

Dyer v Amchem Prods., Inc.

2019 NY Slip Op 32993(U)

October 10, 2019

Supreme Court, New York County

Docket Number: 190039/2017

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

KENNETH J. DYER, as the Administrator for the Estate of KENNETH C. DYER,

INDEX NO. 190039/2017

- against - Plaintiff,

MOTION DATE 09/18/2019

AMCHEM PRODUCTS, INC., et al.,

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by The Goodyear Tire & Rubber Company:

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 The Goodyear Tire & Rubber Company's (hereinafter "Goodyear") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it is granted.

Plaintiff, Kenneth C. Dyer (hereinafter "decedent"), was diagnosed with lung cancer on January 10, 2017. He died from his illness on March 17, 2019 (Mot. Exh. B, Interrogatory 7A and NYSCEF Doc. # 40). Decedent was deposed over a course of three days on February 18, 2017 and March 1 and 6, 2017 (Mot. Exh. A and Opp. Exh. 1). It is alleged that the decedent was exposed to asbestos in a variety of ways. His alleged exposure - as relevant to this motion - was from his work as a salesman for stores that sold floor covering, including Goodyear's vinyl asbestos floor tiles, from 1967 through at least the mid-1980's.

The decedent testified that from 1967 through 1968 he worked as a salesman for Calvert Rug in Baltimore, Maryland (Mot. Exh. A, pgs. 153-154). Decedent claimed that he worked with multiple brands of vinyl asbestos floor tiles at Calvert Rug, including Goodyear's asbestos containing tiles. Decedent specifically recalled seeing the Goodyear name printed on the box. He stated that he believed he was exposed to asbestos while demonstrating to customers how to use the Goodyear tile, by scoring, cutting them with a razor blade knife or straight edge and breaking it up, which resulted in his inhaling dust and debris. He testified that at Calvert Rug he did demonstrations "ten, fifteen times a day" and claimed that he did demonstrations "hundreds of times" (Mot. Exh. A, pgs. 159-162, 166, 172, 377, 488 and 491). Decedent recalled that the Goodyear tiles at Calvert Rug were either 9 x 9 or 12 x 12, and that they had a certain amount of flexibility but could not be folded from one end to the other. He testified that he believed Goodyear tiles contained asbestos because of discussions with various salesmen and from what he read in periodicals and other publicly available materials. (Mot. Exh. A, pgs. 164-165, and 167-170).

Decedent testified that he next worked as a salesman for N. Ginsberg and Son in Baltimore Maryland between 1968 and 1969 (Mot. Exh. A, pgs. 174-175). He specifically identified Goodyear asbestos containing floor tiles as one of the brands that he worked with at N. Ginsberg and Son (Mot. Exh. A, pg. 182). Decedent believed he was exposed

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

to asbestos by cutting the tile to demonstrate its use. He specifically recalled cutting the floor tiles close to his face and breathing in dust and debris. Decedent recalled having to cut the tile, when a customer bought a piece to take with them, or when he cut and prepared pieces to be used by outside contractors on a job (Mot. Exh. A, pg. 184 and 186). Decedent recalled that he prepared orders for delivery and to be installed by outside contractors retained by N. Ginsberg and Son. He would determine the amount of cuts required and make the cuts, or if a diagram was needed he would make one so that the outside contractor knew where to go in a given room (Mot. Exh. A, pgs. 190-192). He claimed that the Goodyear asbestos tiles at N. Ginsberg and Son were similar to those he encountered at Calvert Rugs (they also had limited flexibility and came in boxes that had the Goodyear name printed on them). Decedent testified that he cut the tiles at N. Ginsberg and Son using a razor blade knife and recalled taking tile out of the box to perform demonstrations, including the little pieces. He claimed that he did demonstrations every day at N. Ginsberg and Son, "eight, nine, ten times a day" (Mot. Exh. A, pgs. 186-189 and 409-410).

Decedent testified that he moved to New York and beginning in 1972 through 1991 or 1992 he worked as a salesperson at Kay Floors, in Jamaica, Queens. He claimed that he handled Goodyear's vinyl asbestos tile amongst others. Decedent testified that he demonstrated Goodyear's vinyl asbestos tiles by cutting border tiles and snapping them in his face and inhaling dust, which he did "many, many times." Decedent testified that he knew that he handled Goodyear's vinyl asbestos tiles because he remembered the name from the labels on the boxes. Decedent remembered that the Goodyear tiles were 12 x 12 (Mot. Exh. A, pgs. 221, 225 and 229-232). Decedent testified that as a salesperson at Kay Floors he performed demonstrations using a sharp razor blade knife. He claimed that on a given day he would perform demonstrations "five, eight times a day." He stated that he performed demonstrations on Goodyear tiles "hundreds of times" during the period he worked at Kay Floors (Mot. Exh. A, pgs. 235-236, 241 and 493).

Decedent commenced this action on February 3, 2017 to recover for damages resulting from exposure to asbestos (See NYSCEF Doc. # 1). Goodyear's Acknowledgment of Receipt was uploaded on February 28, 2017 (NYSCEF Doc. # 4). The Summons and Complaint were modified to substitute the estate on June 6, 2019 (NYSCEF Doc. # 43).

Goodyear now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it. Goodyear argues that it has made its prima facie case by establishing that its primary flooring product from 1969 through 1979 - when it discontinued manufacturing floor tile altogether - was all vinyl and did not contain asbestos and that plaintiff relies exclusively on hearsay statements. Goodyear argues that even the extent the plaintiff raises an issue of fact, the decedent's alleged asbestos exposure did not exceed ambient or background levels and posed no risk of his developing the disease. Goodyear claims that decedent's lung cancer was caused by decedent's history of smoking about a pack of cigarettes a day starting in 1958 - when he was about 16 - through 2012 (Mot. Exh. A, pgs. 272, 276 and 283). Goodyear claims that plaintiff 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]).

Goodyear provides the decedent's Social Security records and claims that the periods for employment shown in these records differ from the decedent's testimony (Mot. Exh. C). Goodyear claims that the Social security records show the decedent worked for Kay Floors between 1977 and 1986 and not as decedent testified from 1972 through 1991 or 1992. Goodyear relies on the May 17, 2019 affidavit of corporate representative Joseph A. Kemmerling (Mot. Exh. D) and the February 28, 2008 affidavit of corporate representative Edmund D. Lutz (Mot. Exh. E) to establish that the company ceased manufacturing floor tile in 1979 and that a majority of its floor tile products were only made from vinyl with no asbestos. Goodyear argues that the lack of asbestos containing floor tiles during plaintiffs period of exposure as demonstrated by his social security records warrants summary judgment.

Plaintiff in opposition raises issues of fact. Mr. Kemmerling states he was employed from 1968 through 1979 and that his personal knowledge for the period prior to his employment relies on information contained in formulation cards (Mot. Exh. D). The formulation cards were not exchanged as part of discovery or annexed to the motion papers and there were no other corporate materials (ie brochures or catalog) that would verify the statements made by Mr. Kemmerling for the period prior to 1968, rendering them conclusory and without specific factual basis (See Matter of New York City Asbestos Litigation (DiSalvo), 123 AD 3d 498, 1 NYS 3d 20 [1st Dept. 2014]).

Plaintiff provides Goodyear's response to Interrogatories from unrelated actions wherein it is stated: (1) that pre-1954 to 1975 Goodyear manufactured floor tile that contained 5% asbestos (Opp. Exh. 2, pg. 23); (2) asbestos floor tile was produced by Goodyear from 1952 to 1975 when it was removed from the market, but may have been manufactured for special runs to meet specific customer orders (Opp. Exh. 3, pg. 9); and (3) Goodyear manufactured asbestos floor tile through special runs from 1965 through the early 1970's to meet customer orders with the asbestos content between 5% and 15% (Opp. Exh. 4, pg. 7). Plaintiff also provides the deposition testimony of Goodyear's corporate representative Russell T. Holmes, Goodyear's floor tile development engineer, from an unrelated action, wherein he states that the company manufactured floor tile that contained asbestos starting in 1954 through about 1975 and afterwards periodically would make batches to fill special orders (Opp. Exh. 5, pgs. 50-51, 62 and 70-71).

"It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where there is conflicting testimony (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966], Dollas v. W.R.Grace & Co., 325 AD 2d 319, 639 NYS 2d 323 [1st Dept. 1996] 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 testimony provided by Goodyear's corporate representatives creates credibility issues concerning whether Goodyear manufactured asbestos containing floor tiles during the periods relevant to plaintiff's exposure. This conflicting testimony creates issues of fact that cannot be resolved on this motion for summary judgment. Plaintiff's testimony to the extent that it contradicts the social security records as to his periods of employment also creates a credibility issue for the jury to decide, warranting denial of summary judgment on these bases.

Goodyear alternatively argues that plaintiff failed to proffer any admissible expert opinion or other evidence establishing general and specific causation. Goodyear contends that the likely cause of decedent's lung cancer is his smoking a pack a day for 54 years. Goodyear argues that to the extent the decedent was exposed to asbestos in Goodyear's vinyl asbestos floor tiles, the level of exposure was insufficient to cause his lung cancer.

Goodyear 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 plaintiff is unable to establish general and specific causation. Goodyear argues that its experts Donald E. Marano, CIH, PE, a certified industrial hygienist and professional engineer (Mot. Exh. F), and Dr. David Weill, M.D., a board certified pulmonary disease specialist (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).

Goodyear argues that unlike amphibole asbestos, no causal relationship exists between encapsulated chrysotile asbestos and the development of decedent's lung cancer, eliminating any general causation.

Mr. Marano prepared two reports and an affidavit. His first report is dated August 11, 2017, and a supplemental report is dated March 10, 2019. His Affidavit is dated June 18, 2019 (Mot. Exh. F).

Mr. Marano's first report refers to discovery provided by the plaintiff, and the decedent's deposition testimony and relies on 1992 standards of the Environmental Protection Agency ("EPA"); 1979 standards provided by the U.S. Department of the Navy for the installation of floor tile; and Occupational Safety and Health Administration (OSHA) cumulative dose standard. Mr. Marano's March 10, 2019 report concludes that the decedent had little to no exposure to asbestos, but even if there was exposure to asbestos it would have been very little limited exposure to chrysotile asbestos in amounts that are well below the background dose and the current OSHA permissible exposure limit (Mot. Exh. F).

Mr. Marano's March 10, 2019 supplemental report makes qualitative estimates of the decedent's exposure incorporating private studies with the U.S. Department of Navy standards. He concludes that the decedent's exposure to asbestos is indistinguishable from zero exposure (Mot. Exh. F).

Mr. Marano's June 18, 2019 affidavit incorporates both of his reports, provides more detailed information about his assumptions and concludes that the score and cut demonstrations made by the decedent did not pose a risk of developing an asbestos related disease (Mot. Exh. F).

Dr. David Weill's September 21, 2017 report assesses the decedent's background/personal information, residences, education, military history, employment history, smoking history, and medical history (Mot. Exh. G, pgs. 1-24). He discusses the lung anatomy and defense mechanisms to asbestos. Dr. Weill determines that disease occurs only when defense mechanisms are overwhelmed (Mot. Exh. G, pgs. 25-30). Dr. Weill discusses dose response and states that background levels of retained asbestos fibers do not cause disease. He states that public health extrapolations purposely overestimate risk as a precautionary measure and they are not proof of a causal relationship (Mot. Exh. G, pgs. 31-32). Dr. Weill states that EPA studies greatly overstate the risk of both mesothelioma and lung cancer (Mot. Exh. G, pg. 32). Dr. Weill relies on private studies and the decedent's medical records which show no asbestos or interstitial fibrosis and concludes that the decedent's lung cancer is not asbestos related. He states that even if the decedent was exposed to asbestos it would be inconsequential. Dr. Weill further concludes that the decedent only had an increased risk of lung cancer from his smoking history (Mot. Exh. G, pgs. 33-34). Dr. Weill includes a "Reference List" that includes many studies and articles that are not cited in his report (Mot. Exh. G, pgs. 35-37).

Goodyear's experts Mr. Marano and Dr. Weill rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos and mesothelioma. Goodyear has made a prima facie case on the issue of general causation.

Specific Causation:

Goodyear states that its vinyl asbestos floor tiles did not produce asbestos at a level sufficient to cause the decedent's lung cancer, and thus plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate specific 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, Mr. Marano's March 10, 2019 supplemental report makes qualitative estimates of the decedent's exposure based upon assumptions from the deposition testimony. Mr. Marano cites to the U.S. Department of Navy standards after testing air samples while floor tile was cut and laid over a seventy-five minute period, and private studies involving testing of handling, cutting, installation and clean up, as well as, during maintenance, removal and installation of floor tile (Mot. Exh. F). Mr. Marano concludes that the decedent's exposure to chrysotile asbestos, during cutting with a razor knife was in the range of 0.0018f/cc to 0.027 f/cc, but most likely undetectable. Working with the low end of decedent's exposure to asbestos Mr. Marano concludes that the decedent had a cumulative exposure to asbestos from Goodyear's vinyl asbestos tile of 0.000006 fiber/cc-years. Working with the high end of decedent's exposure Mr. Marano concludes that the decedent had a cumulative exposure to asbestos from Goodyear's vinyl asbestos tile of 0.000007 fiber/cc-years. The report concludes that the decedent's cumulative exposure to asbestos from Goodyear's vinyl asbestos floor tile is indistinguishable from zero exposure (Mot. Exh. F)

Mr. Marano's June 18, 2019 affidavit includes the 19 years decedent testified that he worked at Kay Floor and states that the low end of decedent's exposure to asbestos was equal to a cumulative dose of 0.000013 fiber/cc-years and the high end would equal a cumulative dose of 0.00015 fiber/cc-years. Mr. Marano claims both numbers are well below the current OSHA PEL and that the decedent's cumulative dosage of asbestos was most likely from background exposure to asbestos. He concludes that the decedent's exposure to asbestos from Goodyear's vinyl asbestos containing floor tile did not pose any risk of developing an asbestos related disease (Mot. Exh. F).

Goodyear's expert Dr. Weill 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 or pleural plaques to attribute the cause of lung cancer to asbestos exposure (Mot. Exh. G). Dr. Weill refers to the decedent's deposition testimony concerning his cigarette smoking and the lack of any finding of asbestosis. He concludes that because of the lack of asbestosis, the decedent's lung cancer is more likely caused by his history of smoking cigarettes and emphysema (See Mot. Exh. G, pg. 33).

Goodyear's experts Mr. Marano and Dr. Weill through the use of mathematical modeling and comparison to the exposure levels in medical literature have determined that the decedent's cause of his lung cancer was his smoking history and emphysema. Goodyear has made a prima facie case to obtain summary judgment on the issue of specific causation.

Goodyear argues that plaintiff failed to raise an issue of fact because the opposition papers rely on unsworn expert reports that are hearsay.

Although the plaintiff is entitled to rely on the unsworn, unaffirmed report of Dr. Brent C. Staggs, M.D. annexed to Goodyear's motion papers (Mot. Exh. H), in opposing the motion for summary judgment (Zelman v. Mauro, 81 AD 3d 936, 917 NYS 2d 588 [2nd Dept. 2011]), this report is conclusory and insufficient to raise an issue of fact. Furthermore, unsworn, unaffirmed letter reports do not meet the test of competent admissible evidence sufficient to defeat a motion for summary judgment (see Lazu v. Harlem Group, Inc., 89 AD 3d 435, 931 NYS 2d 608 [1st Dept. 2011], Migliaccio v. Miruku, 56 AD 3d 393, 869 NYS 2d 24 [1st Dept. 2008] citing to McLoryd v. Pennypacker, 178 AD 2d 227, 577 NYS 2d 272 [1st Dept. 1991] lv. denied 79 NY 2d 754, 590 NE 2d 250, 581 NYS 2d 665 [1992]).

Dr. Mark Ellis Ginsburg's letter report dated July 15, 2019 is also unaffirmed and unsworn. This report is also not in admissible form, has no probative value and fails to raise an issue of fact to defeat summary judgment (Grasso v. Angerami, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991]; Quinones v. Ksieniewicz, 80 AD 3d 506, 915 NYS 2d 70 [1st Dept. 2013]; Lazu v. Harlem Group, Inc., 89 AD 3d 435, 931 NYS 2d 608 [1st Dept. 2011]; Migliaccio v. Miruku, 56 AD 3d 393, 869 NYS 2d 24 [1st Dept. 2008]; and McLoryd v. Pennypacker, 178 AD 2d 227, 577 NYS 2d 272 [1st Dept. 1991] lv. denied 79 NY 2d 754, 590 NE 2d 250, 581 NYS 2d 665 [1992]).

Plaintiff's expert reports are not in admissible form and do not raise issues of fact on causation.

Plaintiff also provides copies of transcripts of the trial testimony in unrelated actions from Dr. Douglas Alan Pohl, a pathologist and Dr. Jacqueline Moline, an internist, in support of the arguments opposing summary judgment on causation (Opp. Exhs. 9 and 10). Neither Dr. Pohl nor Dr. Moline have provided an expert report or testimony directly related to the decedent in this action. Dr. Pohl's trial testimony is related to a plaintiff that had mesothelioma not lung cancer (Opp. Exh. 9). The trial testimony of Dr. Pohl and Dr. Moline do not raise issues of fact on this motion for summary judgment.

ACCORDINGLY, it is ORDERED that defendant The Goodyear Tire & Rubber Company's motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it is granted, and it is further,

ORDERED that plaintiff's claims and the cross-claims asserted against The Goodyear Tire & Rubber Company, are severed and dismissed, and it is further,

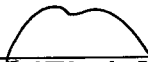
ORDERED that plaintiff's claims remain in effect against the remaining defendants, and it is further,

ORDERED that defendant The Goodyear Tire & Rubber Company is directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the plaintiff, the remaining parties, the General Clerk's Office and the County Clerk's Office, who are directed to mark their records accordingly, and it is further,

ORDERED that the Clerk of the Court enter judgment dismissing all claims and cross-claims against The Goodyear Tire & Rubber Company.

ENTER:

Dated: October 10, 2019



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