

Treacy v Amchem Prods., Inc.
2018 NY Slip Op 30354(U)
February 21, 2018
Supreme Court, New York County
Docket Number: 190352/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ANGELA M. TREACY and ANNA BERTOLOTTI,
as Co-Administratrices for the Estate
of DANTE RICCOBONI,

Index No. 190352/2015.

Plaintiffs

- against -

DECISION AND ORDER

AMCHEM PRODUCTS, INC., et al.,

Defendants
-----X

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendant Goodyear Tire & Rubber Company moves for summary judgment dismissing the complaint and cross-claims against Goodyear Tire & Rubber, C.P.L.R. § 3212(b), on the ground that Goodyear Tire & Rubber's tires to which plaintiffs' decedent Riccoboni was exposed did not contain asbestos. Upon its motion for summary judgment, Goodyear Tire & Rubber bears the burden to demonstrate that its breach of a duty as claimed by plaintiffs did not cause or exacerbate Riccoboni's injuries. Katz v. United Synagogue of Conservative Judaism, 135 A.D.3d 458, 461 (1st Dep't 2016); O'Connor v. Aerco Intl., Inc., 152 A.D.3d 841, 842 (3d Dep't 2017). Pointing to a lack of evidence of causation does not satisfy this burden. Katz v. United Synagogue of Conservative Judaism, 135 A.D.3d at 462; O'Connor v. Aerco Intl., Inc., 152 A.D.3d at 842.

II. GOODYEAR TIRE & RUBBER'S PRIMA FACIE DEFENSE

The parties do not dispute that Riccoboni worked in various locations where Goodyear Tire & Rubber's tiles were being installed. Goodyear Tire & Rubber presents Riccoboni's deposition testimony describing Goodyear Tire & Rubber's tiles where Riccoboni worked as "12 by 12" squares. Aff. of Alexander Broche Ex. B, at 72. His testimony that he did not know whether those tiles contained asbestos and could not determine whether tiles contained asbestos by looking at them, however, fails to demonstrate asbestos in the tiles. See Matter of New York County Asbestos Litig., 52 A.D.3d 300, 301 (1st Dep't 2008). His belief that those tiles contained asbestos because he heard it from federal Occupational Safety and Health Administration personnel and in news accounts is inadmissible hearsay. Rubin v. Rubin, 134 A.D.3d 579, 579 (1st Dep't 2015); Acevedo v. William Scotsman, Inc., 116 A.D.3d 416, 417 (1st Dep't 2014); Rodriguez v. City of New York, 105 A.D.3d 623, 624 (1st Dep't 2013); Peckman v. Mutual Life Ins. Co. of N.Y., 125 A.D.2d 244, 247 (1st Dep't 1986). See People v. Samandarov, 13 N.Y.3d 433, 437 (2009). Goodyear Tile & Rubber also faults plaintiffs' failure to identify the specific addresses where Riccoboni worked, but does not indicate how this information would show the absence of tiles containing asbestos at those sites.

While Goodyear Tile & Rubber's use of Riccoboni's testimony amounts to no more than a showing of deficiencies in plaintiffs' evidence of causation, as opposed to admissible evidence of an

absence of causation, its verified answers to interrogatories may constitute that admissible evidence demonstrating an absence of causation. See C.P.L.R. § 105(u); Veneski v. Queens-Long Island Med. Group, 285 A.D.2d 369, 370 (1st Dep't 2002); Gibson v. St. Luke's Roosevelt Hosp. Ctr., 267 A.D.2d 136, 137 (1st Dep't 1999). Its interrogatory answer that Goodyear Tire & Rubber manufactured only three brands of tiles that contained asbestos, Black Back and Heavy Duty Homogenous (HDH), which were only 9 x 9 inches, and AquaShield, which was never marketed, shows that Goodyear Tire & Rubber did not manufacture or market tiles containing asbestos to which Riccoboni was exposed. Although this evidence may meet Goodyear Tire & Rubber's initial burden, demonstrating its entitlement to judgment as a matter of law, Schiraldi v. U.S. Min. Prods., 194 A.D.2d 482, 483 (1st Dep't 1993), its further answers to interrogatories rebut this evidence.

III. FACTUAL ISSUES RAISED BY PLAINTIFFS

In opposition, plaintiffs present Goodyear Tire & Rubber's verified fourth amended answers to plaintiffs' interrogatories. These answers admit that its HDH tiles also were manufactured in squares of 12 x 12 inches, consistent with Riccoboni's description, and contained 5% asbestos until 1975. United Bank v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 264 (1976); Lexington Park Realty LLC v. National Union Fire Ins. Co. of Pittsburgh, PA, 120 A.D.3d 413, 414 (1st Dep't 2014). Goodyear Tire & Rubber's further evidence, an affidavit by Edmund Lutz,

its sales and marketing employee from 1952 to 1987, that its "primary flooring product was an all-vinyl tile," Broche Aff. Ex. D ¶ 3, fails to demonstrate that its products to which Riccoboni was exposed in fact lacked asbestos. Matter of New York City Asbestos Litig., 123 A.D.3d 498, 499 (1st Dep't 2014); Matter of New York City Asbestos Litig., 122 A.D.3d at 52. See O'Connor v. Aercó Intl., Inc., 152 A.D.3d at 843.

Goodyear Tire & Rubber also presents a report dated November 21, 2014, of testing conducted on a Goodyear Tire & Rubber HDH tile that revealed no asbestos, but the report is unsworn by the analyst who conducted the test, and the director of the laboratory that received the sample tile fails to lay a business record foundation for the report. C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010); 135 E. 57th St., LLC v. 57th St. Day Spa, LLC, 126 A.D.3d 471, 472 (1st Dep't 2015); People v. Vargas, 99 A.D.3d 481, 481 (1st Dep't 2012); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012). Testing of a single sample received in 2014, in any event, does not establish that no tiles manufactured or marketed by Goodyear Tire & Rubber contained asbestos, particularly during Riccoboni's exposure to them from 1964 to 1979.

Plaintiffs thus show a reasonable probability that the Goodyear Tire & Rubber tiles to which Riccoboni was exposed contained asbestos. Matter of New York City Asbestos Litig., 116 A.D.3d 545, 545 (1st Dep't 2014). See Healey v. Firestone Tire & Rubber Co., 87 N.Y.2d 596, 601-602 (1996). Since plaintiffs

raise these factual issues regarding defendant Goodyear Tire & Rubber Company's potential liability, the court denies its motion for summary judgment. C.P.L.R. § 3212(b); Matter of New York City Asbestos Litig., 116 A.D.3d at 545. See Matter of New York County Asbestos Litig., 52 A.D.3d at 301.

DATED: February 21, 2018

Lucy Billings

LUCY BILLINGS, J.S.C.