

Greene v Amchem Prods., Inc.
2021 NY Slip Op 31853(U)
June 1, 2021
Supreme Court, New York County
Docket Number: 190200/2018
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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BONNIE JEAN GREENE, AS ADMINISTRATRIX FOR THE ESTATE OF FREDERICK F. LINDBERG, AND CHRISTINA LINDBERG, INDIVIDUALLY,

Plaintiff,

- v -

AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC, BORGWARNER MORSE TEC LLC, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC., CERTAINTEED CORPORATION, CLYDE UNION, INC, COLUMBIA BOILER COMPANY OF POTTSTOWN, CRANE CO, CROWN BOILER CO., DEAN PUMP DIVISION, FEDERAL- MOGUL ASBESTOS PERSONAL INJURY TRUST, FLOWSERVE US, INC., FMC CORPORATION, FORD MOTOR COMPANY, GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, HONEYWELL INTERNATIONAL, INC., IMO INDUSTRIES, INC, J.H. FRANCE REFRACTORIES COMPANY, KOHLER CO., OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PORT AUTHORITY OF NEW YORK AND NEW JERSEY, R.W. BECKETT CORPORATION, ROPER PUMP COMPANY, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS, SLANT/FIN CORPORATION, THE B.F. GOODRICH COMPANY, (GOODRICH CORPORATION), THE FAIRBANKS COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY,

Defendant.

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INDEX NO. 190200/2018
MOTION DATE 09/03/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 267, 268, 269, 270, 271, 287, 288

were read on this motion to/for

JUDGMENT - SUMMARY

Upon review of the papers and after oral argument, it is ORDERED that defendant Columbia Boiler's ("Columbia") motion for summary judgment pursuant to CPLR 3212, seeking an Order dismissing the Complaint and all cross-claims, in their entirety, as they relate to Columbia

and that this Court conduct a Frye hearing to determine the foundational adequacy and admissibility of plaintiff's experts' opinions regarding causation is denied. The underlying case stems from plaintiff Frederick Lindberg's ("Decedent") diagnosis of mesothelioma due to his exposure to asbestos which led to his death. Plaintiff alleges that Decedent was exposed to asbestos through his work as a boiler mechanic for Federal Oil Company for approximately one and a half years in the mid-1950s where he performed work on Columbia brand boilers. Plaintiff and defendant experts disagree on the underlying science at issue. 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 defendant's asbestos product as the source of their exposure to asbestos (Aff in Op, Exh 1 at 309). In support of their motion defendants submit the expert reports of Industrial Hygienist, Eric J. Rasmuson, who concluded that in the event Decedent worked with Columbia boilers, potential exposure, if any, would have been low level and would not have placed Decedent at

increased risk for mesothelioma (Mot, Exh E at 10). Mr. Rasmuson concluded that “chrysotile-induced mesotheliomas only occur with very high exposure” (*id.* at 8).

In opposition, plaintiff submits the expert reports of Dr. David Y. Zhang who concluded, contrary to defendant’s experts, that chrysotile asbestos fibers are capable of causing cancer. Plaintiff’s deposition combined with the expert reports has created “facts and conditions from which [defendant’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 defendant’s product is capable of causing the underlying illness at issue, and the conflicting testimony warrants the denial of defendant’s motion for summary judgment. Further, the Court finds that the defendant has failed to demonstrate that plaintiff’s expert report is not based upon scientific methodologies, theories or processes that are generally accepted in the relevant scientific community. Thus, the branch of defendant’s motion which seeks a Frye hearing to determine the foundational adequacy and admissibility of plaintiff’s experts’ opinions regarding causation is denied.

Accordingly, it is

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

ORDERED that the branch of defendant’s motion which seeks a Frye hearing 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.



6/01/2021

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