

<b>Camiolo v American Bilrite Inc.</b>
2021 NY Slip Op 31852(U)
May 19, 2021
Supreme Court, New York County
Docket Number: 190199/2019
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA** PART IAS MOTION 13

*Justice*

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FRANCESCA CAMIOLO, AS EXECUTRIX FOR THE  
ESTATE OF PIETRO CAMIOLO, AND FRANCESCA  
CAMIOLO, INDIVIDUALLY,

Plaintiff,

- v -

AMERICAN BILTRITE INC., DOMCO PRODUCTS TEXAS,  
INC., GOODYEAR CANADA, INC., MANNINGTON MILLS,  
INC., THE B.F. GOODRICH COMPANY, (GOODRICH  
CORPORATION), THE GOODYEAR TIRE AND RUBBER  
COMPANY, UNION CARBIDE CORPORATION,

Defendant.

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INDEX NO. 190199/2019  
MOTION DATE 11/23/2020  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 were read on this motion to/for DISMISSAL

Before the Court is defendant The Goodyear Tire & Rubber Company’s (“Goodyear”) motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Goodyear on the grounds that said defendant has made a prima facie case demonstrating that the only product manufactured by defendant which matches plaintiff Pietro Camiolo’s (“Decedent”) description of the alleged asbestos product he worked with, never contained asbestos, and that there is no evidence that any Goodyear brand floor tile with which Decedent may have worked actually contained asbestos. Plaintiffs oppose the motion.

Goodyear’s motion contends that plaintiffs’ counsel has failed to establish that Decedent was exposed to asbestos from materials manufactured by Goodyear. The case at issue arises from Decedent’s fatal diagnosis of mesothelioma. Here, upon motion for summary judgment,

Goodyear alleges that it did not manufacture the asbestos product that allegedly caused Decedent's illness.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The elements of a common-law negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting therefrom (*Jiminez v. Shahid*, 83 A.D.3d 900 [2d Dept 2011]).

The identification of a manufacturer or seller of an allegedly defective product must be proven to impose liability in tort (*Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 504 [1989]). In an asbestos action, a defendant is entitled to summary judgment in the absence of proof that the plaintiff was exposed to asbestos from that defendant's products (*Cawein v. Flintkote Co.*, 203 A.D.2d 105, 106 [1st Dep't 1994]). The plaintiff must allege facts and conditions from which the defendant's liability may be reasonably inferred; specifically, the plaintiff must provide sufficient evidence to show that he not only worked in the vicinity of the defendant's products, but also that he was exposed to asbestos as a result of the use of the defendant's product (*Comeau v. W. R. Grace & Co. - Conn.*, 216 A.D.2d 79, 80 [1st Dep't 1995][citing *Cawein*, 203 A.D.2d at 105-06]).

Goodyear notes that in the case at bar, product identification rests upon the testimony of Decedent's brother, who conceded that Decedent installed floor tiles with a solid colored bottom. Goodyear affirms that the only floor tile sold by Goodyear during the relevant period that matches the tile described by Decedent's brother is Deluxe-On-Grade tiles. Goodyear submits the affidavit of Joseph A. Kemmerling, who was employed by Goodyear from 1968 to 1979 as a

development engineer and as section manager in the vinyl films and flooring division. Mr. Kemmerling affirms that neither the deluxe-on-grade tile nor homogenous-on-grade tile contained asbestos (Mot, Exh E at 11-12). Goodyear also attaches the deposition of Russel T. Holmes, who was employed by Goodyear from 1954 until 1964 as a production supervisor and engineer for the Vinyl Products Division (Mot, Exh C). Mr. Holmes neither the deluxe-on-grade tile nor homogenous-on-grade tile contained asbestos (*id.* at 65-66). Defendant has demonstrated that the Goodyear products used by Decedent did not contain asbestos and has made a prima facie showing of entitlement to judgment as a matter of law and the burden shifts to plaintiffs to raise an issue of fact.

In opposition, plaintiff argues that contrary to defendant's claims, Goodyear has not met its initial burden of proof to put forward a prima facie case precluding material issues of fact that Decedent was exposed to asbestos from working with Goodyear asbestos-containing floor tiles.

Plaintiff argues that defendant has failed to demonstrate unequivocally that its product did not contribute to Decedent's injury (*Matter of New York City Asbestos Litig.*, 146 A.D.3d 700,700 [1st Dept 2017]; *Matter of New York City Asbestos Litig.*, 123 A.D.3d 498, 499 [1st Dept 2014]; *Matter of New York City Asbestos Litig.*, 122 A.D.3d 520, 521 [1st Dept 2014]). Plaintiffs note that because of inherent difficulties in showing injury from a specific defendant's product that occurred in a specific place and time years ago, plaintiff need only show facts and conditions from which a defendant's liability can be reasonably inferred (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995] citing *Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 188 A.D.2d 214, 225 [1st Dept 1993] [finding that "[t]he plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred]).

Plaintiff argues that the affidavit of Mr. Kemmerling does not meet the CPLR 3212(b) requirement that a motion for summary judgment be supported by personal knowledge of an affiant. The First Department has held that the C.P.L.R.'s "personal knowledge" requirement cannot be met where the affiant's knowledge is outside his personal experience and has been gained from "unnamed or unsworn employees or from unidentified and unproduced work records" (*Republic Nat. Bank of New York v. Luis Winston, Inc.*, 107 A.D.2d 581, 582 [1st Dept. 1985]). Plaintiff notes that Mr. Kemmerling began working for Goodyears films and flooring division in 1969. Further plaintiff argues that the affidavit does not state that Mr. Kemmerling has read Decedent's deposition and that Mr. Kemmerling does not point to any source which provides a basis to the claim that Goodyear did not sell asbestos-containing tiles after 1968. Plaintiff successfully demonstrates that Mr. Kemmerling did not have personal knowledge of the sales of asbestos-containing tiles prior to 1968.

Plaintiff further argues that the affidavit of Mr. Holmes contradicts Mr. Kemmerling's opinions and fails to support Goodyear's claim that Goodyear tiles described by Decedent's brother could only have been asbestos-free. Plaintiff attaches Goodyears Fourth Amended Response to Plaintiff's Standard Interrogatories To All Defendants, December 1998 at 23-24, in which Goodyear described their heavy duty homogenous floor tiles as containing 5% asbestos (Aff in Op, Exh 4). Plaintiff notes that Mr. Holmes testified that Goodyear produced heavy duty homogenous floor tiles up until at least 1975 (Aff in Op, Exh 7 at 70-71).

Additionally, plaintiff notes that although Decedent's brother testified that the tiles Decedent had worked with over the course of his career had a solid color bottom, that description was not specific to Goodyear floor tiles. Plaintiff's point to Decedent's brother's testimony that the floor tiles "were all different colors and different measurements" (Aff in Op, Exh 3 at

175:15). Plaintiff has raised several issues of fact as to the testimony of defendant’s employees and Decedent’s brother regarding product identification warrants the denial of defendant’s motion summary judgment.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of defendant on the grounds that said defendant has made a prima facie case demonstrating lack of causation and to dismiss plaintiff’s Complaint and all cross-claims against Goodyear is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This Constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

5/19/2021

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: