

Komiak v A.O. Smith Water Prods., Co.,
2019 NY Slip Op 33067(U)
October 15, 2019
Supreme Court, New York County
Docket Number: 190320/2017
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13IN RE: NEW YORK CITY ASBESTOS LITIGATIONMICHAEL P. KOMIAK, as the Administrator for the
Estate of PETER KOMIAK,

Plaintiff,

- against -

A.O. SMITH WATER PRODUCTS, CO., et al.,

Defendants.

INDEX NO. 190320/2017MOTION DATE 09/18/2019MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1 - 4

Answering Affidavits — Exhibits _____

5 - 6

Replying Affidavits _____

7 - 8Cross-Motion: ☐ Yes ☒ 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 denied.

Plaintiff, Peter Komiak (hereinafter "decedent") was diagnosed with mesothelioma on September 19, 2017. He died from his illness on September 20, 2018 (Mot. Exhs. E and G, Opp. Exh. 16). Decedent was deposed over the course of five days on January 16, 17, 18, 19 and 25, 2018 (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 carpenter, flooring installer and home renovation - working with Goodyear's vinyl asbestos floor tiles from the early 1960's through the mid 1980's.

The decedent testified that from 1960 through about June of 1962 he worked part-time Monday through Friday and all day Saturday, while still in high school, at Carpet Mart in Hempstead, Long Island. He stated that Carpet Mart sold carpet, linoleum and tile. There his job was to sweep-up floors, clean desks for the salesmen, empty the garbage, clean bathrooms and periodically cut carpet and padding, wrap it and place it aside or in a customer's vehicle (Mot. Exh. A, pgs. 175-178 and 181-183).

Decedent testified that after he graduated from high school in June of 1962 he worked for Carpet Mart full-time, working in the warehouse, until he was trained to be a "measure man." Decedent stated the "measure man" job required a suit and tie and to go to a location, measure the job, come back with the measurements and give it to the salesmen who arranged to have the carpet cut-up and given to the installers for installation (Mot. Exh. A, pgs. 184-185 and 192-193). Decedent stated that in 1965, about a year before he was married, he became a tile installer and joined a mechanic/installer union in Brooklyn, Local 2241, which eventually merged with and became Local 2287. He continued to work at Carpet Mart as an apprentice installer for about two years after he joined the union and then left the store. During the years he apprenticed at Carpet Mart decedent claimed he was assigned to a journeyman mechanic and did mostly residential work on multi-family houses. Decedent recalled using vinyl asbestos tile in the basement of some of the houses (Mot. Exh. A, pgs. 195- 197, 199, 232, 358-362 and 424).

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

Decedent identified Goodyear vinyl asbestos tile as used when he was an apprentice installer at Carpet Mart. Decedent described the process of installing vinyl asbestos tile while working at Carpet Mart. He stated that he would install vinyl asbestos tile anywhere including bathrooms and basements. Decedent testified that he would prepare the floor and broom sweep, then he would square off the room and start in the center of the room working his way out (Mot. Exh. A, pgs. 204, 206-210). Decedent testified that he used a Stanley knife to score the tiles and make square cuts, he had a straight edge or tile cutter but did not use it. He stated that a straight cut would take a couple of seconds. He stated he also used a pin to score the tiles, and described a pin as a nail type thing with a little bit of a handle. Decedent described the process using a pin as "You would hit it, work it, fit it." He claimed a pin was more precise than the Stanley knife and took the same amount of time to cut the tile. Decedent testified that when he cut the Goodyear tiles it created dust in the air that he breathed in and he believed it exposed him to asbestos. Decedent recalled having to sweep-up the debris after installing Goodyear tiles using a foxtail broom, that it created asbestos dust that was loaded with particles that he inhaled. (Mot. Exh. A, pgs. 96-98, 502-503, 510-511 and 663-664).

Decedent testified that he left Carpet Mart to do commercial type work that paid more money. He claimed his next job was at J& M Carpet in Hempstead, New York where he worked for about a year while he was still an apprentice. He recalled using Goodyear vinyl asbestos tiles while working for J&M Carpet (Mot. Exh. A, pgs. 234-235, 237 and 243).

Decedent testified that after he left J& M Carpet, he next worked at Gundolt in Brooklyn, New York and was still an apprentice installer when he took the job starting in 1968-1969 through the 1980s. He described Gundolt as having contractors come in to order special carpet and Gundolt would provide the product and the labor. He stated that Gundolt had its own warehouse. Decedent stated that he worked at Gundolt for about fifteen years and became a journeyman mechanic while he worked there (Mot. Exh. A, pgs. 248-251 and 257-258). Decedent specifically recalled that while working for Gundolt he did jobs with vinyl asbestos tile at the Empire State Building, the Intercontinental Hotel, and for three to five years at JC Penney's offices at 52nd or 53rd Street in New York, where he recalled installing Goodyear vinyl asbestos tile in the coffee and showroom areas (Mot. Exh. A, pgs. 257, 279-281, 286-289, 292, 309, 314-315 and 319-321). Decedent testified that beginning in the early to mid-1980's through the 1990's he worked for Consolidated, a company located in Brooklyn, New York (Mot. Exh. A, pgs. 330-332 and 334-336).

Decedent remembered that the word "Goodyear" was printed on the box, and that the tiles were usually 12 x 12 and came in either an eighth or sixteenth of an inch. He described the back of the Goodyear vinyl asbestos tiles as being flat, black and having a logo on it. He stated that the tiles were one-ply and smooth on both sides. Decedent recalled that Goodyear tiles were flexible to a certain point; if you tried to fold them in half; they would break. Decedent claimed that the boxes of Goodyear tiles did not always say vinyl asbestos tile, but that you could see the asbestos fibers in the tiles. He knew it was asbestos fibers after it was pointed out to him by a co-worker. He claimed that you could see the asbestos fibers along the edge of the tile. Decedent recalled the fibers being black in color. He stated that Goodyear vinyl asbestos tile did not have any felt material on it. Decedent stated that he worked with Goodyear vinyl asbestos floor tiles from the early 1960's through the mid-1980's (Mot. Exh. A, pgs. 208-209, 493-497, 501, 504-505, 619, 690 and 693).

Decedent commenced this action on October 17, 2017 to recover for damages resulting from his exposure to asbestos (See NYSCEF Doc. # 1). Goodyear's Acknowledgment of Receipt was uploaded on November 28, 2017 (NYSCEF Doc. # 17). The Summons and Complaint were modified to substitute the estate on November 21, 2018 (NYSCEF Doc. # 107).

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's description of the floor tile does not match their homogenous tile that contained asbestos, which had the same appearance on the top and bottom. Goodyear claims that the plaintiff relies exclusively on hearsay statements made to the decedent by co-workers and that this does not raise any issues of fact sufficient to defeat summary judgment.

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 this standard, 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 relies on the October 26, 2018 and December 12, 2017 affidavits, taken from unrelated actions, of corporate representative Joseph A. Kemmerling (Mot. Exhs. C and D). Mr. Kemmerling states in his October 26, 2018 Affidavit that he was employed by Goodyear from 1968 through 1979 and has personal knowledge that for the period of his employment the tiles produced by the company did not have any asbestos. He further states 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 (Mot. Exh. C). Mr. Kemmerling states in his December 12, 2017 Affidavit that based on a review of affidavits and testimony of former Goodyear employees and a review of documents (that he does not identify), Goodyear did not sell vinyl asbestos tile before or during his period of employment. He further states that Goodyear's "Deluxe on Grade" ("DOG") floor tile that had a different color bottom did not contain asbestos. He states that the "Homogenous On Grade" ("HOG") floor tile that had the same color and pattern throughout also did not contain asbestos (Mot. Exh. D, pgs. 2-3). Goodyear argues that the lack of asbestos containing floor tiles during plaintiffs period of exposure warrants summary judgment.

Mr. Kemmerling states that he was employed from 1968 through 1979 and that his personal knowledge for the period prior to his employment comes from information obtained from transcripts of unidentified former Goodyear employees and unidentified records (Mot. Exh. D). Goodyear has not identified the employees Mr. Kemmerling states he spoke to, and there is no identification of the alleged records he reviewed. Goodyear has not shown annexed to the motion papers the documents that were allegedly reviewed by Mr. Kemmerling. Goodyear does not provide corporate materials (ie brochures or catalog) that would otherwise verify the statements made by Mr. Kemmerling for the period prior to 1968. Mr. Kemmerling's affidavit is conclusory, without any factual basis and insufficient to make a prima facie case for summary judgment (See Matter of New York City Asbestos Litigation (DiSalvo), 123 AD 3d 498, 1 NYS 3d 20 [1st Dept. 2014]).

Plaintiff in opposition 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. Mr. Holmes testified that Goodyear's asbestos containing floor tile had a "black back" through the late 1950's and then the company produced "Heavy Duty Homogenized" ("HDH") floor tiles that also contained asbestos (Opp. Exh. 2, pg. 50-51, 60 and 62).

Plaintiff also 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. 11, 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. 12, pg. 9); and (3) Goodyear also produced a vinyl asbestos floor tile called "Aquashield" that contained asbestos type backing available for purchase from 1965 through 1966 (Opp. Exh. 14, pgs. 6-9, Ans. to Interrogatory No. 3).

"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, of whether Goodyear manufactured asbestos containing floor tiles during the periods relevant to the decedent's exposure. This conflicting testimony creates issues of fact for the jury to decide that cannot be resolved on this motion for summary judgment. Decedent'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.

Goodyear alternatively argues that plaintiff failed to proffer any admissible expert opinion or other evidence establishing general and specific causation. It is Goodyear's contention that the likely cause of decedent's mesothelioma is his exposure to amphibole asbestos from other sources. Goodyear argues that to the extent the decedent was exposed to asbestos in Goodyear's vinyl asbestos floor tiles, the level of exposure from chrysotile asbestos was insufficient to cause his mesothelioma. Goodyear claims that decedent's mesothelioma was most likely caused by decedent's exposure to amphibole asbestos fibers from other sources.

In support of its argument that plaintiff failed to proffer any admissible expert opinion establishing general and specific causation Goodyear relies on the April 10, 2018 unsworn and unaffirmed letter report of plaintiff's expert Dr. David Y. Zhang, M.D., Ph.D., M.P.H., a pathologist, and specialist in occupational medicine (Mot. Exh. G). Goodyear also provides excerpts from Dr. Zhang's deposition and trial testimony in unrelated actions (Mot. Exhs. H and I). Goodyear argues that Dr. Zhang's report fails to assess comparative levels of exposure from different sources, provide qualitative or quantitative assessment of dose exposure, or explain the manner in which the work and exposure to vinyl asbestos floor tile products would increase the decedent's risk of contracting mesothelioma (Mot. Exh. G). Goodyear states that Dr. Zhang's deposition and trial testimony establish that he is unable to parse out whether a particular asbestos containing product caused the decedent's disease (Mot. Exh. H, pg. 98 and Mot. Exh. I, pg. 1767).

Goodyear's use of Dr. Zhang's unsworn and unaffirmed report together with the deposition and trial testimony allows plaintiff to rely on Dr. Zhang's otherwise inadmissible reports in opposition (See Mot. Exh. 16). Plaintiff can rely on Dr. Zhang's report to raise an issue of fact (See *Kearse v. N.Y. City Tr. Auth.*, 16 , AD 3d 45, 789 NYS 2d 281 [2nd Dept. 2005], *Feggins v. Fagard*, 52 AD 3d 1221, 860 NYS 2d 346 [4th Dept. 2008] and *Ryan v. Santana*, 71 AD 3d 1537, 867 NYS 2d 338 [4th Dept. 2010]).

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. Michael Graham, M.D., professor of pathology at St. Louis University, to establish lack of causation (Mot. Exh. E).

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 mesothelioma, eliminating any general causation.

