

Pogacnik v A.O. Smith Water Prods. Co.
2018 NY Slip Op 30675(U)
April 10, 2018
Supreme Court, New York County
Docket Number: 190340/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
-----X

TATJANA POGACNIK, as Executrix of the
Estate of LEON B. POGACNIK, and
TATJANA POGACNIK, Individually,

Index No. 190340/2015

Plaintiff

- against -

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants
-----X

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks damages for the deceased Leon Pogacnik's injuries and death suffered after he was exposed to various materials and equipment containing asbestos during his employment as an architect from 1969 to 1983. Plaintiff alleges that Pogacnik was exposed to asbestos when other workers in his vicinity handled, cut, and installed sheet flooring manufactured by defendant Mannington Mills Inc., work that released dust containing asbestos into the air, which he inhaled. Pogacnik testified at his deposition that he worked in close proximity to Mannington Mills's sheet flooring on many projects from 1969 to 1983. Pogacnik testified that, on at least three of these projects, he visited the project work sites one to four days per week for five to nine months. He specifically recalled observing dust released into the air as workers cut, filed, and otherwise handled the flooring and breathing in that dust. He was

diagnosed with mesothelioma in October 2015.

Mannington Mills now moves for summary judgment dismissing plaintiff's claims, maintaining that the evidence establishes the absence of a general or specific causal relationship between Mannington Mills's sheet flooring and Pogacnik's mesothelioma. Mannington Mills presents affidavits incorporating reports from two experts, Michael Graham M.D., a board certified pathologist, and Mark Durham, a former industrial hygienist, in support of Mannington Mills's two related defenses. First, the asbestos in its sheet flooring was insufficient to have contributed to the development of Pogacnik's disease. Second, Pogacnik's exposure to its sheet flooring containing asbestos was insufficient to have harmed Pogacnik.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, Mannington Mills must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). Only if Mannington Mills satisfies this standard, does the burden shift to plaintiff to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d

742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of Mannington Mills's motion, the court construes the evidence in the light most favorable to plaintiff. De Lourdes Torres v. Jones, 26 N.Y.3d at 763; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If Mannington Mills fails to meet its initial burden, the court must deny it summary judgment despite any insufficiency in plaintiff's opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005).

To succeed at trial on plaintiff's claim, plaintiff must establish (1) that the asbestos in Mannington Mills's sheet flooring could have contributed to the development of Pogacnik's mesothelioma and (2) that his exposure to that asbestos actually did contribute to the development of his mesothelioma. Sean R. v. BMW of N. Am., LLC, 26 N.Y.3d 801, 808 (2016); Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 448 (2006); Matter of New York City Asbestos Litig., 148 A.D.3d 233, 235-36 (1st Dep't 2017); Nonnon v. City of New York, 88 A.D.3d 384, 394 (1st Dep't 2011). Upon Mannington Mills's motion for summary judgment, however, Mannington Mills bears the initial burden to establish that

exposure to the asbestos from Mannington Mills's sheet flooring could not have contributed to mesothelioma or that Pogacnik was not exposed to levels of asbestos sufficient to contribute to the development of his disease. Matter of New York City Asbestos Litig., 122 A.D.3d 520, 521 (1st Dep't 2014); Matter of New York City Asbestos Litig., 123 A.D.3d 498, 498 (1st Dep't 2014); Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463 (1st Dep't 1995).

Mannington Mills does not dispute that its rolled sheet flooring contained asbestos or that Pogacnik worked in the vicinity of its sheet flooring containing asbestos during his career as an architect. Instead, Mannington Mills maintains that plaintiff fails to establish that its sheet flooring released asbestos fibers at levels that could contribute to Pogacnik's mesothelioma and that Pogacnik was exposed to levels of asbestos sufficient to cause his disease. Mannington Mills's position impermissibly shifts to plaintiff its burden upon its motion for summary judgment: Mannington Mills first must establish either that exposure to the sheet flooring containing asbestos could not have contributed to mesothelioma or that Pogacnik was not exposed to levels of asbestos sufficient to contribute to the development of his disease. Katz v. United Synagogue of Conservative Judaism, 135 A.D.3d 458, 462 (1st Dep't 2016); Matter of New York City Asbestos Litig., 122 A.D.3d at 521; Matter of New York City Asbestos Litig., 123 A.D.3d at 498; Reid v. Georgia-Pacific Corp., 212 A.D.2d at 463. Any inadequacies in plaintiff's opposition are irrelevant until Mannington Mills satisfies its

initial burden to make a prima facie showing of its entitlement to summary judgment. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d at 735; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

III. MANNINGTON MILLS'S FAILURE TO SATISFY ITS BURDEN

A. Whether the Asbestos from Mannington Mills's Flooring Could Have Contributed to Pogacnik's Mesothelioma

Mannington Mills fails to satisfy its burden to establish that the release of asbestos fibers from its sheet flooring could not have contributed to Pogacnik's mesothelioma. Dr. Graham concludes that Pogacnik developed mesothelioma due to exposure to amphibole asbestos, and his mesothelioma was not caused by his exposure to chrysotile asbestos dust from Mannington Mills's sheet flooring. Dr. Graham's conclusion thus assumes that the flooring contained chrysotile asbestos, which Mannington Mills contends is a less harmful type of asbestos, "a weak human pleural carcinogen," but Mannington Mills presents no evidence that the flooring Pogacnik was exposed to contained only chrysotile asbestos. Aff. of Terance Calcagno Ex. D, at 3. Nor does either of Mannington Mills's experts find that its sheet flooring did not contain amphibole asbestos. M.V. v. City of New York, 149 A.D.3d 641, 641 (1st Dep't 2017); Park v. Kovachevich, 116 A.D.3d 182, 192 (1st Dep't 2014). See Admiral Ins. Co. v. Joy Contractors, Inc., 19 N.Y.3d 448, 457 (2012).

Dr. Graham also fails to cite any evidence or studies supporting his conclusion that exposure to chrysotile asbestos

dust does not increase a person's asbestos burden or risk of developing mesothelioma. Although Dr. Graham prefaces his report by noting that his opinions overall are based on two publications, he provides no citation to these studies and, more importantly, neither refers to these studies when discussing chrysotile asbestos dust, nor elaborates on their conclusions, and Mannington Mills does not independently present these studies. Parker v. Mobil Oil Corp., 7 N.Y.3d at 450; Matter of Bausch & Lomb Contact Lens Solution Prod. Liab. Litig., 87 A.D.3d 913, 913 (1st Dep't 2011); Lara v. New York City Health & Hosps. Corp., 305 A.D.2d 106, 106 (1st Dep't 2003). Its industrial hygienist, Mark Durham, draws no conclusions as to whether the asbestos in the sheet flooring to which Pogacnik was exposed could cause mesothelioma. Mannington Mills thus fails to present evidence establishing that the asbestos to which Pogacnik was exposed could not have contributed to his mesothelioma.

B. Whether Pogacnik's Exposure to the Asbestos from Mannington Mills's Flooring Actually Did Contribute to the Development of His Mesothelioma

Mannington Mills also fails to establish that Pogacnik was exposed to insufficient levels of asbestos from Mannington Mills's sheet flooring for that exposure to have contributed to mesothelioma. Dr. Graham concludes that exposure to chrysotile asbestos dust does not increase a person's risk for mesothelioma because the release of airborne chrysotile asbestos dust from flooring containing chrysotile asbestos falls within the United States Occupational Safety and Health Administration's

permissible exposure limit. Again, Dr. Graham assumes that the flooring Pogacnik was exposed to contained chrysotile asbestos without any evidentiary basis. M.V. v. City of New York, 149 A.D.3d at 641; Park v. Kovachevich, 116 A.D.3d at 192.

Durham concludes that Pogacnik was not exposed to asbestos dust because his role as a bystander to the handling, cutting, and installation of sheet flooring does not amount to exposure. Pogacnik testified, however, that he was more than a casual, uninvolved bystander. As the architect for the project, he was inspecting at close range how the flooring was cut and installed, a "few feet" away from the workers. Calcagno Ex. C, at 616. More significantly, he observed, in close proximity, that the cutting produced "[w]hitish gray dust," and he inhaled that dust. Id.

Durham rejects Pogacnik's testimony that the cutting and installation of the rolled sheet flooring released asbestos fibers into the air as inaccurate and disputes that cutting the flooring produces dust. Since Durham's opinion impermissibly relies on a determination of Pogacnik's credibility, the opinion may not be used to satisfy Mannington Mills's burden to obtain summary judgment. Severino v. Weller, 148 A.D.3d 272, 275 (1st Dep't 2017); Hutchings v. Yuter, 108 A.D.3d 416, 417 (1st Dep't 2013); Cokeng v. Ogden Cap Properties, LLC, 104 A.D.3d 550, 550 (1st Dep't 2013); Griffin v. Cerabona, 103 A.D.3d 420, 421 (1st Dep't 2013). At best, Durham's dispute with Pogacnik's testimony raises, rather than eliminates, a material factual issue.

Durham also concludes that, even if Pogacnik was exposed to asbestos, his exposure was within the permissible exposure limit, and the contribution of such a low level of exposure to his lifetime exposure to asbestos was negligible. In simply concluding that Pogacnik's exposure was "negligible," Durham never quantifies the exposure. Calcagno Aff. Ex. E, at 9. See Sean R. v. BMW of N. Am., LLC, 26 N.Y.3d at 808; Cornell v. 360 W. 51st St. Realty, LLC, 22 N.Y.3d 762, 784 (2014); Matter of New York City Asbestos Litig., 148 A.D.3d at 236-37. Moreover, Durham bases this conclusion on his review of industrial hygiene studies and air sampling data, but fails to specify the studies or data on which he relies. Mannington Mills also fails to present any of these studies. Parker v. Mobil Oil Corp., 7 N.Y.3d at 450; Matter of Bausch & Lomb Contact Lens Solution Prod. Liab. Litig., 87 A.D.3d at 913; Lara v. New York City Health & Hosps. Corp., 305 A.D.2d at 106. While Durham cites to a website where a record of a survey he conducted of another manufacturer's rolled vinyl sheet flooring is available, he never compares it to Mannington Mills's sheet flooring, particularly whether the flooring surveyed used the same substrate underneath Mannington Mills's flooring that contained the asbestos.

Finally, Mannington Mills's experts both fail to address the effect of Pogacnik's prolonged exposure to asbestos. Pogacnik testified that he inhaled dust from the sheet flooring containing asbestos multiple times a week for many months while working on many projects over 14 years. Dr. Graham neither addresses the

effect of prolonged exposure to chrysotile asbestos dust at these levels, nor concludes that Pogacnik's prolonged exposure within the permissible exposure level did not contribute to his mesothelioma. Durham concludes that Pogacnik's "8-hour time weighted exposure on any such occasion" would have made a "negligible contribution" to Pogacnik's lifetime exposure to asbestos, but does not address the effect of Pogacnik's prolonged exposure to asbestos at these levels. Calcagno Aff. Ex. E, at 9. Mannington Mills thus also fails to establish that Pogacnik's actual, sustained exposure to Mannington Mills's sheet flooring containing asbestos did not contribute to the development of his mesothelioma.

IV. CONCLUSION

For all the reasons explained above, the court denies defendant Mannington Mills's motion for summary judgment.

C.P.L.R. § 3212(b).

DATED: April 10, 2018



LUCY BILLINGS, J.S.C.

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J.S.C.