

Smith v Advance Auto Parts, Inc.

2021 NY Slip Op 31658(U)

May 11, 2021

Supreme Court, New York County

Docket Number: Index No. 190261/2016

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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CAROLINE SMITH, CAROLINE SMITH,
Plaintiff,

INDEX NO. 190261/2016
MOTION DATE 12/06/2019
MOTION SEQ. NO. 015

- v -

ADVANCE AUTO PARTS, INC.,AIR & LIQUID SYSTEMS CORPORATION, ALCOA, INC.,ALCO PRODUCTS, INC.,ALPHA WIRE CORP., AMERICAN BILTRITE INC.,AMERICAN INSULATED WIRE CORP., A.O. SMITH WATER PRODUCTS COMPANY, AMERICAN STANDARD, INC.,ARMSTRONG INTERNATIONAL, INC.,ARMSTRONG PUMPS, INC.,ASBEKA INDUSTRIES, INC.,AURORA PUMP COMPANY, A.W. CHESTERTON CO., INC.,AWC 1997 CORP., BELDEN WIRE & CABLE CO., BORG WARNER CORPORATION, BURNHAM HOLDINGS, INC.,BW/IP, INC.,CARBORUNDUM INC.,CARRIER CORPORATION, CBS CORPORATION, CCX, INC.,CERTAINTED CORPORATION, CIRCUIT BREAKER SALES, INC.,CLEAVER-BROOKS INC.,COOPER INDUSTRIES INC.,COURTER'S COMPANY, CRANE CO., CRANE PUMPS & SYSTEMS, INC.,CYTEC INDUSTRIES INC.,DANA CORPORATION, DEMING PUMPS, DUREZ CORPORATION, EATON ELECTRICAL, INC.,ELECTRIC SWITCHBOARD CO., INC.,ERICSSON, INC.,FEDERAL PACIFIC ELECTRIC COMPANY, FEDERAL PACIFIC EQUIPMENT INC.,FEDERAL PUMP COMPANY, FEDERAL PUMP CORPORATION, FISCHBACH & MOORE, INC.,FMC CORPORATION, FLUOR CORPORATION, FLOWSERVE CORPORATION, FORD MOTOR COMPANY, FORT KENT HOLDINGS, INC.,FOSTER WHEELER, LLC,GARDNER DENVER, INC.,GENERAL CABLE CORPORATION, GENERAL ELECTRIC COMPANY, GENERAL REFRATORIES CO., GENERAL WIRE & CABLE, GENERAL WIRE PRODUCTS, INC.,GENUINE PARTS COMPANY, GEORGIA-PACIFIC LLC,GOULDS PUMPS INCORPORATED, GRAYBAR ELECTRIC COMPANY INC.,GRUNDFOS PUMPS CORPORATION, HATZEL & BUEHLER INC.,HENRY VOGT MACHINE CO., HONEYWELL INTERNATIONAL, INC.,HOWDEN BUFFALO, INC.,HUBBELL POWER SYSTEMS INC.,IMO INDUSTRIES, INC.,INGERSOLL RAND COMPANY, J.H. FRANCE REFRATORIES CO., JOHNSON CONTROLS, INC.,KAISER GYPSUM INC.,KEYSPAN ENERGY CORPORATION, KING INSULATION INC.,LEVITON MANUFACTURING CO., LIGHTOLIER INC.,METROPOLITAN INSURANCE COMPANY, MINE

DECISION + ORDER ON MOTION

SAFETY APPLIANCES COMPANY, NATIONAL GRID, NATIONAL GRID GENERATOR, LLC, NATIONAL LIGHTING COMPANY, O'CONNOR CONSTRUCTORS, INC., PEERLESS ELECTRIC COMPANY, PEERLESS INDUSTRIES, INC., PENT AIR PUMP GROUP, INC., PFIZER INC., PLASTICS ENGINEERING COMPANY, PRESCOLITE, INC., PROGRESS LIGHTING, INC., RILEY POWER INC., ROCKBESTOS SUPRENTANT CABLE CORP., ROCKWELL AUTOMATION INC., RSCC WIRE & CABLE, LLC, SCHNEIDER ELECTRIC CORP., SHELL OIL, SIEMENS ENERGY & AUTOMATION, INC., SPIRAX SARCO, INC., SQUARE D COMPANY, SPX COOLING TECHNOLOGIES, INC., TACO, INC., THE FULTON COMPANIES, THE OKONITE COMPANY, THE TRANE COMPANY, THE WM POWELL COMPANY, THERMO ELECTRIC CO., INC., TREADWELL CORPORATION, TYCO FLOW CONTROL, INC., TYCO VALVES & CONTROLS, INC., UNION CARBIDE CORP., UNITED STATES STEEL CORPORATION, VELAN VALVE CORPORATION, VICTOR WIRE & CABLE CORP., VIKING PUMP CO., INC., WARREN PUMPS, WEIL MCLAIN, YARWAY CORPORATION, YORK INDUSTRIES INC., YORK INTERNATIONAL, YUBA HEAT TRANSFER, LLC, AC LIGHTING & ELECTRICAL SUPPLIES, LLC, COOPER CROUSE-HINDS, LLC; FOR ITS CHICO X BRAND PRODUCTS, GEICO CORPORATION, MACY'S, INC., SEARS ROEBUCK & COMPANY, GOULD ELECTRONICS, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO GOULD., INC., AS SUCCESSOR IN INTEREST TO I-T-E IMPERIAL CORP AND BULLDOG ELECTRIC PRODUCTS CO, EX-FM, INC. FORMERLY KNOWN AS FISCHBACH AND MOORE, INCORPORATED, LONG ISLAND POWER AUTHORITY, LONG ISLAND LIGHTING COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 015) 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 578, 581, 592, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 901, 902

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

Before the Court is defendant Ericsson, Inc.'s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Ericsson on the grounds that plaintiff has failed to establish causation regarding Ericsson. Plaintiff opposes the motion.

Ericsson's motion contends that plaintiff has failed to establish specific causation for plaintiff's mesothelioma in relation to Ericsson's products. The case at issue arises from plaintiff

decedent Alvin Smith's ("Decedent") diagnosis of malignant mesothelioma, which plaintiffs allege was caused by Decedent's exposure to asbestos experienced while skinning, stripping, and pulling asbestos-containing wires and cable manufactured by Ericsson or its predecessors Anaconda Wire & Cable Company ("Anaconda") and Continental Wire & Cable Company ("Continental") at various locations throughout his career. Decedent testified that as a result of his work cutting and stripping the asbestos-insulated wire and cable he was exposed to asbestos dust (Aff in Op Exh 1 at 1302:23-1305:14).

Here, upon motion for summary judgment, Ericsson alleges that it did not cause or substantially contribute to Decedent's lung cancer. Ericsson avers that plaintiff has failed to establish general or specific causation against Ericsson. "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 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). Ericsson alleges that Ericsson's expert, William Longo, Ph.D., was able to determine plaintiff's level of exposure to asbestos was below detection limits of the National Institute of Occupational Safety & Health (Mot Exh D-G). Dr. Longo reported that Continental Wire "would not have any significant occupational exposure to airborne asbestos fibers" (Mot, Exh G at 10).

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 notes that Decedent extensively identified, worked with and was exposed to asbestos containing wire and cable manufactured by Ericsson's predecessors Anaconda and Continental at numerous work sites throughout his career. (Aff in Op, Exh 1 at 145-16; 80; 84-85; 205-207; 320-321; 456-458; 341; 345-346; 1310). Plaintiff submits catalogs, marketing material, and specification sheets from Anaconda which list the use of asbestos components in their cables (Aff in Op Exh 3-4). Plaintiff submits the report of Dr. Albert Miller, a medical causation expert who noted "Mesothelioma is a consistently fatal malignancy of the lining tissues of the bodily cavities, most often the pleura, for which asbestos is the predominant etiology (Aff in Op, Exh 8 at 2). Dr. Miller concluded, to a reasonable degree of medical certainty, that cumulative exposure to asbestos from his work with "a wide range of asbestos-containing equipment including . . . cables" was a substantial contributing factor in the development of Decedent's mesothelioma (*id.*).

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).

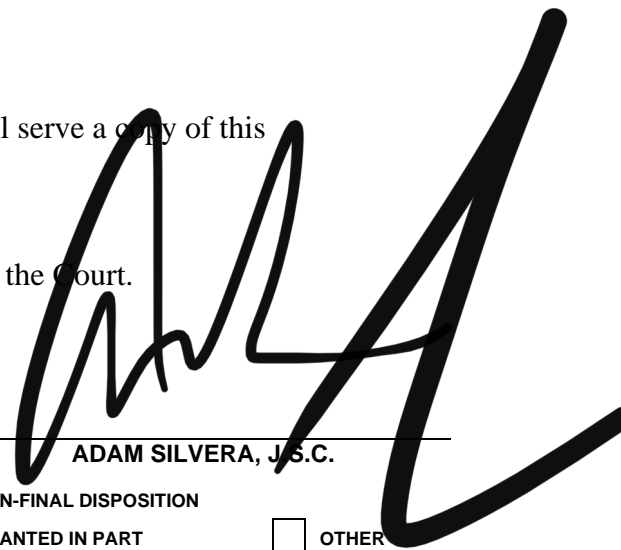
Here, like the plaintiff in *Marzigliano*, plaintiff cites to Decedent's testimony which identified Ericsson and Ericsson predecessor asbestos products as the source of his exposure to asbestos. Decedent's deposition combined with the report of Dr. Miller has created "facts and conditions from which [Ericsson'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 asbestos wires and cables can cause mesothelioma, 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 Ericsson 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 Ericsson 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.



5/11/2021

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE