

Epstein v Atlas Turner, Inc.

2019 NY Slip Op 31413(U)

May 16, 2019

Supreme Court, New York County

Docket Number: 190065/2017

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

SHARON EPSTEIN, Individually and as Independent Administrator of the Estate of IRA EPSTEIN,

INDEX NO. 190065/2017

MOTION DATE 05/01/2019

Plaintiffs, - against -

MOTION SEQ. NO. 006

ATLAS TURNER, INC., et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by Exxon Mobil Corporation:

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 Exxon Mobil Corporation's (hereinafter "Exxon") motion seeking an Order resolving a conflict of law on the issue of causation, applying the Texas causation standard and pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is granted as stated herein.

Plaintiff's decedent, Ira Epstein (hereinafter "decedent"), was diagnosed with mesothelioma on April 22, 2016 and passed away on July 14, 2017 (Opp. Exhs. 1 and 2). Decedent was born in New York in 1952, he moved to Texas in 1976 and remained a resident of the state until his death in 2017 (Mot. Exh. C, Interrogatory Nos. 1, A.4.III.-A.4.XII.) Decedent alleged he was exposed to asbestos in a variety of ways. Decedent's alleged exposure - as relevant to this motion - was while he was employed by a Coca-Cola distributor refilling vending machines at the Exxon refinery in Baytown, Texas from about September of 1976 through 1980 (Mot. Exh. D, pgs 22-25, Exh. E, pgs. 205, 210 and 217, and Exh. F, pgs. 32 and 36).

Decedent was deposed on March 22, 2017, April 4, 2017 and his de bene esse deposition was conducted on April 5, 2017 (Mot. Exhs. D, E and F). He testified that after he left New York in 1976 and came to Texas, his first job was with Coca Cola refilling vending machines. Decedent testified that he worked with Coca Cola from about September of 1976 through 1980, when the plant relocated (Mot. Exh. D, pgs. 22-25 and 28, Exh. Pgs. 205, 210 and 217 and Exh. F, pgs. 32 and 36).

Decedent stated that he was trained by co-worker James Ferrell for a couple of weeks to a month, during that time he was a helper on the truck performing industrial and small business stops. Decedent claimed he was then given his own route, which he basically held for four (4) years (the Baytown Route) that included the Exxon refinery and a few other stops (Mot. Exh. F, pgs. 33 and 43 and Exh. E, pgs. 201-202). He stated that he also worked at another refinery, but that work was unrelated to Exxon (Mot. Exh. D pg. 23, 25 and 27). Decedent testified that his work refilling vending machines at the Exxon Baytown Refinery would take anywhere from four to eight hours daily in the summer, and four days a week in winter. Decedent testified that when he started he had to refill about 64 machines, but a couple of months later bigger vending machines were installed, and the number

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

went down to about 50 machines daily (Mot. Exh. E, pgs. 205 and 208 and Mot. Exh. F, pgs. 34-35).

Decedent stated that the Coca Cola machines he refilled were located inside and outside of the refinery. He testified that the interior locations were in breakrooms, boilerhouses, semi-confined spaces that were under, next to, and around insulated piping. Decedent believed he was exposed to asbestos from asbestos insulation on the pipes. That he was in close proximity, sometimes ten feet away and that he believe he breathed in the dust because it was floating everywhere. He stated that he saw Exxon employees tearing down and putting up pipes, and replacing insulation while he was refilling the vending machines. Decedent testified that he observed several of the vending machines were directly under deteriorating asbestos insulation. He claimed that on several occasions he saw bags in the garbage that said "asbestos," and after asking an Exxon employee what the stuff on the pipes was, he was told it was used to seal the insulation. Decedent testified that the Exxon employees would cut the insulation and seal it with "mud" and put a metal strap around it. He observed dust and dirt flying all over the place all the time (Mot. Exh. D, pgs. 23-25, Mot. Exh. E, pgs. 204, 216 and 218-219, and Exh. F, pg. 49).

Decedent also claimed he was exposed to asbestos at the Exxon Baytown Refinery's automotive shops. He described the automotive shops as huge metal buildings that were open at both ends that could hold as many as twenty (20) or thirty (30) vehicles. Decedent testified that the automotive shops mostly had pick-up trucks, but also bigger trucks and pump trucks. Decedent testified he observed mechanics pulling transmissions, doing brake work, engine work and changing tires (Mot. Exh. E, pgs. 230-235, and Mot. Exh. F, pgs. 55-57, 102 and 105).

Plaintiffs commenced this action on February 22, 2017 alleging the causes of action asserted in the Standard Complaint No. 1. The Complaint states in paragraph 2 that plaintiff's are citizens of the State of Texas (Mot. Exh. A). Exxon filed an Acknowledgment of Receipt on March 17, 2017, referring to its Standard Answer No. 7 (Mot. Exh. B). Plaintiffs' Fourth Amended Summons and Complaint included a cause of action for wrongful death and to amend the caption to include plaintiff Sharon Epstein as independent administrator of the estate (Mot. Exh. G).

Exxon seeks an Order applying Texas Law on the issue of causation and pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it.

Exxon argues that there is a conflict of law on the issue of causation, and that Texas Law has a higher standard, requiring that plaintiffs provide proof that the decedent's exposure to the asbestos containing product more than doubled his risk of contracting mesothelioma. Exxon claims that under New York conflicts of law precedent, decedent was a resident of Texas, allegedly exposed to asbestos in Texas, and that he was diagnosed with mesothelioma, treated and died in Texas, warranting application of the higher standard under Texas Law, which plaintiffs are unable to meet. Exxon states that it is incorporated in New Jersey and has a principal place of business in Texas. Exxon further argues that plaintiffs have not stated a prima facie case against it on causation under Texas Law, warranting summary judgment.

Plaintiffs oppose the motion arguing that there is no actual and relevant conflict of the laws of New York and Texas, and at the time of the decedent's exposure Exxon had its principal place of business in New York (Opp. Exh. 24).

New York is the forum state governing the applicable choice of law principles that will affect the outcome of this case (*Padula v. Lilarn Props. Corp.*, 84 N.Y. 2d 519, 644 N.E. 2d 1001, 620 N.Y.S. 2d 310 [1994]). Under New York choice of law principles, when parties disagree as to which jurisdiction's law should apply to a negligence claim, the court is first required to determine whether there is an actual conflict (*Matter of Allstate Ins. Co. [Stolarz—New Jersey Mfrs. Ins. Co.]*, 81 N.Y. 2d 219, 223, 613 N.E.2d 936, 597 N.Y.S.2d 904 [1993]). Actual

conflict exists when the law in question provides different substantive rules, and that law is relevant to the issue at hand and has “a significant possible effect on the outcome of the trial”(Elmaliach v. Bank of China Ltd., 110 A.D.3d 192, 971 N.Y.S.2d 504 [1st Dept., 2013]).

The highest appellate court in Texas, the Supreme Court, has stated that to meet the standard for proof of causation:

- “(A) Proof of ‘any exposure’ to defendant’s product will not suffice and instead the plaintiff must establish the dose of asbestos fibers to which he was exposed by his exposure to defendant’s product;
 - (B) The dose must be quantified but need not be established with mathematical precision;
 - (C) The plaintiff must establish that the defendant’s product was a substantial factor in causing plaintiff’s disease;
 - (D) The defendant’s product is not a substantial factor in causing the plaintiff’s disease if, in light of the evidence of plaintiff’s total exposure to asbestos or other toxins, reasonable persons would not regard the defendant’s product as the cause of the disease;
- and (E) To establish substantial factor causation in the absence of direct evidence of causation, the plaintiff must prove with scientifically reliable expert testimony that the plaintiff’s exposure to the defendant’s product more than doubled the plaintiff’s risk of contracting the disease.”(emphasis added)
(Bostic v. Georgia Pacific Corp. 439 S.W. 3d 332 [Texas, S. Ct., 2014]).

The New York State Court of Appeal’s has stated the standard to establish causation in toxic tort cases as requiring that an expert opinion set forth:

- “(1) a plaintiff’s exposure to a toxin; (2) that a toxin is capable of causing the particular injuries that plaintiff suffered (general causation); and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation).

Although it is not always necessary for a plaintiff to quantify exposure levels precisely, [the Court] has never dispensed with plaintiff’s burden to establish sufficient exposure to a substance to cause the claimed adverse health effect. At a minimum there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of the agent that are known to cause the kind of harm that the plaintiff claims to have suffered. Not only is it necessary for a causation expert to establish that plaintiff was exposed to sufficient levels of a toxin to have caused his injuries, but the expert also must do so through methods found to be generally accepted as reliable in the scientific community. This “eneral acceptance” requirement, also known as the *Frye* test, governs the admissibility of expert testimony in New York. It asks whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Although unanimity is not required, the proponent must show consensus in the scientific community as to [the methodology’s] reliability.”

(Sean R. v. BMW of N. Am., LLC, 26 N.Y. 3d 801, 48 N.E. 3d 937, 28 N.Y.S. 3d 656 [2016], citing to Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, 857 N.E. 2d 1114, 834 N.Y.S. 2d 584 [2006] and Cornell v. 360 W. 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

In New York causation does not require proof that the plaintiff’s exposure to the defendant’s product “more than doubled the plaintiff’s risk of contracting the disease.” Exxon has established that an actual conflict exists between the laws of Texas and New York.

At the time of the decedent’s alleged exposure at the Exxon Baytown Refinery in Texas, Exxon’s principle place of business and domicile was New

York. Exxon moved its corporate headquarters from New York to Texas in 1990 (Opp. Exh. 24). The parties were domiciled in the same jurisdiction at the time of decedent's diagnosis, treatment and death.

New York makes a distinction between laws which "regulate primary conduct (such as standards of care) and those which allocate losses after the tort occurs (such as vicarious liability rules). If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders. But if competing "post event remedial rules" are at stake other factors are taken into consideration, chiefly the parties' domiciles"(Cooney v. Osgood Mach., 81 N.Y. 2d 66, 612 N.E. 2d 277, 595 N.Y.S. 2d 919 [1993] citing to Shultz v. Boy Scouts of America, 65 N.Y. 2d 189, 480 N.E. 2d 679, 491 N.Y.S.2d 90 [1985]). Loss allocating laws are those that "prohibit, assign, or limit liability, after the tort occurs, such as charitable immunity statutes, guest statutes, wrongful death statutes, vicarious liability statutes, and contribution rules" (Padula v. Lilarn Props. Corp., 84 N.Y. 2d 519, at 522, 644 N.E. 2d 1001, 620 N.Y.S. 2d 310 [1994]).

The parties agree that primary conduct, requiring the application of the law of the jurisdiction where the tort occurred, applies to the causation standard in this case (Opp. Memo. of Law, pg. 30, Reply Brief pg. 9). The decedent alleged he was exposed to asbestos at the Exxon refinery in Baytown, Texas, he was diagnosed and treated for mesothelioma in Texas, and remained a domiciliary of Texas until his death. To the extent Exxon was a New York domiciliary at the time of decedent's exposure, it does not change the fact that the tort occurred in Texas. The Texas standard of causation applies in this case. Plaintiffs are required to prove with scientifically reliable expert testimony the dose of decedent's exposure to asbestos at the Exxon Baytown Refinery, and that it more than doubled decedent's risk of contracting mesothelioma.

Plaintiffs alternatively argue that under the principles of justice, fairness, and for procedural considerations, any higher standard of causation under Texas Law should not be applied in this case. Plaintiffs' claim that the remaining defendants in this action are subject to jurisdiction in New York, and that this motion was made after discovery was complete and the case marked trial ready warranting the application of the New York standard for causation. Plaintiffs also claim that the New York causation standard should be applied over that of Texas because of their failure to warn claims, their claims of hazardous conditions at the premises related to poorly placed asbestos insulation, and their claim that Exxon's wrongful conduct occurred at the corporate offices in New York.

Plaintiffs have not met the heavy burden of establishing that the relief sought is addressing something other than their "notions of expediency and fairness." Plaintiffs are required to show that pursuant to the New York State Constitution, statutes and judicial decisions, enforcing the Texas standard of causation "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," and they have not done so (Shultz v. Boy Scouts of America, 65 N.Y. 2d 189, supra at pg. 202). After conceding that loss allocating laws do not apply, plaintiffs are seeking to use Exxon's domicile at the time of decedent's exposure to apply New York law on causation. Their arguments that other defendants are subject to jurisdiction in New York, and that the motion was made after the case was marked ready for trial, amount to the plaintiffs' notions of expediency and fairness and do not state a public policy basis to apply the New York causation standards.

Plaintiffs have not provided proof in support of their claim that New York law should apply for public policy reasons because Exxon's corporate offices located in New York made determinations that would affect their claims of failure to warn; hazardous conditions at the premises because of the alleged poorly placed asbestos insulation and wrongful conduct related to the decedent's exposure in Texas. The case will proceed to trial with the Texas standard of causation applied solely to Exxon.

Exxon also argues that plaintiffs have not stated a prima facie case on causation under Texas Law, warranting summary judgment.

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, 89 N.Y. 2d 833, 675 N.E. 2d 458, 652 N.Y.S. 2d 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 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 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 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]); Martin v Briggs, 235 A.D. 2d 192, 663 N.Y.S. 2d 184 [1st Dept. 1997]).

Exxon's statement that plaintiffs' cannot make a prima facie case is not a basis to obtain summary judgment. Exxon, as the movant, is responsible for making the prima facie case and only after it has done so, does the burden shift to the plaintiffs to raise an issue of fact.

Exxon refers to decedent's social security records as contradicting his deposition testimony because they state he worked for Coca Cola for one year from the third quarter of 1976 through the third quarter of 1977 (Mot. Exh. H). Decedent testified he worked for Coca Cola for about four years, from September of 1976 through 1980 (Mot. Exh. D, pgs. 22-25 and 28, Exh. E, pgs. 201-202, 205, 210 and 217, and Exh. F, pgs. 32-33, 36 and 43). Exxon argues that plaintiffs have not made a prima facie case against it. Exxon claims that plaintiffs have not provided proof that decedent's limited exposure, inability to identify the difference between products that do or do not contain asbestos, and failure to see any specifications, is insufficient to meet the Texas standard on causation. Exxon argues that plaintiffs are unable to prove that decedent's work refilling vending machines at the Exxon Baytown Refineries, more than doubled the plaintiff's risk of contracting the disease.

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 it 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]).

Exxon's attempt to "point to gaps" in plaintiffs' evidence, does not establish a prima facie case for purposes of obtaining summary judgment.

Alternatively, plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences. Decedent's testimony of the period of exposure and failure to provide specific identification of all sources of asbestos at Exxon's Baytown Refinery in Texas, does not mean that Exxon was unaware of potential asbestos exposure. Decedent testified that on several occasions he saw bags that said "asbestos" in the garbage, and after asking an Exxon employee what the stuff on the pipes was, he was told it was used to seal the insulation (Mot. Exh. D, pgs. 23-25, Mot. Exh. E, pgs. 204, 216 and 218-219, and Exh. F, pg. 49).

It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff 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 70 [2011] and *Doumbia v. Moonlight Towing, Inc.*, 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018]).

The conflicting evidence and decedent's testimony raise triable issues of fact.

The motion papers make no specific references to the alleged defects in plaintiffs' expert reports and disclosures, as applied to the causation under Texas Law. Exxon also failed to provide any of its own expert reports or affidavits in support of the relief sought in this motion until the reply papers.

Exxon attempts to include the Affidavits and Reports of industrial hygienist Alan Leibowitz, CIH, CSP (Reply Exh. B), Jennifer S. Pierce, M.S., Ph.D. a toxicologist and epidemiologist with a Ph.D. in industrial hygiene (Reply Exh., C), and industrial hygienist Daniel E. Agopsowicz, CIH (Reply Exh. D), for the first time in its reply papers. Exxon is presenting new arguments for the first time in reply papers, to support its prima facie case on the issue of the Texas causation standard or as scientifically reliable expert testimony that the decedent's was not exposed to asbestos at Exxon Mobile Corporation's Baytown Refinery, and that any exposure did not more than double decedent's risk of contracting mesothelioma.

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]).

The expert evidence and related arguments made for the first time in Exxon's reply papers, deprive the plaintiffs of the opportunity to reply to the assertions being made with their own expert reports, and are improperly before this Court. Plaintiffs' only reference to the report of its own expert Dr. Steven Markowitz, M.D., Dr.PH, an expert in Occupational and Environmental Medicine, in the opposition papers was used to establish decedent's medical history, and not causation (Opp. Exh. 1) Plaintiffs' CPLR §3101(d) disclosure annexed to the opposition papers identifies multiple potential experts and summaries of anticipated testimony, but plaintiffs did not provide any reports (Opp. Exh. 3). Exxon's failure to provide the expert testimony as part of the motion papers presenting expert evidence and arguments on causation for the first time on reply, warrants denial of summary judgment.

Accordingly, it is ORDERED, that Defendant Exxon Mobil Corporation's motion seeking an Order resolving a conflict of law on the issue of causation, applying the Texas causation standard, and pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is granted only to the extent of applying the Texas standard of causation requiring scientifically reliable expert testimony that the decedent's exposure to asbestos at Exxon Mobil Corporation's Baytown Refinery more than doubled his risk of contracting mesothelioma, and it is further,

ORDERED, that at the time of trial the Texas standard of causation requiring scientifically reliable expert testimony that the decedent's exposure to asbestos at Exxon Mobil Corporation's Baytown Refinery more than doubled his risk of contracting mesothelioma, will be applied solely as to defendant Exxon Mobil Corporation, and it is further,

ORDERED, that Defendant Exxon Mobil Corporation's motion for summary judgment dismissing all claims and cross-claims against it, is denied, and it is further,

ORDERED, that the Defendant Exxon Mobil Corporation is directed to serve a copy of this Order with Notice of Entry on all remaining parties, the Trial Support Clerk located in the General Clerk's Office (Room 119), and on the County Clerk, who are directed to mark their records accordingly, and it is further,

ORDERED, that the remainder of the relief sought in this motion is denied.

ENTER:

Dated: May 16, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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