

Dyer v Amchem Prods., Inc.

2019 NY Slip Op 33539(U)

December 3, 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

Plaintiff,

MOTION DATE 11/06/2019

- against -

MOTION SEQ. NO. 002

AMCHEM PRODUCTS, INC., et al.,

MOTION CAL. NO.

Defendants.

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

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for 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 American Biltrite, Inc.'s (hereinafter "ABI") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it, is denied.

Plaintiff, Kenneth C. Dyer (hereinafter "decedent"), was diagnosed with lung cancer on January 10, 2017 and died from his illness on March 17, 2019 (Mot. Exh. E, and NYSCEF Doc. # 40). Decedent was deposed over the course of three days on February 18, 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, that included ABI's 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 ABI's Amtico asbestos containing tiles. Decedent specifically recalled seeing the ABI name printed on the box. He stated that he believed he was exposed to asbestos while demonstrating to customers how to use the ABI tile, by scoring, cutting with a razor blade knife or straight edge and breaking them up, which resulted in his inhaling dust and debris. He testified that at Calvert Rug he did demonstrations "ten, fifteen times a day" (Mot. Exh. A, pgs. 159-162, 375-379, and 409-410). Decedent recalled that the ABI Amtico tiles were packaged in a cardboard box that he would cut open at the top using the same razor blade he used to cut the tiles. He stated that there were forty-five square pieces of tile that measured 12 x 12 in a box (Mot. Exh. A, pgs. 401-405).

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 ABI's Amtico asbestos containing floor tiles as one of the brands that he worked with at N. Ginsberg and Son (Mot. Exh. A, pgs. 181-182). Decedent believed he was exposed to asbestos by cutting the tile to demonstrate its use. He specifically recalled cutting the floor tiles using a razor blade knife and shears. He testified that he was exposed to asbestos by bringing the floor tiles close to his face to cut them 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

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

outside contractors on a job (Mot. Exh. A, pgs. 182-184 and 186). Decedent testified that he cut ABI Amtico floor tiles about eight times a day at N. Ginsberg and Son. He claimed that ABI Amtico asbestos tiles at N. Ginsberg and Son were similar to those he encountered at Calvert Rugs and largely vinyl because it was the most popular seller. He testified that it would only take about a second to cut one tile. He stated that during the demonstrations he would score the Amtico vinyl asbestos floor tile on a table, then break it close to his face causing him to breathe in the dust (Mot. Exh. A, pgs. 186-189, 410-414 and 487- 488).

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 ABI Amtico vinyl asbestos tile amongst others. He stated that he knew the tiles were ABI Amtico because he remembered the labels on the boxes. Decedent testified that he demonstrated ABI Amtico vinyl asbestos tiles in the same manner as in his other jobs (Mot. Exh. A, pgs. 231-232, 405 and 490). Decedent testified that during the period he worked at Kay Floors on a given day he would perform demonstrations "five, eight times a day." He stated that he performed demonstrations on ABI Amtico vinyl asbestos tiles "hundreds of times a month"(Mot. Exh. A, pgs. 231-232, 234, 241, 414- 417 and 490-492).

ABI failed to attach a copy of the pleadings to the motion papers as required pursuant to CPLR §3212 (b), this defect in the motion papers will be overlooked as the pleadings were filed electronically (Studio A Showroom, LLC v. Yoon, 99 AD 3d 632, 952 NYS 2d 879 [1st Dept. 2012]). Decedent commenced this action on February 3, 2017 to recover for damages resulting from exposure to asbestos (See NYSCEF Doc. # 1). ABI filed its Verified Answer to Plaintiff's Complaint on August 28, 2017 (NYSCEF Doc. # 26). The Summons and Complaint were modified to substitute the estate on June 6, 2019 (NYSCEF Doc. # 43).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it. ABI argues that it has made its prima facie case by establishing that there are no issues of fact on causation. ABI alternatively argues that the decedent's alleged asbestos exposure did not exceed ambient or background levels and posed no risk of his developing the disease. ABI claims that decedent's lung cancer was caused by decedent's history of smoking about a pack of cigarettes a day starting in 1958 through 2012 (Mot. Exh. A, pgs. 272, 276 and 283). ABI 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]).

ABI argues that plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that its asbestos floor products caused the decedent's lung cancer. ABI argues that plaintiffs' evidence and the expert reports of Dr. Brent Staggs, MD, a pathologist (Mot. Exh. O and P), Dr. Sanford Ratner, MD, FACP, FCCP, a pulmonologist (Mot. Exh. R), and Dr. Mark Ellis Ginsburg, MD, a thoracic surgeon (Mot. Exh. S), are speculative and 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]). ABI must unequivocally establish that the decedent’s level of exposure to its Amtico floor products was not sufficient to contribute to the development of his lung cancer (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’ experts’ reports of Drs. Brent Staggs, Sanford Ratner, and Mark Ellis Ginsburg, fails to establish a prima facie basis for summary judgment (Mot. Exhs. O, P, R and S).

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 the October 19, 2018 summary report of its experts John W. Spencer, CIH, CSP prepared with Marc Plisko, CIH (both certified industrial hygienists) (Mot. Exh. B), the reports of Dr. Stanley Geyer, M.D., a pathologist (Mot. Exh. E), Dr. James Crapo, MD, a pulmonary and Internal Medicine specialist (Mot. Exh. M), and Dr. Alan Legasto, MD, a radiologist, establish lack of causation.

ABI’s expert Dr. Legasto’s report is unaffirmed and prepared as a letter addressed to a paralegal (Mot. Exh. M). Unsworn, unaffirmed letter reports do not meet the test of competent admissible evidence sufficient to establish a prima facie case on a motion for summary judgment (see Loadholt v. New York City Transit Authority, 12 AD 3d 352, 783 NYS 2d 660 [2nd Dept. 2004]). ABI’s remaining experts submitted reports that are in proper form; However, the November 19, 2018 and May 25, 2019 reports of Dr. James D. Crapo, only refers to the decedent’s smoking history, pathology, asbestos exposure history, chest radiographs and pulmonary function tests for his conclusion that decedent’s lung cancer was solely caused by cigarette smoking. He provides no reference to testing, studies or even defendant’s other expert reports to support his conclusion that “Products that contain chrysotile in a resin matrix, which do not result in substantial fiber release such as asbestos floor tiles, would not create or contribute to the risk for development of an asbestos related disease.” Dr. Crapo’s report is conclusory and fails to raise any issues of fact on causation (see Parker v. Mobile Oil Corp., 7 NY3d 434, supra at 448, Matter of New York City Asbestos Litigation (Juni), 32 NY 3d 1116, supra and Cornell v. 360 West 51st Street Realty, LLC, 22 NY 3d 762, supra).

Although the plaintiffs are entitled to rely on the unsworn, unaffirmed July 3, 2017 report of Dr. Brent C. Staggs annexed to ABI’s motion papers (Mot. Exh. O) in opposing the motion for summary judgment (Zelman v. Mauro, 81 AD 3d 936, 917 NYS 2d 588 [2nd Dept. 2011] and Siemucha v. Garrison, 111 AD 3d 1398, 975 NYS 2d 518 [4th Dept. 2013] citing to Brown v. Achy, 9 AD 3d 30, 32, 776 NYS 2d 56 [1st Dept. 2004]), this report is conclusory and insufficient to raise an issue of fact. Furthermore, plaintiffs reliance on Dr. Staggs’ Affidavit dated April 15, 2016 (Mot. Exh. P), prepared and sworn more than a year before his July 3, 2017 report, does not specifically identify the decedent, is conclusory and speculative, and fails to raise any issues of fact on causation (see Parker v. Mobile Oil Corp., 7 NY3d 434, supra at 448, Matter of New York City Asbestos Litigation (Juni), 32 NY 3d 1116, supra, and Cornell v. 360 West 51st Street Realty, LLC, 22 NY 3d 762, supra).

Plaintiffs are entitled to rely on the unsworn, unaffirmed July 15, 2019 report of Dr. Mark Ellis Ginsburg annexed to ABI's motion papers (Mot. Exh. S) in opposing the motion for summary judgment (*Zelman v. Mauro*, 81 AD 3d 936, 917 NYS 2d 588 [2nd Dept. 2011] and *Siemucha v. Garrison*, 111 AD 3d 1398, 975 NYS 2d 518 [4th Dept. 2013] citing to *Brown v. Achy*, 9 AD 3d 30, 32, 776 NYS 2d 56 [1st Dept. 2004]). In any case, before oral argument of this motion plaintiffs provided a copy of Dr. Ginsburg's sworn affidavit incorporating the report, and the reasonable explanation that they initially relied on ABI incorporating the report into the motion papers. ABI has not shown that it will be prejudiced by the use of Dr. Ginsburg's report (NYSCEF Doc. No. 137).

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, supra at 448).

Mr. Spencer and Mr. Plisko are employed by Environmental Profiles, Inc. ("EPI"). Mr. Spencer and Mr. Plisko's October 19, 2018 Summary Report states that there is a lack of causal relationship between encapsulated chrysotile asbestos and the decedent's lung cancer. They draw on multiple assumptions as to decedent'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 October 19, 2018 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, National Institute for Occupational Safety and Health ("NIOSH"), 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 lung cancer. They conclude that the decedent's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, and well below the permissible exposure limits set by OSHA and the EPA. That there were other sources of exposure associated with the decedent's lung cancer. To the extent the decedent was exposed to asbestos from ABI's Amtico vinyl asbestos floor tile there would be no asbestos exposure above historical or today's occupational health standards and guidelines (See Mot. Exh. B).

Dr. Geyer's October 24, 2018, and July 31, 2019 reports rely on the same assumptions made by Mr. Spencer and Mr. Plisko in their October 19, 2018 Summary Report, in support of the conclusion that the decedent's exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles did not exceed the OSHA standards for ambient exposure, was insignificant and did not cause lung cancer. Dr. Geyer refers to a study performed by a Naval Regional Medical Clinic that concluded there would be minimal exposure from chrysotile asbestos. Dr. Geyer further concludes that the decedent did not have a clinical diagnosis of asbestosis, but he did have multiple smoking related conditions, and the most probable cause of his lung cancer was from smoking (Mot. Exh. E).

Plaintiff in opposition relies on the July 15, 2019 report of Dr. Mark Ellis Ginsburg, M.D., a thoracic surgeon (Mot. Exh. S and Opp. Exh. 14).

Dr. Ginsburg's July 15, 2019 report assesses the decedent's medical history, past medical history, medications, cigarette smoking history, family history, occupational and environmental exposure, radiology results, and pathology results. Dr. Ginsburg relies on studies and reports from multiple entities - that includes OSHA, NIOSH and the EPA - as demonstrating that all asbestos fibers, including chrysotile fibers, can increase the likelihood of developing lung cancer (Opp. Exh. 14, Ginsburg Report, footnotes 8-25). He concludes that chrysotile has been independently found to cause lung cancer, and that there is no safe level of asbestos exposure (Opp. Exh. 14, Ginsburg Report, footnotes 6, 26, 27 and 29). He further concludes that the decedent's cumulative

exposure to asbestos from each company's asbestos product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tiles, caused his lung cancer (Opp., Exh. 14).

ABI argues that summary judgment is warranted under *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762, supra, 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' expert Dr. Ginsburg, is relying on some of the same scientists and scientific organizations as ABI's 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 rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos and lung cancer. Plaintiffs' expert Dr. Mark Ellis Ginsburg, also relies on studies and reports in part from the same scientific organizations, OSHA, NIOSH and the EPA, to establish that the decedent's exposure to chrysotile asbestos fibers can cause lung cancer. 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 October 19, 2018 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). They also created a table assessing representative personal 8 hour TWA sample data obtained from exposure to cutting and installation of ABI vinyl asbestos floor tile using the same trade practices as described by the decedent (Mot. Exh. B, Table 5). They calculate that the decedent's cumulative exposure to asbestos from ABI's Amtico vinyl asbestos floor tile over a fifteen year period totals approximately the equivalent of 0.18 days and that his exposure was less than 0.00000033 asbestos f/cc - yr. (Mot. Exh. B, pg. 12). Mr. Spencer and Mr. Plisko conclude that the decedent's cumulative exposure was less than and indistinguishable from most lifetime cumulative exposures to ambient asbestos, and well below working lifetime at OSHA and the World Health Organization's ("the WHO") permissible exposure limits (Mot. Exh. B, pg. 12).

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Mr. Spencer and Mr. Plisko's report concludes that (1) there are other potential sources of exposure associated with decedent's lung cancer (2) decedent's "work with or around friable asbestos containing joint compound would most likely expose him to airborne asbestos concentrations greater than ambient/background levels and relevant occupational health guidelines;" (3) if the decedent completed tasks involving cutting or installation of ABI's Amtico vinyl asbestos floor products, he would have had no exposure above historical or today's occupational health standards and guidelines; (4) floor tiles are non-friable encapsulated products and any exposure to airborne asbestos fibers from the manipulation of this product would have been negligible and not considered by OSHA or the EPA to be a health risk;(5) any cumulative exposure the decedent had from working with ABI's Amtico vinyl asbestos floor tile which contained non-friable and encapsulated chrysotile asbestos would have been negligible and would have been considered by OSHA, the WHO and the EPA standards to be well below the strictest occupational exposure levels; and (6) plaintiffs have not provided reliable industrial hygenist exposure assessment including frequency or duration of decedent's exposure (Mot. Exh. B, pgs. 14-15).

ABI's expert Dr. Geyer's October 24, 2018 and July 31, 2019 reports rely on the findings of Mr. Spencer and Mr. Plisko, and their finding that the decedent's cumulative exposure to asbestos was less than 0.0000033 f/cc-yrs. (Mot. Exh. E). Dr. Geyer cites to reports of the United States Department of Health, Education and Welfare and the United States Department of Health and Human Services and concludes that the magnitude and effect of cigarette smoking far outweighs other factors in the risk of developing lung cancer (Mot. Exh. E, pg. 5 and footnotes 12-13). Dr. Geyer further concludes that the decedent had COPD (Chronic Obstructive Pulmonary Disease) and not asbestosis, which together with other respiratory conditions shows a susceptibility to injury from tobacco smoke (See Mot. Exh. E, pg. 4).

Dr. Ginsburg refers to reports, studies and testing and states that installation of asbestos floor tiles has been reported to result in airborne asbestos fiber concentrations as high as 0.26 f/cc and that manipulation of asbestos containing floor tiles can result in release of asbestos fibers in concentrations higher than ambient levels (Opp. Exh. 14, pg. 6 footnotes 31, 38, 39 and 40). Dr. Ginsburg concludes that all asbestos fiber, including chrysotile asbestos, is universally known as a carcinogen and is a substantial contributing cause of lung cancer. He states that asbestos fibers and dust that is visible to the naked eye creates a potentially greater asbestos exposure than current OSHA PEL of 0.1f/cc TWA. Dr. Ginsburg concludes that the decedent'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 lung cancer (Opp. Exh. 14).

Plaintiff is not required to show the precise causes of damages as a result of the decedent'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 admissible evidence in plaintiffs' opposition papers has 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]).

Decedent 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. 154,159-162, 174-175, 181-184, 186-189, 231-232, 234, 241, 375-379,401-405,409-417, 487- 488 and 490-492). Decedent's deposition testimony, when combined with the report Dr. Ginsburg and other admissible evidence provided by the plaintiffs, has created "facts and conditions from which [ABI's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra). Construing the evidence in the light most favorable to the plaintiffs as the non-moving party, they have raised issues of fact.

ABI attempts to attach to the Reply papers the additional affidavits of nine (9) more industrial hygienists, prepared and filed in unrelated actions, to support its claims that dose reconstruction utilized by ABI's experts is the only generally accepted means of establishing causation (See Reply, Exhs. CC, EE, FF, GG, HH, II, JJ, KK, and LL). This evidence amounts 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:

MANUEL J. MENDEZ
J.S.C.

Dated: December 3, 2019



MANUEL J. MENDEZ
J.S.C.

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