

Surace v Amchem Prods., Inc.
2019 NY Slip Op 31937(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 190017/2014
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

RUDOLPH SURACE and MARIE SURACE,

INDEX NO. 190017/2014

Plaintiffs,

MOTION DATE 06/26/2019

- against -

MOTION SEQ. NO. 002

AMCHEM PRODUCTS, INC., et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by American Biltrite, Inc.:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant American Biltrite, Inc.'s (hereinafter referred to as "ABI") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff, Rudolph Surace, was diagnosed with lung cancer on October 16, 2012 (Mot. Exh. E, Opp. Exh. 10). Mr. Surace was deposed over a course of two days on October, 1 and 2 of 2014 (Mot. Exh. A and Opp. Exh. 1). It is alleged that Mr. Surace's exposure to asbestos - as relevant to this motion - was from his work with ABI's Amtico vinyl asbestos floor tile from approximately 1957 through 1995.

Mr. Surace testified that he was employed as a foreman at Elmsford Lumber for ten years from around June 1957 through 1967 (Mot. Exh. A pgs. 169-170, 225-226). He stated that his work for Elmsford Lumber included ABI's Amtico tiles which came in a brown box with lettering that stated the square footage, the color and that it was "vinyl asbestos." He stated that he would have to open the box and remove a quantity of the tiles to complete the customers' orders. Mr. Surace testified that he believed that removing the tiles exposed him to asbestos because the box says it is "vinyl asbestos" and he got asbestos on himself because of the dust and debris in the box (Mot. Exh. A, pgs. 218- 219, 392-393 and 399). Mr. Surace testified that Elmsford Lumber sold ABI's Amtico vinyl asbestos floor tile in the 12 x 12 size, in black, red and green colors. He described ABI's vinyl non-asbestos tile as only stocked in a white marble color or black. He said he could tell he was looking at ABI's vinyl asbestos tile because it was thicker than the vinyl tile (Mot. Exh. A, pgs. 394 -396). He testified that from Spring of 1968 through 1976, he worked as a foreman at R. W. Henry, a lumber yard in Pleasantville, New York. Mr. Surace performed essentially the same work with Amtico asbestos floor tiles at R.W. Henry, including removing floor tiles from boxes for clients. He testified that R. W. Henry only sold ABI's non-asbestos vinyl floor tile in white and the Amtico vinyl asbestos tile in black or white. Any other color had to be special ordered (Mot. Exh. A, pgs. 226-229, 239-240 and 402-404).

Mr. Surace joined the Carpenter's Union Local 53 in 1977, and remained a member through 1995 when he retired (Mot. Exh. A, pgs. 86-87, 241-242). He testified that he worked out of the Local 53 Union Hall in White Plains and was sent to different jobs with multiple employers. He specifically recalled working with ABI's Amtico vinyl asbestos floor tiles at the Galleria Mall, the Gateway highrise building, and Westchester

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

Mall, all located in White Plains, New York. He also specifically recalled the IBM buildings and the Money building located in Purchase, New York (Mot. Exh. A, pgs. 242-243, 255-268, 271, 273, 282 and 306-314, 405-447).

Mr. Surace testified that he applied the Amtico vinyl asbestos floor tile by first putting down whole solid pieces and then returning to do the more time consuming edges. He stated that he would use a sheetrock knife to cut straight edges. He described the process for curved edges as: marking ABI's Amtico vinyl asbestos floor tiles, then heating them to make them softer or pliable, before cutting the curved edges using a sheetrock knife. He described the heating process as taking the tiles out of the box and laying them out to warm up overnight. He claimed that the boxes kept them compact and brittle. Mr. Surace stated he could not use a tile cutter because it would shred and shatter the tiles. He testified that ABI's Amtico vinyl asbestos floor tiles he used at the Galleria Mall, the Gateway highrise building, the Westchester Mall, the IBM buildings, and the Money building, were basically the same, either black or white, 12 x 12 in size, and came in a brown cardboard box (Mot. Exh. A, pgs. 405-447). Mr. Surace testified that he was never given a mask or a respirator during his work as a union carpenter and that he believed he was exposed to asbestos from ABI's Amtico vinyl asbestos floor tile as a result of cutting and handling it, by breathing in visible dust. He also claims that he was exposed to, and breathed in, visible asbestos dust from the sweeping up of debris after working with Amtico vinyl asbestos floor tile (Mot. Exh. A, pgs. 536-538 and 553-554).

Plaintiffs commenced this action on January 31, 2014 to recover for damages resulting from Mr. Surace'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 vinyl asbestos floor tiles, caused Mr. Surace's lung cancer. ABI relies on the April 1, 2014 report of plaintiffs' expert, Dr. Eugene Gibilaro, M.D. F.C.C.P. which concludes Mr. Surace's cigarette smoking and his exposure to asbestos at worksites were both contributing factors in the development of his lung cancer, in support of its argument that plaintiffs will not present any admissible evidence on 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 Mr. Surace's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of his lung cancer (*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, including the April 1, 2014 report of Dr. Eugene Gibilaro, M.D. F.C.C.P. , 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), and the report 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 Mr. Surace's lung cancer, eliminating any general causation.

Mr. Spencer's and Mr. Plisko's August 1, 2017 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and Mr. Surace's lung cancer. They draw on multiple assumptions as to plaintiff's exposure from his deposition testimony and responses to interrogatories. They also rely on reports and studies, including those performed at their company Environmental Profiles, Inc. (hereinafter "EPI"), of ABI's Amtico vinyl asbestos floor tile for a risk and exposure assessment. The August 1, 2017 Summary Report explains the difference between friable and non-friable asbestos containing materials and assesses Mr. Surace's exposure through his work history to both types of asbestos 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, pose a lesser potential of release of asbestos fibers associated with mesothelioma. They conclude that plaintiff's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, well below OSHA and the WHO permissible exposure limits, and well below lifetime cumulative exposure under the EPA clearance limit following an asbestos abatement action (See Mot. Exh. B).

Dr. Geyer's August 4, 2017 report relies on the same assumptions made by Mr. Spencer and Mr. Plisko. Dr. Geyer also cites to Mr. Surace's deposition testimony stating that he smoked about a pack of cigarette's a day, from 1952 or 1953 through 1976, and that his doctors did not find asbestosis, they only found lung cancer (Mot. Exh. A, pgs. 328-331 and 356). Dr. Geyer cites to published literature by the U.S. Department of Health, Education and Welfare, and the U.S. Department of Health and Human Services in support of his conclusions that the lack of asbestosis is proof that Mr. Surace's lung cancer is a result of his smoking cigarettes and not a result of asbestos exposure (See Mot. Exh. E, pg. 3 of 5).

Plaintiffs in opposition rely on the May 13, 2019 report of Dr. Mark Ellis Ginsburg M.D., Associate Director of Thoracic Surgery at Columbia University College of Physicians and Surgeons (Opp. Exh. 10).

Dr. Ginsburg's May 13, 2019 report assesses Mr. Surace's medical history, past medical history, medications, cigarette smoking history, family history, occupational and environmental exposure, radiology results and pathology results. Dr. Ginsburg relies on

studies and reports from multiple entities - that includes WHO, OSHA and the EPA - as demonstrating that all asbestos fiber, including chrysotile fibers can increase the likelihood of developing lung cancer. He concludes that chrysotile has been independently found to cause lung cancer, and that there is no safe minimal level of asbestos exposure (Opp. Exh. 10, footnotes 8-27). He further concludes that Mr. Surace's smoking history contributed, and that his cumulative exposure to asbestos from each manufacturer's asbestos products was a substantial contributing factor, to the cause of his lung cancer (Opp., Exh. 10). Plaintiffs' argue that Dr. Ginsburg included ABI's Amtico vinyl asbestos floor tiles as a substantial contributing factor to the cause of Mr. Surace's lung cancer.

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. Ginsburg, is relying on some of the same scientists and scientific organizations as the defendants' experts in support of the arguments on 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 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. Mark Ellis Ginsburg, also relies on studies and reports in part from the same scientific organizations, OSHA, EPA and the WHO, to establish that plaintiff's exposure to chrysotile asbestos fibers can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Special Causation:

ABI states that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause Mr. Surace's lung 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 1114 [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, In re New York City Asbestos Litigation, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] states that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

In making a comparative exposure analysis, the August 1, 2017 Summary Report by Mr. Spencer and Mr. Plisko recite Mr. Surace's occupational history and assess his exposures to various asbestos products, including drywall and drywall taping, thermal insulation, spray insulation and asbestos dust from construction materials. Mr. Spencer

and Mr. Plisko also cite their study performed at EPI and rely on data from a six hour and 51 minute study they conducted of 161 linear feet of ABI's Amtico vinyl 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." (Mot. Exh. B, pgs. 16-18, Tables 7 and 8). They further calculate that Mr. Surace had less than 0.00022 f/cc exposure from installation of ABI Amtico floor tile. The report states that plaintiff's cumulative exposure to asbestos from ABI's Amtico asbestos floor tile is less than 0.000006 f/cc-yrs. and indistinguishable from most lifetime cumulative exposures to ambient asbestos (Mot. Exh. B, pg. 20).

Mr. Spencer and Mr. Plisko's report concludes that (1) Mr. Surace was most likely exposed to high airborne concentrations of asbestos fibers from working with friable asbestos joint compound, thermal insulation, and spray applied insulation during employment as a carpenter; (2) plaintiffs have not provided any scientifically reliable and relevant industrial hygiene exposure assessment and there is limited or no evidence to suggest that the ABI Amtico floor tiles identified by Mr. Surace contained asbestos, (3) if Mr. Surace cut and installed asbestos containing ABI floor tile, this kind of work would have presented him with no exposure to asbestos above historical or today's occupational health guidelines, if any; (4) any exposure Mr. Surace had from the manipulation of ABI's Amtico vinyl asbestos floor tiles 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; and (5) There are other potential exposures and risk factors associated with lung cancer other than asbestos, which should be considered and properly evaluated (See Mot. Exh. B).

ABI's expert Dr. Geyer relies on published literature in the form of reports and studies, and the findings in the August 1, 2017 Summary Report of Mr. Spencer and Mr. Plisko, and states that Mr. Surace's work performed with and in the vicinity of ABI's Amtico floor tiles would have resulted in negligible or insignificant chrysotile asbestos exposure. Dr. Geyer cites to studies and reports assessing asbestosis and the relationship to asbestos exposure and lung cancer. He concludes that published medical studies support the need for the presence of asbestosis to attribute the cause of lung cancer to asbestos exposure (Mot. Exh. E, pg. 3 of 5, and footnotes 4-9). Dr. Geyer refers to Mr. Surace's deposition testimony concerning his cigarette smoking and the lack of any finding of asbestosis. He concludes that because of the lack of asbestosis, Mr. Surace's lung cancer is more likely caused by his history of smoking cigarettes (See Mot. Exh. E, pg. 3 of 5).

Dr. Mark Ellis Ginsburg, M.D. relies on reports and testing by SRC, Inc. for the USEPA, GCA Corporation and Materials Analytical Services Inc., and states that manipulation or disturbance of asbestos containing floor tiles can result in the release of asbestos fibers that are potentially greater than the ambient level of exposure. Dr. Ginsburg further states that the asbestos content of floor tile is 8 to 30% by weight, and installation of asbestos floor tile results in airborne asbestos concentrations as high as 0.26% f/cc. Dr. Ginsburg also refers to a study of airborne asbestos fibers during cutting, sanding, and snapping of asbestos containing floor tiles with an average level measured at 0.27 f/cc. Dr. Ginsburg refers to another study addressing the repacking of asbestos containing floor tile that resulted in an average level of airborne asbestos exposure of 0.96 f/cc (Opp. Exh. 10, footnotes 31, 38- 40). Dr. Ginsburg concludes that Mr. Surace's cumulative exposure to asbestos fibers from each company's product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tile, was a substantial cause of his lung cancer. He further concluded that Mr. Surace's cigarette smoking was a contributing risk factor which, combined with his exposure to asbestos, increased his risk of lung cancer (Opp. Exh. 10, pgs. 9-10). Dr. Ginsburg's report raises credibility issues and issues of fact on specific causation.

Plaintiffs are not required to show the precise causes of damages as a result of Mr. Surace's exposure to ABI's product, only "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference as to specific causation for exposure to 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 Mr. Surace'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 removed a portion of ABI's Amtico vinyl asbestos floor tiles from boxes for customers; when he was cutting the tiles with a sheetrock knife, and when sweeping up the debris from cutting the tiles after laying down a floor (Mot. Exh. A, pgs. 218- 219, 239-240, 255-268, 306-314, 402-447, 536-538 and 553-554). Mr. Surace's deposition testimony, when combined with the report of Dr. Ginsburg, 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.

ABI attempts to use the reply papers to supplement the expert reports of Mr. Spencer, Mr. Plisko, and Dr. Geyer, with the affidavits of eight (8) additional industrial hygienists prepared for unrelated actions, and to present new arguments on the issue of the scientific basis for "dose reconstruction" (Reply Aff. Exhs. DD, EE, FF, GG, HH, II, JJ and KK).

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 additional expert affidavits and related arguments made for the first time in ABI's reply papers, deprive the plaintiffs of the opportunity to respond and are improperly before this Court.

ACCORDINGLY, it is ORDERED that Defendant American Biltrite, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims asserted against it, is denied.

ENTER:



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

Dated: July 3, 2019

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