

Berger v Aerco Intl., Inc.
2021 NY Slip Op 30743(U)
March 11, 2021
Supreme Court, New York County
Docket Number: 190376/2018
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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STANLEY BERGER, as Administrator for the Estate of
LORRAINE T. BERGER and STANLEY BERGER,
Individually,

INDEX NO. 190376/2018

MOTION DATE 11/23/2020

Plaintiff,

MOTION SEQ. NO. 003

- v -

**DECISION + ORDER ON
MOTION**

AERCO INTERNATIONAL, INC., et. Al.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239

were read on this motion to/for DISMISS.

Before the Court is defendant Vanderbilt Minerals, LLC's ("Vanderbilt") motion for summary judgment, pursuant to CPLR 3212, dismissing all claims and causes of action, including any and all cross claims, against Vanderbilt or in the alternative granting partial summary judgment in favor of Vanderbilt as to any and all claims and causes of action, including cross-claims, relating to products manufactured by defendant American Art Clay Company, Inc. ("AMACO").

Plaintiff opposes the motion.

The case at issue stems from plaintiff Lorraine Berger's ("Decedent") June 22, 2018 diagnosis of mesothelioma that led to her death on April 30, 2019. Plaintiffs allege that Decedent's disease was causally connected to her asbestos exposure from products, which contained Vanderbilt's asbestos-containing Talc. Vanderbilt's motion contends that Vanderbilt talc did not cause Decedent's mesothelioma, that plaintiff cannot demonstrate that Decedent's

injury was caused by exposure to any AMACO products, that Vanderbilt had no duty to warn plaintiff, and that even if Vanderbilt had breached such a duty it would not have been a proximate cause of Decedent's injury.

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 plaintiffs' 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). Vanderbilt avers that their talc does not contain asbestos. Defendant notes that the Mine Safety and Health Administration ("MSHA"), which is tasked with the safety and health of people employed at mines, regularly analyzed talc ore from Vanderbilt's predecessor, Gouverneur Talc Company's ("GTC") property and did not find asbestos in the minerals from the mine (Mot, Exhibit 8 & 9). Vanderbilt further notes that the U.S. Environmental Protection Agency also made it clear that no mineral component found in GTC's talc was regulated or considered to be asbestos (Exhibit 10). Vanderbilt submits admissible evidence, in the form of expert reports and peer reviewed mineralogical studies, which demonstrate that talc in Vanderbilt's NYTAL 100HR, 99 and/or 300 did not contain asbestos.

Vanderbilt's expert, Dr. Mickey Gunter, undertook a study to determine if NYTAL contained asbestos, and concluded that no asbestos was observed in NYTAL samples (Mot, Exh 16 at 2). Vanderbilt's epidemiological expert Linda Dell, critically evaluated numerous scientific articles and research on talc and risk factors for mesothelioma, and "conclude[d] to a reasonable degree of epidemiological certainty that [Decedent's] exposure to talc did not cause her mesothelioma" (Exh 17 at 23). Further, Vanderbilt's expert Dr. Tim D. Oury concluded, "that any exposure to Vanderbilt talc would not have been a significant contributing factor in the pathogenesis of [Decedent's] tumor" (Mot, Exh 18).

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. Plaintiffs submit the report of Dr. Brent C. Staggs, a medical causation expert who concluded "cumulative exposures to asbestos from each company's product or products identified in testimony was a substantial contributing factor to the overall cumulative dose of asbestos and the

development of Mrs. Berger's malignant mesothelioma" (Aff in Op, Exh 2 at 15). Plaintiff submits the report of Dr. Mark Ellis Ginsburg a medical causation expert who concluded that "[Decedent's] described exposure to AMACO slip and glazes, GARE slip and glazes, DUNCAN underglazes, MAYCO slips and glazes and the vermiculite-containing packaging of ORTON cones; individually and cumulatively caused her mesothelioma" (*id.* at 22).

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 mesothelioma" (*id.* at 20 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, increases the likelihood of developing cancer" (*id.*). Dr. Staggs notes that plaintiff testified to having been exposed to visible dust from asbestos-containing products (*id.* at 13). Dr. Ginsburg notes that the presence of visible dust represents a hazard (*id.* at 21). Plaintiff has demonstrated that the visible dust was created from the use of Vanderbilt's products as described in Dr. Ginsburg's report.

Dr. Ginsburg's report cites that, "[t]he presence of visible dust production during manipulation of an asbestos-containing product provides a semi-quantitative measurement of the respirable asbestos in the individual's immediate environment. Johnson specifically noted that '5 mppcf is invisible to the naked eye', the threshold limit value (TLV) established by ACGIH in 1948, which significantly exceeds the current OSHA PEL of 0.1 f/cc TWA" (*id.* at 21). This level of exposure is in stark contrast to that proffered by Dr. Gunter. 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, which 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 that identified Vanderbilt products, such as Gare slip, as the source of his exposure to asbestos (Mot, Exh 6 at 280). Decedent's deposition combined with the report of Dr. Ginsburg has created "facts and conditions from which [Vanderbilt'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 the branch of defendant's motion for summary judgment which seeks to dismiss all claims and causes of action, including any and all cross claims, against Vanderbilt.

The branch of defendant's motion, which seeks partial summary judgment in favor of Vanderbilt as to any and all claims, and causes of action, including cross-claims, relating to

products manufactured by defendant AMACO is granted. Vanderbilt argues that as a bulk supplier of AMACO, Vanderbilt had no affirmative duty to warn plaintiffs about AMACO products; and, even assuming an issue of fact exists as to whether Vanderbilt owed a duty to warn plaintiffs, any alleged breach by Vanderbilt was not a proximate cause of Decedent's injury. Decedent alleged that she had used AMACO wet glaze product (Mot Exh 6 at 101, ¶¶ 2-7).

Vanderbilt avers that it's NYTAL talc was never used in AMACO's wet glaze product. Vanderbilt points to the deposition of William Berry, a corporate designee of AMACO, who testified that AMACO glaze, did not contain talc (Mot, Exh 14 at 105, ¶¶ 14-16). Decedent testified that she used AMACO slip product (Mot, Exh 6 at 126, ¶¶ 5-8). According to AMACO's answers to interrogatories and Mr. Berry's testimony, the only casting slip product sold by AMACO that contained talc supplied by Vanderbilt was a No. 15 blend product (Exhibit 13 at 6; Exhibit 11 at 46, ¶¶13-47, ¶18). Thus, Vanderbilt's motion contains evidence that Vanderbilt's asbestos containing talc product was used in AMACO's product. Mr. Berry testified that the No. 15 formula contained NYTAL 100 Talc in it through 2007 (Mot, Exh 11 at 46, ¶10-47, ¶2). Further, Mr. Berry testified that AMACO purchased NYTAL talc from Vanderbilt to mix into its white-bodied clay (Aff in Opp, Exh 5 at 105-106). As such, the Court must analyze whether Vanderbilt had no affirmative duty to warn plaintiffs about AMACO products.

In opposition, plaintiffs argue that whether a bulk supplier has a duty to warn an end user of the hazards of using its product is for the jury to decide and not appropriate for summary judgment. Plaintiffs argue that "[i]n order for a defendant to avail itself of the bulk supplier doctrine's defense, it must establish as an initial matter that it adequately warned the intermediary manufacturer of the dangers associated with the use of its product" (Aff in Opp at

6, ¶52 citing *Rivers v. AT&T Technologies, Inc.*, 147 Misc.2d 366, 554 N.Y.S.2d 401 [Sup. Ct. N.Y. County 1990]). “While the bulk supplier doctrine seeks to limit manufacturers' liability to the end consumer, it still obligates them to “adequately warn” their distributees” (*Macek v CBS Corp*, 1 Misc 3d 1204[A], 2003 NY Slip Op 50450[U] [Sup Ct, NY County 2013]). Here, the Court finds that Vanderbilt has established that it adequately warned AMACO of the dangers associated with the use of its product. Vanderbilt has demonstrated that it provided Material Safety Data Sheets (“MSDS”) to AMACO in addition to corresponding with AMACO employees regarding the mineralogical content of Vanderbilt Talc products (Mot, Exh 11 at 125, ¶20- 126, ¶13; 20-22). Defendant’s motion contains evidence that Vanderbilt adequately warned AMACO of the asbestos containing products, which AMACO used to make its end product.

Mr. Berry’s testimony demonstrates that Vanderbilt’s warnings were given to AMACO who in turn did not use them on their finished products (*id.* at 126-127). AMACO relied upon outside evaluators at Duke University who tested their products and told them how to label the products (*id.* at 126 and 129). As such, Vanderbilt has demonstrated that it had no input or control over the formulation, manufacturing or labeling of the ultimate end products sold by AMACO. As a sophisticated user of asbestos products, AMACO was aware of the toxicological characteristics of Vanderbilt talc and should have taken the necessary precautions when handling the product (*Rivers*, 147 Misc.2d 366 at 371). Vanderbilt has successfully argued that as a bulk supplier, it properly executed its duty to warn AMACO, and thus had no duty to warn Decedent of AMACO end products. Thus, the branch of defendant’s motion, which seeks partial summary judgment in favor of Vanderbilt as to any and all claims, and causes of action, including cross-claims, relating to products manufactured by defendant AMACO is granted.

Accordingly, it is

ORDERED that the branch of defendant’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Vanderbilt 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 Vanderbilt is denied; and it is further

ORDERED the branch of defendant’s motion for partial summary judgment in favor of Vanderbilt as to any and all claims, and causes of action, including cross-claims, relating to products manufactured by defendant AMACO is granted; 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.

ADAM SILVERA, J.S.C.

3/11/2021
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: