

Carlstrand v Aerco Intl., Inc.
2019 NY Slip Op 32315(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 190194/2017
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

RICHARD CARLSTRAND and ANNA CARLSTAND,
Plaintiffs,
- against -
AERCO INTERNATIONAL, INC., et al.,
Defendants.

INDEX NO. 190194/2017
MOTION DATE 07/30/2019
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Domco Products Texas, Inc.:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Domco Products of Texas, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, alternatively for partial summary judgment on plaintiffs' claim for punitive damages is granted only to the extent of dismissing the punitive damages claim. The remainder of the relief sought in this motion is denied.

Plaintiff Richard Carlstrand was diagnosed with pleural mesothelioma on May 5, 2017. Mr. Carlstrand was deposed over a course of six days on August 8, 9, 10, 11, 15 and 16, 2017 (Mot. Exh. C and Opp. Exh. 1). It is alleged that Mr. Carlstrand was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from exposure to the installation of Azrock vinyl asbestos floor tiles manufactured by defendant Domco Products of Texas, Inc. (hereinafter referred to as "defendant"). Mr. Carlstrand alleges he was exposed to asbestos dust from defendant's Azrock asbestos floor tiles during his work for Waldvogel Brothers from 1962 or 1963 through 1965 as a journeyman/carpenter, for John Melen Incorporated from 1965 through 1977, as a journeyman carpenter and starting in 1967 as foreman/supervisor. He testified that for both jobs he worked at commercial sites throughout the borough of Manhattan. (Mot. Exh. C, pgs. 143, 220-221, 229, 370-371).

Mr. Carlstrand stated that he saw defendant's Azrock asbestos floor tiles at numerous locations. Mr. Carlstrand testified that while working for Waldvogel Brothers he was assigned to the Pan Am Building. He claims that he was exposed to asbestos dust by being in the presence of others that were cutting and installing vinyl asbestos floor tiles. He specifically identified defendant's Azrock vinyl asbestos floor tiles (Mot. Exh. C, pgs. 146, and 157-159). Mr. Carlstrand also specifically recalled seeing defendant's Azrock asbestos floor tiles while working for John Melen Incorporated at Roosevelt Hospital, formerly known as St. Luke's Hospital. Mr. Carlstrand described the packaging for Azrock asbestos floor tiles as having some sort of writing with the brand name on it (Mot. Exh. C, pgs. 371-373). Mr. Carlstrand testified that the asbestos floor tiles were cut at the perimeters, with the center of the floor using full sized tiles. He stated the floor tiles were usually 9x9 or 12x12 (Mot. Exh. C, pgs. 376 and 378). Mr. Carlstrand stated there were different methods used to cut the floor tile with straight cuts going to the perimeter. He described the process of cutting tiles for the perimeter as scribing a tile, marking it, scratching it with an awl or sharp tool, and then it was snapped to the proper size. Mr. Carlstrand stated that sometimes after being snapped the installers had to use a knife to cut off an edge or had to sand the edge. Mr. Carlstrand estimated that the entire process took about one minute (Mot. Exh. C, pg. 379).

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

Plaintiffs commenced this action on July 6, 2017 (NYSCEF Doc. #1). The pleadings were subsequently amended on July 18, 2017, with defendant added as a party. The Amended Verified Complaint incorporates plaintiffs' attorneys - Weitz & Luxenberg, P.C. - Standard Asbestos Complaint For Personal Injury No. 7 (Mot. Ex. A). Defendant served an Acknowledgement of Service of Answer on August 21, 2017 (Mot. Ex. B).

Defendant now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, alternatively for partial summary judgment on plaintiffs' claim for punitive damages .

Defendant contends that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that any of its Azrock vinyl asbestos floor products caused Mr. Carlstrand's mesothelioma.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

Defendant argues that plaintiffs' expert's report, Dr. Mark Ellis Ginsburg, M.D. (Mot. Ex. F) fails to establish general or specific causation. Defendant further 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. Carlstrand's mesothelioma. Defendant claims that plaintiffs' evidence and expert reports are speculative and that the cumulative exposure theory does not establish general or specific causation resulting in the plaintiffs inability to raise any issues of fact 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]). Defendant must unequivocally establish that Mr. Carlstrand's level of exposure to its floor products was not sufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendant's attempt to "point to gaps" in plaintiffs' evidence and expert report fails to establish a prima facie basis for summary judgment.

The initial burden of proof rests with defendant's evidence and the defense experts. 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). Defendant does not provide expert witness reports in support of this motion - only the CPLR 3101(d) expert pre-trial disclosure - identifying four experts, Dr. Stanley B. Fiel, MD, FACP, FCCP, a pulmonary and internal medicine specialist, Dr. Leonard Warton, P.E. , a professional engineer and chemist, Robert C. Adams, CIH CSP, a certified industrial hygenist, and Dr. Stanley J. Geyer, M.D., a pathologist (Mot. Ex. G). Defendant fails to provide evidence making a prima facie case for summary judgment on causation. Its reliance on interrogatory responses "reflecting that its encapsulated floor tile contained

between .1% to 20% chrysotile asbestos” and its CPLR §3101(d) pretrial disclosure (Mot. Exhs. G and H) do not make a prima facie case, warranting denial of summary judgment on both general and specific causation.

Additionally, plaintiffs are not required to show the precise causes of damages as a result of Mr. Carlstrand’s exposure to defendant’s Azrock vinyl asbestos floor tile product. Plaintiffs are only required to show “facts and conditions from which the defendant’s liability may be reasonably inferred.” The opposition papers -which includes Mr. Carlstrand’s deposition testimony identifying defendant’s Azrock asbestos floor tile products and the expert report of Dr. Brett C. Staggs, M.D., a pathologist (Opp. Exhs. 1 and 13)- have provided sufficient proof to create an inference as to causation and raise an issue of fact on causation (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]).

Defendant alternatively seeks partial summary judgment on the plaintiffs’ claim for punitive damages. Defendant argues that plaintiffs’ June 27, 2019 e-mail notification that they are proceeding on the punitive damages claim (Mot. Exh. J), was approximately thirty(30) days before the scheduled trial date, is prejudicial and violates defendant’s due process rights. Defendant claims it was not provided any notice or given the opportunity to meet and confer with plaintiffs or conduct discovery on punitive damages as required under Case Management Order (CMO) IX.M.

CMO XI. M, titled “Discovery Concerning Punitive Damages,” states:

“Where plaintiff asserts a punitive damages claim against a defendant, plaintiff shall answer defendants’ standard interrogatories and document requests seeking information related to punitive damages per the CPLR, and defendant shall answer plaintiffs standard interrogatories and document requests seeking information related to punitive damages per the CPLR. The parties shall confer about the possibility of a stipulation dismissing the prayer for punitive damages as set forth in Section VII.C before responding to standard interrogatories and document requests seeking information concerning punitive damages.”

CMO VII.C, states in relevant part:

“...In cases on the Active or Accelerated Dockets, where the Complaint already contains a prayer for punitive damages...plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it will not proceed with a punitive damages claim against a given defendant plaintiff shall sign a stipulation dismissing the prayer for punitive damages...”

Plaintiffs argues that the defendant was placed on notice of the claim for punitive damages through the pleadings. They state that the Amended Verified Complaint incorporates plaintiffs’ attorneys - “Weitz & Luxenberg, P.C. - Standard Asbestos Complaint For Personal Injury No. 7,” which contains approximately six (6) prayers for relief seeking punitive damages, putting the defendant on notice, but no discovery was sought on this issue until after the case was marked trial ready.

Defendant states that on February 21, 2019, in the objections on the “Trial Readiness Conference Form” (Mot. Exh. I), it inquired as to whether plaintiffs were pursuing punitive damages so that discovery could be obtained and summary judgment sought (Mot. Exh. I). Defendant cites to plaintiffs response to the inquiry, “Plaintiffs do not believe this is a trial readiness issue” and that they would comply with all obligations under the CMO (Mot. Exh. I). Defendant argues that plaintiffs delay in notifying it of the intent to proceed with punitive damages until June 27, 2019 violates the CMO and its due process rights, further warranting summary judgment on the punitive damages claim.

Plaintiffs did not provide any arguments or evidence to refute defendant’s proof that they were on notice since February 21, 2019, of defendant’s (Domco Products of

Texas, Inc.'s) intent to obtain discovery and pursue summary judgment on punitive damages. Plaintiffs delay and failure to contact the defendant until June 27, 2019 results in unfair advantage and a violation of the defendant's due process rights which was not meant to occur under the CMO.


ACCORDINGLY, it is ORDERED that defendant Domco Products of Texas, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, alternatively for partial summary judgment on plaintiffs' claim for punitive damages is granted only to the extent of dismissing the punitive damages claim, and it is further,

ORDERED that plaintiffs claim for punitive damages asserted against Domco Products of Texas, Inc., is severed and dismissed, and it is further,

ORDERED that plaintiffs punitive damages claims continue as to other remaining defendants, and it is further,

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

Dated: July 31, 2019

ENTER:  **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