

Milan-Leal v Brenntag N. Am.
2021 NY Slip Op 30636(U)
March 3, 2021
Supreme Court, New York County
Docket Number: 190354/2018
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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VANESSA MILAN-LEAL, as Executrix for the Estate of
ELIZABETH MILAN,

INDEX NO. 190354/2018

MOTION DATE 11/17/2020

Plaintiffs,

MOTION SEQ. NO. 003

- v -

BRENNTAG NORTH AMERICA, *et al.*

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 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

were read on this motion to/for DISMISSAL.
Before the Court is defendant Lot Less of Fulton Street Inc. and defendant Lot Less of NYC,

Inc.'s (hereinafter referred to as "Lot Less") motion for summary judgment, pursuant to CPLR 3212, for an Order granting dismissal of plaintiff's claims and all cross-claims against Lot Less and granting Lot Less's cross claims for common law and contractual indemnity. Plaintiff opposes the motion and defendant Bristol-Meyers Squibb Company, defendant Cyprus Amax Minerals Company, defendant Whittaker, Clark & Daniels, Inc, Defendants Johnson & Johnson, Johnson & Johnson Consumer Inc., and Johnson & Johnson Health and Wellness Solutions, Inc., defendant Kolmar Laboratories all oppose Lot Less's motion concerning their contractual and common law indemnification cross-claims.

Lot Less's motion contends that plaintiffs have failed to (1) demonstrate that plaintiff decedent, Elizabeth Milan ("Decedent") used a product sold by Lot Less that actually contained asbestos, (2) demonstrate that Johnson & Johnson talcum powder was contaminated at any time, (3) establish negligence (4) establish negligence per se, (5) establish that Lot Less breached

express and implied warranties, (6) establish strict liability, and (7) specifically identify Lot Less's role in an alleged fraudulent conspiracy. Lot Less also seeks affirmative relief under common law indemnification and contractually from co-defendants.

The case at issue arises from Decedent's August 23, 2018 diagnosis with Mesothelioma, which led to her death on December 24, 2018. Plaintiffs allege that Decedent's death was caused by her exposure to asbestos containing Johnson & Johnson talcum powder, which she allegedly purchased from the Lot Less of Fulton Street, Inc. located at 95 Fulton Street, New York, NY. Here, upon motion for summary judgment, Lot Less alleges that plaintiffs claim of negligence fails as a matter of law and as a matter of fact. Lot Less notes that plaintiff's negligence claims are directed at manufacturers and further argue that plaintiffs have failed to allege any facts supporting that Lot Less, a retailer, failed to exercise reasonable care with respect to talcum powder products in this case.

"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 fact finder 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, the Court finds that defendant has failed to meet its prima facie burden. Defendant has not submitted admissible evidence sufficient to prove that it could not have caused Decedent’s illness by selling her asbestos-containing products. Lot Less mistakenly contends that as a retailer it cannot be found negligent or strictly liable for goods it did not produce. It is well settled law that strict liability may be imposed on retailers of defective products because retailers are in a position to influence manufacturers to improve the safety of products (*Finerty v. Abex Corp.*, 27 N.Y.3d 236, 241 [2016] quoting *Sukljian v. Ross & Son Co.*, 69 N.Y.2d 89, 94, 511 N.Y.S.2d 821 [1986] [finding that retailers and distributors of allegedly defective products are usually “in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation”]).

Defendants unconvincingly argue that plaintiffs cannot meet their evidentiary burden in showing that Johnson & Johnson Talcum Powder was contaminated and sold by Lot Less. Defendants argue that “the very most Plaintiff could hope to prove, even crediting all of their evidence is that some Johnson & Johnson Baby Powder, which may have been sold by [Lot Less] may have been contaminated, which is not sufficient to support an inference that Ms. Milan personally used tainted products, let alone tainted products sold by [Lot Less]” (Mot. ¶ 23).

However, the Court notes that in an asbestos personal injury action, the Appellate Division has held that, “[t]he plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant’s liability may be reasonably inferred” (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 2014] [finding that “[An asbestos] defendant’s own failure, in the first instance, to unequivocally establish that its product could not have contributed to the causation of plaintiff’s injury [requires] denial of its motion for summary judgment”]).

Here, defendant has failed to meet its heavy initial burden that Johnson & Johnson Talcum Powder could not have contributed to the causation of Decedent’s injury (*In re New York City Asbestos Litig.: DiSalvo v A.O. Smith Water Prods.*, 123 AD3d 498, 499 [1st Dept 2014]). Instead of demonstrating that they could not have contributed to Decedent’s illness and death, Lot Less points to a “gap in proof” –that Johnson & Johnson’s powder purchased by Decedent has not yet been tested for asbestos. The Court notes that a defendant cannot satisfy its burden by merely pointing to gaps in a plaintiff’s proof (*Alvarez v 21st Century Renovation Ltd.*, 66 AD3d 524, 525 [1st Dept 2009]). Thus, the branch of Lot Less’s motion for an Order granting dismissal of plaintiff’s claims and all cross-claims against Lot Less is denied.

The branch of Lot Less’s motion for an Order granting Lot Less’s cross claims for common law and contractual indemnity is also denied. Lot Less notes that it is well settled that a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product (*McDermott v City of New York*, 50 NY2d 211, 217 [1980]).

However, the Court notes that the matter at hand is not ripe for resolution as the underlying claims against Lot Less have not been resolved. It is well settled that when the underlying claims have not been adjudicated, indemnification is not ripe for resolution (*Francescon v. Gucci Am.*,

Inc., 71 A.D.3d 528, 529 [1st Dept 2010] [finding that contractual and common-law indemnification were premature because the underlying liability issue has yet to be determined]).

As such, Lot Less’s motion for summary judgment is denied in its entirety.

Accordingly, it is

ORDERED that the branch of defendant’s motion for summary judgment, pursuant to CPLR 3212, for an Order granting dismissal of plaintiff’s claims and all cross-claims against Lot Less is denied; and it is further

ORDERED that the branch of defendant’s motion for an Order granting Lot Less’s cross claims for common law and contractual indemnity 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.

3/3/2021
DATE

ADAM SILVERA, J.S.C.

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