

Gallagher v Air & Liquid Sys. Corp.

2019 NY Slip Op 30458(U)

February 25, 2019

Supreme Court, New York County

Docket Number: 190480/2012

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

DENIS J. GALLAGHER and ANN GALLAGHER,

INDEX NO. 190480/2012

Plaintiffs,

MOTION DATE 02/20/2019

- against -

MOTION SEQ. NO. 001

AIR & LIQUID SYSTEMS CORPORATION, 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.:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7 - 9</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant American Biltrite, Inc.'s (hereinafter referred to as "ABI") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff, Denis J. Gallagher was diagnosed with colon cancer on August 28, 2012. He was about seventy-one years old at the time of diagnosis. Mr. Gallagher was deposed over a course of two days on March 19 and 20, 2013 (Mot. Reinhardt Aff. Exh. A and Opp. Commerford Aff. Exh. 8). It is alleged that Mr. Gallagher was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from ABI's product, Amtico vinyl asbestos floor tile. Mr. Gallagher alleges he was exposed to ABI's product through his personal home renovation work in 1969 and 1973, and through his work as a carpenter and member of New York City Carpenter's Union 608 from about 1961 through 1992. He testified at his deposition that although he worked as a carpenter from 1961 until he retired in 1996, his last employer for the years 1992 through 1996 did not perform any floor tile work (Mot. Reinhardt Aff., Exh. A, pg. 554 and Opp. Comerford Aff., Exh. 8, pg. 554).

Mr. Gallagher testified that he worked with ABI's Amtico vinyl asbestos floor tiles and one other brand manufactured by another company (Mot. Reinhardt Aff., Exh. A, pgs. 673- 677 and 680-684). He testified that in 1969 he performed renovations on the kitchen of his home in Whitestone, New York and used ABI's Amtico vinyl asbestos floor tiles. He described the Amtico floor tile he used as being 12x12 in size, and having an off-gray color without a pattern or design, but not purely plain. He described the box the Amtico vinyl asbestos floor tiles came in as brown cardboard, that opened from the top, with the name Amtico and the letters VAT, for Vinyl Asbestos Tile, on it. He testified that the box was about six or seven inches high. Mr. Gallagher testified that in 1969, he used a utility knife and a scribe to score the tiles and then snap them, a process that created visible dust that you could see flying in the air and that he breathed it in. He claimed that he had to cut the Amtico floor tiles around the edges or an obstruction while putting them in the kitchen. Mr. Gallagher testified that he had not properly laid the Amtico floor tile in 1969, and this resulted in the tile cracking when it was walked on, requiring him to redo the kitchen floor a few years later (Mot. Reinhardt Aff., Exh. A, pgs. 180-187, 190-196, 214, 217- 218 and 570-571).

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

Mr. Gallagher claims that in 1973, he was exposed to asbestos by removing the ABI Amtico vinyl asbestos floor tiles from the kitchen of his home. He testified that he used a hand held ice scraper, that was about six inches wide, and paint thinner, to scrape the old tiles off the kitchen floor. He claims the process of removing the Amtico vinyl asbestos floor tile took between ten and twelve hours. Mr. Gallagher testified that while in the process of breaking up and scraping the Amtico vinyl asbestos floor tiles from the kitchen floor, dust came off them that he breathed in. He replaced the Amtico tiles with a different manufacturer's floor tile (Mot. Reinhardt Aff., Exh. A, pgs. 196-200 and 570-571).

Mr. Gallagher testified that he also worked with ABI's Amtico vinyl asbestos floor tile commercially at various locations in New York City, including One World Trade Center, the Pan Am Building and One Penn Plaza. He could not remember any specific Amtico vinyl asbestos tile, but did know that they came in a lot of different colors. Mr. Gallagher testified that the Amtico floor tiles were placed in many different areas of the buildings. He remembered installing them around elevators, freight elevators, corridors, pathways and offices; basically anywhere that was heavily traveled. Mr. Gallagher also remembered the Amtico floor tile he used commercially came in one of the biggest boxes he saw, and that they were 12x12 in size with the letters VAT for Vinyl Asbestos Tile on them. He testified that while performing commercial work he used a guillotine blade cutter and that the area of flooring replaced during renovations could be as much as a thousand square feet, or a couple thousand square feet, and as small as 10x12 feet for small rooms or corridors. Mr. Gallagher testified that during his commercial use of Amtico vinyl asbestos floor tiles dust was created that he breathed in (Mot. Reinhardt Aff., Exh. A, pgs. 57-61, 70-73, 95-96, 206-208, 211-215, 217-219, 224-225 and 570-571).

Plaintiffs commenced this action on October 16, 2012 to recover for damages resulting from Mr. Gallagher's exposure to asbestos (See NYSCEF Doc. # 1).

ABI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. ABI argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that Amtico vinyl asbestos floor tiles caused Mr. Gallagher's colon cancer.

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 NYS 2d 184 [1st Dept. 1997]).

ABI's argument that plaintiffs could not find and failed to proffer any expert opinion or other evidence establishing general and specific causation, or that its product, Amtico vinyl asbestos floor tiles, did not cause Mr. Gallagher's colon cancer, is unavailing. Plaintiffs in opposition provide the expert report and affidavit of Dr. Brent C. Staggs, M.D.. ABI concedes in the Reply papers that it was unaware of Dr. Staggs report when this motion was filed on December 6, 2018 (see Reinhardt Aff. in Reply, pg. 2).

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 Mr. Gallagher's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of his colon cancer (*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," in plaintiffs' evidence, fails to establish a prima facie basis for summary judgment.

ABI contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584[2006] and *Cornell v 360 West 51st Street Realty, LLC*, 22 N.Y. 3d 762, 9 N.E. 3d 762, 986 N.Y.S. 2d 389 [2014]), because plaintiffs are 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), the report from Dr. James D. Crapo, M.D. (Mot. Reinhardt Aff. Exh. D), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. E), 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 N.Y. 3d 434, 448, *supra*).

ABI argues that unlike amphibole asbestos, no causal relationship exists between the encapsulated chrysotile asbestos in Amtico floor tiles or any type of asbestos fibers and the development of colon cancer, eliminating any general causation. ABI submits the expert affidavit and June 30, 2016 Summary Report of John W. Spencer, CIH, CSP (a certified industrial hygienist), prepared with Marc Plisko (a certified industrial hygienist) (Mot. Reinhardt Aff. Exh. B), the report from Dr. James D. Crapo, M.D. (Mot. Reinhardt Aff. Exh. D), and the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. E), to establish lack of 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 June 30, 2016 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and Mr. Gallagher's colon cancer. They draw on multiple assumptions as to Mr. Gallagher's exposure from his deposition testimony and responses to interrogatories. They also rely on reports and studies, including those performed by EPI, of ABI's Amtico vinyl asbestos floor tile for a risk and exposure assessment. The June 30, 2016 Summary Report explains the difference between friable and non-friable asbestos containing materials. It references materials and standards from the Environmental Protection Agency ("EPA"), the World Health Organization ("WHO"), and the Occupational Safety and Health Administration (OSHA), and states that encapsulated non-friable products, such as ABI's Amtico floor tile, pose a lesser potential of release of asbestos fibers. They conclude that Mr. Gallagher's actual exposure to asbestos from ABI's Amtico vinyl asbestos floor tiles was no greater than ambient exposure, and would not have been considered to present a significant health risk by OSHA or the EPA and that there are many potential sources of exposure associated with COPD and colon cancer which should be considered and evaluated (See Mot. Reinhardt Aff. Exh. B).

Dr. James D. Crapo's June 12, 2016 report concludes that Mr. Gallagher has no evidence of an asbestos related disease. He refers to multiple unidentified cohorts as having evaluated for an association between colon cancer and asbestos exposure and concludes that a meta-analysis of these studies demonstrates no significant relationship. Dr. Crapo cites to conclusions from the Institute of Medicine that are not annexed to his

report and states that “epidemiologic evidence for a relationship between asbestos exposure and colorectal cancer was suggestive, but not sufficient to infer a causal relationship.” Dr. Crapo further concludes that ABI products containing encapsulated chrysotile asbestos has a low fiber release and neither created a risk factor or was the likely cause of Mr. Gallagher’s colon cancer (Mot. Reinhardt Aff. Exh. D).

Dr. Geyer’s July 5, 2016 report relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their June 30, 2016 Summary Report. Dr. Geyer cites to the 2006 report of the Institute of Medicine of the National Academies and a 2008 article by J. Gamble, published in *Regulatory Toxicology Pharmacology*, in support of his conclusion that “scientific evidence fails to establish a causal relationship between asbestos exposure and the risk of developing cancer of the color or rectum.” Dr. Geyer also relies on OSHA studies and those of the Naval Regional Medical Clinic as establishing that to the extent Mr. Gallagher had any chrysotile asbestos exposure it would be negligible and insignificant (See Mot. Reinhardt Aff. Exh. E).

Plaintiffs in opposition rely on the report of Brent C. Staggs, M.D. (Opp. Commerford Aff., Exh. 9).

Dr. Staggs’ December 27, 2018 report assesses Mr. Gallagher’s clinical history, radiology reports, pathology reports, pathology materials and asbestos exposure history. Dr. Staggs concludes that exposure to both chrysotile asbestos and amphibole asbestos fibers caused Mr. Gallagher’s primary colonic adenocarcinoma. Dr. Staggs further concludes that Mr. Galagher’s mesothelioma is from cumulative exposure to each company’s asbestos containing products (Opp. Comerford Aff., Exh. 9). It is plaintiffs’ contention that Dr. Staggs is including ABI’s Amtico vinyl asbestos floor tile as part of the cumulative exposure. The December 27, 2018 report incorporates Dr. Staggs’ April 15, 2016 Affidavit which cites to multiple reports and studies as establishing that all types of asbestos fibers including chrysotile asbestos fibers, are causally linked to cancer of other sites. Dr. Staggs’ April 15, 2016 Affidavit relies on reports from the WHO, OSHA, the EPA, the United States Department of Health and Human Services, and the International Agency for Research on Cancer (IARC) (Opp. Comerford Aff., Exh. 9).

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 plaintiffs’ expert, Dr. Staggs, 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, 215 N.E. 2d 341, 268 N.Y.S. 2d 18 [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, Marc Plisko, Dr. James D. Crapo, M.D. and Dr. Stanley Geyer, M.D. rely on recognized studies and reports to establish that there is no causal relationship between chrysotile asbestos or any form of asbestos fiber and colon cancer. Plaintiffs’ expert, Dr. Brent C. Staggs, M.D. also relies on studies and reports in part from the same scientific organizations, OSHA, EPA and the WHO, to establish that plaintiff’s exposure to chrysotile asbestos fibers can cause cancer. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Special Causation:

ABI states that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause Mr. Gallagher's colon cancer, and thus plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special 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 v. Mobil Oil Corp., 7 N.Y. 3d 434, 448, 857 N.E. 2d 11114, 824 N.Y.S. 2d 584 [2006]). 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 v. Mobil Oil Corp., 7 N.Y. 3d 434, supra at 448). In turn, the Appellate Division in the case *In re New York City Asbestos Litigation*, 148 A.D. 3d 233, 48 N.Y.S. 3d 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 9, 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 they conducted of 161 linear feet of 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 calculate and created tables reflecting exposure similar to that of Mr. Gallagher for cutting and installation of Vinyl asbestos floor tile and removal of vinyl asbestos floor tile (M.t Reinhardt Aff. Exh. B, Tables 11 and 12). They determine that Mr. Gallagher averaged 0.00038 f/cc-yr cumulative exposure from cutting, installation and removal of ABI Amtico floor tile. The report further determines that Mr. Gallagher's exposure to encapsulated asbestos in ABI's Amtico vinyl asbestos floor tile would have been negligible (Mot. Reinhardt Aff., Exh. B).

Mr. Spencer's and Mr. Plisko's report concludes that: (1) plaintiffs have not provided any scientifically reliable and relevant industrial hygiene exposure assessment; (2) that ABI's Amtico vinyl asbestos floor tiles are non-friable, encapsulated products and any exposure to asbestos would not be considered by OSHA or the EPA to present a significant health risk; (3) any exposure Mr. Gallagher had from the manipulation of ABI's Amtico vinyl asbestos floor tile would be below historical or today's occupational health standards and guidelines; and (4) there are many potential sources of exposure associated with COPD and colon cancer which would need to be considered and properly evaluated (See Mot. Reinhardt Aff. Exh. B).

Dr. Crapo's report dated June 12, 2016 assesses Mr. Gallagher's smoking history, pathology, asbestos exposure history, chest radiographs and pulmonary function studies. Dr. Crapo provides a detailed assessment of Mr. Gallagher's pulmonary function studies from 2014 as showing severe obstructive lung disease with hyperinflation and gas trapping. Dr. Crapo relies on no other medical studies or reports specifically directed at Mr. Gallagher and concludes that Mr. Gallagher has no evidence of an asbestos related disease. Dr. Crapo further concludes that encapsulated chrysotile asbestos in ABI's vinyl asbestos floor tiles would not be a source of significant asbestos exposure and would neither create or contribute to the risk for Mr. Gallagher developing colon cancer. (Mot. Reinhardt Aff. Exh. D).

ABI's expert Dr. Geyer relies on the findings in the June 30, 2016 Summary Report of Mr. Spencer and Mr. Plisko, Mr. Gallagher's medical records, plaintiffs' responses to Defendant's Fourth Amended Standard Set of Interrogatories and Mr. Gallagher's deposition testimony. Dr. Geyer states that the asbestos chrysotile fibers in ABI's floor tiles were firmly encapsulated in a non-friable matrix that limited their escape into the air. He concludes that any potential chrysotile asbestos encountered by Mr. Gallagher as

part of his work with ABI's Amtico vinyl asbestos floor tiles resulted in negligible and insignificant exposure that was indistinguishable from ambient measurements. He further concludes that because the weight of medical and scientific evidence fails to establish a causal relationship between asbestos exposure and the risk of developing colon cancer, any potential exposure to asbestos from ABI's Amtico vinyl asbestos floor tile did not cause Mr. Gallagher's colon cancer (See Mot. Reinhardt Aff. Exh. E).

Dr. Staggs' April 15, 2015 affidavit states that asbestos creates a dose response that accumulates with exposure, and the more exposure, the more likely it is that a person will get a response in the form of cancer (Opp. Comerford Aff., Exh. 9). Dr. Staggs' December 27, 2018 report assesses Mr. Gallagher's clinical history, radiology reports, pathology reports, pathology materials and asbestos exposure history (Opp. Comerford Aff., Exh. 9). He states that exposure to chrysotile and amphibole asbestos is a known cause of primary colonic adenocarcinoma (colon cancer). Dr. Staggs concludes that Mr. Gallagher's exposure to all types of asbestos fibers were contributing factors to his development of colon cancer. He further concludes that Mr. Gallagher's colon cancer is from cumulative exposure to each company's asbestos containing products, which plaintiffs argue includes ABI's vinyl asbestos floor tile (Opp. Comerford Aff., Exh. 9).

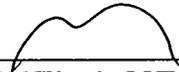
Plaintiffs are not required to show the precise causes of damages as a result of Mr. Gallagher's exposure to ABI's product, only "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference as to specific 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 Mr. Gallagher's deposition testimony, as showing that he identified ABI's Amtico vinyl asbestos floor tiles as a source of his exposure to asbestos. He described the manner of his exposure, specifically being in the presence of, and inhaling, the dust that was emitted when he was cutting the tiles with a scribe and utility knife, or a guillotine blade cutter and when he used a hand held ice scraper to remove tiles (Mot. Reinhardt Aff., Exh. A, pgs.197, 200, 217-218 and 569-571). Mr. Gallagher's deposition testimony, when combined with the December 27, 2018 Report and April 15, 2016 Affidavit of 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 25, 2019


MANUEL J. MENDEZ
J.S.C.

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