

Srica v American Bilrite Inc.
2019 NY Slip Op 31045(U)
April 17, 2019
Supreme Court, New York County
Docket Number: 190445/2014
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

LJUBICA SRICA, as Executrix for the Estate of
BRANKO SRICA, and LJUBIC SRICA, Individually,

INDEX NO. 190445/2014

Plaintiffs,

MOTION DATE 04/10/2019

- against -

MOTION SEQ. NO. 002

AMERICAN BUILTRITE INC., *et al.*,

MOTION CAL. NO. _____

Defendants.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 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 American Biltrite, Inc.'s (hereinafter "ABI") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

Branko Srica (hereinafter referred to as "decedent") was diagnosed with mesothelioma in October of 2014. He died from his illness, at age 74, on July 12, 2016 (Mot. Exh D, Opp. Exh. 5). It is alleged that the decedent was exposed to asbestos in a variety of ways. His exposure to asbestos - as relevant to this motion - was from his work as a building superintendent in Queens, New York, when he alleges he was responsible for removing and replacing ABI's Amtico Asbestos floor tile in up to sixty (60) apartments, from 1975 through 1986 (Mot. Exh. A, Decedents EBT, pgs. 123-125 and 130-136).

Decedent was deposed over the course of two days on April 1, and 2, 2015 (Mot. Decedent EBT Exh. A and Opp. Decedent's EBT, Exh. 2). Decedent testified that he migrated to America from Yugoslavia in what is now known as Croatia. He came to the United States when he was 29 in 1971 (Mot. Exh. A, Decedent's EBT, pgs. 20-23 and 69). From 1975 through 1985, decedent got a job working as a superintendent for a sixty (60) apartment building located at 117th Street in Rockaway. He stated that his job responsibilities as superintendent included scraping away, removing and putting down floor tiles (Mot. Exh. A, Decedent's EBT, pgs. 74, 88-89, 123-125 and 130-134).

Decedent identified two different asbestos tiles that he worked with "Armstrong" and ABI's product, "Amtico." He testified that all of the floor tiles he used were 9 x 9 inches (Mot. Exh. A, Decedent's EBT, pgs. 138-140). Decedent claimed he could tell the difference between the manufacturers floor tiles because ABI's Amtico was "a little more white, lighter." ABI's "Amtico" asbestos tiles were described as "off-white" with a golden sprinkle (Mot. Exh. A, Decedent's EBT, pgs. 143- 144 and 153). Decedent described the box holding ABI's Amtico asbestos tile as a little darker than the tiles. He remembered that the box said "asbestos tiles" on the side and the word "Amtico" on the front. Decedent remembered there was some name in "little writing" but he did not pay attention to it (Mot. Exh. A, Decedent's EBT, pgs. 149-150). He stated that the Amtico box opened from the top and recalled that there were numbers or black writing on the bottom of the tiles (Mot. Exh. A, Decedent's EBT, pgs. 151- 152).

Decedent testified that sometimes he replaced the entire kitchen floor, but that

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

he also repaired floors by fixing or replacing between two and five tiles (Mot. Exh. A, Decedent's EBT, pgs. 124-125, 130-136 and 155-156). He explained that to repair the floor, he would remove all the tiles that were cracked or broken, and then fit in new tiles. He claimed that the process of removing and repairing the kitchen floors would take him about two to three hours. Decedent stated that removing the tiles was easy and that they were often loose, but that the replacement tile would require cutting, and sanding, with a little bit of trimming to make the new tile fit. He used a curved edge knife to cut the tile, and would score it before snapping it off or breaking it. Decedent claimed that the process of breaking the tiles was dusty, he could smell the dust, and that he breathed it in. Decedent testified he also had to clean up with a broom and that would also create dust he breathed in (Mot. Exh. A, Decedent's EBT, pgs. 155-159 and 387-388). He claimed that vinyl asbestos floor tile was less flexible and could break easier, but that the non-asbestos vinyl tile was different because it could bend without breaking. Decedent testified that he only installed vinyl asbestos floor tile (Mot. Exh. A, Decedent's EBT, pgs. 170 -171)

Plaintiff, Ljubic Srica, the decedent's wife, was deposed on December 19, 2016 (Opp. Exh. 3, Ljubic Srica EBT). She remembered observing the decedent putting new tiles in the kitchens. She recalled the names "Armstrong" and "Amtico," that the package said the tiles were asbestos, and that the boxes were "grayish." She testified that when her husband cracked the tiles you could see the dust come out (Opp. Exh. 3, Ljubic Srica EBT, pgs. 190-191 and 202-203).

Plaintiffs commenced this action on November 11, 2014 to recover for damages resulting from the decedent'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.

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 decedent's mesothelioma and death. ABI relies on the reports of plaintiffs' experts, Dr. Kenneth R. Spaeth, M.D. and Dr. David Y. Zhang, M.D., Ph.D. and M.P.H. (Mot. Exhs. F and G), 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]). ABI must unequivocally establish that the decedent'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. Exh. B), the reports from Dr. James D. Crapo, M.D., an internist (Mot. Exh. D), and the reports from Dr. Stanley Geyer, M.D., a pathologist (Mot. Exh. E), establish lack of causation.

General Causation:

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

ABI argues that unlike amphibole asbestos, no causal relationship exists between encapsulated chrysotile asbestos and the development of mesothelioma, eliminating any general causation. ABI submits the expert affidavit and April 5, 2016 Summary Report of John W. Spencer, CIH, CSP, a certified industrial hygienist, his report prepared with Marc Plisko, a certified industrial hygienist (Mot. Exh. B); the reports from Dr. James D. Crapo, M.D., an internist (Mot. Aff. Exh. D), and the reports from Dr. Stanley Geyer, M.D., a pathologist (Mot. Exh. E), 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 April 5, 2016 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and decedent's mesothelioma. They draw on multiple assumptions as to decedent's exposure from his deposition testimony and response to interrogatories. They also rely on multiple reports and studies of ABI's Amtico vinyl asbestos floor tile performed by EPI, for a risk and exposure assessment. The April 5, 2016 Summary Report explains the difference between friable and non-friable asbestos containing materials. It references materials and standards from the Environmental Protection Agency ("EPA"), World Health Organization ("WHO"), and Occupational Safety and Health Administration (OSHA), and states that encapsulated non-friable products such as ABI's Amtico floor tile poses a lesser potential of release of asbestos fibers associated with mesothelioma. They conclude that decedent's actual exposure to asbestos from his work removing, replacing and installing ABI's Amtico vinyl asbestos was indistinguishable from ambient exposure (See Mot. Exh. B).

Dr. James D. Crapo, M.D.'s report dated April 26, 2016 relies on a single study published in the *Croatian Medical Journal* in 2003. Dr. Crapo states that the study found there were high rates of mesothelioma in the shipyards in coastal areas of Croatia where there were high rates of exposure to crocidolite asbestos in the 1970's, that are similar to the decedent's work, before he came to the United States in 1971. Dr. Crapo relies on no other studies or reports but concludes that the decedent's occasional work and limited exposure to encapsulated chrysotile in ABI's Amtico asbestos floor tile, could not have contributed to the decedent's risk for the development of mesothelioma (Mot. Exh. D). Dr. Crapo prepared a Supplemental Report dated July 9, 2018, citing the same Croatian study and concludes that the decedent's disease was most likely caused by exposure to amphibole asbestos in shipyards in Croatia. Dr. Crapo further concludes that the decedent did not have sufficiently high level exposures to chrysotile asbestos from ABI's asbestos floor tiles to cause his mesothelioma. (Mot. Exh. D).

Dr. Geyer prepared five reports, his first report dated April 11, 2016, a supplemental report dated May 2, 2016, a second supplemental report dated September

28, 2016, a third supplemental report dated November 9, 2016, and a fourth supplemental report dated June 11, 2018. Dr. Geyer relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their April 5, 2016 Summary Report and Dr. Crapo's conclusions which rely on the study published in the *Croatian Medical Journal* in 2003. Dr. Geyer includes citations to two other Croatian studies reported in 2002 and three other articles about exposure to asbestos in Croatia (Mot. Exh. E, Second Supplemental Report). Dr. Geyer concludes that the decedent had minimal exposure to chrysotile fibers in ABI's Amtico asbestos floor tiles, and combined with the limited potency of chrysotile asbestos, it is most likely that ABI's asbestos floor tiles were not the cause of decedent's mesothelioma (Mot. Exh. E, first report, and first, second, third and fourth supplemental reports).

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. Dr. Zhang submitted two reports the first dated July 14, 2015, and an Amended Report, dated March 14, 2019 (See Opp. Exh. 5).

ABI argues that plaintiffs failed to raise an issue of fact because the opposition papers rely on unsworn expert reports that are hearsay. Plaintiffs' expert reports may be utilized in opposition to a motion for summary judgment, even as hearsay, if they are not the only evidence submitted (*Navararez v. NYRAC*, 290 A.D. 2d 400, 737 N.Y.S. 2d 76 [1st Dept. 2002]). Plaintiffs have submitted other admissible evidence including the decedent's deposition testimony, his spouse - plaintiff Ljubic Srica's deposition testimony - and interrogatory responses (Opp. Exhs. 1, 2, 3, 4). To the extent ABI argues that Dr. Zhang's amended expert report and the opposition papers were untimely submitted by two days, there has been no showing that the delay was intentional, willful, or that there was prejudice to ABI by the delay, under the circumstances preclusion is not warranted (See *Martin v. Triborough Bridge and Tunnel Authority*, 73 A.D. 3d 481, 901 N.Y.S. 2d 193 [1st Dept. 2010] and *McDermott v. Alvey, Inc.*, 198 A.D. 2d 95, 603 N.Y.S. 2d 162 [1st Dept. 1993]). ABI was timely aware that Dr. Zhang had provided a report dated July 14, 2015, which was addressed by ABI as part of the motion papers, further warranting denial of preclusion (See Mot. Exh. G),

Dr. Spaeth's July 9, 2015 report assesses the decedent's smoking history, occupational exposure history and summarizes the clinical findings, image study reports, pathology reports and pathology findings. Dr. Spaeth relies on a report published in the *American Journal of Medicine* in 2006, that determined malignant mesothelioma is caused by inhalation of asbestos fibers. Dr. Spaeth concludes that decedent's cumulative exposure to each company's asbestos containing product significantly contributed to his mesothelioma (Opp. Exh. 5).

Dr. Zhang's July 14, 2015 report determines that the decedent had a significant history of asbestos exposure. Dr. Zhang relies on review of relevant scientific literature as demonstrating that malignant mesothelioma is a rare malignancy caused by inhalation of asbestos fibers. Dr. Zhang concludes that the decedent 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 decedent's malignant mesothelioma. (Opp. Exh. 5).

Dr. Zhang's March 14, 2019 amended report cites to his own research and publications from OSHA, the EPA and the International Agency for Research on Cancer (IARC) as demonstrating that malignant mesothelioma is caused by inhalation of asbestos fibers, that there is no safe Permissible Exposure Level (PEL) - only target guidelines - and that six asbestos mineral types including chrysotile (serpentine) are known human carcinogens. Dr. Zhang also refers to the findings from the WHO that chrysotile asbestos is a carcinogen that can cause malignancy in humans. Dr. Zhang further relies on EPA monographs that determined that "sanding, grinding, mechanical chipping, drilling, cutting or abrading the material" has a high probability of rendering the ACBM friable and capable of releasing asbestos fiber (Opp. Exh. 5, Dr. Zhang's March 14, 2019 amended report, pg.

16). Dr. Zhang concludes that decedent's cumulative exposure to each company's asbestos containing products significantly contributed to the development of his mesothelioma. (Opp. Exh. 5, Dr. Zhang's March 14, 2019 amended report, pgs. 20-21). It is plaintiffs' contention that Dr. Zhang is including ABI's Amtico asbestos floor tile as part of the cumulative exposure.

ABI 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' expert, Dr. Zhang, 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, Dr. James D. Crapo, M.D. 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. David Y. Zhang, M.D., Ph.D., M.P.H., 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 the decedent'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 April 5, 2016 Summary Report by Mr. Spencer and Mr. Plisko provides a table evaluating the decedent's exposure and 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 asbestos floor tiles containing 14 -15 percent chrysotile asbestos, that was cut using "Guillotine cutter, utility knife, scribe score and snap break, shears (heat and cut, no heat and cut) and linoleum knife." They also conducted a Time Weighted Average evaluation for Cutting, Sanding and Installation of Vinyl-Asbestos Floor Tile (Mot. Exh. B, Tables 6, 7 and 8). They calculate that the decedent's cumulative exposure to asbestos from ABI's Amtico asbestos floor tile is 0.000015 f/cc-yrs. and that

decedent's exposure would be no greater than historical and today's occupational health guidelines, which is indistinguishable from most lifetime cumulative exposures to ambient asbestos (Mot., Exh. B).

Mr. Spencer and Mr. Plisko's report concludes that (1) decedent's exposure to friable asbestos in thermal insulation and joint compound would have most likely exposed him to concentrations greater than ambient/background levels, if they contained asbestos; (2) plaintiffs have not provided any scientifically reliable and relevant industrial hygiene exposure assessment; (3) if decedent completed tasks involving the cutting, sanding installation and/or removal of Amtico asbestos floor tiles manufactured by ABI he would not have been exposed to asbestos above historical or today's occupational health guidelines; and (4) any exposure decedent 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 (See Mot. Exh. B).

Dr. Crapo's April 26, 2016 report assesses the plaintiff's smoking history, pathology, pulmonary function studies, chest radiographs and asbestos exposure history. Dr. Crapo April 26, 2016 report relies on decedent's exposure history and a study showing that there were high rates of mesothelioma in the shipyards in coastal areas of Croatia. He concludes the decedent's exposure to asbestos before he came to the United States caused his mesothelioma. Dr. Crapo further concludes that ABI's asbestos floor tile products and limited exposure to encapsulated chrysotile in ABI's Amtico asbestos floor tile, could not have contributed to the decedent's risk for the development of pleural mesothelioma (Mot. Exh. D). Dr. Crapo's July 9, 2018 Supplemental Report concludes that a chronic, higher level of exposure with amphibole asbestos fiber exposure can cause malignant mesothelioma. Dr. Crapo further concludes that chrysotile asbestos has a much lower potential to contribute to the causation of malignant mesothelioma and that decedent does not have a history of exposure to chrysotile asbestos from ABI's Amtico asbestos floor tiles that was sufficient to cause his mesothelioma (Mot. Exh. D).

ABI's expert, Dr. Geyer's reports conclude that the decedent had minimal exposure to chrysotile fibers in ABI's Amtico asbestos floor tiles, and combined with the limited potency of chrysotile asbestos, it is most likely that ABI's asbestos floor tiles were not the cause of decedent's mesothelioma. Dr. Geyer concludes that the most likely cause of decedent's mesothelioma and death are exposure to amphibole fibers in amosite asbestos found in insulation products in the United States, and exposure from when he resided near and worked in a factory in Rijeka, in the coastal region of Croatia (Mot. Exh. E, first report, and first, second, third and fourth supplemental reports).

Plaintiff's expert, Dr. Kenneth R. Spaeth, M.D., states that the decedent's work as a superintendent exposed him to airborne asbestos fibers that was above background levels from multiple sources on an ongoing basis. Dr. Spaeth concludes that decedent's cumulative exposure to each company's asbestos containing product and equipment, above background levels, was a substantial factor in causing decedent's mesothelioma. (Opp. Exh. 5).

Dr. Zhang's July 14, 2015 report assesses decedent's past medical history, smoking history, family history, occupational history and non-occupational history. Dr. Zhang determines that the decedent had a significant history of asbestos exposure. Dr. Zhang concludes that decedent's cumulative exposure to asbestos and history of asbestos exposure from each company's asbestos containing product significantly contributed to his mesothelioma (Opp. Exh. 5).

Dr. Zhang's March 14, 2019 report provides a detailed assessment of the decedent's occupational history of asbestos exposure and his work as a superintendent. Dr. Zhang further assesses decedent's smoking history, pertinent clinical findings, image study reports, pathology reports and pathology findings. Dr. Zhang concludes that the decedent had a history of significant levels of asbestos exposure, with documented pleural thickening and calcified pleural plaques. Dr. Zhang concludes that there is no reasonable

dispute that the decedent's "exposure levels were significantly higher" because he routinely handled asbestos containing material and equipment, which included floor tiles. 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 decedent's mesothelioma. Dr. Zhang's March 14, 2019 report concludes that decedent's mesothelioma was caused by his cumulative exposure to asbestos.


Plaintiffs are not required to show the precise causes of damages as a result of the decedent's exposure to ABI's Amtico asbestos floor tile, 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 decedent'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 removing and cutting the tiles, sanding off the edges of tiles to make them fit, and sweeping up afterwards (Mot. Exh. A, Decedent's EBT, pgs.74, 88-89, 123-125, 130-136, 155-159 and 387-388). Decedent's deposition testimony, when combined with his wife, plaintiff Ljubic Srca's, deposition testimony of seeing visible dust when her husband cracked the tiles (Opp. Exh. 3, Ljubic Srca EBT, pgs. 190-191 and 202-203), and the reports of Dr. Spaeth and Dr. Zhang, 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: April 17, 2019



 MANUEL J. MENDEZ
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST 7 REFERENCE