

Pomponi v A.O. Smith Water Prods. Co.

2020 NY Slip Op 33589(U)

October 30, 2020

Supreme Court, New York County

Docket Number: 190101/2015

Judge: Adam Silvera

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

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

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EILEEN POMPONI,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO., ABB, INC. AS SUCCESSOR IN INTEREST TO ITE CIRCUIT BREAKERS, INC., AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSOURCE INC., AMERICAN BILTRITE INC., ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BIRD INCORPORATED, BLACKMER, BORG-WARNER CORPORATION, BY ITS SUCCESSOR-IN-INTEREST, BORG-WARNER MORSE TEC, INC., BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC., COMPUTDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, COOPER INDUSTRIES, INC., EATON CORPORATION, AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC, FOSTER WHEELER, L.L.C., GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GEORGIA PACIFIC LLC., GOULD ELECTRONICS INC., GOULDS PUMPS, INC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, IMO INDUSTRIES, INC, ITT INDUSTRIES, INC., INDIVIDUALLY, AND AS SUCCESSOR TO BELL & GOSSETT COMPANY AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., KAISER GYPSUM COMPANY, INC., KARNAK CORPORATION, KOHLER CO., LENNOX INDUSTRIES, INC., LEVITON MANUFACTURING CO., INC., OWENS-ILLINOIS, INC., PEERLESS

INDEX NO. 190101/2015
MOTION DATE 05/19/2020
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

INDUSTRIES, INC., PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, ROCKWELL AUTOMATION, INC., AS SUCCESSOR BY MERGER TO ALLEN- BRADLEY COMPANY, LLC, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST TO SIEMENS ENERGY & AUTOMATION, INC, SLANT/FIN CORPORATION, SUPERIOR BOILER WORKS, INC., SUPERIOR LIDGERWOOD MUNDY CORPORATION, TACO, INC., THE B.F. GOODRICH COMPANY, (GOODRICH CORPORATION), THE FAIRBANKS COMPANY, THE NASH ENGINEERING CO., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC., WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, AZROCK INDUSTRIES, A DIVISION OF DOMCO, INC., JENKINS BROS., MANNINGTON MILLS, INC., SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, CERRO WIRE & CABLE CO., INC. INDIVIDUALLY AND AS SUCESSOR TO AND/OR A/K/A THE ROCKBESTOS COMPANY, ROCKBESTOS WIRE AND CABLE CO., AND ROCKBESTOS SURPRENANT CABLE CORPORATION., ERICSSON, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ANACONDA WIRE & CABLE CO., LEGRAND INDIVIDUALLY, AND AS SUCCESSOR TO PASS & SEYMOUR.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Before the Court is defendant American Biltrite Inc.'s (hereinafter referred to as "American Biltrite") motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of American Biltrite on the grounds that said defendant has made a prima facie case demonstrating

lack of causation and to dismiss plaintiff's Complaint and all cross-claims against American Biltrite. Plaintiff opposes the motion.

American Biltrite's motion contends that plaintiff decedent, Italo Pomponi, has failed to establish specific causation for plaintiff's lung cancer in relation to American Biltrite's products. The case at issue arises from plaintiff's September 4, 2014 diagnosis with fatal lung cancer, which led to his death on November 23, 2016. Plaintiff alleges that the lung cancer was caused by his exposure to asbestos over the course of his career as an electrician employed at Luders Shipyard (1952-1957), at Dalbar Electric (1968-1971 or 72) and at Jansco (1971-1998) until his voluntary retirement in 1998 (Mot, Exh B at 57:22-58:7; 130:24-131:18; 161:18-162:2; 219:9-19). Plaintiff testified that during his career with Luders, Dalbar, and Jansco floor tile made by American Biltrite referred to by plaintiff as "Amtico" were used at worksites (*id.* at 8:17-25; 159-160).

Here, upon motion for summary judgment, American Biltrite alleges that in the case at bar it is impossible for plaintiff to establish general or specific causation against American Biltrite. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). A defendant seeking summary judgment in a products liability case involving asbestos must make a prima facie case that its product could not have contributed to the causation of the plaintiff's injury (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). An opinion on causation in a toxic tort should set forth: (1) a plaintiff's exposure to a toxin; (2) that the toxin is capable of causing the particular illness, or "general causation"; and

(3) that plaintiff was exposed to sufficient levels of the toxin to cause the illness, or “specific causation” (*Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]).

“It is not enough for a plaintiff in a toxic tort action for damages to show that a certain agent sometimes causes the kind of harm that he or she is complaining of; at a minimum, there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered” (*Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 784 [2014] quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 [8th Cir.1996]).

Here, defendant argues that plaintiff’s Complaint fails to demonstrate general causation, that the Amtico tiles at issue contain a level of chrysotile asbestos which is sufficient to cause lung cancer in the general population (see *id.*; *Parker* at 434). American Biltrite alleges that plaintiff has not offered any scientific evidence to prove that the Amtico floor tiles release chrysotile asbestos fibers at a level capable of being a substantial contributing factor to the development of lung cancer in the general population. In support of their claim that the floor tiles do not and could not cause lung cancer in the general population, American Biltrite submit expert affidavits and reports by Certified Industrial Hygienist John Spencer and Pathologist Dr. Stanley Geyer (Mot, Exh C; Exh JJ; Exh F). Mr. Spencer’s report detailed that there are two different categories of asbestos outlined by the Environmental Protection Agency (“EPA”): friable asbestos material and non-friable materials (Mot, Exh C at 3).

Friable asbestos material is defined in the EPA National Emission Standards for Hazardous Air Pollutants (NESHAPs)... as any material containing more than one (1) percent asbestos by weight

that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure... Friable materials have a greater potential to release fibers when disturbed or damaged than non-friable materials... Non-friable materials are encapsulated products, with asbestos fibers bound into a matrix material, a process that significantly reduces or eliminates the potential for release of fibers when damaged or disturbed. According to EPA, certain non-friable materials, such as floor tile... that are in good condition, can be left in buildings being demolished because the fiber release from these materials, even if the materials are damaged, is relatively small compared to the fiber release from friable materials... The sale of non-friable asbestos-containing products in U.S. commerce remains permissible to this day.

Defendants argue that Mr. Spencer demonstrates that Amtico floor tile is non-friable with potential for only low asbestos fiber release, if any at all. Mr. Spencer calculated a worst case scenario of Mr. Pomponi's maximum exposure from work around Amtico tiles and concluded that his cumulative exposure would be less than 0.0000086 f/cc-yrs, an amount indistinguishable from most ambient measurements and below occupational exposure levels allowed by the OSHA, the WHO and the USEPA (*id.* at 16-18). Defendants point to the report of Dr. Geyer who opined that plaintiff's maximum potential exposure to chrysotile asbestos from Amtico tiles could not be deemed a substantial contributing factor to his development of lung cancer (Mot, Exh F at 2). Dr. Geyer concluded that plaintiff's lung cancer was caused by "tobacco smoke, with no contribution from asbestos exposure" (*id.* at 3).

Further, defendants note that from “1952 to the present, American Biltrite has manufactured non-asbestos flooring, and from 1961-85, American Biltrite also manufactured a resin-based vinyl floor tile that contained a chrysotile form of asbestos fiber as a minority ingredient” (Mot at 7). Defendants claim that this floor tile product was non-friable and that the asbestos fibers were bound so that the potential for any fiber release was eliminated or significantly reduced (Mot, Exh C & D). Defendant has made a prima facie showing that its product could not have contributed to the causation of the plaintiff’s injury and the burden shifts to plaintiff to demonstrate that Amtico tiles are capable of causing lung cancer.

In opposition plaintiff demonstrates that Italo Pomponi was exposed to asbestos; that the toxin is capable of causing lung cancer; and that plaintiff was exposed to sufficient levels of asbestos. Plaintiff submits the report of Dr. Mark Ellis Ginsburg, a medical causation expert who noted that asbestos alone is a recognized substantial contributing cause of primary lung cancer (Aff in Op, Exh 16 at 16). Dr. Ginsburg concluded, to a reasonable degree of medical certainty, that cumulative exposure to asbestos from defendant’s product was a substantial contributing factor in the development of Mr. Pomponi’s primary lung cancer and death (*id.*). Contrary to defendant’s assertion that plaintiff’s cumulative exposure to asbestos cannot be deemed a substantial contributing factor to plaintiff’s lung cancer, Dr. Ginsburg asserts that “[t]here is no safe minimal level of exposure to asbestos with respect to lung cancer” (*id.* at 13 internal citations omitted). Dr. Ginsburg states that “there is a general consensus among the scientific community, science organizations, and health agencies that exposure to all forms of asbestos including chrysotile, increase the likelihood of developing cancer” (*id.*).

Dr. Ginsburg notes that plaintiff was exposed to visible dust from asbestos-containing products and that the presence of visible dust represents a hazard (*id.* at 16). He further notes that

manipulation and/or disturbances of asbestos-containing floor tiles can result in the release of asbestos fibers that are exponentially greater than the ambient level of exposure (*id.* at 14). Mr. Pomponi testified that from 1969 to 1971 he spent one-third of his time at work in close proximity from tile layers who were cutting and installing Amtico brand asbestos containing floor tiles (Aff in Opp, Exh 5 at 133, 144, 159-160, 487-488). Plaintiff testified that when the tiles were cut, particles and dust would fall from the tile and he would breath in that dust (*id.* at 1097). Plaintiff has demonstrated that Amtico tiles were disturbed and manipulated causing visible dust as described in Dr. Ginsburg's report.

Asbestos floor tiles have been shown by the EPA to result in asbestos fiber concentration as high as 1.016 f/cc, a level of exposure exponentially greater than that cited by Mr. Spencer (Aff in Op, Exh 16 at 16 internal citations omitted). Dr. Ginsburg notes that "the asbestos content of asbestos floor tile is reported to be 8 to 30% by weight. Installation of asbestos floor tile has been reported to result in airborne asbestos concentration as high as 0.26 f/cc" (*id.* at 14). Dr. Ginsburg's report establishes general causation, in that chrysotile asbestos is capable of causing lung cancer. The report cites to many of the same scientific organizations, researchers, and studies cited by Mr. Spencer and submitted by defendant.

The fact that plaintiff and defendant's experts disagree on the underlying science raises a credibility issue that cannot be resolved without jury consideration. 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 AD3d 439 [2011]). In *Marzigliano v Amchem Products, Inc., et al.*, Index No. 190134/2017 Motion Sequence 003, the Honorable Manuel J. Mendez ruled that conflicting affidavits regarding a plaintiff's exposure to chrysotile asbestos fibers raises issues of fact on general causation. Further, as to specific causation the Court noted

that “[p]laintiffs are not required to show the precise causes of damages as a result of [plaintiff’s] exposure to [defendant’s] product, only ‘facts and conditions from which defendant’s liability may be reasonably inferred’”(id. at 6).

Here, like the plaintiff in *Marzigliano*, plaintiff cites to Mr. Pomponi’s testimony which identified Amtico asbestos floor tiles as the source of his exposure to asbestos (Aff in Opp, Exh 5 at 1097). Mr. Pomponi’s deposition combined with the report of Dr. Ginsburg has created “facts and conditions from which [American Biltrite’s] liability may be reasonably inferred” and raises issues of fact (*Reid v Ga.- Pacific Corp.*, 212 AD2d 462 [1st Dept. 1995]). Thus, plaintiff has provided evidence of causation stating that chrysotile fibers cause lung cancer, and the conflicting testimony warrants the denial of defendant’s motion for summary judgment.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of American Biltrite on the grounds that said defendant has made a prima facie case demonstrating lack of causation and to dismiss plaintiff’s Complaint and all cross-claims against American Biltrite is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This Constitutes the Decision/Order of the Court

10/30/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE