

Layton v Amchem Prods., Inc.
2021 NY Slip Op 30190(U)
January 22, 2021
Supreme Court, New York County
Docket Number: 190063/2019
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

-----X

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, CERTAINTIED CORPORATION, DAP, INC., DOMCO PRODUCTS TEXAS, INC, GENERAL ELECTRIC COMPANY, KARNAK CORPORATION, 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.

-----X

INDEX NO. 190063/2019
MOTION DATE 09/01/2020
MOTION SEQ. NO. 003

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER). Before the Court is defendant American Biltrite Inc.'s (hereinafter referred to as "Biltrite")

motion, motion sequence 003, for summary judgment, pursuant to CPLR 3212, for a finding in favor of 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 Biltrite.

Plaintiff opposes the motion.

Biltrite's motion contends that plaintiff has failed to establish specific causation for plaintiff decedent Michael Layton's ("Decedent") lung cancer in relation to Biltrite'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 Biltrite's "Amtico" brand floor tile, at thousands of work sites.

Here, upon motion for summary judgment, Biltrite alleges that it did not cause or substantially contribute to Decedent's lung cancer. Biltrite avers that plaintiff has failed to establish general or specific causation against 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 or 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). Biltrite alleges that Amtico floor tiles could not have exposed Decedent to levels of chrysotile asbestos that could be a substantial contributing factor to the development of lung cancer. In support of their motion, Biltrite submits the Expert Report of John W. Spencer, CIH, CSP and Marc J. Plisko, CIH (Mot Exh B). Based on Decedent's testimony, Mr. Spencer and Mr. Plisko determined that Decedent's cumulative exposure from working with Amtico floor tiles was .00061 fiber-years per cubic centimeter during the course of his lifetime (*id.* at 14). Mr. Spencer and Mr. Plisko concluded that Decedent's cumulative exposure to asbestos from Amtico flooring was "1) indistinguishable from some lifetime cumulative exposures to ambient asbestos, 2) well below a working lifetime at the OSHA and WHO permissible exposure limits, and 3) also well below lifetime cumulative exposure at the USEPA clearance limit following an asbestos abatement action" (*id.* at 14-15).

Biltrite also submit the reports of medical expert Dr. Stanley J. Geyer, a pathologist, who concluded "any work [Decedent] performed installing Amtico floor tiles created a negligible and insignificant exposure to chrysotile asbestos . . . that would have been insufficient to the cause of his lung cancer"(Mot, Exh E at 2). Dr. Geyer noted that a study of Amtico floor tiles conducted by Environmental Profiles, Inc. showed that Amtico floor tiles presented chrysotile exposures that did not exceed the current OSHA average permissible exposure level of .1 f/cc (*id.*). Dr. Geyer affirmed, "published medical studies support the need for the presence of asbestosis to

attribute the cause of lung cancer to asbestos exposure” (*id.* at 3). Dr. Geyer noted that Decedent showed “no evidence of asbestosis and because of [Decedent’s] history of smoking cigarettes, [Dr. Geyer concluded] that tobacco smoke, with no contribution from asbestos exposure, caused [Decedent’s] lung cancer” (*id.* at 3). Biltrite also submits the Expert Report of Dr. James Crapo, a pulmonologist, who concluded that Decedent did not develop asbestosis and that in the absence of asbestosis he “conclude[d] that [Decedent’s] possible work with or exposure to floor tiles sold by American Biltrite would not have contributed to his risk for developing carcinoma of the lung and of the nasopharynx” (Mot, Exh M at 3).

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 18 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 Amtico sheet flooring and cut it while installing it (Aff in Op, Exh 4 at 396, ¶¶13-18). Plaintiff testified that when he cut sheet flooring there was dust that he would breath in (*id.* at 394, ¶¶18-22). Plaintiff has demonstrated that the Amtico 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 Dr. Geyer. 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 Amtico asbestos sheet flooring as the source of his exposure to asbestos (Aff in Op, Exh 4 at 394, ¶¶18-22; 396, ¶¶13-18). Decedent’s deposition combined with the report of Dr. Ginsburg demonstrate “facts and conditions from which [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 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 Biltrite is denied; and it is further

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

This Constitutes the AMENDED Decision/Order of the Court.

ADAM SILVERA, J.S.C.

1/22/2021
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: