

<b>Moutal v A.O. Smith Water Prods. Co.</b>
2022 NY Slip Op 34086(U)
December 1, 2022
Supreme Court, New York County
Docket Number: Index No. 190086/2019
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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PAUL MOUTAL,

Plaintiff,

INDEX NO. 190086/2019

MOTION DATE

MOTION SEQ. NO. 005

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., AMERICAN BILTRITE INC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BWIP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CERTAINTEED CORPORATION, CLYDE UNION, INC, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO., CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., DAVID FABRICATORS INC A/K/A DAVID ASBESTOS CORP, DOMCO PRODUCTS TEXAS, INC, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, G.S. BLODGETT CORPORATION, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS, MANNINGTON MILLS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC, RHEEM MANUFACTURING COMPANY, SLANT/FIN CORPORATION, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, AERCO INTERNATIONAL, INC., BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BIRD INCORPORATED,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 427, 430

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is hereby ordered that defendant Mannington Mills, Inc.’s (hereinafter referred to as “Mannington”) motion for summary judgment is denied for the reasons set forth below.

The instant matter is premised upon Plaintiff’s alleged exposure to asbestos as a result of his work with Mannington sheet flooring. Plaintiff was diagnosed with lung cancer on January 9, 2019. Plaintiff was deposed on July 30 – 31, and August 1st, 2019, in which he testified that he was employed as a laborer and carpenter within New York City for his uncle Lewis Lastra from 1971 to 1978. In addition, Plaintiff worked at sites within Putnam County for Burton Construction from 1971 to 1975. The work Plaintiff conducted for both his uncle and Burton Construction consisted of the installation and cutting of flooring to fit the shapes and fixtures of rooms. In addition, Plaintiff testified that the flooring he installed for Burton Construction and his uncle Lewis Lastra was manufactured by Mannington and was able to identify Mannington as the manufacturer from papers that came with the flooring. Mannington moves for summary judgment, arguing, *inter alia*, that “Mannington’s sheet flooring was de minimis when compared to [plaintiff’s] work with other products, including those known to potentially cause high levels of asbestos exposure like spackle, boilers, and thermal insulation.” Memorandum Of Law In Support Of Mannington Mills, Inc.’s Motion For Summary Judgment, p. 2 (internal emphasis omitted). Plaintiff opposes, arguing that “Mannington has failed to present any admissible

evidence sufficient to prove that its products could not have caused Mr. Moutal's illness, thus failing to meet its prima facie burden, and its motion must be denied without assessment of Plaintiffs' proof." Affirmation In Opposition To Defendant Mannington Mills, Inc.'s Motion For Summary Judgment, p. 2, ¶ 3 (internal emphasis omitted). Mannington replies.

Pursuant to CPLR 3212(b), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he 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 demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers". *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

First, Mannington contends that Plaintiff's work with Mannington's sheet flooring could not have caused his lung cancer. Namely, that "Plaintiffs must not simply show that asbestos is capable of causing lung cancer, but critically, they must also show that Plaintiff's work with Mannington's sheet flooring caused his specific disease." Memorandum Of Law In Support, *supra*, at p. 5. The Court of Appeals in *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 (2006), held that "[i]t is well-established that an opinion on causation should set forth a plaintiff's exposure to

a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)". As to general causation, Plaintiff has proffered evidence to demonstrate that exposure to asbestos including chrysotile asbestos increases the risk of mesothelioma and asbestos related lung cancer. Plaintiff provides a report from Dr. Mark Ginsburg who opines that "[t]here is overwhelming and incontrovertible scientific evidence that asbestos causes lung cancer". Affirmation In Opposition, *supra*, Exh. 28, Report Of Dr. Mark Ellis Ginsburg, dated April 26, 2021, p. 12. Plaintiff further provides an expert report of Dr. Brent Staggs, who opines that "the inhalation of asbestos fibers of all fiber types causes mesothelioma, lung cancer, as well as cancer of other sites." *Id.* at Exh. 29, Affidavit Of Brent C. Staggs, M.D., dated April 15, 2016, p. 3, ¶ 4. Here, Mannington's arguments rests upon Plaintiff's alleged failure to prove general causation. However, "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment". *Koulermos v A.O. Smith Water Products*, 137 AD3d 575, 576 (1st Dept 2016). Thus, Plaintiff's expert's reports are sufficient to raise genuine issues of fact as to general causation.

As to specific causation, Mannington argues that it has established Plaintiff's work with Mannington sheet flooring was not a substantial contributing cause of his lung cancer. More specifically, "Plaintiff's exposure to asbestos from his work with Mannington sheet flooring was limited and not nearly enough to cause a necessary lifetime dose of asbestos anywhere close to the lowest known lifetime asbestos exposure dose to cause lung cancer." Memorandum Of Law In Support, *supra*, at p. 7. Mannington relies upon their industrial hygienist Mark Durham, who concludes that "Plaintiff, at most, would have experienced a lifetime cumulative dose of asbestos exposure from a Mannington product of only 0.008 fiber-years per cubic centimeter (f-yr/cc)

during the course of his lifetime.” *Id.* at p. 8. According to Mannington, Mr. Durham assumes all facts in Plaintiff’s favor, relies upon established studies regarding potential asbestos exposure in similar work, and approximates that Plaintiff has worked on approximately 19 projects involving Mannington sheet flooring. In *Dyer v Amchem Products Inc.*, 207 AD3d 408, 411 (1st Dept 2022), the Appellate Court held that defendant therein met its burden on summary judgment by, *inter alia*, proffering an industrial hygiene expert as a witness who tendered a study regarding decedent’s exposure to asbestos, which “involved a worker and a helper who cut, scored/snapped Amtico tiles in an isolation test chamber, simulating an eight-hour ‘shift’ . . . Based upon the results of the 2007 EPI study and their review of other materials, publications and decedent’s deposition, [Defendant]’s experts concluded that the decedent’s time weighted average exposure to chrysotile asbestos was below the OSHA eight-hour permissible exposure limit (PEL) of 0.1 f/cc, and also indistinguishable from 0.00000033 f/cc the lifetime cumulative exposure that the general public is exposed to in the ambient air that we all breathe.” Unlike the case at bar, the study relied upon by the defendants in *Dyer* established specific levels of respirable asbestos with regards to the specific moving defendant’s product in the specific work environment of the plaintiff at issue therein. Here, Mannington has proffered no study that demonstrates Plaintiff’s specific exposure levels. Rather, Mannington speculates the dose reconstruction of Plaintiff’s exposure levels and opines Plaintiff’s exposure was well below a level that would substantially contribute to Plaintiff’s illness. Thus, Mannington fails to establish their prima facie case as to specific causation pursuant to the Appellate Division, First Department holdings. As Mannington has failed to meet its initial burden, Mannington’s motion is denied.

Accordingly, it is

ORDERED that Defendant Mannington Mills Inc.'s motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the Court.



ADAM SILVERA, J.S.C.

12/1/2022  
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: