

Sprague v ABB, Inc.

2021 NY Slip Op 30254(U)

January 27, 2021

Supreme Court, New York County

Docket Number: 190342/2018

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

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LORRAINE SPRAGUE, INDEX NO. 190342/2018

Plaintiff(s), MOTION DATE 11/13/2020

- v - MOTION SEQ. NO. 005

ABB, INC. As successor in interest to ITE CIRCUIT BREAKERS, INC., et al. DECISION + ORDER ON MOTION

Defendant(s).

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 328, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355

were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendant Federal-Mogul Asbestos Personal Injury Trust's motion as Successor to Felt Products Manufacturing Company (hereinafter "Fel-Pro" or "Defendant") for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's Complaint and all cross-claims, based on plaintiff's alleged failure to put forth legally sufficient evidence to establish an issue of material fact as to whether respirable asbestos fibers from Fel-Pro brand products were a substantial contributing cause of plaintiff's mesothelioma. Plaintiff opposes the motion.

Defendant's motion contends that plaintiff has failed to establish that a Fel-Pro product was a substantial factor in causing plaintiff's alleged injuries. The case at issue arises from plaintiff Lorraine Sprague's, August 3, 2018 malignant diagnosis of mesothelioma, which plaintiff alleges was caused by her exposure at home to asbestos from her husband's clothing. Plaintiff's husband, David Sprague worked as a dredge man as an oiler/wiper and as a

tugboat/marine engineer from the early 1960s until his retirement in 1987 (Mot, Exh D at 81, 104). Mr. Sprague passed away from lung cancer in 2003 (Aff in Op Exh 1 at 6).

Plaintiff produced two fact witnesses for discovery depositions regarding product identification: Alvin Powers and Charles Chillemi (Mot, Exh E & F). Mr. Powers worked with plaintiff's late husband and testified that he did not remember using Fel-Pro products (Mot Exh E). Mr. Chillemi testified that he recalled seeing several brands of gaskets including Fel-Pro and that cutting gaskets would sometimes create dust (Exh F at 54, 184, 398). Here, upon motion for summary judgment, Fel-Pro alleges that it did not cause plaintiff's injuries, and that Fel-Pro can establish the absence of any evidence of plaintiff's exposure to a Fel-Pro product.

"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 the absence of evidence of plaintiff's exposure to Defendant's products establishes Defendant's facial non-liability, and shifts to plaintiff the burden of demonstrating, by admissible evidence, the existence of a factual issue requiring a trial of the action, or of tendering an acceptable excuse for plaintiff's failure to do so. Defendant argues that to meet this burden, plaintiff must first establish that he or she was exposed to the defendant's product, which requires identification of the specific defendant-manufacturer of the offending product (*Cawein v. Flintkote Co.*, 203 A.D.2d 105, 106 [1st Dept 1994]). According to defendant, plaintiff has not presented evidence creating a reasonable inference that plaintiff breathed in respirable asbestos fibers from Fel-Pro products and, thus, proximate cause cannot be established.

Defendant notes that the present case involves a similar set of facts as that in *Cawein* and should be decided in the same manner. Defendant states that the only identification of Fel-Pro established by plaintiff, that Fel-Pro products were sometimes present on a ship where plaintiff's witness sometimes worked and where plaintiff's husband sometimes worked, is insufficient to establish proximate cause. Defendant further argues that even if Mr. Chillemi could demonstrate that plaintiff's husband worked with Fel-Pro gaskets, said exposure would have been below risk levels associated with mesothelioma. Defendant submits the report of Fel-Pro's expert, Certified Industrial Hygienist, Dr. Jeffrey Birkner, who concluded that if plaintiff was exposed to any respirable fibers from Fel-Pro gaskets, her exposure "would have been far below cumulative lifetime ambient levels, insignificant, and many orders of magnitude below the requisite amount to place her at risk of any asbestos-related disease" (Mot, Exh G at ¶ 11).

Defendant argues that plaintiff cannot defeat the present motion with unsupported, speculative, or conclusory allegations and that mere speculation that a particular product was present at a worksite or that a particular product contained asbestos-containing materials is insufficient to create a triable issue of fact (*Morris v. A.O. Smith Water Products*, Index No. 190082/2009 [NY Sup. J. Mendez, April 15, 2019]; *Leavitt v. A.O. Smith Water Products, Inc.*, 2019 NY Slip Op 31916(U) [NY Sup. J. Mendez, July 1, 2019]). Defendant avers that plaintiff's expert, Dr. Staggs, offers no means of calculating estimated respirable fiber release from Fel-Pro gaskets. Further, defendant argues that Mr. Chillemi's general recollection that Fel-Pro products may have been used at the various boats and ships, in which David Sprague worked, does not identify that plaintiff's husband worked with Fel-Pro products.

Defendant avers that plaintiff's witnesses provide no testimony that plaintiff was exposed to, breathed, inhaled, or even came into contact with any dust produced from her husbands alleged work with a Fel-Pro gasket. Defendant notes that Mr. Chillemi was not certain that Fel-Pro gaskets or sheet material were in stock when he and plaintiff's husband worked together, noting, "if they were in stock . . . we used them" (Mot, Exh F at 399). Thus, defendant argues that plaintiff cannot put forth any evidence, other than the speculative and conclusory assertions of Mr. Chillemi's testimony, establishing that plaintiff was exposed to asbestos fibers released from a Fel-Pro product.

In opposition, plaintiff argues that there may be more than one proximate cause of an injury and that the plaintiff is not required to demonstrate "that the precise manner in which the accident happened, or the extent of the injuries was foreseeable" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). A plaintiff need not demonstrate the precise cause of his/her damages, but only facts and conditions from which defendant's liability can be reasonably

inferred (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). Plaintiff argues that defendant has failed to meet its burden to show that its product could not have contributed to the causation of plaintiff's asbestos-related injuries (*In re New York City Asbestos Litig.: DiSalvo v. A.O. Smith Water Prods.*, 123 AD3d 498, 499 [1st Dept 2014])

Notably, a defendant cannot satisfy this burden by merely pointing to gaps in a plaintiff's proof (*Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524, 525 [1st Dept 2009]). Here, the Court notes that defendant's motion relies solely on gaps in plaintiff's proof in an attempt to meet its burden. Defendant has made conclusory allegations that none of plaintiff's witnesses sufficiently allege that plaintiff was exposed to asbestos from Fel-Pro's products. Defendant has provided no evidence that its gaskets, which plaintiff's witness testified, were present at the various boats and ships where plaintiff's husband worked, were not manufactured with asbestos. Defendant has provided no evidence that their product did not create visible asbestos dust, which could have gotten onto Mr. Sprague's clothing and been inhaled by plaintiff at home for a span of over two decades. Plaintiff has provided testimony from Mr. Chillemi who stated that he remembered plaintiff's husband working on Fel-Pro gaskets and that a lot of dust was produced from cutting the gaskets (Mot Exh F at 398-406).

Fel-Pro contests causation, but merely provides a single report from an industrial hygienist, not a physician nor medical expert, in support of defendant's motion. Fel-Pro "bears the initial burden to establish that exposure to the asbestos from [its products] could not have contributed to [mesothelioma] or that [Plaintiff] was not exposed to levels of asbestos sufficient to contribute to the development of his disease" (*Pogacnik v A.O. Smith Water Prods. Co.*, 60 Misc. 3d 1208[A], 2018 NY Slip Op 51026[U], *2 [Sup Ct, NY County 2018]). Plaintiff successfully argues that Mr. Birkner is not qualified to proffer an opinion about the cause of

plaintiff's disease, nor does he do so (*Burton v. American Cyanamid*, 362 F. Supp.3d 588, 601 [E.D. Wis. 2019] [excluding industrial hygienist's "general opinions about lead toxicity and effects on children because his expertise is not in this area"]; *Buzzerd v. Flagship Carwash of Port St. Lucie, Inc.*, 669 F. Supp.2d 514, 528 [M.D. Pa. 2009] ["Plaintiffs have not shown that an industrial hygienist is qualified to express an opinion on causation"]; *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 865-66 [Del. Super. 2000]) [precluding certified industrial hygienist from proffering any causation opinion, because he "lacks the medical training necessary to testify as to a medical causation for the injuries"]. Defendant has merely pointed to gaps in plaintiff's proof and has failed to provide evidence to prove that plaintiff was not exposed to asbestos from its product. Thus, defendant has failed to meet its burden for summary judgment and defendant's motion to dismiss plaintiff's Complaint and all cross-claims is denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Fel-Pro on the grounds that plaintiff has failed to put forth legally sufficient evidence to establish an issue of material fact as to whether any product manufactured, sold or distributed by Fel-Pro caused or contributed to plaintiff's mesothelioma and to dismiss plaintiff's Complaint and all cross-claims against Fel-Pro 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 Decision/Order of the Court

1/27/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE