

Germain v American Intl. Indus.
2018 NY Slip Op 33306(U)
December 18, 2018
Supreme Court, New York County
Docket Number: 190049/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

EDDIE GERMAIN and MILDRED GERMAIN, as Personal Representative of the Estate of MICHELLE M. GERMAIN,

Plaintiffs,

- against -

AMERICAN INTERNATIONAL INDUSTRIES, et al.,

Defendants.

INDEX NO. 190049/2017
MOTION DATE 11/28/2018
MOTION SEQ. NO. 006
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by Johnson & Johnson and Johnson & Johnson Consumer Inc.:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Second Amended Complaint, is denied.

In February of 2017 Michelle Germain was diagnosed with epithelial mesothelioma (Opp. Exh. 3, "Final Diagnosis" Report dated 2/1/17). On August 4, 2017 Michelle M. Germain (hereinafter referred to as "decedent") died from the disease. She was born on June 10, 1957 and was about 60 years old at the time of her death (Mot. Kurland Aff. Exh. 6). Plaintiffs, the surviving spouse and decedent's daughter on behalf of the estate, allege the decedent was exposed to asbestos in a variety of ways. Decedent's exposure - as relevant to this motion - is from the use of Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (hereinafter referred to jointly as "defendants") products, specifically, Johnson's Baby Powder ("JBP"). The decedent alleged that she used the defendants' product daily from about 1971 to 2017 (Mot. Kurlan Aff. Exhs.3, pg. 19 and Exh. 4, pgs. 701-702).

At her deposition the decedent testified that she recalled her mother used talc powder on her as a child in Haiti but could not specifically provide any details as to the brand of powder (Mot. Kurland Aff., Exh. 5, pgs. 78-79). Decedent testified that after coming to the United States in 1971 at the age of fourteen, she used JBP after showering. She would shake the powder into her hand, rubbed it on her face, and then would shake it directly onto her entire body for approximately two minutes (Opp. Exh. 2, pgs 13-16). The decedent continued this routine into adulthood (Opp. Exh. 2, pg. 19). She recalled that the air would get dusty when she used JBP and that she would breath it in. She liked the smell of the powder (Opp. Exh. 2, pgs. 15-18).

Decedent married Eddie Germaine in 1979 (Opp. Exh. 1, pg. 20). Decedent testified that she used JBP on her first child, Mildred, after she was born in 1980; on her second child, Tamikah, after she was born in 1981; and her third child, Jamar, after he was born in 1981 (Opp. Exh. 1, pgs. 20, 28 and 29). Decedent powdered each child after every diaper change which took place every few hours and after their daily baths (Opp. Exh. 2, pgs. 23-25). She testified that as they got older she would kneel down to the children's height and pour JBP all over them (Opp. Exh. 22-23). She used JBP on each of her three children until they were about seven or eight years old (Opp. Exh. 2, pg 20).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Decedent testified that she used JBP throughout her career as a nurse. Decedent further testified that after she passed the boards in 1992, she worked at various hospitals where JBP was used on the patients. She estimated that over the course of her entire career, she applied JBP on several thousand patients (Opp. Exh. 2, pgs. 26-33). The decedent did not remember reading the writing on the JBP packaging or reading any instructions, only the name on the bottle (Mot. Kurland Aff., Exh. 4, pg. 701).

To the extent the defendants allege that decedent's deposition testimony as to her use of JBP as a nurse contradicts her interrogatory responses (See Memo. of Law in Support of Summary Judgment, pg. 3, footnote 4, citing to Kurland Aff. Exh. 3, Kurland Aff. Exh. 4, pgs. 188-191, 312 -214 and 705), this raises a credibility issue for the jury to consider at the time of trial. (Dollas v. W.R. Grace and Co., et al., 225 A.D. 2d 319, 639 N.Y.S. 2d 323 [1st Dept. 1996]).

Plaintiffs commenced this action on February 13, 2017, and subsequently amended the complaint four times, the Fourth Amended Complaint substituted the decedent's daughter, Mildred Germain as representative of the estate. Plaintiffs' Second Amended Complaint dated February 21, 2017- under the Second Standard Complaint - asserts four causes of action for: (1) negligence for wrongful death and survival damages, (2) strict liability for wrongful death and survival damages, (3) loss of services, society and consortium, and (4) punitive damages (Mot. Kurland Aff., Exh. A). The defendants answered plaintiff's complaint on March 23, 2017 (Mot. Kurland Aff., Exh. 2).

Defendants, Johnson & Johnson (hereinafter referred to individually as "JJ") and Johnson & Johnson Consumer Inc.'s (hereinafter referred to individually as "JJCI"), now move for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Second Amended Complaint.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Defendants' argue that plaintiffs are not expected to present any admissible evidence of exposure to asbestos. Defendants argument that plaintiffs have no evidence and cannot raise an issue of fact that the decedent was exposed to asbestos from the use of JBP during the relevant periods of 1971 to 2016, is not a basis to obtain summary judgment.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of Plaintiff's illness (Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.), 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to Reid v. Georgia - Pacific Corp., 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation*), 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and O'Connor v. Aerco Intl., Inc., 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that Mrs. Germaine either was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of mesothelioma (Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*), 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendants apply the standards asserted in Sean R. v. BMW of N. Am., LLC, 26 N.Y. 3d 801, 48 N.E. 3d 937, 28 N.Y.S. 3d 656 [2016] and *In re New York City Asbestos Litigation* (Mary Juni), 148 A.D. 3d 233, 48 N.Y.S. 3d 365 [1st Dept., 2017], arguing that summary judgment is warranted as to the plaintiffs' strict liability and negligence claims because of lack of causation. Defendants claim that there is no asbestos contamination from their products because: (1) the talc was sourced from asbestos free mines, (2) the mined talc was purified, (3) there were internal tests to ensure the lack

of contamination and (4) both government and independent tests confirmed the product was asbestos free. It is defendants' contention that their defense experts establish the decedent was not exposed to asbestos through use of their products or that they did not cause her mesothelioma.

Defendants rely on multiple articles and reports (Mot. Kurland Aff. Exhs. 7, 8, 9, 10, 11, 16, 19, 20, 24 and 32), FDA findings in August of 2018 (Mot. Kurland Aff. Exh. 32), and the expert affidavits of Dana M. Hollins, MPH, CIH and Mathew S. Sanchez, Ph.D., to establish that the decedent was not exposed to asbestos through use of their products or that they did not cause her mesothelioma. Defendants claim that during the periods relevant to the decedent, JBP talc was obtained from one of three sources, Val Germanasca, Italy, Vermont, and Guangxi, China.

Dana M. Hollins has a Masters Degree in Occupational and Environmental Epidemiology and is a board certified industrial hygienist. She is employed as a Principal Health Scientist by Cardno ChemRisk, a private scientific consulting firm. She did not perform any testing and instead relies exclusively on reports and studies, only some of which were annexed to the motion papers. Ms. Hollins prepared two tables estimating potential exposure associated with consumer use of cosmetic talcum powder products for powdering infants (1) over a period of two years and (2) over a 70 year lifetime (Hollins Aff., para. 76, Table 1 and Table 2, pgs. 26 and 27). A third table was prepared applying specifically to the decedent's potential exposure to JBP relying on the same data as the other two tables (Hollins Aff., pgs. 30-31, para. 79, Table 3). She calculates that the decedent's upper bound cumulative exposure to asbestos from use of JBP is "0.0146 f/cc-yr." (Hollins Aff., pg. 32, para. 80). In preparing the third table, Ms. Hollins makes assumptions as to the time period and amount of exposure, these were lacking in decedent's deposition testimony (Hollins Aff., pgs. 32, para. 79, footnotes e, i, m, n, o, p and q). Ms. Hollins prepares a fourth table "estimating total cumulative ambient asbestos exposure over a 70-year lifetime," which shows that her calculations are within the ATSDR's estimated average of 0.002 to 0.4 f/cc-year due to the number of hours a person spends indoors (Hollins Aff., pgs. 38-39, para. 91).

Ms. Hollins relies on the decedent's deposition testimony that is not annexed to the motion papers at all (Hollins Aff., para. 9, pg. 3). Ms. Hollins states decedent testified she was diagnosed with epithelioid mesothelioma, with pleural effusion in the lining of her lungs, lymphoma and cancer in her spleen" (Hollins Aff., para. 9, pg. 3, citing to Decedent's testimony, Vol. III, pg. 415 and Vol. IV, pgs. 804-805). Ms. Hollins concludes that the decedent's "cumulative exposures to asbestos fiber as a result of using JBP would be far too low to increase her risk of developing pleural mesothelioma." (Hollins Aff., pg. 40, para. 95) She also states it is possible that the decedent's "pleural mesothelioma" was spontaneous (Hollins Aff., pgs. 40-41, para. 98).

Matthew S. Sanchez, Ph.D. has a doctorate in geology and specializes in asbestos and the development of asbestos analytical methods. Dr. Sanchez is employed by a private entity, the RJ Lee Group, Inc., as a Principal Investigator. He states that talc in its purest form is not asbestos. He describes asbestos as a regulated group of six naturally occurring, highly fibrous, silicate minerals that when crystallized can become one of two families of asbestos containing minerals: serpentine and amphibole. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and analysis of the materials used is needed to make a determination.

Dr. Sanchez's report attempts to address alleged defects in plaintiff's expert reports. The part of the report that attempts to discredit plaintiffs' experts does not make a prima facie showing of lack of causation (see Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516; Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575). Dr. Sanchez cites to reports and studies (most of them are not annexed to his affidavit or the motion papers), his own site visits to Italy and China, and testing of allegedly relevant talcs, and concludes that the defendants' talc, mined in Italy, Vermont and China, does not contain asbestos. Dr. Sanchez ultimately concludes that defendants' talcum powder and the talc used by the decedent is free of asbestos to a reasonable degree of scientific certainty.

Defendants' have made a prima facie case for summary judgment on plaintiff's first and second causes of action for negligence and strict liability.

Plaintiffs argue that issues of fact remain as to whether the decedent's exposure to asbestos in the cosmetic talc used in JBP caused her mesothelioma.

In toxic tort cases, an expert opinion must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered, and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (In re New York City Asbestos Litigation (Mary Juni), 148 A.D. 3d 233, supra pg. 236, citing to Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2016]). Specific causation can be established by an expert's comparison of the exposure levels found in the subjects of other studies. The expert is required to provide specific details of the comparison and show how the plaintiff's exposure level related to those of the other subjects (Id). The Juni case applied the Parker v. Mobil Oil Corp., 7 N.Y. 3d 434 and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014], standards for the plaintiff to establish causation.

Plaintiffs' experts are Dr. Steven P. Compton, Dr. William E. Longo, Dr. Murray Finkelstein and Dr. Jacqueline Moline.

Dr. Steven Compton is a doctor of physics, with laboratory experience in spectroscopy and microscopy. He is also the executive director of MVA Scientific Consultants a private research facility (Opp. Exh. 19). Dr. Compton prepared a report on Italian Talc dated August 1, 2017 in which he confirmed the presence of asbestos after scanning electron and transmission electron microscopy in thirteen samples of the Italian talc provided to the defendants (Opp. Exh. 20). He concluded that aerosolization of the consumer talc products containing the samples would have elevated concentrations of asbestos fibers (Opp. Exh. 20). Dr. Compton has raised an issue of fact as to Italian talc, and the plaintiffs' other experts further raise an issue of fact.

Dr. Edward Longo has a Doctorate of Philosophy in Materials Science and Engineering. He also studied microbiology and chemistry (Opp. Exh. 49). Plaintiffs provide his report dated 8-2-17 and the "Below the Waist App. of JBP" report dated September of 2017 (Opp. Exhs. 51A, 51B and 52). Dr. Longo performed studies on samples of the defendants' products and reviewed other reports and studies - most were annexed to the opposition papers - and concluded that there is asbestos in the talc found in defendants products (Exh. 51A, 51B and 52). Dr. Longo's "Below the Waist App. of JBP" report concluded that JBP contains an average mean tremolite asbestos fiber exposure of 2.57 f/cc and an average mean fibrous talc exposure of 1.51 f/cc with a significant exposure to airborne amphibole fibers. Additionally Dr. Longo's "Below the Waist App. of JBP" study showed there was significant exposure to asbestiform talc fibers from the application of JBP (Opp. Exh. 52, pg. 5). Dr. Longo further quantified the amount of asbestos exposure from the use of talc in a manner similar to the decedent's use, concluding that individual individuals who used JBP were more likely to have been exposed to fibrous amphibole asbestos (Opp. Exh. 51A and 51B). The combined evidence from Dr. Longo raises an issue of fact as to causation.

Dr. Murray Finkelstein is a medical doctor and a doctor of physics, specializing in environmental exposures to toxins including asbestos (Opp. Exh. 53 and 54). His reports dated September 5, 2017 and March 7, 2018 address exposure to asbestos in JBP (Opp. Exh. 54, Exhs. A and B). He incorporates relevant portions of multiple studies of talc and his own comparison and scientific modeling of exposure similar to that of the decedent (Opp. Exh. 54). Dr. Finkelstein concludes that JBP had trace amounts of fibrous amphibole that are sufficient to cause mesothelioma and that asbestos is the only relevant known cause of the disease. He further concludes that the decedent's exposure to asbestos in JBP is a substantial contributing cause of her epithelial mesothelioma. Dr. Finkelstein's affidavit is sufficient to raise issues of fact for a jury to determine whether there is a causal relationship between the decedent's exposure to asbestos through her use of talc in defendants' products for many years, and her mesothelioma.

Dr. Jacqueline Moline is a medical doctor specializing in occupational and environmental disease specifically asbestos related occupational medicine. Dr. Moline's report is dated June 21, 2018 (Opp. Exh. 42). Dr. Moline reviewed the decedent's medical history and deposition testimony. Dr. Moline states that the decedent had metastatic malignant mesothelioma of the peritoneum pleura, and the initial diagnosis of epithelioid mesothelioma included evidence of a tumor in her pleura at the same time. Dr. Moline relies on studies, reports, and OSHA standards, concluding that even small amounts of exposure are sufficient to cause mesothelioma. Dr. Moline concludes that

JBP is contaminated with asbestos, and that decedent's exposure to asbestos contaminated talc products caused her epithelioid mesothelioma (Opp. Exh. 42).

Defendants arguments that Dr. Moline was discredited in the *Juni* case are unavailing. In the *Juni* case Dr. Moline testified as to plaintiff's exposure to dust in brakes as part of Mr. Juni's employment. In the *Juni* case the court determined that the plaintiff was unable to establish causation because of Dr. Moline's lack of knowledge whether the asbestos fibers were active after the braking process (In re New York City Asbestos Litigation (Mary Juni), 148 AD3d 233, supra, pg. 237). This case is distinguishable, since it does not involve exposure in a commercial setting or to fiction products, but as part of the use of cosmetic talc.

Summary judgment is a drastic remedy that should not be granted where issues raised in conflicting affidavits cannot be resolved. It should not be granted when there is any doubt. The Court's function on summary judgment is issue finding, not issue determination. (Insurance Co. of New York v. Central Mut. Ins. Co., 47 A.D. 3d 469, 850 N.Y.S. 2d 56 [1st Dept., 2008] citing to Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966]). Conflicting testimony raises credibility issues, that cannot be resolved on papers. They should be determined by a jury instead, and are a basis to deny summary judgment (Prevost v. One City Block LLC, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept. 2017] and Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [1st Dept. 2011]).

Defendants' arguments that the specific bottles of their products used by the decedent were not tested and there is no direct evidence of exposure to asbestos, is not dispositive. Plaintiff is not required to show the precise causes of her damages, but only show facts and conditions from which defendant's liability may be reasonably inferred (Oken v A.C. & S. (Matter of New York City Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, supra at pg. 448, and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

The conflicting expert affidavits, the "reasonable inference" standard and construing the evidence in a light most favorable to the plaintiffs as the non-moving party warrants denial of summary judgment sought by the defendants on plaintiff's strict liability and negligence claims. Plaintiff has sufficiently raised credibility issues and issues of fact as to general and specific causation, requiring a trial of this matter.

Defendants did not make any arguments on plaintiffs' third cause of action for " loss of services, society and consortium. " Summary judgment is denied on the third cause of action.

Plaintiffs raised issues of fact as to the fourth cause of action for punitive damages. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent plaintiffs argue that the defendants placed corporate profits and reputation above the health and safety of the decedent by failing to place any warnings about asbestos on their product, and their continued insistence that there is no asbestos in talc, this issue of punitive damages is to be determined by the trial judge after submission of all evidence.

ACCORDINGLY, it is ORDERED that defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Second Amended Complaint, is denied.

ENTER:

Dated: December 18, 2018


MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
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