

Carlstrand v Aerco Intl., Inc

2019 NY Slip Op 32316(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 190194/2017

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

RICHARD CARLSTRAND and ANNA CARLSTAND,

INDEX NO. 190194/2017

Plaintiffs,

MOTION DATE 07/30/2019

- against -

AERCO INTERNATIONAL, INC., et al.,

MOTION SEQ. NO. 003

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Mannington Mills, Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6 - 7</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Mannington Mills, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff Richard Carlstrand was diagnosed with pleural mesothelioma on May 5, 2017. Ms. Carlstrand was deposed over a course of six days on August 8, 9, 10, 11, 15 and 16, 2017 (Mot. Exh. C and Opp. Exh. 1). It is alleged that Mr. Carlstrand was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from exposure to the installation of vinyl asbestos flooring manufactured by Mannington Mills Inc. (hereinafter referred to as "MMI").

Mr. Carlstrand alleges he was exposed to asbestos dust during his work as a journeyman carpenter and foreman/supervisor while working for John Melen Incorporated, at commercial sites throughout the borough of Manhattan from 1965 through 1977. Mr. Carlstrand testified at his deposition that in 1967 John Melen promoted him to supervisor. He testified that during the entire time he worked for John Melen he was exposed to asbestos dust created from other workers installing MMI's vinyl asbestos sheet flooring (Mot. Exh. C, pgs. 174-176, 179-182). He specifically recalled seeing MMI asbestos sheet flooring while working at St. Luke's Hospital and Roosevelt Hospital. He described the hospital rooms as about 10 by 20 in size. Mr. Carlstrand described the MMI asbestos sheet flooring as about an eighth of an inch and provided on a roll that was about twelve (12) inches in diameter and of different colors. Mr. Carlstrand testified that the underside of the MMI asbestos sheet flooring was a different color from the top and somewhere on the roll it was identified as an MMI product (Mot. Exh. C, pgs. 902-909). He remembered that the MMI flooring was rolled out against the walls where it would be "scribed." Mr. Carlstrand testified that he was exposed to asbestos from MMI sheet flooring during the process of scribing the material to the walls, from the cutting and scraping of the material which flaked, and produced dust as he was standing next to other workers (Mot. Exh. C, pgs. 910-911).

MMI now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. MMI contends that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that any MMI vinyl asbestos floor products caused Mr. Carlstrand's mesothelioma.

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

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

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]).

MMI argues that plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that its asbestos floor products caused Mr. Carlstrand's mesothelioma. MMI argues that plaintiffs' evidence and expert reports are speculative and that the cumulative exposure theory does not establish general or specific causation. MMI claims that plaintiff will not be able to raise any issues of fact on causation.

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]). MMI must unequivocally establish that Mr. Carlstrand's level of exposure to its floor products was not sufficient to contribute to the development of his 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]).

MMI's attempt to "point to gaps" in plaintiffs' evidence fails to establish a prima facie basis for summary judgment.

MMI contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and *In the Matter of New York City Asbestos Litigation (Juni)*, 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], because plaintiffs are unable to establish general and specific causation. MMI argues that its experts Mark F. Durham, an uncertified industrial hygienist/consultant (Mot. Exh. D), and Dr. Dominik D. Alexander, Ph.D., MSPH, an epidemiologist (Mot. 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 NY3d 434, 448, supra).

MMI argues that unlike amphibole asbestos, no causal relationship exists between encapsulated chrysotile asbestos and the development of mesothelioma, eliminating any general causation. MMI submits the expert affidavit and June 20, 2019 report of Mark F. Durham, an uncertified industrial hygienist (Mot. Exh. D); and the expert affidavit and January 23, 2019 report from Dr. Dominik D. Alexander, Ph.D., M.S.P.H., an epidemiologist (Mot. Exh. E) to establish lack of causation.

Mr. Durham's affidavit states that he was a certified industrial hygienist from 1979 to 2013, and that he voluntarily surrendered his certification effective 2013. Mr. Durham assesses Mr. Carlstrand's exposure to asbestos from MMI's sheet flooring using asbestos fiber levels and air sampling data taken by the SRI International residential exposure study conducted between December of 1978 and June of 1979, which were conducted in accordance with the NIOSH Physical and Chemical method. He claims that "retrospective exposure estimates" are acceptable as reliable by OSHA. Mr. Durham concludes, based on assumptions made of Mr. Carlstrand's exposure as a bystander or observer, that MMI

asbestos floor sheeting products would not have been a meaningful contribution to Mr. Carlstrand's lifetime exposure to asbestos (Mot.Exh. D).

Dr. Dominik D. Alexander's January 23, 2019 report provides epidemiologic methodology, a descriptive epidemiology of mesothelioma, and an overview of the epidemiology of mesothelioma among chrysotile-exposed study populations. He cites to multiple reports and studies that are not annexed to the papers, as establishing the risk of mesothelioma. Dr. Alexander cites to data obtained from the National Cancer Institute and studies from the American Cancer Society. He also cites to studies by the United States Environmental Protection Agency (EPA) of automobile mechanics exposed to low level chrysotile asbestos fibers without co-exposure to amphibole asbestos. The January 23, 2019 report concludes that the epidemiologic evidence does not support a conclusion that mesothelioma risk is increased among chrysotile-exposed study populations in the the absence of amphibole co-exposures. Dr. Alexander concludes that Mr. Carlstrand's exposure to chrysotile asbestos from MMI's vinyl asbestos floor sheeting did not cause his mesothelioma (Mot. Exh. E).

Plaintiff in opposition relies on the reports of Dr. Brett C. Staggs, M.D., a pathologist, and Dr. Mark Ellis Ginsburg, M.D., a thoracic surgeon (Opp. Exhs.13 and 14).

Dr. Staggs' affidavit is dated April 15, 2016, and his report is dated December 13, 2018 (Opp. Exh. 13). Dr. Staggs' April 15, 2016 affidavit states that asbestos is a known carcinogen causing all types of diseases in addition to mesothelioma and other cancers. He states that all asbestos fibers - including amphibole, chrysotile and non-commercial asbestiform mineral fibers - cause cancers and that there is no safe level of asbestos exposure. Dr. Staggs cites to reports and findings from the scientific and medical communities in support of his position - including the U.S. Environmental Protection Agency (1986), the American Thoracic Society and OSHA amongst others (Opp. Exh. 13).

Dr. Staggs' December 13, 2018 report assesses Mr. Carlstrand's clinical history, and radiology reports. He refers to his findings in the April 15, 2016 affidavit and concludes that exposure to chrysotile and amphibole asbestos is known to cause malignant mesothelioma. He further concludes that Mr. Carlstrand's mesothelioma is from cumulative exposure to each company's asbestos containing products (Opp. Exh. 13). Plaintiffs argue that the cumulative exposure includes MMI's vinyl asbestos floor sheeting.

Dr. Ginsburg's October 21, 2018 report assesses Mr. Carlstrand's medical history, past medical history, medications, cigarette smoking history, family history, occupational and environmental exposure, radiology reports, and pathology reports. Dr. Ginsburg relies on studies and reports from multiple entities - that includes 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, and that there is no safe minimal level of asbestos exposure (Opp., Exh. 14, Ginsburg Report, footnotes 16,17, 22, and 23). He further concludes that Mr. Carlstrand's cumulative exposure to asbestos from each company's asbestos product, which plaintiffs contend includes MMI's asbestos floor sheeting, caused his mesothelioma (Opp., Exh. 14).

MMI argues 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. 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 accepted 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 experts Dr. Staggs and Dr. Ginsberg are relying on some of the same scientists and scientific organizations as the defendants experts in support of general causation.

MMI's experts Mr. Mark F. Durham relies on studies and reports to establish that there is no causal relationship between chrysotile asbestos in MMI's asbestos floor sheeting product and mesothelioma. Dr. Alexander, MMI's epidemiologist, cites to

scientific studies and reports that are not annexed to his affidavit or report. Plaintiffs' experts, Dr. Staggs and Dr. Ginsberg also rely on studies and reports - in part from the same scientific organizations as MMI's experts - to establish that plaintiff's exposure to chrysotile asbestos fibers in MMI vinyl asbestos floor sheeting can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

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 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [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 NY3d 434, supra at 448]). In turn, the Appellate Division in the case *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.

Mr. Durham, MMI's industrial hygienist and consultant, relies on the Material Safety Data Sheet (MSDS) for GAF Corporation, the company that is alleged to have provided asbestos felt backing for MMI floor sheeting. Mr. Durham makes assumptions based on Mr. Carlstrand's deposition testimony. Mr. Durham calculates that Mr. Carlstrand had a lifetime exposure of 0.0015 fiber-years/cc (Mot., Exh. D). Mr. Durham concludes that Mr. Carlstrand's observation or bystander exposure to installation of MMI vinyl asbestos flooring would not have resulted in a meaningful contribution to his lifetime exposure to asbestos (Mot., Exh. D).

Dr. Alexander relies on the review of Pierce, Ruestow, and Finley 2016 on the no-observed adverse effect level (NOAEL) for a "best estimate" range of exposure as 208-415 f/cc-years. Dr. Alexander concludes that MMI's sheet flooring may result in low-level exposure to chrysotile asbestos fibers that is not associated with any increased risk of mesothelioma. Dr. Alexander further concludes that there is no scientific basis to find that an individual's (Mr. Carlstrand) exposure to MMI's resilient sheet flooring are at increased risk of mesothelioma (Mot., Exh. E, pg. 15).

Dr. Staggs' report concludes that exposure to chrysotile and amphibole asbestos is known to cause malignant mesothelioma, and that Mr. Carlstrand's cumulative exposure from each company's product - which plaintiffs contend includes MMI's vinyl asbestos sheet flooring - is the substantial contributing factor resulting in a cumulative dose of asbestos that caused his malignant mesothelioma (Opp. , Exh. 13).

Dr. Ginsburg refers to reports, studies and testing and concludes that chrysotile asbestos has been independently found to cause mesothelioma and can result in the release of asbestos fibers that are potentially greater than current OSHA PEL of 0.1f/cc TWA. Dr. Ginsburg concludes that Mr. Carlstrand's cumulative exposure to asbestos fibers from each company's product - which plaintiffs contend includes MMI's asbestos sheet flooring - was a substantial contributing factor in the development of his mesothelioma (Opp. Exh. 14).

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]). The conflicting expert 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]).

Additionally, plaintiff is not required to show the precise causes of damages as a result of Mr. Carlstrand's exposure to MMI's product, only "facts and conditions from

which the defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference as to specific causation for MMI's flooring products (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]).

Mr. Carlstrand identified MMI's vinyl asbestos floor sheeting as a source of his exposure to asbestos. He described the manner of his exposure (Mot. C pgs.174-176,179-182 and 902-909). Mr. Carlstrand's deposition testimony, when combined with the reports of Dr. Staggs and Dr. Ginsburg, has created "facts and conditions from which [MMI's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), raising issues of fact.

Plaintiff in opposition argues that MMI and its experts relied only on GAF and its Material Safety Data Sheets (MSDS), as the supplier of asbestos felt for its flooring product, but that in fact multiple manufacturers of asbestos containing felt were used. Plaintiff provides the deposition testimony of M. Bruce Jones, MMI's coporate representative in an unrelated action, wherein he testifies that he bought felt from the other sources (See Opp. Exh. 11). MMI has not shown that records from the other entitles and the MSDS were unavailable, and its experts only refer to GAF Corporation's asbestos felt products as containing encapsulated chrysotile fibers as used in the MMI floor sheeting. There remain issues of fact as to the asbestos in other manufacturers' products used in MMI floor sheeting and causation, warranting denial of summary judgment.

MMI attempts to include a Supplemental Affidavit of the industrial hygienist Mark F. Durham dated February 19, 2019 and to present new arguments as to his knowledge of the manufacture of the asbestos floor sheeting for the first time on reply. MMI for the first time on reply provides the affidavit of Dennis H. Bradway, Corporate Products and Standards Manager, employed since 1982 (Reply Aff. Exhs. 1 and 3). Mr. Bradway claims that MMI did not manufacture or sell any floor tiles until 1993, but Mr. Carlstrand is not alleging exposure to MMI vinyl asbestos floor tile (Reply Aff. Exh. 3).

New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept.,2012], In re New York City Asbestos Litigation (Konstantin), 121 A.D. 3d 230, 990 N.Y.S. 2d 174 [1st Dept., 2014] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]).

The arguments made for the first time in MMI's reply papers, Mr. Bradway's Affidavit and Mr. Durham's Supplemental Affidavit, deprive the plaintiffs of the opportunity to respond to the assertions being made and are improperly before this Court.

To the extent MMI seeks the alternative relief of a Frye hearing to determine the admissibility of plaintiffs' experts regarding causation, that relief is premature on this pre-trial motion for summary judgment and that application should be made by a motion in limine before the trial judge.

ACCORDINGLY, it is ORDERED that Defendant Mannington Mills, 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: July 31, 2019



MANUEL J. MENDEZ

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE