

Avakian v Aerco Intl., Inc.

2020 NY Slip Op 33824(U)

November 16, 2020

Supreme Court, New York County

Docket Number: 190036/2018

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

LAURA AVAKIAN,

Plaintiff,

- v -

AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC, BMCE INC., BORGWARNER MORSE TEC LLC, BRIGGS & STRATTON CORP, CARRIER CORPORATION, CERTAINTEED CORPORATION, COMPUDYNE CORPORATION, CROWN BOILER CO., DANA COMPANIES, LLC, DOMCO PRODUCTS TEXAS, INC, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, HONEYWELL INTERNATIONAL, INC., ITT LLC., KARNAK CORPORATION, KOHLER CO., MANNINGTON MILLS, INC, NISSAN NORTH AMERICA, INC, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, RHEEM MANUFACTURING COMPANY, SEARS, ROEBUCK AND CO, SLANT/FIN CORPORATION, STANDARD MOTOR PRODUCTS, INC, TECUMSEH POWER, TECUMSEH PRODUCTS COMPANY, TENNECO AUTOMOTIVE OPERATING COMPANY INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TOYOTA MOTOR SALES U.S.A., INC., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, FEDERAL - MOGUL ASBESTOS PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO.,

Defendant.

INDEX NO. 190036/2018
MOTION DATE 06/29/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 207, 276

were read on this motion to/for DISMISSAL
Before the Court is defendant Mannington Mills, Inc.'s (hereinafter referred to as "Mannington")

motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Mannington 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 Mannington. Plaintiff opposes the motion.

Mannington's motion contends that plaintiff decedent, Donald Avakian, 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 August 17, 2017 diagnosis with fatal lung cancer, which led to his death on June 2, 2019. Plaintiff alleges that the lung cancer was caused by his exposure to asbestos over the course of his career employed by a man named Eddy and then for Vinny Eldora performing home renovation and carpentry work at various residential and apartment complexes in Queens and Long Island, New York between 1975 and 1983. This work included cutting and installing Mannington's sheet flooring at single family homes and apartment complex projects in Queens and Long Island (Aff in Op, Exh 1 at 104, 448).

Here, upon motion for summary judgment, Mannington alleges that it did not cause or substantially contribute to Mr. Avakian's lung cancer. Mannington avers that plaintiff has failed to establish general or specific causation against Mannington. "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 specific causation. Specific causation may not be established where a plaintiff’s exposure to a toxin released from a defendant’s product was “below the practical threshold for the dose necessary to [cause the plaintiff’s disease]” (*Parker*, 7 NY3d at 443). Mannington alleges that based on Mr. Avakian’s testimony; Mannington’s expert industrial hygienist Mark Durham was able to determine plaintiff’s highest lifetime dose of asbestos possibly attributable to his work with Mannington’s flooring (Mot, Exh D at 8). Mr. Durham opined that plaintiff, at most, would have experienced a cumulative dose of asbestos exposure from a Mannington product of only .013 fiber-years per cubic centimeter during the course of his lifetime (*id.*).

Defendant further submits the report of epidemiologist Dr. Dominik Alexander, an expert with regard to occupational and environmental epidemiology, including exposure to asbestos and asbestos-related diseases (Mot, Exh F). Dr. Alexander affirmed that with regard to amosite and crocidolite asbestos, “epidemiologic studies show that workers in occupations where commercial amosite and crocidolite exposure have occurred are at an increased risk of lung cancer, particularly among individuals with asbestosis, and/or at exposure levels exceeding 25 f/cc

years.” (Ex. F, at 20). Defendants note that Mr. Avakian was never diagnosed with asbestosis and that based on the dose estimate performed by Mr. Durham, plaintiff’s lifetime dose of asbestos exposure attributable to his work with Mannington sheet flooring was approximately 0.013 f/cc, which is approximately 0.05% or 1/2000th of the lifetime dose required to establish a known risk of developing asbestos-related lung cancer. Defendant notes that this number is considerably lower than that permitted by OSHA at 4.5 f/cc.

Defendant points the Court to its recent ruling in this matter by the Honorable Manuel J. Mendez in a Decision/Order dated March 16, 2020 in which summary judgment was granted to co-defendant Goodyear based on similar facts and arguments (March 16, 2020 Order of the Hon. Manuel J. Mendez, J.S.C., *Avakian v. Aerco Int’l, Inc., et al.*, Sup Ct, NY County, Mendez, J., Index No. 190036/2018). Defendant draws parallels here between Mannington and Goodyear whose floor tiles plaintiff also claimed exposed Mr. Avakian to asbestos. In the March 16, 2020 Decision/Order, the Court noted that vinyl floor tiles produced by Goodyear during plaintiff’s employment were made of “a non-homogeneous product known as ‘Deluxe on Grade’ or ‘DOG’ that did not contain asbestos (*id.* at 3). Here, DOG tiles are not in question but rather Mannington’s sheet flooring is at issue herein. Plaintiff’s expert Dr. Mark Ellis Ginsburg notes such flooring has been shown to release asbestos fibers as high as 1.016 f/cc (Aff in Op, Exh 8 at 14). Mannington concedes that the EPA has found that the highest potential fiber release from installation of sheet flooring is 1.016 f/cc; however, defendant alleges that Mr. Ginsburg makes no analysis of how often plaintiff would have worked with the product and what kind of exposure to asbestos Mr. Avakian would have had from that work. Defendant cites Goodyear’s expert, Donald Marano, who calculated that Mr. Avakian would have had a lifetime cumulative

exposure of .00037 to .0056 f/cc years, which would have been lower than that permitted by OSHA at 4.5 f/cc (Mot, Exh G).

In opposition plaintiff demonstrates that Mr. Avakian 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 8 at 14). 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. Avakian'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 11 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 6-7 & 14). 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. Avakian testified that from around 1976 to 1978 he worked for Eddy and then for Vinny Eldora from approximately 1978 to 1983 (Aff in Opp Exh 1 at 92, 109). Mr. Avakian testified that while working for Eddy and Mr. Eldora he used Mannington sheet flooring and personally cut it while installing it (*id.* at 104, 448-449). Plaintiff testified that when he cut Mannington sheet flooring

there was dust that he would breath in (*id.* at 585-586). Plaintiff has demonstrated that the Mannington sheet flooring was disturbed and manipulated causing visible dust as described in Dr. Ginsburg's report.

Dr. Ginsburg's report cites 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). This level of exposure is in stark contrast to that proffered by Mr. Marano and Mr. Durham. 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 defendant's experts.

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. Avakian's testimony which identified Mannington asbestos sheet flooring as the source of his exposure to asbestos (Aff in Op, Exh I at 104, 448). Mr. Avakian's deposition combined with the report of Dr. Ginsburg has created "facts and conditions from which [Mannington's] liability may be reasonably inferred" and raises

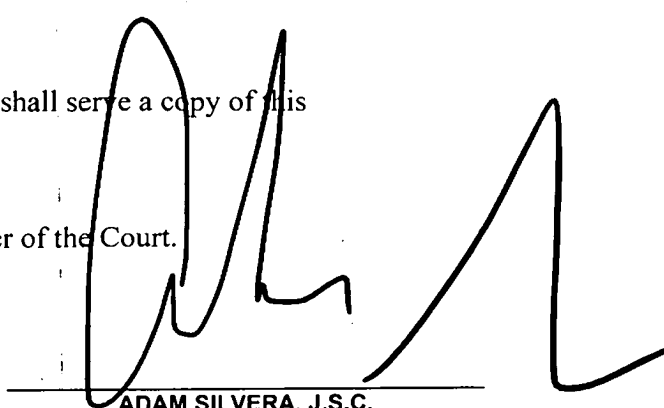
issues of fact (*Reid v Ga.- Pacific Corp.*, 212 AD2d 462 [1st Dept. 1995]). Thus, plaintiff has provided evidence of causation stating that chrysotile fibers cause lung cancer, and the conflicting testimony warrants the denial of defendant's motion for summary judgment.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Mannington 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 Mannington 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.



11/16/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE