

Carlstrand v Aerco Intl., Inc.
2019 NY Slip Op 32317(U)
August 1, 2019
Supreme Court, New York County
Docket Number: 190194/2017
Judge: Manuel J. Mendez
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very close to those workers installing Amtico vinyl asbestos floor tile. He testified that the installers often sanded down the edges and he observed little dust particles on the floor, that he was close enough to breathe in and that he believed contained asbestos (Mot. Exh. A, pgs. 1226-1227).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. ABI contends that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation.

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 plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that its asbestos floor products caused Mr. Carlstrand's mesothelioma. ABI argues that plaintiffs' evidence and their expert report of Dr. Mark Ellis Ginsburg, MD, a thoracic surgeon, are speculative. ABI claims that the cumulative exposure theory does not establish general or specific 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]). MMI 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]).

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], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] 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. ABI argues that its experts John W. Spencer, CIH, CSP, (a certified industrial hygienist), and his June 13, 2019 summary report prepared with Marc Plisko (a certified industrial hygienist) (Mot. Exh. B), and the June 18, 2019 report of 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).

Mr. Spencer and Mr. Plisko are employed by Environmental Profiles, Inc. ("EPI"). Mr. Spencer's and Mr. Plisko's June 13, 2019 Summary Report states there is a lack of

causal relationship between encapsulated chrysotile asbestos and Mr. Carlstrand's mesothelioma. They draw on multiple assumptions as to plaintiff's exposure from his deposition testimony. They also rely on reports and studies, including those performed by EPI, of ABI's Amtico vinyl asbestos floor tile for a risk and exposure assessment. The June 13, 2019 Summary Report explains the difference between friable and non-friable asbestos containing materials. It references materials and standards from the Environmental Protection Agency ("EPA") standards for ambient airborne levels, 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 Mr. Carlstrand's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, well below the permissible exposure limits set by OSHA and the EPA and that even if Mr. Carlstrand was exposed to ABI asbestos floor tile products there would be no asbestos exposure above historical or today's occupational health standards and guidelines (See Mot. Exh. B).

Dr. Geyer's June 18, 2019 report relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their June 13, 2019 Summary Report. Dr. Geyer also prepared a table of published literature in support of his conclusion that chrysotile fibers unaccompanied by contamination with amphibole forms of asbestos, or some mixture of both chrysotile and amphiboles, did not produce mesothelioma in humans (See Mot. Exh. E). Dr. Geyer further concludes that because chrysotile fibers in Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone rendering them unable to cause plaintiff's malignant mesothelioma. He claims that Mr. Carlstrand's exposure to amphibole asbestos fibers (known as amosite or from crocidolite) was from other sources, most likely from asbestos insulation, and are the probable causes of plaintiff's mesothelioma (Mot. Exh. E, June 26, 2018).

Plaintiff in opposition relies on the reports of Dr. Brett C. Staggs, M.D., a pathologist, and Dr. Mark Ellis Ginsburg, M.D., a thoracic surgeon (Opp. Exhs.13 and 14).

Dr. Staggs' affidavit is dated April 15, 2016, and his report is dated December 13, 2018 (Opp. Exh. 13). Dr. Staggs' April 15, 2016 affidavit states that asbestos is a known carcinogen causing all types of diseases in addition to mesothelioma and other cancers. He states that all asbestos fibers - including amphibole, chrysotile and non-commercial asbestiform mineral fibers - cause cancers and that there is no safe level of asbestos exposure. Dr. Staggs cites to reports and findings from the scientific and medical communities in support of his position - including the U.S. Environmental Protection Agency (1986), the American Thoracic Society and OSHA among others (Opp. Exh. 13).

Dr. Staggs' December 13, 2018 report assesses Mr. Carlstrand's clinical history and radiology reports. He refers to his findings in the April 15, 2016 affidavit and concludes that exposure to chrysotile and amphibole asbestos is known to cause malignant mesothelioma. He further concludes that Mr. Carlstrand's mesothelioma is from cumulative exposure to each company's asbestos containing products (Opp. Exh. 13). Plaintiffs argue that the cumulative exposure includes ABI's Amtico vinyl asbestos floor tiles.

Dr. Ginsburg's October 21, 2018 report assesses Mr. Carlstrand's medical history, past medical history, medications, cigarette smoking history, family history, occupational and environmental exposure, radiology reports, and pathology reports. Dr. Ginsburg relies on studies and reports from multiple entities - that includes OSHA and the EPA - as demonstrating that all asbestos fibers, including chrysotile fibers, can increase the likelihood of developing mesothelioma. He concludes that chrysotile has been independently found to cause mesothelioma, and that there is no safe minimal level of asbestos exposure (Opp., Exh. 14, Ginsburg Report, footnotes 16,17, 22, and 23). He further concludes that Mr. Carlstrand's cumulative exposure to asbestos from each company's asbestos product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tiles, caused his mesothelioma (Opp., Exh. 14).

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 accepted 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' experts, Dr. Staggs and Dr. Ginsburg, are 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]). The conflicting expert 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' experts, Dr. Brett Staggs and Dr. Mark Ellis Ginsburg, also rely on studies and reports in part from the same scientific organizations, OSHA and the EPA, 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:

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 the case *In re New York City Asbestos 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 June 13, 2019 Summary Report by Mr. Spencer and Mr. Plisko cites to their studies conducted at 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 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, Table 4, pg. 11). They also created a table assessing representative personal 8 hour TWA sample data obtained from exposure to cutting, sanding and installation of ABI vinyl asbestos floor tile using the same trade practices as described by Mr. Carlstrand (Mot. Exh. B, Table 5, pg. 12). They calculate that Mr. Carlstrand averaged 0.076 f/cc (PCM) and 0.008 f/cc (TEM) of exposure respectively over an 8 hour TWA (Mot. Exh. B, pg. 12). They further calculate that Mr. Carlstrand's bystander exposure to installation of ABI Amtico floor tile was 0.25 f/cc-yrs. (PCM) and 0.0031 asbestos f/cc-yrs (PCME) (Mot. Exh. B, pgs. 14-15). The report states that Mr. Carlstrand's cumulative exposure to asbestos from ABI's Amtico vinyl asbestos floor tile is less than and indistinguishable from some lifetime cumulative exposures to ambient asbestos, and well below working lifetime at OSHA and the WHO's permissible exposure limits (Mot. Exh. B, pg. 15).

Mr. Spencer and Mr. Plisko's report concludes that (1) Mr. Carlstrand was a union carpenter that did not personally handle, cut, or install any floor tile - including ABI's

Amtico floor tiles - during his working career (2) plaintiffs have not provided any scientifically reliable and relevant industrial hygiene exposure assessment; (3) Mr. Carlstrand's work with and in close proximity to others manipulating friable asbestos containing insulation and joint compound, he would not have been exposed to asbestos greater than ambient/ background levels and relevant occupational health guidelines; (4) If Mr. Carlstrand observed other trades install ABI's Amtico vinyl asbestos floor tiles this type of work would have presented him with no exposure to asbestos above historical or today's occupational health standards and guidelines; and (5) any exposure Mr. Carlstrand had from the manipulation of ABI's 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 (Mot. Exh. B).

ABI's expert Dr. Geyer's June 18, 2019 report relies on the findings of Mr. Spencer and Mr. Plisko - including a separate report of a study conducted in 2007, unannexed reports and studies that are incorporated into a table, Mr. Carlstrand's deposition testimony, and "reported pathologic diagnosis and other clinical findings" (Mot. Exh. E). Dr. Geyer concludes that because the encapsulated chrysotile fibers in Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone, rendering them unable to cause Mr. Carlstrand's mesothelioma. He concludes that Mr. Carlstrand's exposure to amosite and crocidolite asbestos fibers from other sources, specifically asbestos insulation, are a more likely cause of his mesothelioma (See Mot. Exh. E).

Dr. Staggs' report concludes that exposure to chrysotile and amphibole asbestos is known to cause malignant mesothelioma, and that Mr. Carlstrand's cumulative exposure from each company's product - which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tiles - is the substantial contributing factor resulting in a cumulative dose of asbestos that caused his malignant mesothelioma (Opp. , Exh. 13).

Dr. Ginsburg refers to reports, studies and testing and concludes that chrysotile asbestos has been independently found to cause mesothelioma and can result in the release of asbestos fibers that are potentially greater than current OSHA PEL of 0.1f/cc TWA. Dr. Ginsburg concludes that Mr. Carlstrand's cumulative exposure to asbestos fibers from each company's product - which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tiles - was a substantial contributing factor in the development of his mesothelioma (Opp. Exh. 14).

Plaintiff is not required to show the precise causes of damages as a result of Mr. Carlstrand's exposure to ABI's Amtico vinyl asbestos floor tile product, only "facts and conditions from which the 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 products (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]).

Mr. Carlstrand identified ABI's Amtico vinyl asbestos floor tiles as a source of his exposure to asbestos. He described the manner of his exposure (Mot. A, pgs. 157-159, 560-562, 564-565, 570-573, and 1226-1227). Mr. Carlstrand's deposition testimony, when combined with the reports of Dr. Staggs and 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), raising issues of fact.

ABI attempts to attach to the Reply papers the additional affidavits of eight (8) more industrial hygienists, prepared and filed in unrelated actions, in support of its claims that dose reconstruction utilized by ABI's experts is the only generally accepted means of establishing causation (See Reply, Exhs. S, T, U, V, W, X, Y and Z). This evidence amount to new arguments raised for the first time in reply papers, deprives the plaintiffs of an opportunity to respond, and is 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]).

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 against it, is denied.

ENTER:

Dated: August 1, 2019


MANUEL J. MENDEZ
J.S.C.

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J.S.C.

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