

Avakian v Aerco Intl., Inc.

2021 NY Slip Op 31160(U)

April 8, 2021

Supreme Court, New York County

Docket Number: 190036/2018

Judge: Adam Silvera

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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

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LAURA AVAKIAN,

Plaintiff,

- v -

AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC.,AMERICAN BILTRITE INC, BMCE INC.,BORGWARNER MORSE TEC LLC,BRIGGS & STRATTON CORP, CARRIER CORPORATION, CERTAINTeed CORPORATION, COMPUDYNE CORPORATION, CROWN BOILER CO., DANA COMPANIES, LLC,DOMCO PRODUCTS TEXAS, INC, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC,HONEYWELL INTERNATIONAL, INC.,ITT LLC., KARNAK CORPORATION, KOHLER CO., MANNINGTON MILLS, INC, NISSAN NORTH AMERICA, INC, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC,SUCCESSOR IN INTEREST, RHEEM MANUFACTURING COMPANY, SEARS, ROEBUCK AND CO, SLANT/FIN CORPORATION, STANDARD MOTOR PRODUCTS, INC, TECUMSEH POWER, TECUMSEH PRODUCTS COMPANY, TENNECO AUTOMOTIVE OPERATING COMPANY INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TOYOTA MOTOR SALES U.S.A ., INC.,U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, FEDERAL - MOGUL ASBESTOS PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO.,

INDEX NO. 190036/2018
MOTION DATE 2/25/2021
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 208, 209, 210, 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, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339

were read on this motion to/for DISMISSAL

Before the Court is defendant American Biltrite Inc.'s ("American Biltrite") motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of American 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 American Biltrite. Plaintiff opposes the motion.

American Biltrite's motion contends that plaintiff, has failed to establish specific causation for plaintiff decedent, Donald Avakian's ("Decedent") lung cancer in relation to American Biltrite's Amtico floor tile products. The case at issue arises from plaintiff's August 17, 2017 diagnosis with fatal lung cancer, which led to his death on June 2, 2019. Plaintiff alleges that the lung cancer was caused by Decedent's exposure to asbestos over the course of his career working with Amtico floor tiles.

Here, upon motion for summary judgment, American Biltrite contends that in the case at bar it is impossible for plaintiff to establish general or specific causation against American 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 causation, that the Amtico tiles at issue contain a level of chrysotile asbestos, which is sufficient to cause lung cancer in the general population (see *id.*; *Parker* at 434). American Biltrite alleges that plaintiff has not offered any scientific evidence to prove that the Amtico floor tiles release chrysotile asbestos fibers at a level capable of being a substantial contributing factor to the development of lung cancer in the general population. In support of their claim that the floor tiles do not and could not cause lung cancer in the general population, American Biltrite submit expert affidavits and reports by Certified Industrial Hygienist John Spencer and Pathologist Dr. Stanley Geyer (Mot, Exh B; E; W). Mr. Spencer’s report detailed that there are two different categories of asbestos outlined by the Environmental Protection Agency (“EPA”): friable asbestos material and non-friable materials (Mot, Exh B at 3).

“Friable asbestos material” is defined in the EPA National Emission Standards for Hazardous Air Pollutants (NESHAPs)... as any material containing more than one (1) percent asbestos by weight that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure... Friable materials have a greater potential to release fibers when disturbed or damaged than non-friable

materials... Non-friable materials are encapsulated products, with asbestos fibers bound into a matrix material, a process that significantly reduces or eliminates the potential for release of fibers when damaged or disturbed. According to EPA, certain non-friable materials, such as floor tile... that are in good condition, can be left in buildings being demolished because the fiber release from these materials, even if the materials are damaged, is relatively small compared to the fiber release from friable materials... The sale of non-friable asbestos-containing products in U.S. commerce remains permissible to this day.

Defendants argue that Mr. Spencer demonstrates that Amtico floor tile is non-friable with potential for only low asbestos fiber release, if any at all. Mr. Spencer calculated a worst case scenario of Decedent's maximum exposure from work around Amtico tiles and concluded that his cumulative exposure would be less than 0.0084 f/cc-yrs, an amount indistinguishable from most ambient measurements and below occupational exposure levels allowed by the OSHA, the WHO and the USEPA (*id.* at 12). Defendants point to the report of Dr. Geyer who opined that "[a]ny work Donald Avakian performed installing Amtico floor tiles created a negligible and insignificant exposure to chrysotile asbestos, if the Amtico floor tiles contained any chrysotile asbestos and if any exposure occurred, that would have been insufficient to contribute to the cause of his reported lung cancer" (Mot, Exh E at 2-3). Dr. Geyer concluded that plaintiff's lung cancer was caused by "tobacco smoke, with no contribution from asbestos exposure" (*id.* at 4). Defendant has made a prima facie showing that its product could not have contributed to the

causation of Decedent's injury and the burden shifts to plaintiff to demonstrate that Amtico tiles are capable of causing lung cancer.

In opposition plaintiff demonstrates that Decedent was exposed to asbestos; that the toxin is capable of causing lung cancer; and that Decedent was exposed to sufficient levels of asbestos. Plaintiff submits relevant case law and scientific studies in support of its opposition. Plaintiff argues that defendant disregards the Appellate Division's ruling in *In re New York City Asbestos Litig. (Robaey)*, Index 190276/2013, 2020 WL 4514931 [App Div, 1st Dept, Aug. 6, 2020]. Plaintiff notes that the Court in *Robaey* found that New York has "upheld verdicts based upon the same type of evidence as was submitted here," namely, "that the visible dust plaintiff was exposed to was necessarily in excess of 1% and sufficient to cause her disease" (Aff in Op at 2, ¶5 citing *Robaey* at 2).

Plaintiff points to American Biltrite's Answers to Interrogatories, which list there products' Asbestos Content by Percentage and admit that it sold "Asphalt tile contained approximately 28 to 30% [asbestos]; VAT 13 to 18% [asbestos]; Felt backing that contained 80 to 85% [asbestos] and was affixed to some sheet vinyl flooring; and cutback adhesive approximately 3 to 8% [asbestos]" (Aff in Op, Exh 2). Decedent testified to handling Amtico vinyl asbestos tiles at various work projects and to have been exposed to asbestos containing dust (Aff in Opp, Exh 4 at 93; 101-102; 109-110; 381; 473-475; 481). Decedent testified that he was exposed to asbestos dust from cutting Amtico flooring with a razor blade or sheers (*id.* at 480; 583-585). As such, the Court finds that Decedent identified Amtico branded products as those which created asbestos dust at the relevant work sites during the time plaintiff has alleged injury.

Decedent's testimony paired with American Biltrite's own admissions in their Answers to Interrogatories is sufficient to raise issues of fact barring defendant's motion for summary

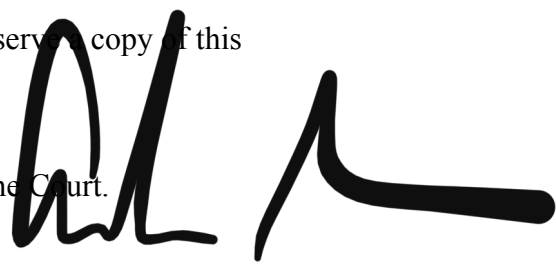
judgment. In *Marzigliano v Amchem Products, Inc., et al.*, Index No. 190134/2017 Motion Sequence 003, the Honorable Manuel J. Mendez ruled that “[p]laintiffs are not required to show the precise causes of damages as a result of [plaintiff’s] exposure to [defendant’s] product, only ‘facts and conditions from which defendant’s liability may be reasonably inferred’”(id. at). Here, like the plaintiff in *Marzigliano*, plaintiff cites to Decedent’s testimony, which identified Amtico asbestos floor tiles as the source of his exposure to asbestos. Decedent’s testimony paired with American Biltrite’s admissions as to the percentage levels of asbestos in Amtico products contained in their Answers to Interrogatories has created “facts and conditions from which [American 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 American 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 American Biltrite 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.



4/8/2021
DATE

ADAM SILVERA, J.S.C.

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