Battistoni v AERCO Intl., Inc.
2016 NY Slip Op 32552(U)
December 21, 2016
Supreme Court, New York County
Docket Number: 190103/2015
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK
---X
IN RE NEW YORK CITY ASBESTOS LITIGATION
---X
DARIO BATTISTONI,

Plaintiff,

-against-

AERCO INTERNATIONAL, INC., *et al.*,

Defendants
---X

Index 190103/2015
Motion Seq. 003

DECISION & ORDER

PETER H. MOULTON, J.S.C:

In this asbestos personal injury action, defendant ITW Food Equipment Group LLC (hereafter "ITW FEG," "defendant") moves for summary judgment dismissing plaintiff's complaint and any cross-claims against it. Defendant contends that the motion should be granted because its products could not have been a substantial contributing factor to the causation of plaintiff's mesothelioma, citing *Matter of New York City Asbestos Litig.* (48 Misc 3d 460 [Sup. Ct., New York County 2015]) (hereafter "*Juni*") as well as *Parker v. Mobil Corp.*, 7 NY3d 434 (2006) (hereafter "*Parker*"). Defendant notes that plaintiff worked as a butcher at a delicatessen in Queens, New York, from 1979 to 1980, and later worked as a butcher and banquet chef in kitchens at the Century Plaza Hotel in Los Angeles, California from 1980 to 1999. Central to plaintiff's claim is his allegation that at those jobs, he worked with Hobart and Traulsen commercial kitchen equipment that exposed him asbestos and caused his mesothelioma. Defendant criticizes what it describes as plaintiff's assertion that each asbestos-containing product that he encountered during his lifetime, including ITW FEG products, substantially contributed to the development of his asbestos-related disease.

Defendant further criticizes plaintiff's reliance on the expert report of Dr. David Y. Zhang, a pathologist and occupational medicine specialist, who has opined that plaintiff's "mesothelioma is related to asbestos exposure and the cumulative exposure of [sic] each asbestos-containing product significantly contributed to the development of his malignant mesothelioma." Defendant argues that Dr. Zhang's opinions should be rejected, because they lack a proper foundation. In support of this argument, defendant annexes the affidavit of Dr. Michael Graham, who contends that Dr. Zhang's opinions are not premised on a generally accepted medical theory used to determine the causation of mesothelioma in the occupational and environmental medical community. Defendant avers that Dr. Zhang's report fails to quantify plaintiff's alleged exposure to asbestos from commercial kitchen equipment, does not examine the frequency or regularity of plaintiff's alleged exposure, and does not do any type of qualitative assessment of plaintiff's exposure or comparison of plaintiff's work to published studies of similar work. Finally, defendant avers that Dr. Zhang does not cite to a single work-practice or epidemiological study concerning work in commercial kitchens or work by butchers or chefs. Instead, defendant contends that Dr. Zhang relies solely on his own "general, subjective and conclusory assertions," *Parker*, 7 NY3d at 591, and on a theory that has been soundly discredited by courts, that "any exposure" to asbestos is a substantial contributing factor to the development of mesothelioma. Because Dr. Zhang employs no reliable scientific methodology in arriving at his causation opinion, in direct contravention of *Parker*, defendant submits that his opinion lacks a proper scientific foundation and is inadmissible. Without Dr. Zhang's causation testimony, defendant asserts that plaintiff cannot maintain a cause of action against ITW FEG, thus making judgment in its favor a *fait accompli*.

Plaintiff opposes the motion, arguing at the outset that ITW FEG's motion must be denied

as improper inasmuch as it is actually a premature motion *in limine* masquerading as a motion for summary judgment. Plaintiff goes on to maintain that defendant's attacks to Dr. Zhang's report are unpersuasive because defendant entirely ignores Dr. Zhang's supplemental report, which considered the relevant scientific literature, as well as plaintiff's medical file consisting of his answers to interrogatories, deposition testimony, medical records, and pathology reports. Plaintiff highlights that in Dr. Zhang's supplemental report, he opined that "Mr. Battistoni's malignant mesothelioma is related to asbestos exposure and the cumulative exposure of each asbestos-containing product significantly contributed to the development of his malignant mesothelioma," and further added as follows: "Based on Mr. Battistoni's history of asbestos exposure, clinical presentation, radiological findings and histology diagnoses, it is my opinion to a reasonable degree of medical certainty that Mr. Battistoni has asbestos-related malignant mesothelioma."

Beyond Dr. Zhang's supplemental report, plaintiff emphasizes that he testified extensively that while he worked at the Century Plaza Hotel, Hobart food boilers, mixers, washers, and grinders, and refrigerators were repaired in his presence (*see* Dario Battistoni Deposition Transcript ["Tr."], Aug. 12-14, 2015, at 218-220, 225-226, 240-242, 281-288, 291, 295, 299-300, 304-309, 313-325, 367-383, 386-387, 390-391, 519-521). Those repairs included "workers replacing the seals on the mixers" (Tr. at 287), "changing pieces, seals...bolts" (Tr. at 295), and "drilling," all of which generated visible asbestos-containing dust. (Tr. at 461-465, 508-516). Plaintiff further stresses that he explained at his deposition that he was exposed to visible asbestos dust which he breathed in by virtue of the work performed, namely the removal, repair, and replacement of asbestos-containing gaskets, pipes, insulation, and cylinders (*id.*). Likewise, plaintiff described in great detail his exposure to visible asbestos dust by virtue of repair work performed in his presence

on Hobart brand products and components thereof (Tr. at 140-157, 304-309, 313-325, 344, 358-359, 362-363, 369- 387, 441-451, 454-459, 475-506). Those repairs included the sanding and scrapping of Hobart brand refrigerators, freezers, boilers, mixers, grinders, washers, saws, choppers, and ovens (*id.*). Plaintiff further avers that the repairs included gasket removal and replacement of Hobart brand steamers, including brushing and sanding, as well as seal replacement on pipes and insulation thereon (*id.*). Plaintiff further testified that he was also exposed to visible asbestos dust by virtue of drilling and repair work performed upon Traulsen refrigerators and Traulsen heaters and the coordinate cleaning thereof, which he performed (Tr. at 461-465, 508-516). Additionally, plaintiff states that on October 24, 2016, Dr. Neil Schachter issued a report which considered plaintiff's medical records, interrogatories, and deposition testimony, among other things, and concluded as follows: "[A]ll of the exposures to asbestos-containing products and equipment detailed in Mr. Battistoni's occupational history resulting in respirable asbestos being released into his breathing zone above background level, contributed to his cumulative dose of asbestos and caused his illness." Based on this collective evidence, much of which plaintiff contends defendant ignored in its moving papers, an issue of fact clearly exists as to whether plaintiff was exposed to asbestos from ITW FEG's products.

Plaintiff further contends that his experts in no way intend to opine, nor have they opined, that "any exposure" to asbestos was a substantial contributing factor to the development of his mesothelioma. Plaintiff protests that ITW FEG's characterizations to the contrary are erroneous. More importantly, plaintiff contends that ITW FEG's motion proffers a contention with respect to scientific quantification and causation that is contrary to long-standing appellate authority. Under New York law, plaintiff submits that the presence of visible asbestos dust at a work site, especially

on a regular and prolonged basis, is sufficient evidence for an expert to opine that the product was a substantial factor in causing asbestos-related disease. The proper authority on this issue, plaintiff avers, is *Lustenring v A. C. & S., Inc.* (13 AD3d 69 [1st Dept 2004]) and its long list of progeny, including post-*Parker* Appellate Division decisions re-applying the *Lustenring* standard. Finally, plaintiff submits that ITW FEG's reliance on the affidavit of Dr. Michael Graham proffered in support of its motion is misplaced, as Dr. Graham's contentions amount to nothing more than an improper attempt to impose a quantification requirement where none exists under *Parker*.

In reply, defendant maintains that the motion is not a premature motion *in limine*. Defendant also contends that plaintiff has not shown that he had substantial exposure to asbestos dust. To support this conclusion, defendant directs that court back to Dr. Graham's affidavit, which it submits offers scientific, not legal, opinions, and competently demonstrates that plaintiff's expert causation opinions lack a proper foundation.

Discussion

When moving for summary judgment, a defendant must first establish its *prima facie* entitlement to judgment by demonstrating the absence of material issues of fact *(see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). An affidavit from a corporate representative which is "conclusory and without specific factual basis" does not meet the burden *(Matter of New York City Asbestos Litig. (DiSalvo*), 123 AD3d 498 [1st Dept 2014]). Additionally, a defendant cannot obtain summary judgment merely by "pointing to gaps in plaintiffs' proof" *(see Torres* v. *Industrial Container*, 305 AD2d 136, 136 [1st Dept. 2003]). The First Department recently reiterated this holding in two asbestos cases, *Koulermos* v. *A.O. Smith Water Prods.* (137 AD3d 575 [1st Dept

2016]) and *Ricci* v *A.O. Smith Water Prods* (143 AD3d 516 [1st Dept 2016]). In *Koulermos*, the court held that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" *(id.* at 576). The court further noted that the failure to present evidence, such as affidavits, which affirmatively demonstrate the merit of the defense is enough to deny summary judgment *(id.)*. Similarly *Ricci,* the court held that Cleaver-Brooks failed to establish entitlement to summary judgment by "merely pointing to perceived gaps in plaintiff's proof, rather than submitting evidence showing why his claims fail" (143 AD3d at 516, *supra*).

It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" *(Reid* v *Georgia- Pacific Corp.,* 212 AD2d 462, 463 [1st Dept 1995]). To defeat summary judgment, a plaintiff's evidence must create "[a] reasonable inference" that plaintiff was exposed to a specific defendant's product *(see Comeau* v. *W.R. Grace & Co.-Conn),* 216 AD2d 79 [1st Dept 1995]).

Recently, the First Department cited to both *Penn* v *Amchem* (85 AD3d 475 [1st Dept 2011]*)* and *Lustenring* v *AC & S, Inc.* (13 AD3d 69, *supra*), and upheld jury verdicts based on a plaintiff's testimony of regular exposure to asbestos dust and expert testimony that such exposure was the proximate cause of a plaintiff's mesothelioma (*see Matter of New York City Asbestos Litig.*, 143 AD3d 483 [1st Dept 2016] [plaintiff electrician worked on installing, renovating and demolishing boilers, asbestos-containing insulation and mixing asbestos concrete powder]; *Matter of New York City Asbestos Litig.*, 143 AD3d 485 [1st Dept 2016] [plaintiff mechanic and electrician worked on removing asbestos- containing insulation from valves and mixing asbestos insulation cement]).

Defendant's motion is denied because defendant has failed to demonstrate that its products

(which it concedes that it sold during the relevant times) "could not have contributed to the causation of plaintiff's injury" *(Matter of New York City Asbestos Litig. (Berensmann),* 122 AD3d 520 [1st Dept 2014]); *Reid*, 212 AD2d 462, *supra*; *Matter of New York City Asbestos Litig. (DiSalvo),* 123 AD3d 498 [1st Dept 2014]). While defendant asserts that plaintiff has failed to demonstrate that his exposures to its products were substantial, it is not plaintiff's burden on summary judgment to do so.

Even assuming that defendant met its burden of proof based on Dr. Graham's affidavit (which it did not), issues of fact exist for trial. Dr. Graham's opinion is based on his conclusion that plaintiff's exposure to defendant's products requires that Dr. Zhang quantify the amount, duration, frequency, fiber type, and product type when assessing the sufficiency of an asbestos exposure and the likelihood that such exposure could result in the development of a disease; namely, mesothelioma. Dr. Graham's opinion that Dr. Zhang's report is "bare," "conclusory," and devoid of "sufficient dose" discussions is based on his own interpretation of Dr. Zhang's report and failure to consider plaintiff's deposition testimony. It is the jury who must evaluate plaintiff's testimony of exposure to dust from defendant's product, with the aid of expert testimony, and decide whether plaintiff's exposure to defendant's products was a substantial factor in causing his mesothelioma *(see Penn*, 85 AD3d 475, *supra*; *Lustenring*, 13 AD3d 69, *supra*; *Matter of New York City Asbestos Litig.*, 143 AD3d 483, *supra* and *Matter of New York City Asbestos Litig.* 143 AD3d 485, *supra).* The court cannot choose between conflicting expert opinions, affidavits, and assessments.

Contrary to defendant's argument, plaintiff's expert opinions do not fail to satisfy the requirements of *Parker*. Defendant misinterprets *Parker*, which noted that a plaintiff need not quantify exposure levels precisely or use a dose-response relationship. Indeed, it is worth noting

that *Parker* relied upon *Westberry v Gislaved Gummi AB* (178 F3d 257 [4th Cir 1999]), a case which allowed expert testimony demonstrating that a plaintiff contracted sinus disease from airborne talc based on a qualitative, not quantitative, analysis. As *Parker* acknowledges "often, a plaintiff's exposure to a toxin will be difficult or impossible to quantify by pinpointing an exact numerical value" (7 NY3d at 447). Therefore, *Parker* holds that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (*id.* at 448). Things such as the intensity of the exposure may be more important than the cumulative dose, and plaintiff's work history can be considered in order to estimate the exposure (*id.* at 449).

The long-settled appellate precedent both prior to and since *Parker* has affirmed this analytical paradigm (*see Penn v Amchem*, 85 AD3d 475, *supra*; *Weigman vA.C. & S, Inc.*, 24 AD3d 375 [1st Dept 2005]; *Lustenring v AC & S, Inc.*, 13 AD3d 69, *supra*). Here, plaintiff's experts are entitled to state their opinions based on the evidence they reviewed. As previously noted, it is for the jury to decide whether the evidence presented, including the expert testimony, is sufficient to find that exposure to defendant's products was a "substantial factor" in causing plaintiff's illness. Dr. Zhang opined that the cumulative exposure of <u>each</u> of defendant's products was a substantial factor in plaintiff's development of mesothelioma. Contrary to defendant's contention, plaintiff does not have to express his alleged exposures with quantitative certainty. To take *Parker* to such an extreme would forestall recovery in nearly all asbestos cases. Justice Judith Gische explained it well in *Kersten* v. *A.O. Smith Water Prods. Co.*, Index No. 190129/10 [Sup. Ct., NY County 2011]). She noted that "in connection with asbestos exposure cases that the courts have acknowledged that

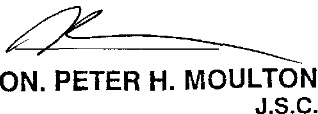
in this type of litigation, precisely numerically quantifying exposure, is extremely difficult if not virtually impossible." She further noted that if defendant's reading of *Parker* was correct "it would be the death knell to asbestos exposure litigation because the standards that the defendants are seeking to impose would create an insurmountable standard that would deprive these toxic tort litigants of their day in court . . . [which] was one of the dangers that the *Parker* court was very aware of when it issued its decision." Indeed, the court in *Parker* stated that it is "inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court" (7 NY3d at 447).[1] Ironically, defendant criticizes plaintiff for not pinpointing an exact numerical value based upon a scientific methodology, but Dr. Graham's own discussions of plaintiff's exposure lack any evidence of quantification and are completely dependent on Dr. Graham's "non-scientific" interpretation of Dr. Zhang's report and plaintiff's testimony.

It is hereby,

ORDERED that defendant's motion for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: December 21, 2016



HON. PETER H. MOULTON
J.S.C.

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[1] Defendant's emphasis on quantification ignores the pervasive reality in asbestos cases that the precise product at issue is almost always no longer on the market, and therefore not capable of being tested. That was not the case in *Parker*, where the product at issue, namely benzene as a component of gasoline, was capable of being tested as a potential cause of plaintiff's acute myelogenous leukemia (AML). Additionally, in *Parker* there were several potential causes for plaintiff's ailment, and no epidemiological studies finding an increased risk for AML because of gasoline exposure. The same is not true here, since exposure to asbestos has long been attributed as the signature cause of mesothelioma. As such, there is an established increased risk for mesothelioma where one breathes in respirable asbestos fibers.