

Favor v Amchem Prods., Inc.
2021 NY Slip Op 33299(U)
October 12, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 617231/2018
Judge: Jerry Garguilo
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SHORT FORM ORDER

E-FILE

INDEX No. 617231/2018
CAL. No. 202001181AB

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 6/3/21 (002 & 004)
MOTION DATE 5/28/21 (007)
ADJ. DATE 7/21/21
Mot. Seq. # 002 MD
Mot. Seq. # 004 MD
Mot. Seq. # 007 MD

-----X
SUZANNE FAIVOR and LAWRENCE
FAIVOR,

Plaintiffs,

WEITZ & LUXENBERG
Attorney for Plaintiffs
700 Broadway
New York, New York 10003

LANDMAN CORSI BALLAINE & FORD P.C.
Attorney for Defendant DAP, Inc.
1617 JFK Boulevard, Suite 955
Philadelphia, PA 19103

- against -

GORDON & REES SCULLY
MANSUKHANI LLP
Attorney for Defendant Hennessy
Industries, LLC
One Battery Park Plaza, 28th Floor
New York, New York 10004

AMCHEM PRODUCTS, INC., et al.

Defendants.
-----X

MANNING GROSS + MASSENBURG LLP
Attorney for Defendant American Biltrite Inc.
14 Wall Street, 28th Floor
New York New York 10005

Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant DAP, Inc. k/n/a La Mirada Products Co., Inc., dated April 1, 2021; Notice of Motion and supporting papers by defendant Hennessy Industries, LLC, dated April 22, 2021; Notice of Motion and supporting papers by defendant American Biltrite Inc., dated April 22, 2021 Answering Affidavits and supporting papers by plaintiff, dated June 11,

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2021 and June 15, 2021; Replying Affidavits and supporting papers by defendant DAP, Inc. k/n/a La Mirada Products Co., Inc., dated June 25, 2021; Replying Affidavits and supporting papers by defendant American Biltrite Inc., dated June 25, 2021; Replying Affidavits and supporting papers by defendant Hennessy Industries, Inc., dated July 1, 2021; Other ____; it is

ORDERED that the motion (002) by defendant DAP, Inc., the motion (004) by defendant Hennessy Industries, LLC, and the motion (007) by defendant American Biltrite Inc. are consolidated for the purposes of this determination, and it is further

ORDERED that the motion (002) by defendant DAP, Inc. for summary judgment is denied, and it is further

ORDERED that the motion (004) by defendant Hennessy Industries, Inc. for summary judgment is denied, and it is further

ORDERED that the motion (007) by defendant American Biltrite Inc. for summary judgment is denied.

This is an action to recover damages, personally and derivatively, for injury allegedly incurred by Suzanne Faivor as the result of exposure to asbestos. Plaintiff alleges that she was exposed to asbestos, in part, from products used by her father during various occupational work, as well as while performing home construction and renovation work. With regard to defendant DAP, Inc. k/n/a La Mirada Products Co. (“DAP”), plaintiff alleges that she was exposed to asbestos in caulking compounds manufactured by DAP. Defendant Hennessy Industries, LLC (“Hennessy”) is the successor-in-interest to AMMCO Tools, Inc. (“Ammco”), which was a manufacturer of brake grinding machines owned by plaintiff’s father. Although it is undisputed that the Ammco grinders used by plaintiff’s father did not contain asbestos, she alleges that she was exposed to asbestos released from products the machinery was used to grind, such as brakes and floor tiles. With regard to defendant American Biltrite Inc., plaintiff alleges that she was exposed to asbestos in floor tiles which were installed by her father at their homes in New York and Florida, as well as at her grandmother’s New York home.

DAP now moves for summary judgment, arguing that plaintiff failed to identify its caulking products as asbestos-containing products to which she was exposed, and that plaintiff cannot establish general or specific causation with respect to any DAP product. In support of its motion, DAP submits copies of the pleadings, deposition testimony by plaintiff’s sister, Patricia Harris, and an affidavit by Ward Treat, who was formerly employed by DAP as a senior chemist, assistant quality control manager and technical support specialist. DAP also submits, inter alia, affidavits by Victor Rogli, M.D., James McCluskey, M.D., and Robert C. Adams.

The Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g provides that, on a motion for summary judgment, other than a motion made pursuant to CPLR 3213, “there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.” No such statement of material facts was annexed to DAP’s notice of motion. Accordingly, DAP’s motion is denied, without prejudice to renewal upon proper papers no later than 30 days after the date of this order.

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Hennessy moves for summary judgment, arguing that there is no evidence establishing that it caused or contributed to plaintiff's injuries. With respect to general causation, Hennessy argues that the chrysotile asbestos generated during the use of the Ammco equipment in the presence of plaintiff was not capable of causing her injury. With respect to specific causation, Hennessy argues that plaintiff was not exposed to a sufficient level of chrysotile asbestos during the use of Hennessy products in her presence to have caused her alleged injury. In support of its motion, Hennessy submits, inter alia, copies of the pleadings, the deposition testimony of plaintiff and Harris, an affidavit by Kevin Belack, and affidavits by Dr. Victor Roggli, Dr. Dominik Alexander, and Dr. Christy Barlow. Hennessy also submits a copy of an April 20, 2020 report by plaintiff's expert, David Y. Zhang, M.D., Ph.D., MPH.

Plaintiff testified that her father had grinding machines in the garage and basement of their home, and that she would pass through, and play in, the garage while he used the grinder. She estimated that she was present on approximately fifty occasions when her father used the grinding machine. Harris, plaintiff's older sister, testified that their father owned three Ammco grinders, which he used to grind brakes, smooth the edges of floor tiles, cut parts of a boiler, and sharpen tools. Harris stated that two of the Ammco grinders were located in the basement and garage of their home in Lake Ronkonkoma, and the third was located in the Texaco gas station where their father worked. She testified that plaintiff was present when their father used the machines, both when passing through the garage and when visiting her father at the Texaco station. Harris stated that her father performed hundreds of brake jobs at their home, and that he used the brake grinder in the garage on an almost daily basis. She estimated that plaintiff was in the vicinity of their father while he used the Ammco grinder approximately 300 to 400 times between 1965 and 1974. Harris testified that her father also used the grinder to sand the sides of floor tiles used at their homes in New York and Florida, and at her grandmother's home. She states that her father would use an air compressor to "blow out" the grinder, and that it did not have an attached dust collection system. She further testified that she and her siblings, including plaintiff, would sweep up the dust created by the use of the grinder.

The affidavit by Belack, an employee of Hennessy, states that Ammco was in the business of designing, manufacturing and selling brake service equipment, including brake shoe arcing machines and brake lathes. Belack further states that those machines did not contain asbestos, and were not designed or intended to be used solely with asbestos-containing products. His affidavit also states that neither Ammco nor Hennessy ever manufactured or sold a brake shoe arcing machine that did not incorporate a dust collection system.

The affidavit of Victor Roggli, M.D., a pathologist, annexes a report regarding his study of slides prepared from a biopsy specimen obtained from plaintiff's omentum. Based on his review of the slides, Dr. Roggli diagnosed plaintiff with "a malignant (diffuse) peritoneal mesothelioma, epithelial variant." In his second report, Dr. Roggli opines that chrysotile asbestos does not cause or contribute to the development of peritoneal mesothelioma in humans.

The affidavit of Dominik Alexander, Ph.D, MSPH, an epidemiologist, annexes a report which states that he has "critically reviewed and examined the epidemiological literature related to chrysotile asbestos and the risk of mesothelioma in various occupations, including motor vehicle mechanics and brake repair workers." Alexander opines that "[plaintiff's] alleged bystander and/or domestic

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automotive friction exposure to motor vehicle repair work, including work with brakes, did not result in exposure to asbestos fibers that placed her at increased risk of peritoneal mesothelioma.” He further notes that “a significant proportion of mesotheliomas among women do not appear to be asbestos-related, and several studies have shown that most cases of female mesotheliomas are not attributable to either occupational or domestic (non-occupational) asbestos exposure.”

The affidavit of Christy Barlow, a toxicologist, annexes a report in which she offers her opinion regarding the potential exposures to asbestos associated with the use of Ammco grinders. Based on her review of the testimony regarding the use of the Ammco grinders in plaintiff’s presence, Barlow conducted an exposure assessment and estimated plaintiff’s maximum potential exposure to asbestos resulting from her father’s potential work with the grinders as 0.03 fibers per cubic centimeter of air per year, which she states “is below cumulative exposures at contemporaneous asbestos occupational exposure limits and reported chrysotile no-observed adverse effect levels (NOAELS).” Barlow opines that plaintiff’s “exposure to chrysotile asbestos from grinding brakes would not have increased [plaintiff’s] risk of developing mesothelioma.”

Hennessy also submits an April 20, 2020 report by plaintiff’s expert, Dr. David Y. Zhang, a pathologist. Citing various studies, Dr. Zhang opines that all asbestos fiber types, including chrysotile, cause peritoneal mesothelioma. With regard to dose and dose-response, Dr. Zhang states, “[t]he risks of developing mesothelioma and lung cancer is dose dependent and low level (dose) exposure of asbestos carries significant risk.” Dr. Zhang notes that airborne asbestos fibers are extremely thin, and only visible collectively as dust by the naked eye. He states, “At the visible dust level, the asbestos fibers concentration can be several millions to several hundred millions.” Based on his review of medical records, discovery responses and deposition testimony relevant to this matter, Dr. Zhang states,

Ms. Faivor has a long-standing history of secondary asbestos exposure from asbestos and asbestos-containing materials and equipment such as a boiler, water heater, pipes, sheet rock, joint compound, pipe covering, bowling balls, flooring materials, automotive materials, caulking material, and insulating materials in multiple environments throughout her lifetime that created an environment of asbestos-containing dust that she breathed.

With respect to plaintiff’s exposure to asbestos from her father’s automotive work, Dr. Zhang notes that plaintiff testified that her father “sanded” new brakes, creating dust which she breathed. Based on his review of plaintiff’s medical records, Dr. Zhang opines that plaintiff’s malignant mesothelioma “is related to asbestos exposure and the cumulative exposure of each asbestos-containing product significantly contributed to the development of her peritoneal malignant mesothelioma, epithelioid type.”

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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New*

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York Univ. Med. Ctr., 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form, and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

“In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff’s exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)” (*Sean R. v BMW of North America, LLC*, 26 NY3d 801, 808, 28 NYS3d 656 [2016]; see also *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584 [2006]; *Pistone v American Biltrite, Inc.*, 194 AD3d 1085, 149 NYS3d 204 [2d Dept 2021]). “[T]here must be evidence from which the fact finder can conclude that the plaintiff was exposed to levels of the agent that are known to cause the kind of harm that the plaintiff claims to have suffered” (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784, 986 NYS2d 389 [2014], citing *Wright v Willamette Indust., Inc.*, 91 F3d 1105, 1107, [8th Cir. 1996]). However, “it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided whatever methods an expert uses to establish causation are generally accepted in the scientific community.” (*Parker v Mobil Oil Corp.*, 7 NY3d 434 at 448, 824 NYS2d at 590).

The motion by Hennessy for summary judgment is denied. Dr. Zhang’s report, which was submitted by Hennessy, raises triable issues of fact regarding whether chrysotile asbestos causes peritoneal mesothelioma, and whether plaintiff’s malignant peritoneal mesothelioma was caused by exposure to asbestos dust created by her father’s use of the Ammco grinders (see *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Pistone v American Biltrite, Inc.*, *supra*). “The experts’ conflicting interpretations of the underlying studies and literature present[s] a credibility battle between the parties’ experts, which is properly left to a jury for its resolution.” (*Pistone v American Biltrite, Inc.*, 194 AD3d at 1085, 149 NYS3d at 206).

Defendant American Biltrite also moves for summary judgment, arguing that plaintiff failed to identify any of its floor tiles as asbestos-containing products to which she was exposed, and that any such exposure did not proximately cause plaintiff’s illness. In support of its motion, American Biltrite submits, inter alia, the parties’ deposition testimony, an affidavit by Roger Marcus, reports by John Spencer, Dr. Stanley Geyer, Dr. James Crapo and plaintiff’s expert, Dr. Zhang.

The affidavit by Rober Marcus states that he is the president and CEO of American Biltrite. Marcus states that American Biltrite manufactured asbestos-containing vinyl asbestos tile and asphalt tile and non-asbestos containing vinyl flooring products in both 9 inch by 9 inch and 12 inch by 12 inch sizes from 1961 to 1985.

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The affidavit by John Spencer, an industrial hygienist, annexes his report relevant to this matter. In his report, Spencer notes that plaintiff alleges exposure to asbestos from Amtico floor tile manufactured by American Biltrite, which was used by her father during renovation work at her family home in New York, renovation work at her grandmother's home in New York, and new construction of her family home in Florida. In addition to exposure from her father's work with the floor tiles, plaintiff alleges exposure to dust created by such work from cleaning up after the work, and from laundering her father's clothes. Based on his review of available literature and his performance of exposure assessment exposure studies of American Biltrite floor tile, Spencer opines that "if the flooring material manufactured by American Biltrite and potentially cleaned-up by [plaintiff] were, in fact, asbestos-containing, the work performed with the product would not have presented any airborne asbestos fiber exposure in excess of historical or current occupational health standards." Spencer additionally opined that, "[i]f [plaintiff] encountered clothing that came into contact with American Biltrite floor tile products that contained asbestos, her personal exposure from handling debris housed in clothing from these materials would be well below the strictest occupational exposure levels allowed by the OSHA and the WHO."

The affidavit of Stanley Geyer, M.D., a pathologist, annexes his report in which he opines that plaintiff's alleged exposure to floor tile manufactured by American Biltrite "would have created a negligible and insignificant chrysotile asbestos exposure, if the Amtico floor tiles contained any chrysotile asbestos and if any exposure to chrysotile asbestos occurred, that would have been insufficient to contribute to the cause of her reported peritoneal malignant mesothelioma." He states,

Because the chrysotile fibers in Amtico vinyl asbestos floor tiles were firmly embedded in a resin matrix that prevented or limited the escape of free fibers into workers' breathing zones, because the defense mechanisms of the upper airways and the lungs limit exposure and biopersistence of chrysotile asbestos in lungs, and because published medical literature demonstrates that chrysotile asbestos does not cause malignant mesothelioma, unless a high and persistent chrysotile exposure occurs along with a significant contamination of the chrysotile by an amphibole-type of asbestos, [plaintiff's] work with or around Amtico floor tiles played no role in the cause of her reported peritoneal malignant mesothelioma.

The affidavit by James Crapo, M.D annexes a report in which he opines,

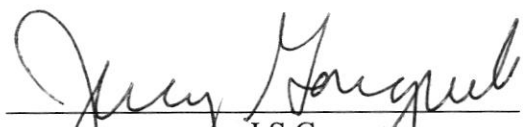
Products contain chrysotile in an encapsulated form and which have low fiber release, such as floor tiles, would not be a source of significant asbestos exposure and would neither create or contribute risk for development of peritoneal mesothelioma. I would conclude [plaintiff's] possible direct or indirect exposures to asbestos containing floor tiles sold by American Biltrite would not have contributed to her risk of developing a peritoneal mesothelioma.

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In order to establish its entitlement to summary judgment in an action based on alleged exposure to asbestos, a defendant must make a prima facie showing that its products could not have contributed to the causation of the plaintiff's asbestos-related injury (see *Fischer v American Biltrite, Inc.*, 184 AD3d 446, 126 NYS3d 16 [1st Dept 2020]; *O'Connor v AERCO Intern., Inc.*, 152 AD3d 841, 57 NYS3d 766 [3d Dept 2017]; *Matter of New York City Asbestos Litig.*, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]). If this burden is met, the plaintiff must then allege facts and conditions from which the defendant's liability may reasonably be inferred, that is, that the plaintiff was in the vicinity where the defendant's products were used and that the plaintiff was exposed to the defendant's products (see *Matter of New York City Asbestos Litig.*, supra; *Scheidel v A.C. and S. Inc.*, 258 AD2d 751, 685 NYS2d 829 [3d Dept 1999]). "The plaintiff is not required to show the precise cause of his damages, but only to show facts and conditions from which defendant's liability can be reasonably inferred" (*Reid v Georgia-Pacific Corp.*, 212 AD2d at 463, 622 NYS2d 946; see also *Matter of New York City Asbestos Litig.*, 116 AD3d 545, 984 NYS2d 45 [1st Dept 2014]; *Matter of New York City Asbestos Litig.*, 7 AD3d 285, 776 NYS2d 253 [1st Dept 2004]; *Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188 AD2d 214, 593 NYS2d 43 [1st Dept 1993], *affd* 82 NY2d 821, 605 NYS2d 3 [1993]).

American Biltrite has failed to establish as a matter of law that its products could not have contributed to the causation of plaintiff's injuries. According to the deposition testimony of plaintiff and Harris, which was submitted in support of American Biltrite's motion, plaintiff was exposed to dust created by her father's installation of Amtico floor tiles at their homes in New York and Florida, and at her grandmother's home, between 1970 and 1977. American Biltrite also submits an affidavit by Marcus stating that American Biltrite manufactured asbestos-containing floor tiles from 1961 to 1985. As discussed above, the report by Dr. Zhang, which was submitted by American Biltrite, states his opinion that plaintiff's malignant mesothelioma "is related to asbestos exposure and the cumulative exposure of each asbestos-containing product significantly contributed to the development of her peritoneal malignant mesothelioma, epithelioid type." As such, American Biltrite has failed to make a prima facie showing that its products could not have contributed to the causation of the plaintiff's asbestos-related injury (see *Pistone v American Biltrite, Inc.*, supra; *Fischer v American Biltrite, Inc.*, supra; *O'Connor v AERCO Intern., Inc.*, supra; *Matter of New York City Asbestos Litig.*, supra; *Reid v Georgia-Pacific Corp.*, supra). Accordingly, the motion by American Biltrite for summary judgment dismissing the complaint against it is denied (see *Alvarez v Prospect Hosp.*, supra).

Dated: October 12, 2021


HON. JERRY GARGUILO
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION