

Richards v Amchem Prods., Inc.
2020 NY Slip Op 34827(U)
July 10, 2020
Supreme Court, Erie County
Docket Number: Index No. 814000/2018
Judge: Deborah A. Chimes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

IN Re: EIGHT JUDICIAL DISTRICT ASBESTOS LITIGATION

DONALD RICHARDS, as Executor of the Estate of
WILLIAM RICHARDS,

Plaintiff,

DECISION AND ORDER
Index No. 814000/2018

vs.

AMCHEM PRODUCTS, INC., et al.,

Defendants.

Attorneys

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Chimes, J:

Defendant, American Biltrite (“Biltrite”), moves for summary judgment on the grounds that the Amtico tiles it manufactured did not and could not have caused decedent to develop mesothelioma, and that plaintiff has failed to

establish causation, both specific and general. Plaintiff has opposed the motion asserting that defendant failed to make prima facie showing that its floor tiles could not have caused decedents disease and in the alternative that questions of fact exist as to causation precluding summary judgment. The motion is being decided on submission.

In support of its motion, Biltrite has submitted its Notice of Motion, dated January 14, 2020, Affirmation of Robert E. Demeusy, Esq., dated January 14, 2020, with attached Exhibits A-M,, and Reply Affirmation of Justin A. Reinhardt, Esq., dated February 25, 2020, with attached Exhibits (N-YY). In opposition to the motion plaintiff submitted Affirmation of Thomas M. Comerford, Esq., dated February 4, 2020, with attached Exhibits (1-19).

Plaintiff has brought this action to recover for damages associated with the death of William Richards caused by mesothelioma. Plaintiff alleges that decedent was injured by exposure to asbestos contained in the Amtico floor tiles he used in the course of his employment while working for TDH Refrigeration at grocery stores in Buffalo from 1966 through 1995, and at Ryan Homes Construction at many residential work sites from 1950 through the 1980's. Plaintiff asserts that decedents exposure to asbestos (more specifically Chrysotile), was caused by his use of Amtico brand floor tiles which included the handling and installation of the tiles as well as using a utility knife to cut the tiles. Decedent testified at deposition that he was able to visually see the asbestos dust that he inhaled, and that he never used a mask or respiratory protection.

Decedent identified the tiles as Amtico tiles stating that the tiles were 12 x 12, and 1/8th of an inch thick, they came in different colors and were smooth to the touch, that they came in a brown, square cardboard box, and the packaging said "Amtico" in block lettering. Decedent was diagnosed with mesothelioma on August 2, 2018 and died on January 15, 2019.

Biltrite initially argues that plaintiff cannot establish that he was exposed to asbestos by Amtico floor tiles based on his general description of the tiles. Biltrite admits that certain Amtico tiles contained asbestos and that certain tiles did not contain asbestos. They argue that plaintiff never adequately identified working with the asbestos-containing tiles. Decedent identified the tiles as "Amtico" tiles but did not ever see the word "asbestos" associated with the tiles. Defendant submitted an affidavit from Rodger Marcus stating that Biltrite manufactured both asbestos-containing and non-asbestos containing vinyl flooring products that were similar in appearance (NYSEF Doc 134). Decedent did testify that he saw the asbestos fibers in the air while he was cutting the tiles.

Biltrite presented expert affidavits from Certified Industrial Hygienist John Spencer which defendant claims contains objective scientific data demonstrating that the floor tile containing chrysotile asbestos does not and could not cause mesothelioma in the general population. Mr. Spencer's opinions include that even if decedent was exposed to chrysotile, his lifetime cumulative exposure was at or below at the USEPA clearance limit, and below OSHA and WHO permissible exposure limits (NYSEF Doc. 100). Spencer uses dose

reconstruction analyses to determine that decedent's exposure to chrysotile was no greater than that of the general population and therefore could not have been a substantial contributing factor to his development of mesothelioma.

Bilrite also submitted expert affidavits from Pathologist Dr. Stanley Geyer and Pulmonologist Dr. James Crapo to state that the use of Amtico floor tile does not and could not cause mesothelioma in the general population and therefore it would not and could not in decedent. Crapo and Geyer concluded that decedent was exposed to a negligible amount of chrysotile. They both relied on and incorporated numerous scientific studies in developing their opinions.

Plaintiff disagrees with defendants' position and asserts that no legitimate scientific organization or scientist has exempted chrysotile from the forms of asbestos known to cause mesothelioma. Plaintiff indicates that there are just as many studies which have concluded that all asbestos fiber types, including chrysotile are responsible for the etiology of lung cancer and mesothelioma.

Plaintiffs submits expert opinions from Dr. Brent Staggs, and Dr. Mark Ellis Ginsburg (NYSEF Docs. 127 and 128 respectively). Plaintiff's experts compare the facts of this case to scientific literature and conclude that decedents exposure to Amtico tiles containing visible asbestos, as testified to by decedent, was a substantial contributing factor to his development of mesothelioma. Interestingly, plaintiffs and defendants' experts rely on many of the same studies, to reach their differing opinions.

Analysis

To prevail on a motion for summary judgment, the proponent must make its 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 [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, enough to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 [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, [1st Dept.1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, [1983], aff'd 62 NY2d 686, 465 NE2d 30 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136 [1st Dept. 2003]).

In cases alleging asbestos exposure, a defendant must "make prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.- Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79 [1st Dept. 1995]). The defendant must "unequivocally establish that its

product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520 [1st Dept. 2014]). "Plaintiff is not required to show the precise causes of his damages, but only show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga.-Pacific Corp.*, 212 AD2d 462 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285).

General causation is demonstrated by the levels of exposure to the product at issue, with a specified toxin as a component, sufficient to cause the disease to the general population, while specific causation requires a showing that the plaintiff's actual exposure to the product at issue, with a specified toxin as a component, was at levels sufficient to be a substantial contributing factor to the cause of the plaintiff's disease (see *Parker v Mobil Oil Corp.*, 7NY3d 434 [2006]).

Amtico argues that since the plaintiff has offered no scientific evidence of general causation showing that the floor tiles could cause mesothelioma, the plaintiff cannot satisfy the burden of demonstrating general and specific causation that decedent's work in the presence with Amtico floor tiles was a substantial contributing factor to his development of mesothelioma. However, the initial burden is on Biltrite to establish a prima facie showing that its product "could not have contributed to the causation of decedent's injury" (see *Comeau*,

supra., *emphasis added*). Biltrite has not established the lack of causation.

However, even if Biltrite was able to establish a prima facie showing, plaintiff has raised issues of fact to be resolved at trial. Plaintiff has submitted testimony from decedent as to his use of asbestos containing Amtico tiles, as well as submitting competing expert affidavits in opposition to defendants, which warrant a trial on the issue of causation. Similarly, as to specific causation there are competing expert affidavits which raise issues of fact to be resolved at trial.

Conclusion

Based on the foregoing, it is hereby;

ORDERED that defendants motion for summary judgment is denied in all respects.

SO ORDERED: July 10, 2020



HON. DEBORAH A. CHIMES
Justice of the Supreme Court