

Linsky v Algoma Door, Inc.

2019 NY Slip Op 30816(U)

March 27, 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.	<u>190149/2016</u>
- against -	Plaintiff,	MOTION DATE	<u>03/20/2019</u>
ALGOMA DOOR, INC., <i>et al.</i> ,		MOTION SEQ. NO.	<u>003</u>
	Defendants.	MOTION CAL. NO.	<u> </u>

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 9</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, 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 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. Hwang Aff. Exh. C, Opp. Golanski Aff. Exh. 1). It is alleged that the Ms. Linksy was exposed to asbestos in a variety of ways. Her exposure - as relevant to this motion - was from second hand exposure to the installation of vinyl asbestos flooring manufactured by Mannington Mills Inc. (hereinafter referred to as "MMI").

Plaintiff alleges she was exposed to asbestos dust during her work as an interior designer, draftperson and project manager for multiple employers from about 1978 through 1983. 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 from about 1982 through 1985. Ms. Linsky went into a partnership and then performed her own work for William Allison Design Associates, an S corporation, from about 1986 through 2013 (Mot. Hwang Aff., Exh. C, pgs. 67, 71, 73 -77, 110, 129, 131, 136-139). Plaintiff is alleging exposure to MMI's vinyl asbestos sheet flooring that was produced, at least, from 1978 through 1983, when MMI stopped using the asbestos backed sheet flooring. She testified that she continued to use MMI's products in her own business after 1985 and throughout her career (Mot. Hwang Aff., Exh. C, pgs. 347, 350, 463-464). Plaintiff alleges that she used MMI vinyl asbestos floor sheeting until it was no longer available by direct or indirect purchase.

Ms. Linsky 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 (Mot. Hwang Aff., Exh. C, pgs. 55-56, 71, 82-83, 85-86, 88, 113, 118, 123-127, 129-133, 139-140, 146, 191-192, 214 and 218-219). Plaintiff testified 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 (Mot. Hwang Aff., Exh. C, pg. 185). Plaintiff identified MMI's vinyl asbestos sheet flooring, as one of three brands of vinyl asbestos sheet flooring, that she observed while working at various commercial construction sites. Ms. Linsky recalled

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

that the MMI vinyl asbestos flooring came in ten or twelve foot rolls that were wrapped in brown papers that had a shipping label on it identifying it as from MMI (Mot. Hwang Aff. Exh. C, pgs. 339 - 346).

Ms. Linsky testified that she observed the sheet flooring process as removing whatever was there, scraping off the glue, and scarring the floor if needed to get an even surface. If the scarring was not good enough a floating floor or self-leveling floor would be set in place and when it was dry, there would be a layer of glue with the MMI vinyl asbestos sheet flooring applied on top. She testified that the whole perimeter would have to be cut, and most of the time the MMI asbestos sheet flooring would be laid down at a 90 degree angle with work performed on the remaining two sides. Ms. Linsky testified that she observed the floor workers using either a mat knife, a cutting machine or a metal piece of equipment that would be placed in the corner and cut along the corner moving it down as they went to make it fit. She stated that installation was done quickly but preparation took a long time (Mot. Hwang Aff. Exh. C, pgs. 347- 349). Ms. Linsky stated that she only observed MMI sheet flooring applied in commercial spaces, and that it was used mostly for back office type locations. She remembered it being used in coffee rooms, file rooms, libraries and laboratories as in a Research & Development room. She used sheet flooring because it was easier to clean than tile (Mot. Hwang Aff., Exh. C, pgs. 345 -351).

MMI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. MMI contends that plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that any MMI asbestos floor products caused Ms. Linsky'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 plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that its asbestos floor products caused Ms. Linsky's mesothelioma. MMI relies on the reports of plaintiff's experts, Dr. Kenneth R. Spaeth, M.D., M.P.H., MoccH, and Dr. Brent C. Staggs, M.D. (Mot. Hwang Aff., Exhs. G, H and I), in support of its argument that plaintiff will not present any admissible evidence as to causation.

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 Ms. Linsky's level of exposure to its floor products 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]).

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 uncertified industrial hygienist/consultant (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 December 28, 2018 expert affidavit and November 20, 2018 report signed as "consultant" of Mark F. Durham, an uncertified industrial hygienist (Mot. Hwang Aff. Exh. D); an expert affidavit and January 23, 2019 report from Dr. Dominik D. Alexander, Ph.D., M.S.P.H., an epidemiologist (Mot. Hwang Aff. Exh. E), and the affidavit and October 18, 2018 report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Hwang Aff. Exh. F) to establish lack of causation.

Mr. 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, December 28, 2018 Durham Aff., pg.1, para. 2).

Mr. Durham relies on: (1) his curriculum vitae (2) a December 1979 written report by SRI International summarizing testing done on resilient tiles in private homes at five different sites between December of 1978 and June of 1979; (3) the Material Safety Data Sheet (MSDS) from GAF Corporation, a supplier of asbestos felt used on MMI's flooring products; (4) a walk-through tour of MMI's vinyl flooring production facility in Salem, New Jersey, observations of the manufacture and handling of rolled vinyl sheet flooring; his 1976 personal wall to wall industrial hygiene compliance inspection of the Armstrong Cork Company vinyl floor tile and sheet flooring manufacturing plant in Lancaster, Pennsylvania and the American Board of Industrial Hygiene's (ABIH) definition of industrial hygienists and how it shapes perspectives; (5) the American Industrial Hygiene Association (AIHA) standards; and (6) Occupational Safety and Health Administration (OSHA) standards; and (7) Mr. Durham's November 20, 2018 report presenting his conclusions and opinions as to the plaintiff's exposure. Mr. Durham also draws on assumptions of plaintiff's exposure from Ms. Linsky's deposition testimony and responses to interrogatories (Mot. Hwang Aff. Exh. D).

Mr. Durham performed a "retrospective exposure estimate" of Ms. Linsky's exposure to asbestos from MMI's sheet flooring using asbestos fiber levels and air sampling data taken by the SRI International residential exposure 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 1994 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. The January 23, 2019 report concludes that

the epidemiologic evidence clearly shows that exposure to amphibole asbestos fibers, especially from commercial amosite and crocidolite, are causally associated with pleural and peritoneal mesothelioma. Dr. Alexander 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 cites to studies by the American Cancer Society and the National Cancer Institute showing the demographics of mesothelioma, and states that a higher percentage of women have peritoneal mesothelioma and a higher percentage of men have pleural mesothelioma (Mot. Hwang Aff. Exh. E).

Dr. Alexander's January 28, 2019 affidavit relies on the findings in his report, Mr. Durham's findings that Ms. Linsky had a low level of exposure, and a critical review of epidemiologic studies of chrysotile asbestos of the kind found in MMI's vinyl asbestos floor sheeting. He concludes that there is no scientific evidence for the conclusion that Ms. Linsky's low-level exposure to chrysotile asbestos fibers increases the risk of mesothelioma. Dr. Alexander further concludes that a significant proportion of pleural and peritoneal mesothelioma among women do not appear to be asbestos related. Dr. Alexander states that most cases of mesothelioma in women are not attributable to occupational or domestic asbestos exposure and concludes that Ms. Linsky's exposure to chrysotile asbestos from MMI's vinyl asbestos floor sheeting did not cause her mesothelioma (Mot. Hwang Aff. Exh. E).

Dr. Geyer relies on the assumptions and conclusions made by Dr. Alexander and Mr. Durham, plaintiff's discovery responses and her deposition testimony. 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 Ms. Linsky's malignant mesothelioma (See Mot. Hwang Aff. Exh. F, pg. 3 of 5 and 4 of 5).

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 Dr. Brent C. Staggs, M.D. (Opp. Golanski Aff., Exhs. 10, 11 and 12).

Dr. Spaeth's September 4, 2018 report assesses plaintiff's clinical history, past medical history, family history, occupational exposure history and non-occupational exposure history. Dr. Spaeth relies on multiple studies and findings by governmental and non-governmental health agencies (that are not annexed to his report) to demonstrate that all commercial asbestos fibers, including chrysotile fibers, can by themselves cause mesothelioma (Opp. Golanski Aff., Exh. 10, 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 - as contributing to plaintiff's mesothelioma (Opp. Golanski Aff., Exh. 10, pgs. 5 and 6 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," (2015) which determined that, there is no safe level of exposure to all type of asbestos, including chrysotile (Id. at pg. 4, n. 5).

Plaintiff provides Dr. Brent C. Staggs, M.D.'s affidavit dated April 15, 2016 (Opp. Golanski Aff., Exh. 12), and his report dated December 11, 2016 (Opp. Golanski Aff., Exh. 11). Dr. Staggs April 15, 2016 affidavit states that asbestos is a known carcinogen causing all types of diseases in addition to mesothelioma and other cancers. He states that all asbestos fibers - including amphibole, chrysotile and non-commercial asbestiform mineral fibers - cause cancers and that there is no safe level of asbestos exposure. Dr. Staggs cites to reports and findings from the scientific and medical communities in support of his position - including the U.S. Department of Health and Human Services (2001), the

American Thoracic Society, OSHA, the World Trade Organization amongst others (Opp. Golanski Aff., Exh. 12, pgs. 3-6).

Dr. Staggs December 11, 2016 report assesses plaintiff's clinical history, radiology reports, pathology reports, pathology materials and asbestos exposure history (Opp. Golanski Aff. Exh. 11). He refers to his findings in the April 15, 2016 affidavit and 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 (Opp. Golanski Aff. Exh. 11). Plaintiff argues that the cumulative exposure includes MMI's vinyl asbestos floor sheeting.

MMI argues 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. 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 experts Dr. Spaeth and Dr. Staggs are 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]).

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' experts, Dr. Kenneth R. Spaeth and Dr. Brett C. Staggs also rely on studies and reports - in part from the same scientific organizations as MMI's experts - to establish that plaintiff's exposure to chrysotile asbestos fibers in MMI vinyl asbestos floor sheeting 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 Ms. Linsky's mesothelioma, and thus plaintiff is 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 and consultant, 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 Ms. Linsky's deposition testimony and discovery responses. Mr. Durham determines that

Ms. Linsky was present for about ten installations a year from 1978 through 1983, and calculates an annual exposure level of 0.0024 f/cc or f/mL. Mr. Durham calculates that Ms. Linsky had a lifetime exposure of 0.00015 fiber-years/cc (Mot. Hwang Aff., Exh. D). Mr. Durham states that for 1972 through 1976 the OSHA Permissible Exposure Level (PEL) was 5 f/cc and from 1994 through the present it was 0.1 f/cc averaged over an eight hour shift. Mr. Durham concludes that Ms. Linsky's observation of flooring contractors installing MMI vinyl asbestos flooring was well below OSHA PEL (Mot. Hwang Aff., Exh. D).

Dr. Alexander relies on Mr. Durham's conclusions and modeling. 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 Ms. Linsky's exposure to MMI's sheet flooring increased her risk of mesothelioma (Mot. Hwang Aff., Exh. E).

MMI'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. 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 Ms. Linsky's malignant mesothelioma. He concludes that Ms. Linsky's exposure to asbestos fibers was from other sources, including amosite asbestos fibers in asbestos pipe and boiler insulation and amphibole asbestos fibers found on pipe coverings, which are the more likely causes of her mesothelioma (Mot. Hwang Aff. Exh. F).

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 flooring are "at a higher risk for developing all manifestations of asbestos related disease including mesothelioma" (Opp. Golanski Aff. Exh. 10, pgs. 5-6 of 9). He concludes that Ms. Linsky's inhaling airborne asbestos fibers for an extended period of time, on an ongoing basis, resulted in her cumulative exposure to asbestos dust which is the likely cause of her mesothelioma (Opp. Commerford Aff., Exh. 7, pg. 5 of 9). Dr. Spaeth further concludes that plaintiff's inhaling airborne asbestos fibers for an extended period of time "from the manipulation of asbestos containing materials," an ongoing basis during her visits to construction sites results in cumulative exposure - above background levels - as contributing to plaintiff's mesothelioma (Opp. Golanski Aff., Exh. 10, pgs. 5 and 6 of 9). Plaintiff argues that the manipulation of asbestos materials would include MMI vinyl asbestos floor tile. 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 MMI's vinyl asbestos floor sheeting - is the substantial contributing factor resulting in a cumulative dose of asbestos that caused her malignant mesothelioma and pleural plaques (Opp. Golanski Aff., Exhs. 11 and 12).

Plaintiff is not required to show the precise causes of damages as a result of Ms. Linsky's exposure to MMI's product, only "facts and conditions from which the 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]).

Ms. Linsky's deposition testimony, is cited as showing that she identified MMI's vinyl asbestos floor sheeting as a source of her exposure to asbestos. She described the

manner of her exposure (Mot. Hwang Aff. C pgs. pgs. 339 - 351). Ms. Linsky's deposition testimony, when combined with the reports of Dr. Spaeth and Dr. Staggs, 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 raises issues of fact.

Plaintiff in opposition argues that MMI and its experts relied only on GAF and its Material Safety Data Sheets (MSDS), as the supplier of asbestos felt for its flooring product, but that in fact multiple manufacturers of asbestos containing felt were used, including, Tarkett, Nicolet, Congoleum, Armstrong and Lupel-SNA. Plaintiff provides MMI's interrogatory responses where the other entities are identified. Plaintiff also provides the deposition testimony of M. Bruce Jones, MMI's coporate representative in an unrelated action, wherein he testifies that he bought felt from the other sources (See Opp. Golanski Aff. Exh. 4. pg. 3, and Exh. 5, pg. 5). MMI has not shown that records from the other entitles and the MSDS were unavailable, and its experts only refer to GAF Corporation's asbestos felt products as containing encapsulated chrysotile fibers as used in the MMI floor sheeting. There 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, but Ms. Linsky is not alleging exposure to MMI vinyl asbestos floor tile (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 27, 2019


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

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE