

Niedert v Amchem Prods., Inc.
2022 NY Slip Op 34232(U)
December 13, 2022
Supreme Court, New York County
Docket Number: Index No. 190311/2017
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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EDITH NIEDERT,

Plaintiff,

- v -

AMCHEM PRODUCTS, INC., AURORA PUMP COMPANY, BLACKMER, BURNHAM, LLC, CERTAINT EED CORPORATION, CONSOLIDATED EDISON COMPANY, CRANE CO., GENERAL ELECTRIC COMPANY, GEORGIA PACIFIC LLC (DELAWARE), GEORGIA PACIFIC LLC (NORTH CAROLINA), GEORGIA PACIFIC LLC, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, ITT LLC., KEELER-DORR-OLIVER BOILER COMPANY, OWENS-ILLINOIS, INC, PFIZER, INC. (PFIZER), THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 86, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111

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

Upon the foregoing documents, it is hereby ordered that Defendant The Goodyear Tire & Rubber Company's (hereinafter referred to as "Goodyear") motion for summary judgment is denied for the reasons set forth below.

The instant matter is premised upon Plaintiff Edith Niedert's alleged exposure to asbestos as a result of laundering her husband, Paul Niedert's clothing. From 1956 to 1993, Mr. Niedert worked as a plumber and a steamfitter, tasked with removing and installing Goodyear gaskets and gasket materials. Plaintiff's response to interrogatories state that asbestos dust would cover Mr. Niedert's clothes from work, which he would wear home. Mrs. Niedert would then launder his clothes approximately two to three times a week. Plaintiff was subsequently diagnosed with

lung cancer on July 19, 2017. Goodyear moves for summary judgment, arguing, *inter alia*, that Plaintiff's exposure from handling Mr. Niedert's clothing was so insignificant that it did not contribute or cause Plaintiff's lung cancer. Goodyear also argues that Plaintiff's smoking history was the cause of her lung cancer. Plaintiff opposes, arguing that Goodyear has failed to meet their prima facie burden on causation that exposure to Goodyear's gaskets and gasket containing materials could not have resulted in Plaintiff's diagnosis. Goodyear 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, Goodyear argues that industrial hygienist Mr. John Spencer demonstrates Plaintiff's para-occupational exposure to asbestos was insignificant to cause Plaintiff's illness. More specifically, "[t]he airborne asbestos concentrations for a person that handles the clothes of a person who works with asbestos are 0.2% to 1.4% of the daily 8-hr [time weighted average] of

the worker.” Memorandum Of Law In Support Of Defendant The Goodyear Tire & Rubber Company’s Motion For Summary Judgment, p. 6 (internal emphasis omitted). Conversely, Plaintiff argues that “industrial hygienist, John Spencer. . . [relies] on skewed interpretations of the facts and cherry-picked studies that fail to meet Defendant’s prima facie burden and, at most, create conflicts with Plaintiffs’ causation evidence that must be resolved by a jury.” Plaintiffs’ Affirmation In Opposition To Defendant, The Goodyear Tire & Rubber Company’s, Motion For Summary Judgment, p. 14, ¶ 29 (internal emphasis omitted). 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. Goodyear has proffered no study that demonstrates Plaintiff’s specific exposure levels. Instead, Mr. Spencer’s analysis “was performed in accordance with the NIOSH 7400 method of analysis by phase contact microscopy.” Affidavit of John Spencer, CIH, CSP, dated Nov. 22, 2021, Exh A, Summary Report Of John Spencer dated December 16, 2020, p. 17. Mr. Spencer attests that his evaluations were based on asbestos

containing gaskets which were fabricated, removed, and installed through the methods of the average tradesmen. *See Id.* Mr. Spencer's conclusions are based solely on dose reconstruction without regard to Plaintiff's specific circumstances which exposed her to ultra-carcinogenic asbestos fibers.

Furthermore, Goodyear argues that Plaintiff's lung cancer was caused by her smoking history, and not by her alleged exposure to asbestos. Namely, Goodyear relies upon Dr. Robert Sussman, a physician who is board certified in pulmonary medicine, who opines that "smoking is far and away the greatest risk for the development of lung cancer, accounting for 87% of all lung cancers." Memorandum Of Law In Support, *supra*, at p. 7. Conversely, Plaintiff argues that Goodyear attempts to shift the responsibility to Plaintiff for her lung cancer by digressing from the standard of specific causation. 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)". Furthermore, "[t]he mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury". *Mazella v Beals*, 27 NY3d 694, 706 (2016) (internal quotations omitted). Therefore, Plaintiff's smoking history does not negate that asbestos is an ultra-carcinogenic substance that is capable of causing mesothelioma. Further, Dr. Sussman opines that "[a]s a general rule, asbestos exposure is only a risk factor for lung cancer in the setting of asbestosis." Affidavit Of Robert Sussman, M.D., November 19, 2021, Exh. A, Report Of Dr. Robert Sussman, dated November 5, 2021, p. 10. However, Plaintiff relies upon Dr. Steven Markowitz's article *Asbestos-Related Lung Cancer and Malignant Mesothelioma of the Pleura:*

Selected Current Issues, which recognizes asbestos as a human lung carcinogen. See Affirmation In Opposition, supra, at p. 24, ¶ 56. Here, triable issues of fact exist, as the “nonmovant’s expert . . . squarely opposes. . . the moving parties’ expert, [in which] the result is a classic battle of the experts that is properly left to a jury for resolution”. Mason v Adhikary, 159 AD3d 1438, 1439 (4th Dept 2018) (internal quotations omitted). As Goodyear has failed to meet its initial burden, Goodyear’s motion is denied.

Accordingly, it is

ORDERED that Defendant The Goodyear Tire & Rubber Company’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.

12/13/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED

NON-FINAL DISPOSITION

APPLICATION:

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE