

<b>Lauke v Amchem Prods., Inc.</b>
2019 NY Slip Op 32242(U)
July 26, 2019
Supreme Court, New York County
Docket Number: 190425/2014
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

MANFRED LAUKE and NORA LAUKE, Plaintiffs, - against - AMCHEM PRODUCTS, INC., et al., Defendants.

INDEX NO. 190425/2014 MOTION DATE 07/17/2019 MOTION SEQ. NO. 003 MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Domco Products of Texas, Inc.s/h/a Azrock Industries, 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 Domco Products of Texas, Inc. s/h/a Azrock Industries, Inc.'s (hereinafter referred to as "Defendant") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff, Manfred Lauke was diagnosed with asbestosis on January 23, 2013 and stomach cancer on December 11, 2013 (Mot. Exh. D, pg. 5, 7A). He was about seventy years old at the time of diagnosis. Mr. Lauke was deposed over a course of three days on January 13, 14 and 15, 2016 (Mot. Exh. E, days 1-3 and Opp. Exh. 1). It is alleged that Mr. Lauke was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from Defendant's Azrock asbestos floor tile products. Mr. Lauke alleges he was exposed to Defendant's asbestos floor tile products through his work as a renovator and tile installer in New York from 1979 through 1985 - performing work in Co-Op City in the Bronx, on apartments and in the auditorium (Mot. Exh. E, day 1, pgs. 179-181 and 188, and day 2, pgs. 286-289 and 323-328 ).

Mr. Lauke testified that he believes he was exposed to asbestos in defendant's Azrock asbestos floor tiles in Co-Op City, while he was "laying them down" in the kitchens, hallways or hallway closets. He described his work as ripping out the old flooring or tiles using an ice scraper and preparing the floor, then putting down the new tiles. He stated he would score and snap the new floor tiles using a sheetrock knife or a pin vise, or if he only needed straight lines he used a tile cutter to cut them (Mot. Exh. E, day 1, pgs. 180-184, and day 2, pgs. 319 - 324). Mr. Lauke testified that he had to shave the tiles to make them fit the moulding and that it was a dusty process that resulted in him breathing in the dust. He also testified that he would sweep up when he was done, and that this also created dust that he breathed in. Mr. Lauke stated that breathing in the dust exposed him to asbestos (Mot. Exh. E, day 3, pgs. 664-666, and 671). Mr. Lauke claimed that as a floor tile installer he would receive approximately ten job orders a week while working at Co-Op City and he installed tile in more than 50 apartments (Mot. Exh. E, day 1, pg. 184, day 3, pg. 670).

Mr. Lauke testified that in either 1980 or 1981 he also worked in an auditorium that was part of Co-Op City, tiling a stage using Defendant's Azrock tile. He stated that the stage was built to fit into and underneath the larger main stage. (Mot. Exh. E, day 2, pgs. 323- 328). He testified that he used a sheet rock knife and a pin vise, but he used a tile cutter more often in the auditorium because of the straight lines (Mot. Exh. E, day 2, pg. 319-321). Mr. Lauke stated that after the auditorium he returned to work in residential units

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

at Co-Op City until the company he worked for lost its bid in 1985 (Mot. Exh. E, day 1, pgs. 183-187).

Plaintiffs commenced this action on October 27, 2014 asserting claims for negligence and products liability, alleging Mr. Lauke's exposure to asbestos in the Defendant's Azrock asbestos floor tile product caused his stomach cancer (Mot. Exh. A and NYSCEF Doc. # 1). On February 9, 2015 Defendant filed an Acknowledgement of Service and Answer (Mot. Exh. C).

Defendant now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. Defendant argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that its Azrock asbestos floor tiles caused Mr. Lauke's stomach cancer.

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 (*Alvarez v. Prospect Hospital*, 68 NY 2d 320, 501 NE 2d 572, 508 NYS 2d 923 [1986]). 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 (*Jacobsen v. New York City Health and Hospitals Corp.*, 22 NY 3d 824, 11 NE 3d 159, 988 NYS 2d 86 [2014]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*Vega v. Restani Construction Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012] and *De Lourdes Torres v. Jones*, 26 NY 3d 742, 47 NE 3d 747, 27 NYS 3d 468 [2016]).

Defendant argues that plaintiffs' experts, Dr. Fabio Giron, M.D., an internist and pulmonologist, and Dr. Robert Lautin, M.D., a radiologist, do not establish general and specific causation, or that its product (Azrock asbestos floor tiles), caused Mr. Lauke's stomach cancer. Defendant claims that the expert reports of Dr. Giron and Dr. Lautin do not contain references, studies or other reliance materials linking asbestos exposure to the development of stomach cancer.

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]). Defendant must unequivocally establish that Mr. Lauke's level of exposure to its product, Azrock asbestos floor tile, was not sufficient to contribute to the development of his stomach cancer (*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]).

Defendant's attempt to "point to gaps" in plaintiffs' evidence, fails to establish a prima facie basis for summary judgment. The initial burden of proof rests with the Defendant's evidence and the defense expert report of Dr. Michael Graham, M.D., a professor of pathology. It is only after defendant tenders sufficient evidence to make a prima facie showing of lack of causation that the burden shifts back to the plaintiffs to provide evidence-including their experts' reports- to raise any issues of fact (See *Alvarez v. Prospect Hospital*, 68 NY 2d 320 at 324).

Plaintiffs in opposition provide the additional expert report and affidavit of Dr. Brent C. Staggs, M.D.. Defendant argues that plaintiffs provided the expert report of Dr. Staggs for the first time in opposition to this motion and it was unable to address the report in its arguments. Defendant would first have to make a prima facie case before addressing Dr. Staggs report. Defendant has not made a prima facie case eliminating all material issues of fact. Furthermore, the report of Defendant's expert (Dr. Graham) fails to contain

references, studies, or other reliance materials, establishing there is no link between asbestos exposure and the development of stomach cancer.

Defendant argues that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006] 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.

**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 N.Y. 3d 434, 448, *supra*).

Defendant provides the expert report of Dr. Michael Graham, professor of pathology at St. Louis University, dated November 13, 2016, to establish lack of causation, but there are no arguments specifically citing to his report. Defendant's arguments on general causation only point to gaps in plaintiff's expert reports and their alleged inability to establish general causation, as previously stated herein. That does not make a *prima facie* case.

Dr. Graham's November 13, 2016 report summarizes Mr. Lauke's medical history and cigarette smoking history. He states "In my opinion, the weight of the current scientific information does not establish, to a reasonable degree of medical certainty, a causal relationship between asbestos exposure and the development of gastric adenocarcinoma." Dr. Graham further states, "The use of encapsulated chrysotile-containing gaskets is associated with the airborne release of chrysotile dust within the current PEL (0.1 f/cc). Exposure to chrysotile dust at this concentration would neither significantly increase a person's overall asbestos burden nor increase the risk of developing asbestos." Dr. Graham does not state any opinion nor does he assess Mr. Lauke's level of exposure to asbestos in Defendant's Azrock asbestos floor tiles or how it failed to cause his injuries. Dr. Graham does not cite to any scientific or medical study, report, or publication in support of this conclusion and none are annexed to his report (Mot. Exh. F).

Plaintiff's expert Dr. Fabio Giron's December 12, 2014 report (annexed to the motion papers) refers to Mr. Lauke's smoking history and his entire work place exposure. Dr. Giron makes assumptions stating "Asbestos exposure is a risk factor for the development of gastric cancer." Dr. Giron does not cite to any scientific or medical study, report, or publication in support of this opinion and none are annexed to his report (Mot. Exh. G).

Plaintiff's expert Dr. Robert Lautin, M.D., is a radiologist, his October 5, 2014 report (annexed to the motion papers), only addresses Mr. Lauke's CT of his chest dated January 23, 2013. He has an "impression" that Mr. Lauke's bilateral pulmonary asbestosis and bilateral asbestos related pleural disease is a direct result of past exposure to asbestos. Dr. Lautin does not assess Mr. Lauke's stomach cancer nor does the report assess the level of exposure to asbestos (Mot. Exh. H).

Plaintiffs in opposition further rely on the report of Dr. Brent C. Staggs, M.D. a pathologist, dated July 2, 2019 and April 15, 2016 Affidavit (Opp. Exhs. 2 and 3).

Dr. Staggs' July 2, 2019 report assesses Mr. Lauke's clinical history, radiology reports, pathology reports, and asbestos exposure history. Dr. Staggs states that exposure to both chrysotile asbestos and amphibole asbestos fibers are known to cause primary gastric adenocarcinoma and cites to a study cited in the Netherlands, and two reports in support of his opinion. Dr. Staggs states that Mr. Lauke's long smoking history also increased his risk of primary gastric adenocarcinoma. Dr. Staggs opines that Mr. Lauke's stomach cancer is from cumulative exposure to each company's asbestos containing products (Opp. Exh. 2). It is plaintiffs' contention that Dr. Staggs is including Defendant's Azrock vinyl asbestos floor tile as part of the cumulative exposure. Dr. Staggs

April 15, 2016 Affidavit cites to multiple reports and studies as establishing that all types of asbestos fibers, including chrysotile asbestos fibers, are causally linked to cancer of other sites. Dr. Staggs' April 15, 2016 Affidavit relies on reports from the WHO, OSHA, the EPA, the United States Department of Health and Human Services, and the International Agency for Research on Cancer (IARC) (Opp., Exh. 3).

Defendant's argument that summary judgment is warranted under summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006] (*Juni*), 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], is unavailing. Defendant failed to provide an expert report or other evidence that establishes Mr. Lauke's lack of general causation. Defendant did not make a prima facie case of general causation. In any case, the plaintiffs' evidence and the report of Dr. Staggs is sufficient to raise an issue of fact on general causation.

### 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 N.Y. 3d 434, 448, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [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 N.Y. 3d 434, supra at 448]). In turn, the Appellate Division in the case *In re New York City Abestos Litigation*, 148 A.D. 3d 233, 48 N.Y.S. 3d 365 [1st Dept. 2017] held that the standards set by *Parker* are applicable in asbestos litigation.

Defendant states that it's Azrock floor tiles only had encapsulated chrysotile asbestos and did not produce breathable dust to a level sufficient to cause Mr. Lauke's stomach cancer, and thus plaintiffs are unable to establish special causation. Defendant argues that plaintiff had limited exposure to new Azrock vinyl asbestos floor tiles. Defendant claims that only some of the Azrock vinyl composition tiles sold between 1981 and 1983 contained asbestos and they came with an installation manual with an asbestos warning. Defendant claims that Mr. Lauke's testimony that he failed to read a manual or see a warning, most likely means he did not use the Azrock asbestos floor tiles (Mot. Exh. E, day 2, pg. 332, and day 3, pgs. 674-675).

Dr. Graham's November 13, 2016 report summarizes Mr. Lauke's medical history and cigarette smoking history. Dr. Graham states:

"The use of encapsulated chrysotile-containing gaskets is associated with the airborne release of chrysotile dust within the current PEL (0.1 f/cc). Exposure to chrysotile dust at this concentration would neither significantly increase a person's overall asbestos burden nor increase the risk of developing asbestos.

It is my opinion to a reasonable degree of medical certainty that chrysotile dust derived from gaskets associated with Rheem Manufacturing products would not cause or contribute to the development of asbestosis." (Mot. Exh. F)

Dr. Graham's report does not address Defendant's Azrock asbestos floor tile or Mr. Lauke's stomach cancer (Mot. Exh. F). Dr. Graham's report does not meet the standard stated under *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, supra, and does not make Defendant's prima facie case on specific causation.

Defendant has not met its prima facie burden for summary judgment on specific causation and the burden has not shifted to the plaintiffs, so there is no need to assess plaintiffs expert reports or evidence.

Furthermore, assessing the expert reports and plaintiffs' evidence, they sufficiently raise an issue of fact warranting denial of Defendant's motion for summary judgment.

Plaintiffs' expert Dr. Fabio Giron's December 12, 2014 report refers to Mr. Lauke's smoking history and his entire work place exposure. Dr. Giron states that Mr. Lauke had known asbestos exposure and radiographic manifestations of asbestosis. He opines that Mr. Lauke's asbestos exposure was a contributor to the development of his primary gastric cancer (Mot. Exh. G).

Plaintiffs' expert Dr. Robert Lautin's October 5, 2014 report only addresses Mr. Lauke's CT of his chest (dated January 23, 2013). Dr. Lautin does not assess Mr. Lauke's exposure or the cause of his stomach cancer (Mot. Exh. H).

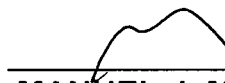
Dr. Staggs' April 15, 2015 affidavit states that asbestos creates a dose response that accumulates with exposure, and the more exposure, the more likely it is that a person will get a response in the form of cancer (Opp., Exh. 3). Dr. Staggs' July 2, 2019 report assesses Mr. Lauke's clinical history, radiology reports, pathology reports, and asbestos exposure history. He states that exposure to chrysotile and amphibole asbestos is a known cause of primary gastric adenocarcinoma (stomach cancer). Dr. Staggs concludes that Mr. Lauke's exposure to all types of asbestos fibers were contributing factors to his development of primary gastric adenocarcinoma. He further opines that Mr. Lauke's gastric adenocarcinoma is from cumulative exposure to each company's asbestos containing products, which plaintiffs argue includes Defendant's Azrock vinyl asbestos floor tile (Opp., Exh. 2).

Plaintiffs are not required to show the precise causes of damages as a result of Mr. Lauke's exposure to Defendant's Azrock asbestos floor tile 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 Defendant's Azrock 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. Lauke's deposition testimony, as showing that he identified Defendant's Azrock vinyl asbestos floor tiles as a source of his exposure to asbestos. He described the manner of his exposure, specifically that he would score and snap the new Azrock floor tiles using a sheetrock knife or a pin vise, or he if he only needed straight lines he used a tile cutter to cut them (Mot. Exh. E, day 1, pgs. 180-184, and day 2, pgs. 319 - 324). Mr. Lauke further testified that he had to shave the tiles to make them fit for the moulding and that it was a dusty process that resulted in him breathing in the dust. He also testified that he would sweep up when he was done and that also created dust that he breathed in. Mr. Lauke stated that breathing in the dust exposed him to asbestos (Mot. Exh. E, day 3, pgs. 664-666, and 671). Mr. Lauke's deposition testimony, when combined with the July 2, 2019 Report and April 15, 2016 Affidavit of Dr. Staggs, has created "facts and conditions from which [Defendant's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), giving plaintiffs the benefit of all favorable inferences as the non-moving parties, they have sufficiently raised issues of fact, warranting denial of summary judgment to the defendant.

ACCORDINGLY, it is ORDERED that Defendant DOMCO Products of Texas, Inc. s/h/a Azrock Industries, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:



MANUEL J. MENDEZ  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: July 26, 2019

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