

Matter of Marzigliano v Amchem Prods., Inc.

2019 NY Slip Op 30535(U)

March 1, 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,**

INDEX NO. 190134/2017
MOTION DATE 02/20/2019
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

Plaintiffs,
- against -

AMCHEM PRODUCTS, INC., et al.,
Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Mannington Mills, Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits _____	4 - 5
Replying Affidavits _____	6 - 7

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Mannington Mills, Inc.'s (hereinafter referred to as "MMI") 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. Hwang Aff. Exh. C and Opp. Golanski Aff. Exh. 5). 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, and from 1971 through 1972 (Mot. Hwang Aff., Exh. C, pgs. 244, 787 and 805).

Mr. Marzigliano testified at his deposition that he worked with MMI asbestos sheet flooring on about fifteen jobs and covered about 500 square feet with the product per job (Mot. Hwang Aff., Exh. C, pgs. 673- 674). Mr. Marzigliano also testified that he remembered working with MMI asbestos products while performing residential work in Nassau County, New York (Mot. Hwang Aff., Exh. C, pgs. 786- 787). He claims that he used MMI products mostly in kitchens, dining rooms, living rooms and about five percent of the time in the basements (Mot. Hwang Aff., Exh. C, pgs. 787-788). Mr. Marzigliano testified that the asbestos floor tile came in a cardboard box of about fifteen pieces that were 8 x 8 or 9x 9 inches and said "Mannington tile" on it. Mr. Marzigliano described the sheet flooring as packaged in a roll. He described the MMI sheeting as wrapped in white paper that said "Mannington" on it and having designs of various colors but that the back of the sheeting was black (Mot. Hwang Aff., Exh. C, pgs. 789-794).

Mr. Marzigliano testified that he used either a sharp knife or a saw, alternatively he would score the floor tile and crack it. He claims that the cutting or sawing process with the floor tiles generated dust, as did sweeping up the debris during the clean up process. Mr. Marzigliano claims that he was also exposed to asbestos dust by sanding the edges of the MMI floor tiles with sandpaper (Mot. Hwang Aff., Exh. C, pgs. 797-802). He testified that he would cut and, if the knife was not sharp, score the MMI asbestos sheet flooring. Mr. Marzigliano claims he was also exposed to asbestos dust while cutting the MMI sheet flooring and cleaning up the debris (Mot. Hwang Aff., Exh. C, pg. 797, 800-801).

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 Mot. Hwang Aff. Exh. A). MMI filed its Verified Answer on August 29, 2017 (Mot. Hwang Aff. Exh. B).

MMI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. MMI contends that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that any MMI asbestos floor products 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]).

MMI argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that its asbestos floor products caused Mr. Marzigliano's mesothelioma. MMI's reliance on the reports of plaintiffs' experts, Dr. David Y. Zhang, M.D., Ph.D., M.P.H. and Dr. Mark Ellis Ginsburg, M.D. (Mot. Hwang Aff., Exhs. G and H), in support of its argument that plaintiffs 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]). MMI must unequivocally establish that Mr. Marzigliano's level of exposure to its floor products, 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]).

MMI's attempt to "point to gaps," in plaintiffs' evidence, fails to establish a prima facie basis for summary judgment.

MMI contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and *In the Matter of New York City Asbestos Litigation (Juni)*, 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], because plaintiffs are unable to establish general and specific causation. MMI argues that its experts Mark F. Durham, an industrial hygienist (Mot. Hwang Aff. Exh. D), Dr. Dominik D. Alexander, Ph.D., MSPH, an epidemiologist (Mot. Hwang Aff. Exh. E), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Hwang Aff. Exh. F), 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*).

MMI argues that unlike amphibole asbestos, no causal relationship exists between encapsulated chrysotile asbestos and the development of mesothelioma, eliminating any general causation. MMI submits the expert affidavit and November 6, 2018 report of Mark F. Durham, industrial hygienist (Mot. Hwang Aff. Exh. D); an expert affidavit and report dated January 23, 2019 from Dr. Dominik D. Alexander, Ph.D., M.S.P.H., an epidemiologist (Mot. Hwang Aff. Exh. E), and the affidavit and report dated October 18, 2018 from Dr. Stanley Geyer, M.D., a pathologist (Mot. Hwang Aff. Exh. F) to establish lack of causation.

Mark F. Durham's affidavit states that he was a certified industrial hygienist from 1979 to 2013, and that he voluntarily surrendered his certification effective 2013. Mr. Durham is employed as a Senior Consultant for Durham Technical Services, LLC ("DTS") (Mot. Hwang Aff., Exh. D, January 30, 2019 Durham Aff., pg.1, para. 2).

Mr. Durham relies on: (1) a December of 1979 written report by SRI International summarizing testing done in private homes at five different sites between December of 1978 and June of 1979; (2) MMI's internal monitoring records for worker exposure to airborne asbestos; the Material Safety Data Sheet (MSDS) from GAF Corporation, a supplier of asbestos felt used on MMI's flooring products; (3) a walk-through tour of MMI's vinyl flooring production facility in Salem, New Jersey (no indication of date of tour); (4) observations of the manufacture and handling of rolled vinyl sheet flooring; (5) the American Industrial Hygiene Association (AIHA) standards; (6) his 1976 industrial hygiene compliance inspection, while employed by the Occupational Safety and Health Administration (OSHA), of Armstrong Cork Company vinyl asbestos floor tile; and (7) OSHA standards. Mr. Durham also draws on assumptions as to plaintiff's exposure from his deposition testimony and responses to interrogatories (Mot. Hwang Aff. Exh. D).

Mr. Durham performed a "retrospective exposure estimate" of Mr. Marzigliano's exposure to asbestos from MMI's flooring using asbestos fiber levels and air sampling data taken by the SRI International study. He claims that "retrospective exposure estimates" are acceptable as reliable by OSHA. He refers to OSHA's Permissible Exposure Level (PEL) from 1972 to 1976 as 5 f/cc and from 1984 through the present as 0.1 f/cc averaged over an 8 hour work shift. Mr. Durham concludes that plaintiff's actual exposure to asbestos from MMI's floor products with asbestos backing was negligible and below the past and present OSHA PEL (Mot. Hwang Aff. Exh. D).

Dr. Dominik D. Alexander's January 23, 2019 report provides epidemiologic methodology, a descriptive epidemiology of mesothelioma, and an overview of the epidemiology of mesothelioma among chrysotile-exposed study populations. He cites to multiple reports and studies, that are not annexed to the papers, as establishing the risk of mesothelioma from various asbestos fibers. Dr. Alexander states that the epidemiologic evidence clearly shows exposure to amphibole asbestos fibers, especially from commercial amosite and crocidolite, are causally associated with pleural and peritoneal mesothelioma. He claims that the only setting in which chrysotile asbestos exposure has been associated with mesothelioma is among miners and millers in Quebec, Canada and Balanger, Italy, as a result of cumulative exposures in excess of several hundred fibers per cc-years. Dr. Alexander concludes that Mr. Marzigliano's low level exposure to chrysotile asbestos fibers, is not associated with increased risk of mesothelioma and there is no reason to find an increased risk from work with MMI's sheet flooring.

Dr. Geyer relies on the assumptions and conclusions made by Dr. Alexander in his January 23, 2019 Report and Mr. Durham's November 6, 2018 report. Dr. Geyer's report includes a prepared 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. Hwang Aff. Exh. F, pg. 3 of 5). Dr. Geyer further concludes that

because chrysotile fibers in MMI's floor products 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 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 the mesothelioma (See Mot. Hwang Aff. Exh. F, pg. 4 of 5).

Plaintiffs in opposition rely on the reports of Dr. Mark Ellis Ginsburg M.D., Associate Director of General Thoracic Surgery at Columbia University College of Physicians and Surgeons and Dr. David Y. Zhang, M.D., Ph.D., M.P.H., a specialist in pathology and occupational therapy (Opp. Golanski Aff. Exhs. 8 and 10).

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 include the World Health Organization (WHO), OSHA and the Environmental Protection Agency (EPA) - as demonstrating that all asbestos fiber, including chrysotile fibers can increase the likelihood of developing mesothelioma. He also cites articles appearing in the Int. Journal of Occup. Environ. Health and the Annals of Epidemiology that discuss the relationship of chrysotile asbestos to mesothelioma. Dr. Ginsburg concludes that chrysotile asbestos fibers have been independently found to cause mesothelioma, and that there is no safe minimal level of asbestos exposure (Opp. Golanski Aff. Exh. 8, 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 MMI's asbestos flooring, caused Mr. Mazigliano's mesothelioma (Opp. Opp. Golanski Aff. Exhs. 8).

Dr. Zhang's September 18, 2017 report 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." (Opp. Golanski Aff. Exh. 10). It is plaintiffs' contention that Dr. Zhang is including MMI's floor products including sheet flooring as part of the cumulative exposure.

MMI'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 defendant's experts and he also cites to epidemiological reports 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]).

MMI's experts Mr. Mark F. Durham and Dr. Stanley Geyer, M.D. rely on studies and reports to establish that there is no causal relationship between chrysotile asbestos and mesothelioma. Dr. Alexander, MMI's epidemiologist, cites to scientific studies and reports but does not annex any of them to his affidavit or report. 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:

MMI states that its flooring products 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 the case *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.

Mr. Durham, MMI's industrial hygienist, relies on the Material Safety Data Sheet (MSDS) for GAF Corporation, the company that is alleged to have provided asbestos felt backing for MMI floor sheeting. Mr. Durham makes assumptions based on Mr. Marzigliano's deposition testimony. Mr. Durham determines that Mr. Marzigliano performed nine installations over the course of 3.6 years, and calculates an annual exposure level of 0.0024 f/cc or f/mL (Mot. Hwang Aff., Exh. D). Mr. Durham further calculates that Mr. Marzigliano's cumulative or "lifetime" exposure to asbestos from MMI's products is 0.00087 fiber-years/mL and that this exposure is negligible (Mot. Hwang Aff., Exh. D).

Dr. Alexander relies on Mr. Durham's conclusions and modeling in the November 6, 2018 report. Dr. Alexander further relies on the review of Pierce, Ruestow, and Finley 2016 on the no-observed adverse effect level (NOAEL) for a "best estimate" range of exposure as 208-415 f/cc-years. Dr. Alexander concludes that MMI's sheet flooring may result in low-level exposure to chrysotile asbestos fibers that is not associated with any increased risk of mesothelioma. Dr. Alexander further concludes that there is no scientific basis to find that Mr. Marzigliano's exposure to MMI's sheet flooring increased his risk of mesothelioma (See Mot. Hwang Aff., Exh. E).

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 of Mr. Durham and Dr. Alexander, for the scientific modeling to establish specific causation. 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 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. Hwang Aff. Exh. F).

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." (Opp. Golanski Aff. Exh. 10). It is plaintiffs' contention that Dr. Zhang is including MMI's floor products, including the sheet flooring, 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 (Opp. Golanski Aff. Exh. 8, 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 likely the cause of his mesothelioma (Opp. Golanski Aff. Exh. 8). 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 MMI'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 MMI's flooring products (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 MMI's asbestos floor tiles and sheet flooring as a source of his exposure to asbestos. He described the manner of his exposure (Mot. Hwang Aff. C pgs. 673- 674 and 797-802). Mr. Marzigliano's deposition testimony, when combined with the reports of Dr. Zhang and Dr. Ginsburg, has created "facts and conditions from which [MMI's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), and raise issues of fact. Plaintiffs have also provided proof that MMI used multiple manufacturers of asbestos containing felt on the sheet flooring, including, Tarkett, Nicolet, Congoleum, Armstrong, Lupel-SNA and GAF Corporation (See Opp. Golanski Aff. Exh. 4. pg. 123, and Exh. 3, pg. 26). MMI and its experts only refer to GAF Corporation's asbestos felt products containing encapsulated chrysotile fibers as used in the MMI floor sheeting, and rely only on the MSDS for GAF Corporation, there also remain issues of fact as to the asbestos in other manufacturers' products used in MMI floor sheeting and causation, warranting denial of summary judgment.

MMI attempts to include a Supplemental Affidavit of the industrial hygienist Mark F. Durham and to present new arguments as to the manufacture of the asbestos floor tile for the first time on reply. MMI for the first time on reply provides the affidavit of Dennis H. Bradway, Corporate Products and Standards Manager, employed since 1982 (Reply Aff. Exhs. 1 and 3). Mr. Bradway claims that MMI did not manufacture or sell any floor tiles until 1993, which is after the period of Mr. Marzigliano's alleged exposure (Reply Aff. Exh. 3). The Affirmation in Support of this motion refers to MMI "floor products" or "sheet flooring," there was no specific argument as to the manufacture or sale of floor tiles by MMI prior to 1993 until the reply papers. The arguments made for the first time in MMI's reply papers, Mr. Bradway's Affidavit and Mr. Durham's Supplemental Affidavit deprive the plaintiffs of the opportunity to reply to the assertions being made and are improperly before this Court.

New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept., 2012], In re New York City Asbestos Litigation (Konstantin), 121 A.D. 3d 230, 990 N.Y.S. 2d 174 [1st Dept.,

2014] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]).

To the extent MMI seeks the alternative relief of a Frye hearing to determine the admissibility of plaintiffs' experts regarding causation, that relief is premature on this pre-trial motion for summary judgment and that application should be made by a motion in limine before the trial judge. Plaintiff has provided evidence of causation stating that chrysotile fibers cause mesothelioma, and the conflicting testimony warrants denial of summary judgment.

ACCORDINGLY, it is ORDERED that Defendant Mannington Mills, 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: March 1, 2019



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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