

Layton v Amchem Prods., Inc.
2021 NY Slip Op 30189(U)
January 22, 2021
Supreme Court, New York County
Docket Number: 190063/2019
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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MICHAEL LAYTON,

Plaintiff,

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC
AG COMPANY, N/K/A BAYER CROPSCIENCE INC,
AMERICAN BILTRITE INC, BIRD INCORPORATED, CBS
CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY
MERGER TO CBS CORPORATION, F/K/A
WESTINGHOUSE ELECTRIC CORPORATION,
CERTAINTED CORPORATION, DAP, INC., DOMCO
PRODUCTS TEXAS, INC, GENERAL ELECTRIC
COMPANY, KARNAK CORPORATION, MANNINGTON
MILLS, INC, PFIZER, INC. (PFIZER), THE B.F. GOODRICH
COMPANY, (GOODRICH CORPORATION), U.S.
RUBBER COMPANY (UNIROYAL), UNION CARBIDE
CORPORATION, WEIL-MCLAIN, A DIVISION OF THE
MARLEY-WYLAIN COMPANY, A WHOLLY OWNED
SUBSIDIARY OF THE MARLEY COMPANY, LLC,

Defendant.

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INDEX NO. 190063/2019
MOTION DATE 08/31/2020
MOTION SEQ. NO. 002

**AMENDED DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218

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

Before the Court is defendant Mannington Mills, Inc. (hereinafter referred to as “Mannington”) motion, motion sequence 002, 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 has failed to establish specific causation for plaintiff decedent Michael Layton’s (“Decedent”) lung cancer in relation to Mannington’s products. The case at issue arises from plaintiff’s July 16, 2017 diagnosis with fatal lung cancer,

which led to his death on April 17, 2020. Plaintiff alleges that the lung cancer was caused by his prolonged, substantial exposure to asbestos over the course of his career during which he was involved in the removal and replacement of all types of flooring, including Mannington brand flooring, at thousands of work sites.

Here, upon motion for summary judgment, Mannington alleges that it did not cause or substantially contribute to Decedent'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 Decedent'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 9). Mr. Durham opined that plaintiff, at most, would have experienced a cumulative dose of asbestos exposure from a Mannington product of only .0019 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 Decedent was never diagnosed with asbestosis and that based on the dose estimate performed by Mr. Durham, plaintiff's lifetime dose of asbestos exposure was approximately 0.047 f/cc, which is approximately 0.19% or 1/500th of the lifetime dose required to establish a known risk of developing asbestos-related lung cancer. Defendant notes that this number "was actually orders of magnitude lower than that permitted by OSHA by (4.5 f/cc)" (Mot at 12). .

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

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. 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 which 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, as noted above Defendant cites Dr. Durham's report who calculated that Decedent had a lifetime cumulative exposure of to asbestos which was lower than that permitted by OSHA at 4.5 f/cc (Mot at 12).

In opposition plaintiff demonstrates that Decedent 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. Ginsburg, who noted that asbestos alone is a recognized substantial contributing cause of primary lung cancer (Aff in Op, Exh 8 at 12). Dr. Ginsburg concluded, to a reasonable degree of medical certainty, that while Decedent's smoking history was a contributing cause to his lung cancer, it is also his opinion that cumulative exposure to asbestos from defendant's product was a substantial contributing factor in the development of Decedent's primary lung cancer and death (*id.* at 12-13). 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 10 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.* at 9 internal citations omitted).

Plaintiff submitted Decedent’s testimony that he inhaled visible dust from defendant’s asbestos containing floor tiles. Dr. Ginsburg notes that the presence of visible dust represents a hazard (*id.* at 12). 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 11). Decedent testified that he used Mannington sheet flooring and cut it while installing it (Mot Exh C at 400-402) Plaintiff testified that when he cut Mannington sheet flooring there was dust that he would breath in (*id.* at 402). 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 11). This level of exposure is in stark contrast to that proffered by 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 Decedent’s testimony, which identified Mannington asbestos sheet flooring as the source of his exposure to asbestos (Mot, Exh C at 400-402). Decedent’s deposition combined with the report of Dr. Ginsburg demonstrate “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 AMENDED Decision/Order of the Court,

ADAM SILVERA, J.S.C.

1/22/2021
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
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APPLICATION:

CHECK IF APPROPRIATE: