

Komiak v A.O. Smith Water Prods., Co.

2019 NY Slip Op 33589(U)

December 4, 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 30001(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
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

MICHAEL P. KOMIAK, as the Administrator for the Estate of PETER KOMIAK,

Plaintiff,

- against -

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

Defendants.

INDEX NO. 190320/2017

MOTION DATE 11/06/2019

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by American Biltrite Inc.:

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, 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 granted.

Plaintiff, Peter Komiak (hereinafter "decedent") was diagnosed with mesothelioma on September 19, 2017 and died from his illness on September 20, 2018 (Mot. Exh. E and Opp. Exh. 10). 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 ABI's Amtico vinyl asbestos floor tiles from the mid-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 described the process of installing vinyl asbestos tile while working at Carpet Mart. Decedent testified that he would prepare the floor and broom sweep, then he would square off the room, starting in the center of the room he would make chalk lines and work his way out from the center (Mot. Exh. A, pgs. 204, 206-210, and 482). Decedent testified that he used a Stanley knife to score the tiles and make square cuts. He stated that a straight cut would take a couple of seconds. He stated he also used a pin, which was a nail type thing with a little bit of a handle to score the tiles. Decedent stated that when using a pin "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 ABI Amtico floor tiles he could see the asbestos fibers. Decedent recalled having to sweep-up the debris after installing ABI Amtico vinyl asbestos floor tiles, and that it created asbestos dust he inhaled (Mot. Exh. A, pgs. 96-98, 475-481, 482, 483-487, and 657-658).

Decedent 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 next recalled using ABI Amtico vinyl asbestos tiles while working for J&M Carpet for approximately a year performing mostly commercial and some residential work (Mot. Exh. A, pgs. 234-235, 237-239 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 stated Gundolt had 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. 248-252 and 257-258). Decedent specifically recalled that while working for Gundolt he did jobs with ABI vinyl asbestos tile at the Intercontinental Hotel (Mot. Exh. A, pgs. 288-289). 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 stated that he worked with ABI Amtico vinyl asbestos floor tiles from the early 1960's through the mid-1980's (Mot. Exh. A, pgs. 472 and 481). Decedent identified ABI Amtico vinyl asbestos floor tile as one he used when he was an apprentice installer at Carpet Mart. He recalled the word "Amtico" was written on the box. He stated the Amtico tiles were 12 x 12 and came in a box that had varying amounts of tile but initially it was about ninety (90). Decedent claimed that the box with ninety (90) tiles was heavy and you had to be careful not to drop it because that would break the corners. Decedent testified that as an apprentice installer he was responsible for opening up the box, separating the tiles that were stuck together, unpeeling them, getting rid of the dust on them and feeding tiles to the mechanic responsible for laying them down. Decedent recalled seeing the words "vinyl asbestos tile" on the boxes of ABI Amtico vinyl asbestos floor tile (Mot. Exh. A, pgs. 210-212, 467).

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 October 17, 2017 to recover for damages resulting from his exposure to asbestos (See NYSCEF Doc. # 1). ABI filed its Verified Answer to Plaintiff's Complaint on December 15, 2017 (NYSCEF Doc. # 39). The Summons and Complaint were modified to substitute the estate on November 21, 2018 (NYSCEF Doc. # 107).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it. ABI contends that plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that Amtico floor tiles caused the decedent's mesothelioma.

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 mesothelioma. ABI argues that plaintiff's evidence - including the January 17, 2018 expert report of Dr. Sanford Ratner, M.D. a pulmonary specialist (Mot. Exh. G), and the April 10, 2018 expert report of Dr. David Y. Zhang, M.D., Ph.D. and M.P.H. specializing in pathology and occupational medicine (Mot. Exh. H) - 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 product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

ABI's reliance on the reports of plaintiff's experts, Dr. Sanford Ratner and Dr. David Y. Zhang (Mot. Exhs. G and H), in support of its argument that plaintiff will not present any admissible evidence as to causation, is unavailing. ABI's attempt to "point to gaps," in plaintiffs' evidence, fails to establish a prima facie basis for summary judgment.

ABI contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006] and *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014]) because plaintiffs are unable to establish general and specific causation. ABI argues that its experts John W. Spencer (a certified industrial hygienist), his report prepared with Marc Plisko (a certified industrial hygienist) (Mot. Exh. B), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Exh. D), 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).

ABI argues that unlike amphibole asbestos, no causal relationship exists between encapsulated chrysotile asbestos and the development of mesothelioma, eliminating any general causation. ABI submits the August 1, 2018 Summary Report of John W. Spencer, a certified industrial hygienist, prepared with Marc Plisko, a certified industrial hygienist (Mot. Exh. B) and the August 23, 2018 and April 19, 2019 reports of Dr. Stanley Geyer, M.D., a pathologist (Mot. Exh. E), to establish lack of causation.

Mr. Spencer is employed as President of Environmental Profiles, Inc. ("EPI") and Mr. Plisko is a Senior Project Manager at EPI. Mr. Spencer's and Mr. Plisko's August 1, 2018 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and the decedent's mesothelioma. They draw on multiple assumptions as to plaintiff's exposure from his deposition testimony and other discovery. They also rely on reports and studies, including those by EPI, performed on ABI Amtico vinyl asbestos floor tile for a risk and exposure assessment. The August 1, 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"), World Health Organization ("WHO"), and Occupational Safety and Health Administration (OSHA), and states that encapsulated non-friable

products, such as ABI's Amtico floor tile, pose a lesser potential of release of asbestos fibers associated with mesothelioma. They conclude that plaintiff's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, well below a working lifetime at OSHA and the WHO permissible exposure limits, and well below lifetime cumulative exposure at the EPA clearance limit following an asbestos abatement action (See Mot. Exh. B).

Dr. Geyer's August 23, 2018 report relies on published literature in the form of reports and studies that are incorporated into a table in his report and contain the same assumptions made by Mr. Spencer and Mr. Plisko in their August 1, 2018 Summary Report. Dr. Geyer states that chrysotile fibers unaccompanied by contamination with amphibole forms of asbestos, or some mixture of both chrysotile and amphiboles, does not produce mesothelioma in humans (See Mot. Exh. E). Dr. Geyer concludes that because chrysotile fibers in ABI Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone, rendering them unable to cause the decedent's malignant mesothelioma. He claims that the decedent's exposure to amosite or crocidolite asbestos fibers was from other sources, including asbestos insulation on pumps, boilers and asbestos pipe covering, and are the more likely causes of his mesothelioma (See Mot. Exh. E, pg. 4 of 5). Dr. Geyer's April 19, 2019 report is supplemental and prepared reviewing additional pathology slides. Dr. Geyer restates his prior conclusion that the chrysotile fibers in ABI Amtico floor tiles were embedded in a resin matrix, and incapable of causing the decedent's malignant mesothelioma.

ABI's experts John W. Spencer, Marc Plisko and Dr. Stanley Geyer, M.D. rely on recognized studies and reports to establish that there is no general causal relationship between chrysotile asbestos and the decedent's mesothelioma and have stated a prima facie basis to obtain summary judgment on general causation.

Special Causation:

ABI states that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause the decedent's mesothelioma, and thus plaintiff is unable to establish 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 (In re New York City Abestos 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 August 1, 2018 Summary Report by Mr. Spencer and Mr. Plisko cites to studies and reports - including their study performed at Environmental Profiles, Inc. (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, Tables 4 and 5). The report states that the decedent's total cumulative exposure to asbestos from ABI's Amtico asbestos floor tile is less than 0.0000202 f/cc-yrs. and indistinguishable from most lifetime cumulative exposures to asbestos (Mot. Exh. B).

Mr. Spencer and Mr. Plisko's summary report concludes that (1) the decedent's work around and with other friable asbestos products including joint compound and thermal systems are the most likely cause of his mesothelioma, to the extent they contained asbestos fibers (2) plaintiff failed to provide any scientifically reliable and relevant industrial hygiene exposure assessment; (3) to the extent the decedent competed tasks that included cutting and installation of ABI Amtico vinyl asbestos floor tiles he would have had no exposure to asbestos above historical or present day occupational health standards and guidelines; (4) any exposure the decedent had from the manipulation of Amtico vinyl asbestos floor tile which contained non-friable and encapsulated chrysotile asbestos would have been negligible, and would not have been considered by either the Occupational Safety and Health Administration (OSHA) or the Environmental Protection Agency (EPA) to present a significant health risk; (5) even if the decedent cut and installed asbestos containing ABI floor tile, his exposure would be well below the strictest occupational exposure levels allowed by OSHA and the World Health Organization (the WHO)(See Mot. Exh. B).

Dr. Geyer's August 23, 2018 report relies on published literature in the form of reports and studies that are incorporated into a table in his report, which he states establish that pure chrysotile asbestos fibers, that were not contaminated by amphibole forms of asbestos fibers, did not produce mesothelioma in humans. Dr. Geyer incorporates the findings in the August 1, 2018 Summary Report of Mr. Spencer and Mr. Plisko and concludes that because the encapsulated chrysotile fibers in ABI's Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone, rendering them unable to cause the decedent's malignant mesothelioma. He concludes that the decedent's exposure to amphibole asbestos fibers from other sources, including insulation and asbestos pipe covering, are a more likely cause of his mesothelioma (See Mot. Exh. E, pgs. 3 and 4 of 5). Dr. Geyer's April 19, 2019 supplemental report, prepared after reviewing additional pathology slides, restates his prior conclusion that the chrysotile fibers in ABI Amtico floor tiles were incapable of causing the decedent's malignant mesothelioma.

ABI's experts John W. Spencer, Marc Plisko and Dr. Stanley Geyer, M.D. have stated a prima facie basis to obtain summary judgment on specific causation.

Although the plaintiffs are entitled to rely on the unsworn, unaffirmed April 10, 2018 expert report of Dr. David Y. Zhang, M.D. annexed to ABI'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]), Dr. Zhang's April 10, 2018 report summarizing the decedent's occupational /asbestos exposure, smoking history, pathology reports and pathology findings, with references to research showing that mesothelioma is unrelated to smoking, is insufficient to raise an issue of fact on general or specific causation. Furthermore plaintiffs in opposition annex the unsworn, unaffirmed March 6, 2019 supplemental letter report of Dr. Zhang which does 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]).

Plaintiffs attempt on October 16, 2019 to correct the defect in Dr. Zhang's March 6, 2019 supplemental report, by e-filing a letter to this Court with an attached expert affidavit seeking a nunc pro tunc correction (NYSCEF Doc. # 217), approximately two weeks after the motion was marked fully submitted in the Submissions Part (Room 130), is an inappropriate attempt to file a sur-reply. Plaintiff did not provide a reasonable excuse for the delay and has not shown that ABI would not be prejudiced by this Court's acceptance of the belatedly corrected document. Plaintiffs have failed to raise an issue of fact on either general or specific causation (Tran Han Ho v. Brackley, 69 AD 3d 533, 894 NYS 2d 391 [1st Dept. 2010]).

ACCORDINGLY, it is ORDERED that American Biltrite Inc.'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 American Bilrite Inc., 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 American Bilrite Inc. 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 defendant American Bilrite Inc..

ENTER:

Dated: December 4, 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