 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 plaintiffs' expert, Dr. Ginsburg, 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, Marc Plisko and Dr. Stanley Geyer, M.D. rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos and mesothelioma. Plaintiffs' expert, Dr. Mark Ellis Ginsburg, also relies on studies and reports in part from the same scientific organizations, OSHA, EPA and the WHO, 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.

Special Causation:

ABI states that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause Mr. Marzigliano's mesothelioma, and thus plaintiffs are unable to establish special causation.

The Court of Appeals has 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 v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]). 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 v. Mobil Oil Corp.*, 7 NY3d 434, supra at 448]). 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, the July 9, 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 they conducted of 161 linear feet of 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." (Mot.

Reinhardt Aff., Exh. B, Tables 3 and 4). They further calculate that Mr. Marzigliano had less than 0.0000035 f/cc-yr. exposure from installation of ABI Amtico floor tile and that he had less than 0.0000088 f/cc-yrs. exposure to asbestos from cutting Amtico vinyl asbestos floor tiles with power tools. The report states that plaintiff's cumulative exposure to asbestos from ABI's Amtico asbestos floor tile is less than 0.000013 f/cc-yr. and indistinguishable from most lifetime cumulative exposures to ambient asbestos (Mot. Reinhardt Aff., Exh. B).

Mr. Spencer and Mr. Plisko's report concludes that (1) plaintiffs have not provided any scientifically reliable and relevant industrial hygiene exposure assessment (2) there is limited or no evidence to suggest that the ABI Amtico floor tiles identified by Mr. Marzigliano contained asbestos, (3) any exposure Mr. Marzigliano had from the manipulation of Amtico vinyl asbestos floor tile which contained non-friable and encapsulated chrysotile asbestos would have been negligible and would not have been considered by either OSHA or the EPA to present a significant health risk, and (4) even if Mr. Marzigliano cut and installed asbestos containing ABI floor tile, his exposure would be well below the strictest occupational exposure levels allowed by OSHA and the WHO (See Mot. Reinhardt Aff. Exh. B).

ABI's expert Dr. Geyer relies on published literature in the form of reports and studies that are incorporated into a table in his report, and the findings in the July 9, 2018 Summary Report of Mr. Spencer and Mr. Plisko. The published literature Dr. Geyer relies on for his table are not annexed to either his report or the motion papers. Dr. Geyer 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 Mr. Marzigliano's malignant mesothelioma. He concludes that Mr. Marzigliano's exposure to amphibole asbestos fibers from other sources, including insulation and asbestos pipe covering, are a more likely cause of his mesothelioma (See Mot. Reinhardt Aff. Exh. D).

Plaintiffs' expert, Dr. Zhang cites to his own research and relies on review of relevant scientific literature - including, Levin et al., Am. J. Ind. Med. 37:6, 2000, and Suzuki, et al., Ind. Health. 39(2): 183-5, 2001 - as demonstrating that malignant mesothelioma is a rare malignancy caused by inhalation of asbestos fibers. He claims that any exposure to asbestos results in a higher incidence of malignant mesothelioma. Dr. Zhang concludes that Mr. Marzigliano had "a history of significant levels of asbestos exposure." He further concludes, "...the cumulative exposure to each company's asbestos containing products significantly contributed to the development of his (Mr. Marzigliano's) malignant mesothelioma." (Mot. Reinhardt Aff. Exh. E). It is plaintiffs' contention that Dr. Zhang is including ABI's Amtico vinyl asbestos floor tile as part of the cumulative exposure that resulted in Mr. Marzigliano's mesothelioma.

Dr. Mark Ellis Ginsburg, M.D. relies on reports and testing by SRC, Inc. for the USEPA, GCA Corporation and Materials Analytical Services Inc., and states that manipulation or disturbance of asbestos containing floor tiles can result in the release of asbestos fibers that are potentially greater than the ambient level of exposure. Dr. Ginsburg further states that the asbestos content of floor tile is 8 to 30% by weight, and installation of asbestos floor tile results in airborne asbestos concentrations as high as 0.26% f/cc-yr. Dr. Ginsburg also refers to case reports of asbestos floor tile workers developing mesothelioma (Mot. Reinhardt Aff., Exh. F, footnotes 68, 77- 80). Dr. Ginsburg concludes that Mr. Marzigliano's cumulative exposure to asbestos fibers from each company's product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tile, was the likely cause of his mesothelioma (Mot. Reinhardt Aff. Exh. F). Dr. Ginsburg's report raises credibility issues and issues of fact on specific causation.

Plaintiffs are not required to show the precise causes of damages as a result of Mr. Marzigliano's exposure to ABI's product, only "facts and conditions from which defendant's liability may be reasonably inferred." 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]).

Plaintiffs cite to Mr. Marzigliano's deposition testimony, as showing that he identified ABI's Amtico vinyl asbestos floor tiles as a source of his exposure to asbestos. He described the manner of his exposure, specifically being in the presence of, and inhaling, the dust that was emitted when he was cutting the tiles with a sheetrock knife or a saw, and when sanding off the edges (Mot. Reinhardt Aff., Exh. A, pgs. 672, 674-675, 700-701, 705-706 and 708). Mr. Marzigliano's deposition testimony, when combined with the reports of Dr. Zhang and Dr. Ginsburg, has created "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 19, 2019


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

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