

**Albin v A.O. Smith Water Prods., Co.**

2019 NY Slip Op 30897(U)

March 29, 2019

Supreme Court, New York County

Docket Number: 190007/2017

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

ROBERT ALBIN and KATHLEEN ALBIN,
- against -
Plaintiffs,
A.O. SMITH WATER PRODUCTS, CO., et al.,
Defendants.

INDEX NO. 190007/2017
MOTION DATE 03/20/2019
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Mannington Mills, 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 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 Robert Albin was diagnosed with lung cancer and colon cancer in September of 2016. Mr. Albin is seventy-three years old. He was deposed over a course of eight days on April 18-19, 2017, and June 5, 6, 7, 14, 15 and 16 of 2017 (Mot. Carni Aff. Exh. C and Opp. Golanski Aff. Exh. 1). It is alleged that Mr. Albin was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from MMI's sheet flooring products, and his work with his father from when he was eight years old in about 1953, until the late 1960's or early 1970's, and through work on the kitchen of his own home in the 1970's through 1980's (Mot. Carni Aff., Exh. C, pgs. 983-985).

Mr. Albin testified that he worked with his father on "side jobs" starting at about eight years old until, his father died in 1973. He claims the jobs were residential and he typically worked with his father on weekends and sometimes on weeknights. Mr. Albin testified that through work with his father on "side jobs" he was exposed to asbestos in MMI flooring (Mot. Carni Aff., Exh. C, pgs. 101 - 105 and 116-119). Mr. Albin also specifically recalled installing MMI flooring in the kitchen of his own residence located at 21 Shore Road (Mot. Carni Aff., Exh. C, pgs. 1055).

Mr. Albin identified MMI sheet flooring as packaged in a roll. He did not specifically remember the MMI sheet flooring width as to whether it was twelve feet or fourteen feet. Mr. Albin claims that the length of MMI sheet flooring was cut to what was needed, so that if you needed twenty feet, you would get twenty feet. He testified that when you looked at a roll of MMI sheet flooring you knew the manufacturer by the word "Mannington" printed in black on the back edge of the roll. Mr. Albin also remembered the MMI sheet flooring he used in his residence as being gold with a white speckled pattern that was "a little bumpy" or not smooth on the surface, and that it was about 3/16 inches thick. He testified that the backing was whitish in color and that he chose MMI sheet flooring because it was seamless, it came in one big piece so there would be no seams in the floor (Mot. Carni Aff. Exh. C, pgs. 1059 - 1066 and 1070-1071).

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

Mr. Albin described the kitchen of his home at 21 Shore Road, Lindenhurst, New York, as “one rectangular room and then one long room going down, not long but ten feet,” and he gave the dimensions as twelve feet wide by ten feet and then eleven feet the other way. He testified that there was “a hallway going into the living room and the rest of the house” that was nine feet wide and ten to twelve feet long (Mot. Carni Aff., Exh. C, pgs. 1064-1065). He further testified the installation process for 21 Shore Road required that the room be emptied except for the cabinets, then he would put a quarter inch of luan (a wood cleaning surface) down and take measurements. The flooring was rolled out in the garage - in the driveway on top of drop clothes - and then rough cuts were made (Mot. Carni Aff., Exh. C, pg. 1068). After the rough cuts, Mr. Albin would roll up the MMI sheet flooring and take the piece to the kitchen to see how “everything looks,” then he would take it out again, put the glue down on the floor and put the piece of MMI sheet flooring into place, cutting the edges as he went (Mot. Carni Aff., Exh. C, pg. 1069).

Mr. Albin also recalled working with MMI sheet flooring, with his father at two houses on Beach Street and Surf Street in Lindenhurst, New York. He testified that MMI sheet flooring was installed in the kitchens of both houses. Mr. Albin testified that when working with his father he rolled the MMI sheet flooring and carried it into the house, he was also responsible for the straight cuts, his father did the angle cuts (Mot. Carni Aff., Exh. C, pgs. 1074-1075 and 1077-1078). He remembered that the Beach Street house had an 8 x 10 foot rectangular kitchen floor and the Surf Street house had a 6 x 9 foot kitchen floor (Mot. Carni Aff., Exh. C, pgs. 1078-1081).

Mr. Albin testified that he used either a linoleum knife or a sheetrock knife, to cut the MMI flooring. He explained that a linoleum knife was hook-shaped and would be used for scribing next to the cabinets, trimming and it worked well on angles. He used the sheetrock knife - which is just a straight blade - only for straight cuts (Mot. Carni Aff., Exh. C, pgs. 1068 and 1074). He testified that cutting the MMI sheet flooring was a very slow process that would take about a day to complete (Mot. Carni Aff., Exh. C, pg. 1076).

Mr. Albin claims that he was exposed to asbestos by cutting the MMI sheet flooring, and in the handling of the roll - specifically by rolling it up and carrying it into the house. He testified that when he cut the MMI sheet flooring he observed dust that he breathed in (Mot. Carni Aff., Exh. C, pgs. 1070-1072 and 1460-1461).

Plaintiffs commenced this action on January 6, 2017 to recover for damages resulting from Mr. Albin’s exposure to asbestos (See Mot. Carni Aff., Exh. A). MMI filed its Verified Answer with Affirmative Defenses and Cross-claims on July 18, 2017 (Mot. Carni 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. Albin’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.

Albin's mesothelioma. MMI relies on the reports of plaintiffs' experts, Dr. Kenneth R. Spaeth, M.D., M.P.H., Mocch and Dr. David Y. Zhang, M.D., Ph.D., M.P.H. (Mot. Carni Aff., Exhs. G and H), to support its argument that plaintiffs 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 [1<sup>st</sup> Dept. 2016] and Koulermos v. A.O. Smith Water Products, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1<sup>st</sup> 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 [1<sup>st</sup> Dept., 1995] citing to Reid v. Georgia - Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1<sup>st</sup> 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 [1<sup>st</sup> Dept., 2014] and O'Connor v. Aerco Intl., Inc., 152 A.D. 3d 841, 57 N.Y.S. 2d 766 [3<sup>rd</sup> Dept., 2017]). MMI must unequivocally establish that Mr. Albin'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 [1<sup>st</sup> Dept., 2014]).

MMI's attempt to "point to gaps" in plaintiffs' evidence is not 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. Carni Aff., Exh. D), Dr. Dominik D. Alexander, Ph.D., MSPH, an epidemiologist (Mot. Carni Aff., Exh. E), and the report from Dr. Michael Graham, M.D., a pathologist (Mot. Carni 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. Carni 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. Carni Aff., Exh. E), and the affidavit and November 13, 2018 report of Dr. Michael Graham, 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. Carni Aff., Exh. D, February 26, 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 technical paper published in "Environmental Research" in 1969 favoring the use of chrysotile asbestos over other forms "on the basis of relative abundance alone;" (4) A GCA Corporation

report prepared for the U.S. Environmental Protection Agency (EPA); 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 his personally conducting and overseeing the collection of over one thousand bulk-samples of flooring products, including vinyl sheet flooring; (5) the Material Safety Data Sheet (MSDS) from GAF Corporation, a supplier of asbestos felt used on MMI's flooring products; a walk-through tour of MMI's vinyl flooring production facility in Salem, New Jersey (no indication of date of tour); observations of the manufacture and handling of rolled vinyl sheet flooring; (6) the American Industrial Hygiene Association (AIHA) definition of industrial hygiene; (7) AIHA standards and two representative pages from publications; and (8) OSHA historical exposure monitoring data published in the The Federal Register from June 20, 1986. Mr. Durham also draws on assumptions of Mr. Albin's exposure from his deposition testimony and responses to interrogatories (Mot. Carni Aff., Exh. D).

Mr. Durham performed a "retrospective exposure estimate" of Mr. Albin'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. Mr. Durham refers to OSHA's Permissible Exposure Level (PEL) for 1972- 1976 as 0.5/fcc and from 1994 through the present as 0.1 f/cc averaged over an eight hour shift. Mr. Durham concludes that plaintiff's actual exposure to asbestos from MMI's floor products containing asbestos backing was negligible and below the past and present OSHA PEL (Mot. Carni Aff., Exh. D).

Dr. Dominik D. Alexander's February 26, 2019 reports provide epidemiologic methodology, a descriptive epidemiology of both lung and colon cancer, and discusses risk factors. He cites to multiple reports and studies, that are not annexed to the papers, as establishing risk of cancer from various asbestos fibers. Dr. Alexander discusses the epidemiology of colorectal cancer among the asbestos exposed study populations - referring to studies that are not annexed to the motion papers - that show no increased risk among chrysotile asbestos cement workers in the United Kingdom. He refers to studies showing a slight risk when lung cancer SMR's were surrogate measures of exposure, but determines that since 1994 the analytical epidemiologic evidence "has been inconsistent and not supportive of increased risk." Dr. Alexander concludes that there is no direct causal relationship between asbestos and colon cancer (Mot. Carni Aff., Exh. E)

Dr. Alexander states that it is his "understanding that resilient sheet flooring may have contained chrysotile fibers in a low-dose exposure setting." He cites to epidemiologic studies showing that workers heavily exposed to chrysotile asbestos fibers (typically well above 25 f/cc-years), may be at increased risk of lung cancer but only in the presence of asbestosis or long fibers such as textile workers. Dr. Alexander concludes that there is no increased risk of lung cancer from low level exposure to chrysotile asbestos fibers. Dr. Alexander determined that Mr. Albin's family history and exposure to tobacco smoke are more likely causes of the lung cancer. Dr. Alexander concludes that there is no causal relationship with MMI resilient sheet flooring - which may result in low level chrysotile asbestos fiber exposure - to an increased risk of either lung cancer or colon cancer (Mot. Carni Aff., Exh. E).

Dr. Graham relies on the assumptions and conclusions made by Mr. Dunham, Dr. Alexander's reports, and plaintiffs' discovery - including Mr. Albin's deposition testimony, his medical records, and reports by plaintiffs' experts. Dr. Graham's November 13, 2018 report cites to published scientific literature in support of his conclusions, after review of records and Mr. Albin's microscopic slides. Dr. Graham opines that the presence of asbestosis is requisite to a finding that a patient's lung cancer was caused by asbestos exposure. Dr. Graham's November 13, 2018 report concludes that Mr. Albin's lung cancer was caused by cigarette smoke and that "neither his lung cancer nor his colon cancer was caused or contributed to by any asbestos derived from Columbia Boiler boilers to which he may have been exposed." (Mot. Carni Aff., Exh. F). The November 13, 2018 report does not mention MMI sheet flooring.

Plaintiffs in opposition rely on the reports of Dr. Kenneth R. Spaeth, M.D., M.P.H., MoccH, a specialist in preventative and occupational medicine and Dr. David Y. Zhang, M.D., Ph.D., M.P.H., a specialist in pathology and occupational therapy (Opp. Golanski Aff. Exhs. 10 and 11).

Dr. Spaeth's October 9, 2017 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 asbestos fibers create a higher risk of developing lung cancer, and can meet the criteria and attribution of asbestos to lung cancer (Opp. Golanski Aff., Exh. 10, pg. 6 of 11, and footnotes 1-13 on pg. 8 of 11). He determines that "the causative relationship between asbestos and lung cancer applies to not only amphiboles but chrysotile asbestos, as well, as universally agreed upon by the major public health and governmental agencies and demonstrated in abundant toxicological and epidemiological literature" (Opp. Golanski Aff., Exh. 10, pg. 6 of 11 and footnotes 1-7,16,22, 26-30 on pgs. 8-9 of 11). Dr. Spaeth also relies on multiple studies and findings for his determination that, the weight of epidemiological evidence indicates that asbestos exposure regardless of whether it is amphibole or chrysotile is a risk factor for development of colon cancer (Opp. Golanski Aff., Exh. 10, pg. 6 of 11 and footnotes 43-50 on pgs. 9-10 of 11). Dr. Spaeth states that although Mr. Albin had multiple risk factors for colon cancer his asbestos exposure was also a significant factor (Opp. Golanski Aff., Exh. 10, pg. 6 of 11). In support of his conclusion Dr. Spaeth relies on reports from OSHA, the EPA, and the United States Department of Health and Human Services.

Dr. David Y. Zhang's October 18, 2017 report provides Mr. Albin's occupational history of asbestos exposure, smoking history, summary of pertinent clinical findings, summary of image study reports, summary of pathology reports, and pathology findings. Dr. Zhang cites to epidemiology studies in the *American Journal of Medicine* and *American Journal of Industrial Medicine* that have shown that lung and colon cancer are strongly associated with asbestos exposure and a higher incidence of malignant neoplasms. Dr. Zhang states that many international and federal agencies recognize asbestos as a potent carcinogen. He cites to studies done by the EPA and OSHA as demonstrating that malignant mesothelioma is caused by inhalation of asbestos fibers. He claims that there are studies that demonstrate that the combined smoking of tobacco and exposure to asbestos confer a much higher risk of developing lung cancer. He concludes, "...the cumulative exposure to asbestos from each company's asbestos products was a substantial contributing factor in the development of Mr. Albin's asbestos related lung cancer and colon cancer" (Opp. Golanski Aff. Exh. 11). It is plaintiffs' contention that Dr. Zhang is including MMI's asbestos backed sheet flooring as part of the cumulative exposure.

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 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' experts are relying on some of the same scientists and scientific organizations as MMI's experts and they also cite to scientific reports or studies 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 [1<sup>st</sup> 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 Tr. Auth.*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

MMI's expert Mr. Mark F. Durham relies on studies and reports to establish that there is no causal relationship between chrysotile asbestos and lung cancer or colon

cancer. Dr. Michael Graham's report does not reference MMI asbestos backed sheet flooring. 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, also relies on studies and reports in part from the same scientific organizations, OSHA, and the EPA, to establish that plaintiff's exposure to chrysotile asbestos fibers can cause lung cancer and colon cancer. Dr. Zhang cites to studies and reports as showing that Mr. Albin's exposure to asbestos was a contributing factor in causing his lung and colon cancers. 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. Albin's lung cancer and colon cancer, 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. Albin's deposition testimony. He calculates Mr. Albin's exposure from MMI asbestos backed sheet flooring for only the three residential kitchens he testified about, with an 8 hour time weighted exposure, as totaling no more than 0.07 f/cc, with an annual exposure of 0.00027 f/cc, and a lifetime exposure averaged as 0.0008 f/cc and that this exposure is negligible (*Mot. Carni Aff.*, Exh. D).

Dr. Alexander relies on Mr. Durham's conclusions and modeling in the two February 26, 2019 reports. Dr. Alexander did not perform modeling and states in both reports that "It is my understanding that resilient sheet flooring may have contained short chrysotile fibers in a low dose exposure setting." Dr. Alexander cites to multiple factors as potentially causing either colon cancer or lung cancer and 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 colon cancer or any increased risk of lung cancer. (See *Mot. Carni Aff.*, Exh. E).

Dr. Graham, relies on published literature, in the form of reports and studies that are incorporated into a table in his report, the findings of Mr. Durham and Dr. Alexander, for the scientific modeling to establish specific causation, but refers to exposure to "Columbia Boilers," not MMI asbestos backed sheet flooring (See *Mot. Carni Aff.* Exh. F).

Plaintiff's expert, Dr. Kenneth R. Spaeth, M.D., states that even in the absence of asbestosis, asbestos exposure increases the risk of lung cancer. He determines that the weight of epidemiological evidence indicates that asbestos exposure, regardless of chrysotile or amphibole, is a risk factor for development of colon cancer. He 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 (*Opp. Golanski Aff.* Exh. 10). Dr. Spaeth concludes that although there are multiple factors contributing to Mr. Albin's lung and colon cancers, the presence of visible dust resulting from the manipulation of asbestos containing material are well above established regulatory

thresholds and increase the risk of asbestos related disease. Dr. Spaeth concludes that Mr. Albin's cumulative exposure to asbestos generated at levels above background, including from "manipulation of flooring," caused his colon and lung cancers (Opp. Golanski Aff., Exh. 10, pg. 7 of 11). Dr. Spaeth's report raises credibility issues and issues of fact on specific causation.

Plaintiffs' expert, Dr. Zhang relies on review of scientific literature and epidemiology studies as demonstrating that lung cancer and colon cancer are strongly associated with asbestos exposure and are the most common asbestos induced malignancy. Dr. Zhang concludes that Mr. Albin had "a history of significant levels of asbestos exposure." He further concludes, "...the cumulative exposure to each company's asbestos product or products was a substantial contributing factor in the development of Mr. Albin's asbestos related lung cancer and colon cancer." (Opp. Golanski Aff. Exh. 11).

Plaintiffs are only required to show "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. Albin's deposition testimony, as showing that he identified MMI's asbestos backed sheet flooring as a source of his exposure to asbestos. He described the manner of his exposure (Mot. Carni Aff. C pgs. 1055,1059, 1066-1068, 1071, 1074-1081 and 1460-1461). Mr. Albin's deposition testimony, when combined with the reports of Dr. Spaeth and Dr. Zhang, 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 the deposition testimony of M. Bruce Jones, MMI's vice-president of manufacturing and Dennis Bradway, MMI's corporate representative (in unrelated actions), as 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. 5, pg. 26 and Exh. 6. pg. 125). 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.

To the extent MMI seeks the alternative relief of a Frye/Parker 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. 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 29, 2019

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

Check one:  FINAL DISPOSITION      X NON-FINAL DISPOSITION  
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