

Lamenta v ABB, Inc.
2020 NY Slip Op 32133(U)
June 25, 2020
Supreme Court, New York County
Docket Number: 190312/2017
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
ANTONIETTA LAMENTA, Individually and as
Administrator for the Estate of CARLETTO LAMENTA,

-against-

Plaintiffs,

ABB, INC., et al.,

Defendants.

INDEX NO. 190312/2017
MOTION DATE 05/26/2020
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion by American Biltrite, Inc. 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>7-9</u>

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendant American Biltrite, Inc.'s (hereinafter referred to as "ABI") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all crossclaims against it is granted.

Plaintiff, Carletto Lamenta (hereinafter "decedent"), was diagnosed with lung cancer in October of 2017 and died from his illness on March 16, 2018 (Mot. Exhibits E, M and O). Decedent's deposition took place over the course of seven days on November 9,10, 27, 28, 29, 30 and December 4, 2017 (Mot. Exhibit A). 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 with ABI's Amtico vinyl asbestos floor tiles from the 1970's through the mid-1980's.

Decedent testified that he was born and raised in Italy. He came to the United States when he was fourteen years old, on August 8, 1973, and started working three days later. Decedent worked for a cousin's husband, Fernando Ciatti, at his marble and tile contracting company called "Fernando Ciatti Construction," through 1977. He recalled that he worked with the construction company at various locations in New York, New Jersey and Pennsylvania (Mot. Exhibit A, pgs. 128-131 and 136). Decedent started his own company in 1977 and testified that he used ABI's vinyl asbestos floor tiles through the mid-1980's (Mot. Exhibit A, pgs. 635-637 and 639).

Decedent testified that he worked with both vinyl and vinyl asbestos containing floor tile. He specifically identified ABI's Amtico asbestos containing floor tile. Decedent stated that he knew which tile contained asbestos because when he scored and cut asbestos containing tile, dust would be released. He stated that they did not have a machine, so they would put a piece of wood on top of the

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

twelve by twelve tile, score it with a sheetrock knife and snap it. He stated the process created a very dusty atmosphere and that he would breathe in that dust. He believed that he was exposed to asbestos from ABI's Amtico tiles from using them in over thousands of jobs (Mot. Exhibit A, pgs. 176-179 and 896-897).

Decedent described the process of installing vinyl asbestos tile. He stated that he would start in the middle of the room and work his way out using a ruler to measure. He would cut the sides to make them fit. Decedent testified that the process of cutting an asbestos tile would take anywhere from two seconds to half a minute depending on the size of the tile. Larger tiles would cut quicker. He recalled that the older tiles were ten by ten and the newer asbestos containing tiles were twelve by twelve. He did not recall any specific colors or patterns on the tiles or the specific wording on the box (Mot. Exhibit A, pgs. 184-186 and 189-190). Decedent stated that he knew he worked with ABI Amtico vinyl asbestos floor tiles from the name on the boxes. He recalled they either had a speckled pattern with two different colors or a single solid color (Mot. Exhibit A, pgs. 620, 633-634 and 644).

Decedent commenced this action on October 12, 2017 to recover for damages resulting from his exposure to asbestos (See NYSCEF Doc. # 1). ABI filed its Verified Answer to Plaintiff's Amended Complaint on December 5, 2017 (NYSCEF Doc. # 50).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all crossclaims against it. ABI contends that plaintiffs failed to proffer any expert opinion or other evidence establishing general or 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 October 21, 2017 expert report of Dr. Fabio Giron, M.D., a pulmonary specialist (Mot. Exhibit N), and the January 18, 2018 expert report of Dr. William N. Rom, M.D., M.P.H. specializing in pathology and pulmonary medicine (Mot. Exhibit O) - 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. Fabio Giron and Dr. William N. Rom (Mot. Exhibits N and O), 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. Exhibit B), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Exhibit E), and James D. Crapo, M.D. (Mot. Exhibit M) 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 December 4, 2018 Summary Report of John W. Spencer, a certified industrial hygienist, prepared with Marc Plisko, a certified industrial hygienist (Mot. Exhibit B). Mr. Spencer's and Mr. Plisko's December 4, 2018 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and the decedent's lung cancer. They draw on multiple assumptions as to plaintiff's exposure from his deposition testimony and other discovery. Mr. Spencer and Mr. Plisko also rely on reports and studies, including testing they performed on ABI Amtico vinyl asbestos floor tile, for a risk and exposure assessment. The December 4, 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), The World Health Organization (The WHO), National Institute for Occupational Safety and Health (NIOSH) and Occupational Safety and Health Administration (OSHA). The report states that encapsulated non-friable products, such as ABI's Amtico floor tile, pose a lesser potential of release of asbestos fibers associated with decedent's lung cancer. They conclude that the decedent's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was negligible and would not result in exposure that is greater than historic and occupational health guidelines. They further conclude that decedent's exposure to ABI's Amtico vinyl asbestos floor tiles would not have been considered by OSHA and the EPA to present a significant health risks and that there are other potential sources of decedent's exposure to be considered as causing his lung cancer (Mot. Exhibit B).

Dr. Geyer a pathologist, has two reports dated December 18, 2018 and May 5, 2019. Dr. Geyer's December 18, 2018 report relies on the assumptions made by Mr. Spencer and Mr. Plisko in their December 4, 2018 Summary Report. He cites the OSHA average Permissible Exposure Level (PEL) and a study performed by the Naval Regional Medical Clinic and determines that the decedent's exposure to chrysotile asbestos in ABI's Amtico vinyl asbestos tiles- to the extent he was exposed- did not result in significant exposure and did not cause his lung cancer. The December 18, 2018 report states that the lack of a presence of asbestosis and the decedent's smoking history and COPD further demonstrates that the decedent's lung cancer was not caused by ABI's Amtico vinyl asbestos tiles (Mot. Exhibit E). Dr. Geyer's May 5, 2019 report is supplemental and prepared reviewing an additional eight pathology slides. Dr. Geyer restates his prior conclusion that any exposure the decedent had to chrysotile asbestos fibers in ABI Amtico floor tiles was insufficient to contribute to the cause of his lung cancer (Mot. Exhibit E).

Dr. James D. Crapo's December 10, 2018 report discusses the decedent's smoking history, pathology, asbestos exposure history, chest radiographs, and pulmonary function studies. He concludes that the decedent did not develop asbestosis, pleural plaques or pleural calcifications which are common in individuals with substantial occupational exposure. Dr. Crapo further concludes that ABI products containing encapsulated chrysotile asbestos fiber has a low fiber release and neither created a risk factor nor was the likely cause of the decedent's lung cancer (Mot. Exhibit M). Dr. Crapo cites no reports, studies or authorities, for his conclusions. The December 10, 2018 report is conclusory and does not state a prima facie basis to obtain summary judgment on causation (*Gaddy v. Eyler*, 79 Ny 2d 955, 591 NE 2d 1176, 582 NYS 2d 990 [1992]).

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 vinyl asbestos floor tiles did not produce breathable dust to a level sufficient to cause the decedent's lung cancer, 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;" "comparison 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 December 4, 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. Exhibit B, Tables 4). The report states that based on noted installation studies the decedent's estimated total cumulative exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles is calculated to be 0.065 f/cc-yrs. using PCM data and 0.0068 asbestos f/cc-years using TEM data (Mot. Exhibit B, tables 5 and 6). They state that the decedent's cumulative exposure to asbestos from his work was indistinguishable from some life-times cumulative exposures to ambient asbestos and well below lifetime cumulative exposure limits as stated by OSHA, the WHO and the EPA. (Mot. Exhibit B, tables 5 and 6).

The December 4, 2018 Summary Report concludes: (1) the decedent's work with other friable asbestos products including asbestos containing thermal insulation systems and joint compounds would have most likely exposed him to airborne asbestos concentrations greater than ambient levels; (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 OSHA or the 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 WHO, there are other potential sources of exposure associated with lung cancer and decedent's lung cancer is not caused by his work with ABI vinyl asbestos floor tiles (See Mot. Exhibit B).

Dr. Geyer's December 18, 2018 report incorporates the findings in the December 4, 2018 Summary Report of Mr. Spencer and Mr. Plisko. He concludes that the encapsulated chrysotile fibers in ABI's Amtico floor tiles firmly embedded in a resin matrix, did not cause the decedent's lung cancer. Dr. Geyer states that the lack of a presence of asbestosis, the decedent's smoking history and COPD further demonstrates that the decedent's lung cancer was not caused by ABI's Amtico vinyl asbestos tiles. He concludes that the decedent's lung cancer was likely caused by other sources (See Mot. Exhibit E). Dr. Geyer's May 5, 2019 supplemental report, prepared after reviewing an additional eight pathology slides, restates his prior conclusion that the chrysotile fibers in ABI Amtico floor tiles were incapable of causing the decedent's lung cancer (Mot. Exhibit E).

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, and unaffirmed October 21, 2017 expert report of Dr. Fabio Giron, M.D. (Mot. Exhibit N), and the January 18, 2018 expert report of Dr. William N. Rom, M.D., M.P.H. (Mot. Exhibit O), in opposing the motion for summary judgment (Zelman v. Mauro, 81 AD 3d 936, 917 NYS 2d 588 [2nd Dept. 2011]), Dr. Giron's report summarizes decedent's September 21, 2017 cytology report, and then makes a conclusory statement that "Asbestos exposure is a potent risk factor for the development of lung cancer." Dr. Giron's report is conclusory, speculative and insufficient to raise and issue of fact on general or specific causation. Dr. Rom's report reviews the decedent's medical history related to his lung cancer, smoking history and his alleged work exposure history. Dr. Rom concludes that the decedent's total cumulative exposure to asbestos was the cause of his lung cancer. Dr. Rom does not state the basis for his conclusion which is conclusory and insufficient to raise an issue of fact on general or specific causation.

Furthermore, the conclusory reports of Dr. Giron and Dr. Rom do not meet the test of competent admissible evidence sufficient to defeat a motion for summary judgment (see Gaddy v. Eyler, 79 Ny 2d 955, 591 NE 2d 1176, 582 NYS 2d 990 [1992], and 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 provide the March 20, 2019 expert report of Kenneth S. Garza, CIH, MS (Environmental Science and Management), a board-certified industrial hygienist. (Opp. Exhibit 1). The March 20, 2019 report is not subscribed before a notary or other authorized official, is inadmissible hearsay and not competent evidence on causation (see CPLR §2106, Shinn v. Catanzaro, 1 AD 3d 195, 767 NYS 2d 88 [1st Dept. 2003], Arce v. 1704 Seddon Realty Corp., 89 AD 3d 602, 935 NYS 2d 1 [1st Dept. 2011] citing to Mazzola v. City of New York, 32 AD 3d 906, 821 NYS 2d 247 [2nd Dept., 2006]).

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 crossclaims against it is granted, and it is further,

ORDERED that plaintiff's claims and all crossclaims asserted against American Biltrite Inc., are severed and dismissed, and it is further,

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

ORDERED that defendant American Biltrite 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 crossclaims against defendant American Biltrite Inc.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**



**MANUEL J. MENDEZ
J.S.C.**

Dated: June 25, 2020

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