

<b>Lanza v American Bilrite, Inc.</b>
2019 NY Slip Op 33602(U)
December 9, 2019
Supreme Court, New York County
Docket Number: 190014/2014
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

RALPH LANZA, as Personal Representative for the Estate of SANTO LANZA and RITA LANZA as spouse,

INDEX NO. 190014/2014

Plaintiffs,

MOTION DATE 11/20/2019

- against -

MOTION SEQ. NO. 001

AMERICAN BILTRITE, 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. Rows include 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 (hereinafter "ABI") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

On September 24, 2013 Santo Lanza was diagnosed with malignant mesothelioma. Plaintiffs commenced this action on January 27, 2014 alleging Mr. Lanza's injuries resulted from exposure to asbestos in the defendants' products. On March 4, 2014, before he could be deposed, Mr. Lanza (hereinafter referred to as "decedent") died from the disease. Decedent was a career painter, his alleged exposure - as relevant to this motion - was from his home renovation at 1065 57th Street, in Brooklyn, New York while installing and removing ABI's Amtico vinyl asbestos floor tiles from 1963 through the early 1980's and as part of side jobs at various locations in Brooklyn, Bronx, Long Island and New Jersey, on weekends and summer months from about 1966 through about 1973.

Decedent's son, John Lanza, was deposed in this action over the course of four days on November 17, 18, 24, and December 9, 2015 (Mot. Exh. A and Opp. Exh. 1). Mr. Lanza testified that his family moved to 1065 57th Street, Brooklyn, New York in 1963 and his parents remained in the home until the mid-1990's, when it was sold (Mot. Exh. A, pgs. 25-30). Mr. Lanza stated that starting in 1963 the decedent performed a gut renovation on the entire building, which consisted of three floors and a basement. He stated that ABI Amtico vinyl asbestos floor tile was installed in the bedrooms, kitchen, hallways and stairways of the first three floors and on the entire basement floor. Mr. Lanza testified he had personal knowledge of the tile work performed by the decedent because starting when he was about eleven years old in 1963 through when he was about fourteen or fifteen years old, he was the one that helped the decedent during the floor tile installation process (Mot. Exh. A, pgs. 25-30, 44-48, 50-51, 56-58, 86, 142-143, 343-346, 350, 378, 380-381, 388-399, and 400- 401).

Mr. Lanza stated that he knew the decedent used Amtico vinyl asbestos floor tiles because he saw it on the boxes when he carried them into the rooms they were working. He described the ABI Amtico vinyl asbestos floor tile boxes as made of cardboard, square, light grey in color, with the word "Amtico" in block letters and "vinyl asbestos floor tile" printed on it in black. He stated that the box opened from the side and there were about twenty to thirty tiles inside. He stated the tiles were square, nine by nine and had a dark

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

color on the bottom. Mr. Lanza testified that he observed his father opening ABI vinyl asbestos floor tile boxes and that the decedent also opened them from the side.

Mr. Lanza remembered the decedent marking-off the kitchen floor using string with chalk on the end of it, starting somewhere in the middle of the room. He testified that the decedent used a hook blade and utility knife to cut the tile corners near the ends by the wall. He recalled the hook blade was used to shave off a small portion if it was off by a small amount. Mr. Lanza stated that the decedent would use a torch to soften the tile, then cut it with the utility knife's straight razor blade, and snap it off. Mr. Lanza testified that when he observed the decedent cutting ABI Amtico vinyl asbestos tiles, after they were snapped, he could see the asbestos containing dust coming out of the tiles, and that he and the decedent breathed it in. He stated that during the clean-up process they used a shovel and a broom, then threw everything into the garbage can, which was extremely dusty, and that he and the decedent breathed in the asbestos containing dust (Mot. Exh. A, pgs. 345-351, 372-375, 380, 384, 413-415 and 456-457).

Mr. Lanza stated that his father also removed ABI Amtico vinyl asbestos floor tiles from the kitchen and hallways on each floor so that it could be replaced with linoleum. He testified that a leak caused the decedent to also remove all of the ABI Amtico vinyl asbestos floor tile from the basement two or three years after it was installed. Mr. Lanza stated that he and a co-worker helped the decedent remove the tiles. He described the removal process as using a hammer, a crowbar on the first floor and a rented electric chisel everywhere else, and that the tiles came off in pieces which was extremely dusty. He recalled seeing the decedent spitting the dust up because he was breathing it in. Mr. Lanza remembered the decedent cleaning up the debris, after removing tiles, by using a shovel and broom to throw the pieces into the garbage can, which was very dusty. He stated that he and the decedent breathed in the asbestos containing dust (Mot. Exh. A, pgs. 356-361, 384, 388, 393-394, 399, 405-413 and 457-460)

Mr. Lanza testified that starting from when he was about fourteen years old through when he was about twenty years old he worked with the decedent performing side jobs that included tile installation work using ABI Amtico vinyl asbestos tile, mostly in residential homes. He stated that the work was off the books for cash, done on weekends and the summer months, in Brooklyn, Bronx, Long Island and New Jersey. Mr. Lanza testified that he knew ABI Amtico vinyl asbestos floor tiles were used on the side jobs, because he picked them up from the decedent's full-time job sites to put in the car (Mot. Exh. A, pgs. 94-97, 212).

ABI failed to attach a copy of the pleadings to the motion papers as required pursuant to CPLR §3212 (b), this defect in the motion papers will be overlooked as the pleadings were filed electronically (Studio A Showroom, LLC v. Yoon, 99 AD 3d 632, 952 NYS 2d 879 [1<sup>st</sup> Dept. 2012]).

Plaintiffs commenced this action on January 27, 2014 alleging Mr. Lanza's injuries resulted from exposure to asbestos (NYSCEF Docket No. 1). The Summons and Complaint were amended three times, on January 23, 2015, March 16, 2015 and November 23, 2015 (NYSCEF Doc. Nos. 15, 17 and 33). ABI filed its Notice of Appearance on May 15, 2017 (NYSCEF Doc. No. 73).

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 floor tiles caused the decedent'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 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 argues that plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that its asbestos floor products caused the decedent's mesothelioma. ABI argues that plaintiff's evidence - including the April 17, 2018 expert report of Mr. Steven Pascal, a certified industrial hygienist (Mot. Exh. I), and the April 30, 2018 expert report of Dr. David Y. Zhang, M.D., Ph.D. and M.P.H. specializing in pathology and occupational medicine (Mot. Exh. R) - are speculative and that the cumulative exposure theory does not establish general or specific 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]). ABI must unequivocally establish that the decedent's level of exposure to its product, Amtico vinyl asbestos floor tile, was not sufficient to contribute to the development of the decedent's 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 reliance on the reports of plaintiff's experts, Mr. Steven Pascal and Dr. David Y. Zhang (Mot. Exhs. I and R), in support of its argument that plaintiff will not present any admissible evidence as to causation, is unavailing. 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 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]). 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. Exh. B), the report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Exh. E), the report from Dr. David Weill, M.D., a lung disease specialist (Mot. Exh. G), and the report of Mr. Frank Prudenti, a flooring mechanic and retired owner of a union flooring company (Mot. Exh. H), establish lack of causation.

ABI's expert Mr. Prudenti's report is unaffirmed and prepared as a letter addressed to a defendant's law office (Mot. Exh. H). Unsworn, unaffirmed letter reports do not meet the test of competent admissible evidence sufficient to establish a prima facie case on a motion for summary judgment (see *Loadholt v. New York City Transit Authority*, 12 AD 3d 352, 783 NYS 2d 660 [2nd Dept. 2004]).

#### 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 and the development of mesothelioma, eliminating any general causation. ABI relies on the July 9, 2018 Summary Report of John W. Spencer and Marc Plisko (Mot. Exh. B), a September 16, 2016 report and two supplemental reports from Dr. Stanley Geyer, M.D., a pathologist (Mot. Exh. E), and the August 29, 2016 report of Dr. David Weill, M.D. (Mot. Exh. G), to establish lack of causation.

In making a comparative exposure analysis the August 29, 2016 Summary Report by Mr. Spencer and Mr. Plisko cites to the U.S. Environmental Protection Agency (EPA) determination that floor tile considered non-friable can be left in buildings because of the relatively small fiber release, even if damaged, the Occupational Safety and Health Administration (OSHA) permissible exposure limit (PEL), and the National Institute for Occupational Health and Safety (NIOSH) standards which are incorporated into tables (Mot. Exh. B, Tables 8 and 9). The report states that the decedent's total cumulative exposure to asbestos from ABI's Amtico asbestos floor tile is less than 0.0011 f/cc-yrs. and indistinguishable from ambient asbestos under the standards stated by OSHA, the EPA and NIOSH (Mot. Exh. B, pg. 17).

Dr. Geyer's September 16, 2016 report relies on published literature in the form of reports and studies that are incorporated into a table in his report, which he states establish that pure chrysotile asbestos fibers, that were not contaminated by amphibole forms of asbestos fibers, did not produce mesothelioma in humans. Dr. Geyer incorporates the findings in the August 29, 2016 Summary Report of Mr. Spencer and Mr. Plisko, a May 9, 1979 United States Navy Industrial Hygiene Survey, and the permissible exposure limits from the World Health Organization (the WHO), OSHA and the EPA, in support of his conclusion that because the encapsulated chrysotile fibers in ABI's Amtico floor tiles were firmly embedded in a resin matrix they were unable to cause the decedent's malignant mesothelioma. He concludes that the decedent's exposure to amphibole asbestos fibers from other sources, including insulation, are a more likely cause of his mesothelioma (See Mot. Exh. E, pgs. 3 and 4 of 5). Dr. Geyer's January 21, 2018 supplemental report, prepared after reviewing additional pathology slides, and his second supplemental report dated May 29, 2018 assessing plaintiffs' expert reports, restates his prior conclusion that the decedent's malignant mesothelioma was most likely caused by exposure to amosite asbestos fibers and not the chrysotile fibers in ABI Amtico floor tiles (Mot. Exh. E, Supp. reports).

Dr. David Weill's August 29, 2016 report provides a clinical overview and assesses the decedent's occupational exposure incorporating the Summary Report of Mr. Spencer and Mr. Plisko. He cites a series of private studies and articles addressing friction products, mostly referencing automobile mechanics, shipyard workers and navy insulators, in support of his conclusion that only exposure to amphibole asbestos fibers, and not encapsulated chrysotile asbestos fibers, increases the risk of mesothelioma. Dr. Weill states that amphibole asbestos fibers are historically the cause of an elevated mesothelioma risk. Dr. Weill further concludes that low dose exposure to encapsulated chrysotile asbestos in ABI Amtico vinyl asbestos floor tiles did not significantly increase the decedent's risk of, or cause, his mesothelioma (Mot. Exh. G).

Plaintiff in opposition relies on the sworn reports of Dr. David Y. Zhang, M.D., Ph.D. and M.P.H. and Mr. Steven Pascal, a certified industrial hygienist (Opp. Exhs.5 and 6).

Dr. Zhang's September 12, 2019 report states the general approach of occupational medicine, general opinions on the epidemiology of mesothelioma, defines and identifies the forms of asbestos fibers, and health effects. Dr. Zhang cites to NIOSH's statement that exposure to all levels of asbestos is related to disease. He cites to OSHA and EPA's recognition that exposure to asbestos is a health hazard and refers to various asbestos related diseases including mesothelioma. He refers to the historic OSHA PEL standards - including the current 0.1 f/cc for work in all industries - and noted that OSHA also stated that the PEL is a target guideline for regulatory purposes only and does not establish any "safe" level of exposure. Dr. Zhang states the EPA's definition of asbestos as a known human carcinogen, which includes chrysotile fibers. Dr. Zhang also states the WHO has recognized chrysotile asbestos fibers as a carcinogen that can cause malignancy in humans (Opp. Exh. 5, pgs. 9-10 and 13). Dr. Zhang concludes that the decedent had a history of significant level of asbestos exposure. He further concludes that the decedent's exposure to asbestos containing products, including floor tiles, without dust control, contributed to the development of his mesothelioma (Opp. Exh. 5). It is plaintiffs' contention that Dr. Zhang is including ABI's Amtico vinyl asbestos floor tile as part of the cumulative exposure that caused the decedent's mesothelioma.

Mr. Paskal's April 17, 2018 sworn report defines asbestos as a confirmed human carcinogenic dust. He states that the beathing of a respirable fraction incurs the risk of mesothelioma that increases with each inhaled dose. Mr. Paskal states the standard measure of asbestos exposure, which for long term cumulative exposure is expressed as fiber/cc-years, and the means of measurement. He references OSHA's ceiling value for determining ambient exposure. Mr. Paskal references the Helsinki criteria and states that although chrysotile asbestos is less biopersistent in the lungs and associated with lower incidence rates, lower level exposure should still be considered sufficient to cause mesothelioma. Mr. Paskal cites to the decedent's exposure to asbestos from ABI Amtico vinyl asbestos floor tile and the failure to use a respirator, as stated in the deposition testimony of John Lanza. Mr. Paskal concludes that the decedent's cumulative exposure from each product and activity, was substantially greater than ambient levels and contributed to the decedent's increased risk of mesothelioma (Opp. Exh. 6).

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' experts, Dr. Zhang and Mr. Paskal, are 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 [1<sup>st</sup> 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 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' experts, Dr. Zhang and Mr. Paskal, also rely on studies and reports in part from the same scientific organizations (OSHA, EPA, the WHO and NIOSH) to establish that the decedent's exposure to chrysotile asbestos fibers caused his mesothelioma. 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 the decedent's mesothelioma, 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 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 (*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 August 29, 2016 Summary Report by Mr. Spencer and Mr. Plisko cites their study performed at 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." (Mot. Exh. B, Table 7). They make assumptions relying on Mr. Lanza's deposition testimony, create tables reflecting the decedent's exposure under NIOSH standards and calculate the decedent's exposure from each task with a chart reflecting his calculated cumulative dose exposure compared to reported ambient levels (Mot. Exh. B, tables 8 and 9 and Figure 2). The report states that the decedent's total cumulative exposure to asbestos from ABI's Amtico asbestos floor tile is less than 0.0011 f/cc-yrs., and indistinguishable from most lifetime cumulative exposures to ambient asbestos (Mot. Exh. B, pg. 17).

Mr. Spencer and Mr. Plisko's summary report concludes that (1) the decedent's work around and with other friable asbestos products, including joint compound and thermal insulation, would most likely have exposed him to airborne asbestos concentrations greater than ambient background levels; (2) the plaintiffs failed to provide any scientifically reliable and relevant industrial hygiene exposure assessment; (3) to the extent the decedent completed tasks that included cutting and installation of ABI Amtico vinyl asbestos floor tiles he would have had no exposure to asbestos above historical or present day occupational health standards and guidelines; and (4) floor tiles are non-friable encapsulated products, any exposure to airborne asbestos fibers from the manipulation of these products would have been negligible and would not have been considered by OSHA or the EPA to present a significant risk (See Mot. Exh. B).

ABI's expert Dr. Geyer's September 16, 2016 report incorporates the findings in the August 29, 2016 Summary Report of Mr. Spencer and Mr. Plisko, as supporting his conclusion that encapsulated chrysotile fibers in Amtico floor tiles were unable to cause the decedent's malignant mesothelioma. He states that decedent's cumulative exposure of 0.0011 f/cc-yr., was found below ambient levels, which is consistent with the limited free escape of asbestos fibers and the defense mechanisms of the upper airways and lungs limit exposure. He concludes that the decedent's exposure to amosite asbestos fibers from other sources, including insulation, are a more likely cause of his mesothelioma (See Mot. Exh. E). Dr. Geyer's January 21, 2018 and May 29, 2018 supplemental reports do not make any additional assessments and restate his prior conclusion that the decedent's malignant mesothelioma was most likely caused by exposure to amosite asbestos fibers, and not the chrysotile fibers in ABI Amtico floor tiles (Mot. Exh. E, Supp. reports).

Dr. David Weill's August 29, 2016 report states that many studies report that chrysotile asbestos does not create an elevated mesothelioma rate. He incorporates the Summary Report of Mr. Spencer and Mr. Plisko which found the decedent's exposure from ABI Amtico vinyl asbestos floor tiles were below ambient levels. Dr. Weill cites a series of private studies and articles addressing friction products referencing automobile mechanics, ship yard workers and navy insulators, as further establishing that other forms of asbestos fibers and not chrysotile asbestos increases the risk of mesothelioma. He concludes that after considering arguments that low dose chrysotile asbestos-containing tiles cause mesothelioma, they do not alter his opinion. He further concludes that any exposure the decedent had to chrysotile asbestos did not elevate his risk for developing mesothelioma (Mot. Exh. G).

Plaintiffs' expert, Dr. Zhang cites to his own research and relies on his review of scientific literature as demonstrating that vinyl asbestos tiles contain a significant amount of asbestos, approximately 85% chrysotile asbestos and 15% latex binder. He states that non-friable materials that are in a matrix of resinous binders that are sanded, ground, drilled, cut or abraded are to be treated as friable and are capable of releasing asbestos material. Dr. Zhang refers to studies by Millette and Brown as demonstrating that repacking floor tiles resulted in the release of airborne asbestos in average personal concentrations of 0.96 PCM f/cc and average area concentrations of PCM f/cc. He states that the studies also found that asbestos floor tile debris and dust contained approximately 15% chrysotile asbestos. He also refers to a private study by Materials

Analytical services in 2004 (of a box of re-packed unbroken vinyl asbestos floor tiles) taken from a box of broken tiles showed average concentrations of asbestos of 0.96 fibers/cc in individual samples. Dr. Zhang concludes that the decedent inhaled a significant amount of asbestos fibers, which would be more than ambient levels and his cumulative exposure to ABI Amtico vinyl asbestos floor tiles was a substantial contributing factor of his mesothelioma (Opp. Exh. 5).

Mr. Paskal states that the decedent's work practices in the removal and installation of vinyl asbestos floor tile, including hammering, dry scraping and post-work sweeping, were not calculated to minimize or contain the release of dust. He cites to a report by Murphy Levine Bazzaz, Lynch and Burgess and calculates that the decedent's exposure from ABI Amtico vinyl asbestos floor tile would have ranged from 0.01 to 1.0 fibers/cc, with higher exposures occurring during scraping and clean-up. He concludes that the decedent would have had asbestos exposure that ranged from hundreds to millions of times greater than and in addition to ambient levels. He further concludes that each product and activity contributed to the decedent's risk of contracting mesothelioma (Opp. Exh. 6).

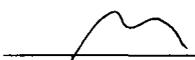
Plaintiffs are not required to show the precise causes of damages as a result of the decedent's exposure to ABI's product, only "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof with the reports of Dr. Zhang and Mr. Paskal, together with other evidence, 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. John Lanza's deposition testimony, showing that he identified the decedent's exposure to ABI Amtico vinyl asbestos floor tiles as a source of his exposure to asbestos. He described the manner the decedent was in the presence of, and inhaled, the dust that was emitted when he was cutting, installing, removing, and cleaning up after installing and removing ABI Amtico vinyl asbestos floor tiles (Mot. Exh. A, pgs. 25-30, 44-48, 50-51,56-58, 86, 94-97, 142-143, 212, 343-343, 345-351, 356-361, 372-375, 378, 380-381,384, 388-399, 400- 401,405-412, 413-415 and 456-460). Mr. Lanza's deposition testimony, when combined with the reports of Dr. Zhang and Mr. Paskal, has created "facts and conditions from which [ABI's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra). Construing the evidence in the light most favorable to the plaintiffs as the non-moving party, it 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: December 9, 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