Mr. Marano's June 21, 2019 affidavit and report dated May 18, 2018 conclude that there was either no exposure to asbestos or, to the extent the decedent was exposed to asbestos from Goodyear's asbestos containing floor tile products, it was below background levels and Occupational Safety and Health Administration (OSHA) permissible exposure limits (Mot. Exh. F). Mr. Marano's June 21, 2019 affidavit incorporates his report, and states that the decedent's exposure to chrysotile asbestos from Goodyear's floor tiles would have had to be in the hundreds of fibers per cc-year to cause his mesothelioma. Mr. Marano claims that the decedent's exposure through his limited work with Goodyear vinyl asbestos floor tile is substantially less than the amount needed to cause his mesothelioma. Mr. Marano proceeds to criticize Dr. Zhang's report stating that it does not provide a basis for the causation opinions or identify a sufficient dose of asbestos associated with Goodyear asbestos containing floor tile products (Mot. Exh. F, Aff. pgs. 1-4).

Mr. Marano's May 18, 2018 report refers to discovery provided by the plaintiff, decedent's exposure history, and the decedent's deposition testimony. He states that the decedent identified Goodyear's vinyl asbestos floor tile as one of multiple brands used. Mr. Marano states that there was no evidence, other than decedent's deposition testimony, that he could see asbestos fibers in the Goodyear tiles he worked with and in any case the asbestos fibers would be white not black. Mr. Marano refers to four people identifying Goodyear as not using asbestos in the floor tile after 1967 or 1968, Joseph Kemmerling, Charles Josvanger, John Kay and William Riley. Goodyear only provided an affidavit from Joseph Kemmerling and did not identify in the motion papers these other individuals or provide their statements. Mr. Marano 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 the OSHA cumulative dose standard. Mr. Marano's May 18, 2018 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).

Dr. Graham's May 12, 2018 report assesses the decedent's medical history, work history and smoking history, stating that decedent smoked one pack of cigarettes daily for ten (10) years prior to quitting in 1965 (Mot. Exh. E, Report, pg. 2). Dr. Graham reviews decedent's microscopic slides and pleural tissue samples and concludes that the decedent developed pleural malignant mesothelioma. He states that it is generally accepted that amphibole asbestos is a potent human pleural carcinogen and that the decedent's exposure history indicates that he more likely sustained significant exposure to amphibole asbestos which is supported by the pleural fibrous plaques. He further states that chrysotile asbestos is a weak human pleural carcinogen and there is "accumulating scientific information that these tumors are caused by a contaminating amphibole (most commonly tremolite) (Mot. Exh. E, Report, pg. 3). Dr. Graham does not assess the decedent's level of exposure to asbestos in Goodyear's asbestos floor tile products 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 his conclusion and none are annexed to his report.

Plaintiffs, in opposition, rely on the March 6, 2019 amended report of Dr. Zhang (Opp. Exh. 16). Dr. Zhang, states the general approach of occupational medicine, and provides general opinions on the epidemiology of mesothelioma and its health effects. Dr. Zhang refers to federal and international regulations on asbestos and cites to OSHA and the EPA standards regulating the use of asbestos. He cites to the World Health Organization (the WHO) and the International Agency for Research on Cancer (IARC) as recognizing that all types of asbestos fibers, including chrysotile, can cause mesothelioma in humans. Dr. Zhang discusses the various forms of asbestos exposure related diseases. He cites to recent private studies (Feder et al.) as showing that chrysotile fibers can persist in the human lung from four (4) to up to twenty-two (22) years after exposure. He further cites to the WHO as recognizing that chrysotile asbestos is a carcinogen. Dr. Zhang discusses floor tiles and asbestos exposure. He assesses the decedent's occupational history, medical history and asbestos exposure. Dr. Zhang concludes that the decedent's cumulative asbestos exposure to asbestos from each manufacturer's product caused his mesothelioma (Opp. Exh. 16).

Dr. Zhang's April 10, 2018 report assessed decedent's occupational history and asbestos exposure, smoking history, and summarized the pathology reports and findings. He concluded that the decedent had a significant level of exposure to asbestos and that the cumulative exposure to each company's asbestos containing products significantly contributed to the development of his malignant mesothelioma (Mot. Exh. G).

Goodyear 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 plaintiff is 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 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' expert, Dr. Zhang, in his amended report is relying on some of the same scientific organizations as the defendants' expert, Mr. Marano, in support of the arguments on general causation. Dr. Zhang's initial report annexed to the motion papers is providing essentially the same evidence as defendant's expert, Dr. Graham, which provides no generally accepted standard.

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]). Conflicting 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]).

Goodyear's expert Mr. Marano relies on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos and mesothelioma. Plaintiff's expert, Dr. Zhang, in his amended report also relies 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.

Specific Causation:

Goodyear states that its vinyl asbestos floor tiles did not produce asbestos at a level sufficient to cause the decedent's mesothelioma, and thus plaintiffs are unable to establish specific 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 report makes qualitative estimates of the decedent's exposure based upon assumptions from the decedent's deposition testimony. Mr. Marano cites to the U.S. Department of the 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 states that his personal experience and observation is that typical floor installation creates little if any visible dust in the air. He determines that the decedent's limited time of cutting Goodyear's asbestos containing floor tile, would have resulted in a very low exposure to airborne asbestos fibers and that any dose of asbestos would be far below the current OSHA PEL (4.5f/cc-years). Mr. Marano states that the decedent's background range for a man of his age would be from 0.009 to 1.9 f/cc-2001 years expressed in work years. The report concludes that the decedent's cumulative exposure to asbestos from Goodyear's vinyl asbestos floor tile is well below current OSHA permissible exposure limits and so low as to not have substantially increased his risk of mesothelioma (Mot. Exh. F).

Dr. Graham's May 12, 2018 report summarizes the decedent's medical history and cigarette smoking history. Dr. Graham states:

"The use of encapsulated chrysotile-containing floor tile 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 malignant mesothelioma.

It is my opinion to a reasonable degree of medical certainty that Mr. Komiak's pleural malignant mesothelioma was caused by occupational/paraoccupational exposure to amphibole asbestos and was not caused by any chrysotile dust derived from Goodyear Tire and Rubber Company floor tiles to which he may have been exposed." (Mot. Exh. E)

Dr. Graham's report does not provide mathematical modeling or comparison of decedent's exposure to Goodyear's vinyl asbestos floor tile and decedent's mesothelioma (Mot. Exh. E). 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.

Plaintiff's expert, Dr. Zhang's March 6, 2019 report cites to studies that reported the average fiber concentrations for floor tile installation to be 0.05 to 0.27 f/cm. Dr. Zhang further states that the dust and debris from asbestos floor tiles was tested and contained approximately 15% chrysotile asbestos (Opp. Exh. 16). Dr. Zhang relies on the studies and reports as indicating that there is no reasonable dispute that exposure levels are significantly higher when workers routinely engage in handling asbestos containing material, including floor tiles. He states "the evidence and the scientific information regarding the causal relation between asbestos and mesothelioma provides more than sufficient evidence" for the conclusion that decedent's mesothelioma was caused by his asbestos exposure. Dr. Zhang concludes that the cumulative exposure to each company's asbestos containing products significantly contributed to the development of his malignant mesothelioma (Opp. Exh.16).

Plaintiff is not required to show the precise causes of damages as a result of the decedent's exposure to Goodyear's vinyl asbestos containing 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 from exposure to Goodyear's 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 decedent's deposition testimony as showing that he identified Goodyear's vinyl asbestos floor tiles as a source of his exposure to asbestos. He described the manner of his exposure, specifically from when he cut the Goodyear tiles creating dust in the air that he breathed in and having to sweep up the debris after installing Goodyear tiles using a foxtail broom, that created asbestos dust that was loaded with particles that he inhaled (Mot. Exh. A, pgs. 96-98, 502-503, 510-511 and 663-664). Decedent's deposition testimony, when combined with the reports of Dr. Zhang has created "facts and conditions from which [Goodyear's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), and is sufficient to raise issues of fact, warranting denial of 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 denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 15, 2019


MANUEL J. MENDEZ
J.S.C.

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