

**Avakian v Consolidated Edison of N.Y.**

2020 NY Slip Op 30804(U)

March 16, 2020

Supreme Court, New York County

Docket Number: 190036/2018

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**

**LAURA AVAKIAN, as the Administratrix for the  
Estate of DONALD AVAKIAN, and  
LAURA AVAKIAN, individually,**  
  
**Plaintiffs,**

**INDEX NO. 190036/2018**  
**MOTION DATE 03/04/2020**  
**MOTION SEQ. NO. 001**  
**MOTION CAL. NO. \_\_\_\_\_**

**-against-**

**CONSOLIDATED EDISON OF NEW YORK, et al.,**  
  
**Defendants.**

The following papers, numbered 1 to 8 were read on this motion by Goodyear Tire & Rubber Company pursuant to CPLR §3212 for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7- 8</u>

**CROSS-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 granted.

Plaintiff, Donald Avakian (hereinafter “decedent”) was diagnosed with lung cancer on August 17, 2017 and died from his illness on June 2, 2019 (Opp. Exh. 1, NYSCEF Doc. No. 113). Decedent was deposed on July 23, 24 and 25, 2018 (Mot. Exh. B and Opp. Exh. 1). His relevant alleged exposure was from his work as a mechanic performing carpentry and home renovations in residential homes and apartment complexes in Queens and Long Island. This work included installing Goodyear’s vinyl asbestos floor tiles from 1975 through 1983.

Decedent testified that starting around 1975 he worked off the books for Eddy, a polish gentlemen he probably met while working at his father’s gas station. He stated that he did mechanic work - that included carpentry and replacing flooring - at residential sites which were single family homes and apartment houses in Queens and Long Island (Mot. Exh. B, pgs. 87-90). Decedent described the floor tiles used as typically twelve by twelve or nine by nine and affixed to the floor using glue. He identified Goodyear as one of four manufacturers of the floor tiles that were used (Mot. Exh. B, pgs. 101-102). Decedent testified that starting in 1978 through approximately 1983, he worked off the books for Vinny Eldora doing home

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

renovation on residences in Long Island and Queens. He testified that he worked three to four days a week between seven and eight hours a day. He recalled that when he was working for Vinny Eldora he worked with thicker one eighth of an inch tile that was less flexible (Mot. Exh. B, pgs. 109-112 and 379-383).

Decedent stated that the Goodyear vinyl asbestos tiles had a black backing that was not smooth regardless of the color on the front. He described the tiles as smooth on top, a sixteenth of an inch thick, kind of stiff and made of vinyl. He affirmed that if you folded it from corner to corner the Goodyear vinyl floor tile would break. Decedent could not recall a specific color or pattern on the tiles, whether or where the Goodyear name was located on the tiles (Mot. Exh. B, pgs. 361- 369). He stated that the Goodyear vinyl asbestos tile came in a white cardboard box with about twenty-four tiles and the word "Goodyear" printed on it (Mot. Exh. B, pgs. 373-375).

Decedent stated that when installing the Goodyear vinyl asbestos floor tiles he started in the center, putting down glue with a grooved trowel. As he got closer to the perimeter he would sometimes have to cut the tile with a blade and snap it off, or he used shears to cut the tiles to fit it all together. Decedent stated that the process of cutting the tile with a blade and snapping it off would take about a minute. He said using the shears could take a little longer depending on the curves. He testified that he observed dust coming off the Goodyear vinyl asbestos tiles when he cut them, that he breathed in. He also recalled using a broom to sweep up the area after laying the Goodyear vinyl asbestos floor tile which would kick up visible dust, that he breathed in, from the scraps of the tiles. Decedent believed that the dust he breathed in exposed him to asbestos (Mot. Exh. B, pgs. 377 - 378 and 582-583).

Decedent stated that he started smoking cigarettes when he was fourteen or fifteen years old in the early 1970's, and smoked a pack or a little less until he quit for good in 2010 (Mot. Exh. B, pgs. 142, 144 and 174-176).

Plaintiffs commenced this action on February 14, 2018 to recover for damages resulting from decedent's exposure to asbestos (See Mot. Exh. A, NYSCEF Doc. # 1). Goodyear's Acknowledgment of Receipt is dated March 6, 2018 (Mot. Exh. A). The Second Amended Summons and Complaint substituted the estate on June 26, 2019 (Mot. Exh. A).

Goodyear now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it.

Goodyear states that decedent's description of vinyl floor tiles as having a black backing means they were non-homogenous, and the company's non-homogenous vinyl floor tiles did not contain asbestos during the relevant time period. Goodyear argues that decedent's description of the vinyl floor tile that allegedly exposed him to asbestos, together with the affidavit of its corporate representative and the company's records, establish a prima facie case for summary judgment. Alternatively, Goodyear argues that even if the decedent was exposed to asbestos it would have been below background level and well below the cumulative dose permitted under current permissible exposure limits.

Goodyear claims that decedent's lung cancer was most likely caused by decedent's cigarette smoking and not by exposure to asbestos from its floor tile products, further warranting 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 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]).

In support of its argument that the decedent was not exposed to asbestos from its vinyl floor tiles, Goodyear provides the June 27, 2012 affidavit of corporate representative Joseph A. Kemmerling. The affidavit was prepared over five years before plaintiffs commenced this action. He states that he was employed by Goodyear from 1968 through 1979 and has personal knowledge that from 1969 through 1979 the tiles produced by the company did not have any asbestos. Mr. Kemmerling also states that in the 1970's Goodyear made a non-homogenous product known as "Deluxe on Grade" or "DOG" that did not contain asbestos (Mot. Exh. D, para. 4).

Goodyear also provides its Supplemental Amended Responses to Interrogatories wherein it is stated that the company "no longer manufactured vinyl floor tile products beginning in 1978 or 1979" and that the company was sold in 1987 (Mot. Exh. E, pg. 2). Goodyear's Answer to Interrogatory No. 21 states that the company manufactured "Black Back floor tile and Heavy Duty Homogenous floor tile" for a limited time period when they may have contained chrysotile asbestos fiber (Mot. Exh. E, pg. 16).

Mr. Kemmerling was not employed by Goodyear during the entire period relevant to the decedent's exposure and he does not state the basis for knowledge (Mot. Exh. D). Furthermore, Mr. Kemmerling's report was prepared over five years before this action was commenced and is missing attachments. Mr. Kemmerling's affidavit is conclusory, without specific factual basis and does not provide an evidentiary basis to establish that the decedent was not exposed to asbestos from Goodyear's vinyl floor tiles (See Matter of New York City Asbestos Litigation (DiSalvo), 123 AD 3d 498, 1 NYS 3d 20 [1<sup>st</sup> Dept. 2014]).

Additionally, plaintiff provides Goodyear's June 3, 2008 responses to Interrogatories wherein it is stated that from approximately 1949 to 1965 Goodyear manufactured floor tile that may have contained asbestos and from 1965 through 1966 Goodyear also manufactured vinyl asbestos floor tile that contained an asbestos type backing (Opp. Exh. 3, Answer to Interrogatory No. 2, pg. 4 of 15). Goodyear's response to interrogatories also states that its "Black Back" asbestos containing tiles that were made from 1949 to 1954 came in 9 x 9 tiles and

approximately one sixteenth of an inch thick. Heavy Duty Homogenous tiles were made from 1954 and out of normal stock production in 1965, and "Aquashield," which came in sheets and contained an asbestos-type backing, was available for purchase from 1965-1966. Both Black Back and Heavy Duty Homogenous vinyl floor tiles had special runs to meet specific orders after they were no longer in normal stock production. The content of chrysotile asbestos in Goodyear's tiles is stated to be likely in the range of 5% to 15% (Opp. Exh. 3, Answer to Interrogatory No. 3, pgs. 7 and 8 of 15).

"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 [1<sup>st</sup> Dept. 1996] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1<sup>st</sup> Dept., 2015]).

The evidence provided by plaintiffs, including the interrogatory responses, create credibility issues concerning whether Goodyear manufactured "Black Back" vinyl asbestos containing floor tiles during the periods relevant to plaintiff's exposure. This evidence creates issues of fact on this issue that cannot be resolved on this motion for summary judgment.

Goodyear alternatively argues that it is entitled to summary judgment on the issue of causation. Goodyear contends that the likely cause of decedent's lung cancer is his smoking about thirty to forty packs of cigarettes a year starting from about 1970 through 2010. 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.

It is Goodyear contention 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. Robert Sussman, M.D., F.C.C.P. a board certified pulmonary disease specialist (Mot. Exh. G), 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 March 1, 2019, and a supplemental report is dated December 20, 2019 (Mot. Exh. F).

Mr. Marano's March 1, 2019 report refers to and assesses the decedent's deposition testimony and refers to affidavits from four Goodyear employees to state that there was no asbestos in the vinyl floor tile. Only Mr. Kemmerling's affidavit is attached to the motion papers. Mr. Marano states that the decedent's deposition testimony establishes that he would have been exposed to very low to non-detectable doses of asbestos and that the cumulative dose would have been below background range as permitted by the current Occupational Safety and Health Administration (OSHA) standard. (Mot. Exh. F).

Mr. Marano's December 20, 2019 supplemental report makes qualitative estimates of the decedent's exposure, incorporating private studies with the OSHA standards. He concludes that the decedent's exposure to asbestos is well below the OSHA permissible exposure limit (Mot. Exh. F).

Dr. Robert Sussman's February 15, 2019 report assesses the decedent's case report and medical history, smoking history, occupational and exposure history, family history and test results (Mot. Exh. G). He states that cigarette smoke is a known carcinogen. Dr. Sussman relies on private epidemiologic studies and the U.S. Surgeon General's reports of the hazards of smoking and second hand exposure (Mot. Exh. G, pg. 5). Dr. Sussman refers to the decedent's medical records which show no asbestosis and his medical history of COPD 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. Sussman concludes that the decedent's exposure to asbestos was not sufficient to cause asbestosis or asbestos related lung cancer and his lung cancer was the result of his smoking (Mot. Exh. G).

Goodyear's experts Mr. Marano and Dr. Sussman rely on recognized studies and reports to establish that there is no causal relationship between decedent's exposure to chrysotile asbestos from Goodyear vinyl asbestos tile and his lung cancer. 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 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 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 December 20, 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 from Goodyear’s vinyl asbestos floor tile 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 0.00037 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 0.0056 fiber/cc-years which is below the range of the cumulative dose of asbestos from background exposure and the cumulative dose permitted by OSHA (4.5 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).

Goodyear’s expert Dr. Sussman’s December 6, 2019 Affidavit cites to private 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 to attribute the cause of lung cancer to asbestos exposure (Mot. Exh. G, Sussman Aff., pg. 4). His February 15, 2019 report cites to the 1947 British Annual Report of the Chief Inspector of Factories and additional private studies and reports as further support for his position that lung cancer without asbestosis is not caused by asbestos exposure (Mot. Exh. G, report, pgs. -5-8). Dr. Sussman refers to the decedent’s medical history and deposition testimony concerning his cigarette smoking and the lack of any finding of asbestosis. He concludes that due to the lack of asbestosis, and multiple co-morbidities independent from the decedent’s lung cancer that significantly decrease life expectancy- including COPD, coronary artery disease and diabetes mellitus - his lung cancer is likely caused by his history of smoking cigarettes and not a consequence of exposure to Goodyear vinyl asbestos tile (See Mot. Exh. G, pgs. 9-10).

Goodyear’s experts Mr. Marano and Dr. Sussman have established a prima facie case on specific causation with comparative assessment of decedent’s exposure and his smoking history.

Dr. Mark Ellis Ginsburg’s letter report dated February 9, 2020 is unaffirmed and unsworn. This report is not in admissible form, has no probative value and fails to raise any issues 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 [1<sup>st</sup> Dept. 2013]; Lazu v. Harlem Group, Inc., 89 AD 3d 435, 931 NYS 2d 608 [1<sup>st</sup> Dept. 2011]; Migliaccio v. Miruku, 56 AD 3d 393, 869 NYS 2d 24 [1<sup>st</sup> Dept. 2008]; and McLoryd v. Pennypacker, 178 AD 2d 227, 577 NYS 2d 272 [1<sup>st</sup> Dept. 1991] lv. denied 79 NY 2d 754, 590 NE 2d 250, 581 NYS 2d 665 [1992]). Plaintiff's expert report is not in admissible form and does 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. 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: March 16, 2020

  
\_\_\_\_\_  
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