

Margolis v Amchem Prods., Inc.

2019 NY Slip Op 30340(U)

February 14, 2019

Supreme Court, New York County

Docket Number: 190106/2017

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

PAUL D. MARGOLIS and MARJORIE MARGOLIS,

INDEX NO. 190106/2017

Plaintiffs,

MOTION DATE 01/23/2019

- against -

MOTION SEQ. NO. 005

AMCHEM PRODUCTS, INC., et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by American Biltrite, Inc.:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for 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 Defendant American Biltrite, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it is denied.

Plaintiff Paul D. Margolis, was diagnosed with pleural mesothelioma on December 19, 2016. He was about 70 years old at the time of his diagnosis. Mr. Margolis was deposed over a course of four days on May 16, 17, 18 and 22, 2017 (Mot. Reinhardt Aff. Exh. A, Opp. Romanelli Aff. Exh. 2). It is alleged that Mr. Margolis was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from Amtico vinyl asbestos floor tiles manufactured by American Biltrite, Inc.(hereinafter referred to as "ABI").

Mr. Margolis testified at his deposition that he was exposed to second hand asbestos dust as a student while at Syracuse University in Syracuse, New York (hereinafter referred to as "Syracuse") from about September of 1964 through 1968. He testified at his deposition that as a freshman, from about September of 1964 through May of 1965, while residing at the Marion Hall dormitory on the Syracuse campus he observed repair work that included the replacement of the floor tiles. He testified that this work was being done all over campus and that he remembered four different brands of tiles being used as replacement for the floor tiles at Marion Hall, which included ABI's Amtico vinyl asbestos floor tiles (Opp. Romanelli Aff. Exh. 2, pgs. 185-190, 196). Mr. Margolis testified that in his sophomore year he moved to Dell Plain Hall dormitory, for the period from 1965 through 1966. He observed the replacement of floor tile work also being done in Dell Plain Hall using the same four brands of floor tiles that were used at the Marion Hall Dormitory (Opp. Romanelli Aff. Exh. 2, pgs. 185, 193-195). He also testified that he was a matter of feet away from repairs being made on campus. He identified the new flooring as vinyl asbestos floor tiles that were one square foot in size and tan or grey with a mottle design (Mot. Reinhardt Aff., Exh. A, pgs. 446-449). Mr. Margolis described the Amtico box as eighteen inches tall, brown cardboard colored, that bore the name "Amtico" and the words "vinyl asbestos tile" (Mot. Reinhardt Aff., Exh. A, pgs. 461- 463). He testified that the tiles were cut with a tile knife and in cutting pieces of tile to fit, the workers scored it, cut it, snapped it and then applied it, and that the process created dust that he breathed in (Mot. Reinhardt Aff., Exh. A, pgs. 446-449 and 564- 565).

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

During his junior and senior year at Syracuse - 1966 through August of 1968 - Mr. Margolis testified that he resided at the Zeta Beta Tau fraternity house (Mot. Reinhardt Aff., Exh. A, pg. 185). He testified that a new addition was being made to the old fraternity house, walls were being torn down and new flooring put in. Mr. Margolis testified that the four brands of tiles he previously identified on the Syracuse campus were used for the new flooring at the fraternity house, this includes ABI's Amtico vinyl asbestos floor tile (Mot. Reinhardt Aff., Exh. A, pgs. 185, 200-203, 212-213, 237). He described the new floor tile at the fraternity house as being installed with whole pieces in the middle and then cut to fit (Mot. Reinhardt Aff., Exh. A, pgs. 453-454).

Mr. Margolis testified that after college, in September of 1968 he got a job as Media Planner at Dancer Fitzgerald Sample, on Madison Avenue, New York. He was eventually promoted to Media Supervisor and worked there for about two years until about September of 1970 (Mot. Reinhardt Aff., Exh. A, pgs. 322, 325). He testified that while he was working at Dancer Fitzgerald Sample, repairs and renovation was being done in the building, and specifically that the floor tiles were being lifted and replaced on multiple floors. He testified that the work performed on the floor he worked on was entirely floor tiles and the same four types of new tile he identified on the Syracuse campus was being used, including ABI's Amtico vinyl asbestos floor tile. Mr. Margolis testified that a tile knife was used to cut the tile (Opp. Reinhardt Aff., Exh. A, pgs. 327-329). He described the work performed at Dancer Fitzgerald Sample as patchwork, with a mix of whole tiles and cut tiles to fit, and that the tiles were grey (Mot. Reinhardt Aff., Exh. A, pgs. 458 - 459).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it.

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 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent 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 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]).

ABI argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that its product, Amtico asbestos vinyl floor tiles, caused Mr. Margolis' mesothelioma. ABI's reliance on the reports of plaintiffs' experts Dr. Brent Staggs, M.D., Dr. Mark Ellis Ginsburg, M.D., and Dr. Omur Cinar Elci, M.D., Ph.D., (Mot. Reinhardt Aff., Exhs. E, F and G) in support of its argument that plaintiff will not present any admissible evidence as to causation, is unavailing.

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 Products*, 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 did not contribute to the causation of plaintiff's illness (*Comeau v. W.R. Grace & Co. - Conn. (Matter of New York City Asbestos Litigation)*, 216 A.D. 2d 79, 628 N.Y.S. 2d 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], *Di Salvo 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. 2d 766 [3rd Dept., 2017]). ABI must unequivocally establish that the plaintiff's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of her mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

ABI's attempt to "point to gaps," by alleging plaintiffs have no evidence, fails to establish a prima facie basis for summary judgment.

An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (*Kasae v. H.E.E. Co.*, 95 A.D. 3d 568, 944 N.Y.S. 2d 95 [1st Dept., 2012]). A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge such as deposition testimony (See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D. 3d 595, 20 N.Y.S. 3d 6 [1st Dept., 2015] and *Hoeffner v. Orrick, Herrington & Sutcliffe, LLP*, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1st Dept., 2009]).

ABI is using its attorney's affirmation to submit documentary evidence in admissible form, specifically plaintiff's testimony, ABI's expert reports and ABI's Answers to plaintiff's interrogatories, which are sufficient for summary judgment.

ABI contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006] and *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014]) because plaintiff is unable to establish general and specific causation. ABI argues that its experts John W. Spencer, CIH, CSP, (a certified industrial hygienist), his report prepared with Marc Plisko (a certified industrial hygienist) (Mot. Reinhardt Aff. Exh. B), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. D), establish lack of causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, *supra*).

ABI argues that, unlike amphibole asbestos, no causal relationship exists between encapsulated chrysotile asbestos used in their product and the development of mesothelioma, eliminating any general causation. ABI submits the expert affidavit and June 27, 2018 Summary Report of John W. Spencer, CIH, CSP, and Marc Plisko, certified industrial hygienists (Mot. Reinhardt Aff. Exh. B) and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. D), to establish the lack of general causation.

Mr. Spencer is employed as President of Environmental Profiles, Inc. ("EPI") and Mr. Plisko is a Senior Project Manager at EPI. Mr. Spencer's and Mr. Plisko's July 10, 2018 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and Mr. Margolis' mesothelioma. They draw on multiple assumptions as to Mr. Margolis' exposure from his deposition testimony and responses to interrogatories. They also rely on multiple reports and studies, including those performed by EPI, of ABI's Amtico vinyl asbestos floor tile for a risk and exposure assessment. The July 10, 2018 Summary Report explains the difference between friable and non-friable asbestos containing materials. It references materials and standards from the Environmental Protection Agency ("EPA"), World Health Organization ("WHO"), and Occupational Safety and Health Administration (OSHA), and states that encapsulated non-friable products such as ABI's Amtico floor tile poses a lesser potential of release of asbestos fibers associated with mesothelioma. They conclude that plaintiff's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, well below a working lifetime at OSHA and the WHO permissible exposure limits, and well below lifetime cumulative exposure at the EPA clearance limit following an asbestos abatement action (See Mot. Reinhardt Aff. Exh. B).

Dr. Geyer's report dated July 11, 2018 relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their July 10, 2018 Summary Report. Dr. Geyer prepared a table of published literature in support of his conclusion that chrysotile fibers unaccompanied by contamination with amphibole forms of asbestos, do not produce mesothelioma in humans (See Mot. Reinhardt Aff. Exh. D). The published literature Dr. Geyer relies on are not annexed to either his report or the motion papers. Dr. Geyer further concludes that because the encapsulated chrysotile fibers in Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone, rendering them unable to cause plaintiff's malignant mesothelioma. He concludes

that Mr. Margolis' exposure to amphibole asbestos fibers from other sources, including asbestos pipe covering, are more likely the causes of his mesothelioma (Mot. Reinhardt Aff. Exh. D).

Plaintiffs in opposition rely on the reports of Dr. Mark Ellis Ginsburg, M.D., Associate Director of General Thoracic Surgery at Columbia University College of Physicians and Surgeons, and Brent C. Staggs, M.D., a pathologist (Opp. Romanelli Aff., Exh. 1). Plaintiffs provide these expert reports together with Mr. Margolis' pathology reports from White Plains Hospital and Mount Sinai Hospital Laboratory.

Dr. Ginsburg's June 24, 2017 report assesses plaintiff's medical history, past medical history, family history, occupational and environmental exposure, pathology reports and radiology reports. Dr. Ginsburg relies on studies and reports from multiple entities - that includes WHO, OSHA and the EPA - as demonstrating that all asbestos fiber, including chrysotile fibers can increase the likelihood of developing mesothelioma. He concludes that chrysotile has been independently found to cause mesothelioma, there is no safe minimal level of asbestos exposure and that manipulation of asbestos floor tiles can result in the release of asbestos fibers that are potentially greater than ambient levels (Opp. Romanelli Aff., Exh. 1, Ginsburg Report, "Summary," footnotes 4, 8-27, 30, 37, 44-55 and 61-63). He further concludes that Mr. Margolis' cumulative exposure to asbestos from each company's product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tiles, caused his mesothelioma (Opp. Romanelli Aff., Exh. 1).

Dr. Brent C. Staggs, M.D.'s June 23, 2017 report assesses Mr. Margolis' clinical history, radiology reports, pathology reports, pathology materials and asbestos exposure history (Opp. Romanelli Aff., Exh. 1). He concludes that exposure to chrysotile and amphibole asbestos is known to cause malignant mesothelioma. He further concludes that Mr. Margolis' mesothelioma is from cumulative exposure to each company's asbestos containing products (Opp. Romanelli Aff., Exh. 1). It is plaintiffs' contention that Dr. Staggs is including ABI's Amtico vinyl asbestos floor tile as part of the cumulative exposure.

ABI's argument that summary judgment is warranted under *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] because plaintiffs are unable to establish general causation, is unavailing. In *Cornell*, 22 NY3d 762, supra, the defendant-corporation established a prima facie case as to general causation establishing generally accepted standards within the relevant community, of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiff's expert, Dr. Ginsburg, is relying on some of the same scientists and scientific organizations as the defendants' experts in support of general causation.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

ABI's experts John W. Spencer and Marc Plisko and Dr. Stanley Geyer, M.D. rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos and mesothelioma. Plaintiffs' expert, Dr. Mark Ellis Ginsburg, also relies on studies and reports in part from the same scientific organizations to establish that plaintiff's exposure to chrysotile asbestos fibers can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Specific Causation:

ABI argues plaintiff cannot establish specific causation because its Amtico vinyl asbestos floor tiles did not produce breathable dust on a level that is sufficient to cause Mr. Margolis' mesothelioma.

The Court of Appeals has enumerated several ways an expert might demonstrate specific causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin;" "[c]omparison to the exposure levels of subjects of other studies could be helpful provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker*, 7 NY3d 434, supra at 448). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see *Parker*, 7 NY3d 434, supra at 448). In turn, the Appellate Division in (*In re New York City Asbestos Litigation*), 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

In making a comparative exposure analysis, the July 10, 2018 Summary Report by Mr. Spencer and Mr. Plisko cites their study performed at Environmental Profiles, Inc. (EPI). Mr. Spencer and Mr. Plisko rely on data from a six hour and 51 minute study of 161 linear feet of floor tile they conducted on ABI's Amtico vinyl asbestos floor tiles containing 14 -15 percent chrysotile asbestos, that was cut using "Guillotine cutter, utility knife, scribe score and snap break, shears (heat and cut, no heat and cut) and linoleum knife." They also incorporate the results of an eight hour sample data representing bystander exposure obtained during the cutting and installation of floor tile manufactured by ABI into a table showing area air sampling for cutting and installation of vinyl asbestos floor tile (Mot. Reinhardt Aff., Exh. B, Table 6). They further calculate that Mr. Margolis had less than 0.000004 f/cc-yr. bystander/area exposure and that he had less than 0.000017 f/cc-yrs. helper exposure to asbestos from Amtico vinyl asbestos floor tiles. The report states that plaintiff's cumulative exposure to asbestos is indistinguishable from most lifetime cumulative exposures to ambient asbestos (Mot. Reinhardt Aff., Exh. B).

Mr. Spencer and Mr. Plisko's report concludes that (1) Mr. Margolis' exposure to asbestos containing joint compound is the most likely cause of his exposure to airborne asbestos, (2) plaintiff has not provided any scientifically reliable and relevant industrial hygiene exposure assessment, (3) if Mr. Margolis observed workers cut and install ABI floor tile products, although they did contain asbestos, his exposure was not above historical or today's occupational health standards and guidelines if any, and (4) any exposure plaintiff had from the manipulation of Amtico vinyl asbestos floor tile, which contained non-friable and encapsulated chrysotile asbestos, would have been negligible and would not have been considered by either OSHA or the EPA to present a significant health risk (See Mot. Reinhardt Aff. Exh. B).

ABI's expert Dr. Geyer did not conduct any testing, he relies on published literature in the form of reports and studies that are incorporated into a table in his report, and the findings in the July 10, 2018 Summary Report of Mr. Spencer and Mr. Plisko. The published literature Dr. Geyer relies on for his table are not annexed to either his report or the motion papers. Dr. Geyer concludes that because the encapsulated chrysotile fibers in Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone, rendering them unable to cause plaintiff's malignant mesothelioma. He concludes that Mr. Margolis' exposure to amphibole asbestos fibers from other sources, including asbestos pipe covering, are a more likely cause of his mesothelioma (See Mot. Reinhardt Aff. Exh. D).

Plaintiff's expert Dr. Mark Ellis Ginsburg, M.D. relies on reports and testing by GCA Corporation and Materials Analytical Services Inc. and states that manipulation or disturbance of asbestos containing floor tiles can result in the release of asbestos fibers that are potentially greater than the ambient level of exposure. Dr. Ginsburg further relies on the reports by GCA Corporation and Materials Analytical Services Inc. and states that the asbestos content of floor tile is 8 to 30% by weight, and installation of asbestos floor tile results in airborne asbestos concentrations as high as 0.26% f/cc-yr. Dr. Ginsburg also refers to case reports of asbestos floor tile workers developing mesothelioma (Opp. Romanelli Aff., Exh. 1, footnotes 61-63). Dr. Ginsburg concludes that Mr. Margolis' cumulative exposure to asbestos fibers from each company's product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tile, was the likely cause of his

mesothelioma (Opp. Romanelli Aff., Exh. 1). Dr. Ginsburg's report raises credibility issues and issues of fact on specific causation.

Dr. Brent C. Staggs, M.D.'s report concludes that Mr. Margolis was exposed to all asbestos fiber types (chrysotile and amphibole) which are known to cause malignant mesothelioma. Dr. Staggs further concludes that Mr. Margolis' cumulative exposure from each company's product, which plaintiffs contend includes ABI's Amtico vinyl asbestos floor tile, is the substantial contributing factor resulting in a cumulative dose of asbestos that caused his malignant mesothelioma (Opp. Romanelli Aff., Exh. 1).

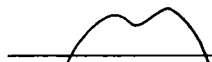
Plaintiffs are not required to show the precise causes of plaintiff's damages, only "facts and conditions from which defendant's liability may be reasonably inferred," and the opposition papers have provided sufficient proof to create an inference as to specific causation for ABI's Amtico vinyl asbestos floor tile (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]).

Plaintiffs cite to ABI's interrogatory responses, as showing that during the period relevant to Mr. Margolis' alleged exposure, ABI manufactured Amtico vinyl asbestos floor tiles (Opp. Romanelli Aff., Exh. 3). Mr. Margolis identified ABI's Amtico vinyl asbestos floor tiles as a source of his exposure to asbestos and he described the manner of his exposure, specifically being in the presence of the tiles being cut, or scored and snapped creating dust, over the course of about six years (Mot. Reinhardt Aff., Exh. A and Opp. Romanelli Aff., Exh. 1). His testimony, when combined with the reports of Dr. Ginsburg and Dr. Staggs, has created "facts and conditions from which [ABI's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), and is sufficient to raise issues of fact, warranting denial of summary judgment.

ACCORDINGLY, it is ORDERED that Defendant American Biltrite, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims asserted against it is denied.

ENTER:

Dated: February 14, 2019



MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ
.J.S.C.

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