

Rothlein v American Intl. Indus.
2019 NY Slip Op 32801(U)
September 23, 2019
Supreme Court, New York County
Docket Number: 190374/2016
Judge: Manuel J. Mendez
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ASUPREME 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 ROTHLEIN and JENNIFER D. ROTHLEIN
N/K/A JENNIFER D. ANSELL, as Personal
Representative of the Estate of EDWARD
ROTHLEIN, Deceased,

INDEX NO. 190374/2016
MOTION DATE 09/11/2019
MOTION SEQ. NO. 010
MOTION CAL. NO. _____

Plaintiffs,

- against -

AMERICAN INTERNATIONAL INDUSTRIES, for its
Clubman and Clubman Brand, et al.,

Defendants.

The following papers, numbered 1 to 10, were read on this motion pursuant to CPLR §3212 for summary judgment by American International Industries:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____	5 - 7
Replying Affidavits _____	8 - 10

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, American International Industries's motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Complaint and all cross-claims against it, alternatively for partial summary judgment dismissing the plaintiffs' claims for punitive damages, is granted as stated herein.

Plaintiff, Edward Rothlein (hereinafter decedent), was diagnosed with peritoneal mesothelioma on or about October of 2016. He died on October 17, 2018 (Opp. Exh. 9). Plaintiffs allege the decedent's exposure to asbestos - as relevant to this motion - is from asbestos containing talc in "Clubman Talc" products that were manufactured by American International Industries (hereinafter "American"). Plaintiffs allege that the decedent was exposed to the asbestos in the moving defendant's products from about 1982 through 1995.

At his deposition the decedent testified that he used Clubman talcum powder around 1982 until approximately 1995 (Opp. Exh. 1, pgs. 209-211, 218-221 and 224). Decedent testified that he used a dime sized amount of the Clubman talcum powder on his face and a little more than a quarter sized amount on his body. He stated that he would apply the talcum powder on his face after shaving, every other day. He stated that after pouring it into his hands he rubbed the talcum powder in his hands together and then patted his face with his hands. Decedent claimed that the process would create "powder dust." Decedent had a moustache and he tried not to get the talcum powder in it, but claimed there was dust from the powder because the mustache was always full. He claimed he had to comb or brush out the mustache for a half to a full minute to remove the Clubman talcum powder from it. He testified that he used the talcum powder on his body after bathing three to four times a week. Decedent stated that he poured it into his hands and then spread it over his body. He described the Clubman talcum powder as white, very fine and "silky." Decedent claimed he used Clubman talcum powder because the smell reminded him of an old barbershop (Opp. Exh. 1, pgs. 202-203 and 210-211 and 215-217, and Opp. Exh. 4, pgs. 58-60).

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

Decedent's wife and children also used Clubman talc powder product in the home. Plaintiff Mrs. Sharon Rothlein stated at her deposition that she also used Clubman talcum powder on herself. Mrs. Rothlein testified that she also observed her husband use the Clubman talcum powder after shaving (Opp. Exh. 5, pgs. 58 and 116). Decedent's daughter, Jennifer testified at her deposition that she used Clubman talcum powder products on occasion until she moved out of her parents house in 1991 (Opp. Exh. 6, pgs.75 and 144). His son Adam testified at his deposition that he used Clubman talcum powder because his father used it (Opp. Exh. 7, pg. 29).

Plaintiffs commenced this action on December 8, 2016 to recover for damages resulting from the decedent's exposure to asbestos from the defendants' products. The complaint was subsequently amended twice to add additional defendants. Plaintiffs' Standard Complaint - incorporated into the Short-Form Complaint - asserts eleven causes of action for: (1) negligence, (2) strict liability, (3) breach of warranty, (4) premises liability, Labor Law and NYS Industrial Code Violations, (5) liability for contractors and subcontractors, (6) liability for "dust mask" defendants, (7) civil conspiracy and fraud, (8) joint and several liability, (9) disclaimer of federal jurisdiction, (10) Sharon Rothlein's loss of consortium, and (11) punitive damages (Mot. Exh. A).

American served an Answer to plaintiffs' complaint on January 9, 2017 and an Answer to plaintiffs' Standard Complaint No. 1 on January 11, 2017. On March 20, 2017 American served an Amended Acknowledgment of Service of and Answer to Plaintiff's Complaint (Mot. Exh. C).

American now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, alternatively, American seeks partial summary judgment dismissing the plaintiffs' claims for punitive damages.

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 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party 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, 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 by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

At the outset, American argues that it is not liable for plaintiff's claims prior to August 13, 1987. American claims that it purchased some of the Neslemur Company's assets from its then owner Kleer-Vu, on August 13, 1987, but that the parties expressly agreed that American was not assuming he tort or product liabilities of the Neslemur Company. In support of its argument American provides the affidavit of its Executive Vice-President, Charles Loveless, which confirms that the company did not blend, sell or distribute Clubman talcum powder prior to 1987. American also provides a copy of the asset purchase agreement with the Neslemur Company (Mot. Exh. D).

In New York, a corporation that acquires the assets of another is not liable for the torts of its predecessor (Schumacher v Richards Shear Co., 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 [1983]). There are four exceptions to New York's general rule on successor liability, as the successor may be "held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the

transaction is entered into fraudulently to escape such obligations” (Schumacher v Richards Shear Co., 59 NY2d 239, *supra*).

The four exceptions do not apply and American cannot be held liable for the torts of its predecessor the Neslemur Company. American cannot be considered a mere continuation of the Neslemur Company since there was no purchase of the manufacturing facilities, equipment or the real property. American paid the Neslemur Company cash consideration for the assets it purchased and there was no transfer of stocks from either company. There is no common ownership of assets or shared employees, no common owners or officers between the corporations. There was no consolidation or merger of the two companies. The Asset Purchase Agreement did not require American to acquire the Neslemur Company’s liabilities. Since the four exceptions do not apply American is granted summary judgment on plaintiffs’ claims related to decedent’s exposure to asbestos contaminated Clubman talcum powder products prior to August 13, 1987.

American has made a prima facie case as to the decedent’s alleged exposure to asbestos contaminated Clubman talcum powder products for the period starting in 1982 through August 13, 1987. American is not liable for any of decedent’s alleged exposure to asbestos contaminated Clubman talcum powder purchased by Mrs. Rothlein and used by the decedent before August 13, 1987.

American argues that plaintiffs have no evidence, cannot prove general or specific causation or raise an issue of fact that the decedent was exposed to asbestos contaminated Clubman talcum powder during the relevant period after August 13, 1987.

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 Prods., 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 could not have contributed to the causation of Plaintiff’s illness (Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.), 216 AD2d 79, 628 NYS2d 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], DiSalvo 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. 3d 766 [3rd Dept., 2017]). American must unequivocally establish that Mr. Rothlein either was not exposed to asbestos from their Clubman talcum powder products, or that the levels of asbestos he was exposed to was not sufficient to contribute to the development of his mesothelioma (Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*), 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

American provides no expert testimony to make a prima facie case on causation. American’s arguments that plaintiffs lack evidence, and that the experts’ reports are conclusory and speculative, amounts to “pointing to gaps in plaintiff’s proof” and fails to a prima facie case to obtain summary judgment.

American must first meet its prima facie burden before plaintiffs are required to provide any evidence to raise an issue of fact. On American’s motion seeking summary judgment on causation, it is not the plaintiffs’ burden to prove that decedent’s exposure to American’s Clubman talcum powder products during the relevant time period was a substantial factor in causing his mesothelioma. “The fact that some talc might be asbestos-free does not eliminate the possibility that plaintiff was exposed to defendant’s asbestos containing product”(See *Feinberg v. Colgate-Palmolive Co. (In re New York City Asbestos Litigation)*, 53 Misc. 3d 579, 39 N.Y.S. 3d 629 [Sup. Ct., New York County, 2016] citing to *Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, *supra* at 521).

“In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant’s product” (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff need “only show facts and conditions from which defendant’s liability may be reasonably inferred” (Reid v Ga.-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). A plaintiff’s inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has “presented sufficient evidence, not all of which is hearsay, to warrant a trial” (Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

American attempts to rely on decedent’s testimony at his de bene esse deposition that he used Clubman talcum powder through the early 1990’s, and after defense counsel misinterpreted the response, decedent answered “yes.”(Opp. Exh. 4, pgs. 103). American’s attempt to severely limit the time period of decedent’s alleged exposure to asbestos containing Clubman talcum powder products to “early 1990,” is unavailing (Opp. Exh. 4, pgs. 58 and 103). Decedent repeatedly testified at his deposition that he used Clubman talcum powder until approximately 1995 (Opp. Exh. 1, pgs. 209-211, 218-221 and 224). At his de bene esse deposition decedent referred to exposure through the use of Clubman talcum powder products through the early 1990’s (Opp. Exh. 4, pg. 58). He also specifically stated later in the de bene esse deposition “You can go by the other testimony. I was more sharp - I was sharper then than I am now. I can’t remember squat. So I would say the first testimony was the right testimony”(Opp. Exh. 4, pg. 109).

Plaintiff, as the non-moving party, is entitled to the benefit of all favorable inferences regardless of American’s allegation that they are unable to provide sufficient proof of decedent’s exposure. To the extent the decedent provided contradictory testimony, as to his exposure through either the early 1990’s or 1995, there is no proof that it was to obtain a favorable outcome in this action or in summary judgment. Decedent’s conflicting testimony as to the length of time he used Clubman Talc, presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1st Dept., 1999]).

American relies on the affidavit of its corporate representative Mr. Loveless, he states that the company started to blend talcum powder in 1989 and at that time it was supplied with pharmaceutical grade talc from Whittaker Clark and Daniels (“WCD”). Mr. Lovelace states that no formulation used by American included or used asbestos as an ingredient and that all the suppliers used certified that the talc did not contain detectable or regulated asbestiform minerals. Mr. Lovelace claims that American stopped producing Clubman talcum powder with talc and switched to cornstarch as of July 1, 2017 as a result of difficulties obtaining insurance and baseless litigation (Mot. Exh. D).

Plaintiff in opposition refers to deposition transcripts of Mr. Loveless and of Theodore Hubbard, WCD’s corporate representative, from unrelated actions. Mr. Loveless testified that Clubman talcum powder used talc supplied from WCD from 1987 through 2003 (Opp. Exh. 10). Mr. Hubbard testified that the sales records show that the 1745 talc, which plaintiffs allege was sold to American and used in Clubman talcum powder during the relevant period, came from a mine in Montana (Opp. Exh. 15, pgs. 77-79). Plaintiffs argue that the same Montana talc was tested by Dr. Steven P. Compton, Ph.D. and found to contain asbestos, raising an issue of fact on liability (Opp. Exh. 19, Exh. 21, and Exh. 22).

Plaintiff relies on the reports of Dr. Murray Finkelstein, Ph.D., M.D., a medical doctor and epidemiologist. Dr. Finkelstein reviewed the decedent’s pathology report, reports testing done by Dr. Compton and other scientists at the MVA testing facility and discusses the human health effects of exposure to cosmetic talc including the epidemiology of mesothelioma. Dr. Finkelstein concludes that the

decedent's exposure to asbestos fibers from the Clubman talcum powder was a substantial contributing cause of his mesothelioma (Opp. Exhs. 24 and 25).

Plaintiff also provides the November 20, 2017 expert report of Dr. Jacqueline Moline, MD, Msc, FACP, FACOEM, a specialist certified in Occupational and Internal Medicine. Dr. Moline relies on various studies, testing and reports assessing the same talc used by American in Clubman talcum powder products, and states that asbestos contamination was identified, and that there is no safe level of exposure to asbestos. Dr. Moline further relies on literature referenced by the Center for Disease Control as establishing that exposure to contaminated talc products can result in the development of mesothelioma. Dr. Moline concludes that the decedent's exposure to asbestos contaminated talc in the Clubman talcum powder used by her husband caused her mesothelioma (Opp. Exh. 26).

American's argument that the specific bottles of their products used by the decedent were not tested and that there is no direct evidence of exposure to asbestos, is unavailing. Plaintiffs are not required to show the precise causes of their damages, but only show facts and conditions from which defendant's liability may be reasonably inferred (*Oken v A.C. & S. (Matter of New York City Asbestos Litig.)*, 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, supra at pg. 448, and *Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

Plaintiff has sufficiently raised credibility issues and issues of fact as to general and specific causation, warranting denial of summary judgment.

American alternatively seeks partial summary judgment dismissing the plaintiffs' claims for punitive damages. American argues it is not liable for any third-party actions by its predecessor Neslemur or Kleer-Vu and there is no evidence of intentional wrongdoing.

Plaintiffs raised issues of fact as to the cause of action for punitive damages. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (*Ross v. Louise Wise Servs., Inc.*, 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]).

To the extent that during the relevant period of August 13, 1987 through the early 1990's or 1995, plaintiffs argue that the American placed corporate profits and reputation above the health and safety of the decedent by failing to place any warnings about asbestos on their product, and American's continued insistence that there is no asbestos in the pharmaceutical grade talc that was supplied to them, the issue of punitive damages is to be determined by the trial judge after submission of all evidence.

ACCORDINGLY, it is ORDERED that defendant American International Industries's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, alternatively for partial summary judgment dismissing the plaintiffs' claims for punitive damages, is granted only to the extent of dismissing plaintiffs' claims asserted against American International Industries, for the period of decedent's alleged exposure to asbestos contaminated Clubman talcum powder products from 1982 through August 13, 1987, and it is further,

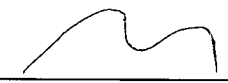
ORDERED that plaintiffs' claims asserted against American International Industries for the sale, distribution or supply of asbestos contaminated talcum powder from 1982 to August 13, 1987, are severed and dismissed, and it is further,

ORDERED that the remainder of plaintiffs' claims and all cross-claims asserted against American International Industries for the period from August 13, 1987 through 1995 remain in effect, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied, and it is further

ORDERED that defendant American International Industries is directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the remaining parties, the General Clerk's Office and the County Clerk's Office, who are directed to mark their records accordingly.

ENTER:



MANUEL J. MENDEZ
J.S.C.

Dated: September 23, 2019

MANUEL J. MENDEZ
J.S.C.

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