

Davis v Acme Liquidating Corp.
2021 NY Slip Op 33568(U)
July 23, 2021
Supreme Court, Erie County
Docket Number: Index No. 811699/2019
Judge: Deborah A. Chimes
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STATE OF NEW YORK
SUPREME COURT : EIGHTH JUDICIAL DISTRICT

In Re: Eighth Judicial District Asbestos Litigation

This Document Applies to:

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JONATHAN E. DAVIS and LORETTA J. DAVIS,
his spouse,

Plaintiffs,

v.

ACME LIQUIDATING CORP., et al,

Defendants.

DECISION and ORDER
Index No. 811699/2019

Defendant CompuDyne LLC f/k/a CumpuDyne Corporation, Individually and as successor to York Shipley, Inc. (CompuDyne) moves for summary judgement under CPLR 3212 seeking to dismiss the plaintiff's complaint and all cross-claims. (NYCEF 002).

In support of its motion, CompuDyne submitted a Notice of Motion dated January 21, 2021 and the Attorney Affirmation of Benjamin L. Careathers, dated January 21, 2021 together with the attached exhibits. In opposition, the plaintiff submitted the Attorney Affidavit of Michael A. Ponterio, sworn to on February 4, 2021 together with the attached exhibits, the Physician Affirmation of Jerrold L Abraham, M.D. dated January 29, 2021 together with attached exhibits and the

Affidavit of Industrial Hygienist, Jerry Lauderdale sworn to on February 1, 2021 together with attached exhibits.

Plaintiff, worked as a laborer at Gramco Inc. mill from 1976 to 1979. During this time, the plaintiff testified his primary responsibility was handling grain and on occasion would perform maintenance and repair work on a boiler manufactured by the defendant. He testified that on about 13 occasions he would assist the boiler service contractor called in to service the boiler. On some of these occasions he would assist in the maintenance of the boiler by hand scraping and wire brushing the gasket material of the interior door and flanges on top of the boiler. The plaintiff testified to the process in which he would remove the material and that the process created visible dust that he inhaled. The plaintiff estimated it would take a half hour to an hour to remove and replace the gasket. Additionally, on occasion the plaintiff would mix dry asbestos cement in water which would then be applied by the contractor servicing the boiler. The plaintiff testified that when mixing the asbestos cement with water, there was dust created that he breathed in. In July 2019, the plaintiff was diagnosed with mesothelioma and died on July 10, 2020.

Defendant moves to dismiss the complaint arguing the plaintiff cannot establish general and specific causation. Defendant relies in part on the report of John Henshaw, their retained industrial hygienist who opines the plaintiff could not

have been exposed to asbestos from the York Shipley boiler at a level that was a substantial factor in causing his development of mesothelioma. The defendant also relied on the report of its pulmonary expert, Brian Tayler, M.D. who opined the exposure to the York Shiley boiler did not cause or contribute to the plaintiff's mesothelioma. Defendant also challenges the methodology used by the plaintiff's experts Dr. Markowitz and Dr. Abraham arguing they do not rely on accepted scientific methodology and they do not offer specific comparative assessment of the plaintiff's exposure through "quantitative, qualitative or any meant whatsoever" to develop specific causation, nor does plaintiff offer scientific evidence of general causation.

The defendant's industrial hygienist's report states that "Any related asbestos exposure Mr. Davis might have experienced while allegedly working on or in the vicinity of a York-Shipley boiler would have been well below the cumulative chrysotile exposure levels with which increased risk of disease is associated. In support of his opinion the expert in part relies on studies or reports that addressed the potential for airborne fiber exposure associated with the work with the boiler described by the plaintiff. He goes on to opine that if the plaintiff's disease was caused by asbestos it was likely amphibole asbestos. Defendant also relies on the report of its pulmonary medical doctor which states "if [plaintiff] sustained any exposure to chrysotile asbestos attributable to work that he

performed on and/or around the boilers associated with CompuDyne LLC, such exposure was “de minimus and did not cause or contribute to his development of malignant pleural mesothelioma.”

These reports however were submitted as attachments to an attorney affidavit and are inadmissible hearsay. Therefore, the reports are insufficient to support a summary judgement. (*see, Sauter v Calabretta*, 90 AD 3d 1702; *Fallon v Duffy* 95 AD 3d 1416; *Haidar v Air & Liquid Systems Corp., et al.*, [Sup Ct. Erie County January 15, 2021, Chimes, J., Index No. 810929-2021]). Defendant failed to meet its initial burden and summary judgement is denied.


Even if the court were to accept the unsworn reports, the plaintiff, through the sworn affidavits of Jerry Lauderdale an Industrial Hygienist and Jerrold Abraham, M.D., sufficiently raised a triable issue of fact on the issues of general and specific causation. For example, Jerrold Abraham M.D., stated that it is the consensus opinion in the medical and scientific community that “each of the major types of asbestos fiber, including chrysotile... individually can cause mesothelioma.” The expert went on to opine that the work the plaintiff conducted on the York-Shipley boiler released levels of asbestos fibers into the plaintiff’s breathing zone in excess of the background levels and the OSHA excursion limit and that this exposure was a substantial factor in causing the plaintiff’s

mesothelioma. Where there is competing expert opinions, the weight to give the testimony and the credibility of the witnesses must be resolved by a jury.

Defendant's motion for summary judgement is denied in its entirety.

SO ORDERED:

DATED: July 23, 2021
Buffalo, New York



Hon. Deborah A. Chimes, J.S.C.