

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

THOMAS MANTOVI and LORRAINE MANTOVI,

INDEX NO. 190055/2017

Plaintiffs,

MOTION DATE 01/16/2019

- against -

MOTION SEQ. NO. 004

AMERICAN BUILTRITE, 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.:

	<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 motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it is granted.

Plaintiff Thomas Mantovi (hereinafter referred to as "decedent") was diagnosed with pleural mesothelioma on January 11, 2017 and died from his illness on November 1, 2018. Decedent was deposed over a course of four days on April 10, 11, 12, and 13 of 2018 (Mot. Reinhardt Aff. Exh. A and Opp. Ratzki Aff. Exh. 1). It is alleged that the decedent was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from his work as an insurance agent for State Farm Insurance Company and Nationwide Insurance Company from 1967 through 1979 (Mot. Reinhardt Aff. Exh. A, pg. 889).

Decedent testified at his deposition that as an insurance agent he visited various residential and commercial construction sites to perform inspections, and there he was exposed to asbestos containing dust while in the immediate vicinity of work being performed by others on Amtico vinyl asbestos floor tiles manufactured by American Biltrite, Inc. (hereinafter referred to as "ABI")(Mot. Reinhardt Aff. Exh. A, pg. 144, 907-908 and 910-911). Specifically, he testified that he was exposed to asbestos by breathing in dust during frequent inspections of sites where Amtico asbestos containing vinyl floor tiles were being cut and laid down, with tools such as box cutters and rotary saws (Mot. Reinhardt Aff. Exh. A, pgs. 210, 385, 907-908 and 956-957). He also testified that he was present when the workers swept up the dust created from the installation of the Amtico floor tiles (Mot. Reinhardt Aff. Exh. A, pgs. 910-911). Decedent identified Amtico floor tiles because of the brand name displayed on the boxes and subsequently also identified that the boxes. He further testified that the boxes had the word asbestos on them (Mot. Reinhardt Aff. Exh. A, pgs. 385-386, 908 and 954-955). Plaintiffs commenced this action on February 16, 2017 to recover for damages resulting from decedent'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 contends that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that Amtico floor tiles caused decedent's mesothelioma.

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

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 NYS2d 184 [1st Dept. 1997]). Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]).

Plaintiffs in opposing the motion argue that ABI's motion does not contain admissible proof or comply with CPLR 3212(b) because they don't provide an affidavit of an individual with personal knowledge, and that this warrants denial of summary judgment.

An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (*Kasae v. H.E.E. Co.*, 95 A.D. 3d 568, 944 N.Y.S. 2d 95 [1st Dept., 2012]). A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge such as deposition testimony (See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D. 3d 595, 20 N.Y.S. 3d 6 [1st Dept., 2015] and *Hoeffner v. Orrick, Herrington & Sutcliffe, LLP*, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1st Dept., 2009]).

ABI's attorney affirmation is being used to submit documentary evidence in admissible form, specifically decedent's testimony, ABI's expert reports and ABI's Answers to plaintiff's interrogatories, which are sufficient to obtain summary judgment.

Alternatively, plaintiffs argue that ABI's experts fail to make a prima facie showing that asbestos in its vinyl floor tiles could not have caused decedent's mesothelioma.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, (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 submits the expert affidavit and October 12, 2017 Summary Report of John W. Spencer, CIH, CSP, a certified industrial hygienist and Marc Plisko a certified industrial hygienist (Mot. Reinhardt Aff. Exh. B); an expert affidavit and report from Dr. Stanley Geyer, M.D., a pathologist (Mot. Reinhardt Aff. Exh. D); and an expert affidavit and report from Dr. David Weill, M.D., a pulmonary specialist (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, a private entity. Mr. Spencer and Mr. Plisko's October 12, 2017 Summary Report shows a lack of causal relationship between encapsulated chrysotile asbestos and decedent's mesothelioma. They draw on multiple assumptions as to decedent's exposure, multiple reports and studies of ABI Amtico floor tile performed by EBI, to conduct a risk and exposure assessment. They explain the difference between friable and non-friable asbestos containing materials, and citing to the Environmental Protection Agency ("EPA") and Occupational Safety and Health Administration (OSHA) reports and standards, state that encapsulated non-friable

products such as ABI's Amtico floor tile pose a lesser potential of release of asbestos fibers associated with mesothelioma (See Mot. Reinhardt Aff. Exh. B).

Dr. Geyer's report relies on the same assumptions made by Mr. Spencer and Mr. Plisko in their October 12, 2017 Summary Report. Dr. Geyer also prepared a table of published literature in support of his conclusion that chrysotile fibers unaccompanied by contamination with amphibole forms of asbestos or some mixture of both chrysotile and amphiboles, did not produce mesothelioma in humans (See Mot. Reinhardt Aff. Exh. D, pg. 3 of 6). Dr. Geyer further concludes that because chrysotile fibers in Amtico floor tiles were firmly embedded in a resin matrix, they were prevented or limited from any escape into a worker's breathing zone (See Mot. Reinhardt Aff. Exh. D, pg. 4 of 6).

Dr. David Weill, M.D. is a pulmonary specialist and is self-employed as Principal of the Weill Consulting Group, a private entity. His affidavit and report dated October 13, 2017 submitted by ABI, addresses the minimal threshold level below which there is no excess risk of developing mesothelioma (See Mot. Reinhardt Aff. Exh. E).

Dr. Weill refers to studies of ambient exposure levels in cities in the United States of between 0.02 f/cc and 0.008 f/cc as not being associated with disease (Mot. Reinhardt Aff. Exh. E, pg. 18 of 75). He relies on multiple studies and reports and historical exposure determinations. Dr. Weill discusses the differences in fiber type potency, and provides charts of "Mesothelioma Deaths by Fiber Types" for the years 1983, 1987, 1996 and 2013. His charts show that the highest amount of deaths were from cigarettes, and that chrysotile miners had only 2% deaths from mesothelioma in 1983 and 1987 with no deaths in 1996 and 2013. Dr. Weill discusses animal studies including the National Institute for Occupational Safety and Health ("NIOSH") 2009 study showing that rats with exposure to chrysotile at higher levels showed no pathology (Mot. Reinhardt Aff., Exh. E, pgs. 43-45 of 75). Dr. Weill concludes that the risk of mesothelioma appears and correlates only when there are significant amphibole fibers or a mixture of fiber exposures which are not found in ABI's Amtico floor tiles, which contain only encapsulated chrysotile fiber (Mot. Reinhardt Aff. Exh. E, pgs. 29, 30, 32 and 36-37 of 75).

Plaintiff in opposition relies on the report of Dr. David Y. Zhang, M.D., Ph.D. and M.P.H., a specialist in pathology and occupational therapy, that is annexed to the defendants motion papers (See Mot. Reinhardt Aff. Exh. F). Dr. Zhang provides decedent's work history, medical history, radiological findings, histological diagnosis and pathology reports. Dr. Zhang concludes that the decedent had "a history of significant level of asbestos exposure." He further concludes, "...the cumulative exposure to each company's asbestos containing products significantly contributed to the development of his malignant mesothelioma." Dr. Zhang makes no reference to studies or report establishing that the chrysotile fibers in ABI's Amtico vinyl asbestos floor tiles were capable of causing decedent's mesothelioma more than his exposure to other products. He also fails to make any distinctions between chrysotile fibers and the other asbestos fibers decedent could have been exposed to. Dr. Zhang's report is insufficient to raise an issue of fact as to general causation.

ABI's expert reports, which rely on EPA and OSHA reports, and scientific studies to formulate a conclusion are sufficient to meet the prima facie burden for summary judgment on general causation.

Special Causation:

ABI states that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause 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 Abestos 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 October 12, 2017 Summary Report by Mr. Spencer and Mr. Plisko cites a study performed by Environmental Profiles, Inc. (EPI), a private entity. Like many of the relevant studies cited in the October 12, 2017 Summary Report, it is not annexed to his report. They also cite to Amtico's former Vice President, Donald C. Ferguson's, affidavit dated March 30, 2009, which is also not annexed to the report or to Amtico's motion papers (See Mot. Reinhardt Aff. Exh. B).

Mr. Spencer and Mr. Plisko estimate decedent's cumulative exposure levels to Amtico floor tiles by conducting a mathematical modeling analysis relying on decedent's deposition testimony, scholarly reports and studies. In calculating decedent's exposure, they also determine the value for "Bystander During Installation of Amtico VAT Floor Tile" for decedent as 0.000013 f/cc-yrs. and the value for "Bystander During Cutting of Amtico VAT Floor Tile" as 0.00078" from the EPI study. From these assumptions and calculations, they conclude that decedent's estimated total cumulative exposure is 0.00079 f/cc-yrs, an exposure level that "(1) is indistinguishable from most lifetime cumulative exposures to ambient asbestos, (2) well below a working lifetime at the OSHA and WHO permissible exposure limits and (3) also well below lifetime cumulative exposure at the USEPA clearance limit following an asbestos abatement action" (See Mot. Reinhardt Aff. Exh. B, pg. 15).

ABI's expert Dr. Geyer relies on decedent's deposition testimony, the October 12, 2017 Summary Report by Mr. Spencer and Mr. Plisko, and the reports and studies he cites in a table. Dr. Geyer concludes that the exposure to asbestos that caused decedent's mesothelioma was not from ABI's Amtico floor tile, but from decedent's prior employment with Mobil Oil Refinery and U.S. Navy ships and exposure to asbestos insulation (Mot. Reinhardt Aff. Exh. D, pg. 4 of 6).

Dr. David Weill, M.D.'s affidavit and report dated October 13, 2017 directly addresses the decedent's work history and his alleged exposure to asbestos from ABI's Amtico vinyl floor tile containing asbestos. Dr. Weill concludes that the decedent was exposed to amphibole asbestos fiber that is not found in ABI's Amtico asbestos vinyl floor tile and the cumulative exposure to the encapsulated chrysotile fiber in ABI's product would have been insignificant (Mot. Reinhardt Aff. Exh. E, pg. 57 of 75).

ABI's expert reports are sufficient to meet the prima facie burden for summary judgment on specific causation.

Plaintiffs' reliance on Dr. Zhang's report, plaintiff's deposition testimony and precedent from multiple jurisdictions, is insufficient to raise an issue of fact on specific causation. Plaintiff's conclusory argument that Dr. Zhang's trial testimony will rest on an "overwhelming scientific consensus," is unavailing. Dr. Zhang's report does not rely on comparison to the exposure levels of subjects of other studies, does not provide comparison of the encapsulated chrysotile fibers in ABI's Amtico vinyl asbestos floor tiles to other forms of asbestos fibers, or establish that plaintiff was exposed to sufficient levels of asbestos from his second hand exposure to ABI's product, to raise an issue of fact on specific causation (See *Parker v. Mobil Oil Corp.*, 7 NY3d 434, *supra*).

Plaintiffs are not required to show the precise causes of decedent's damages, only "facts and conditions from which defendant's liability may be reasonably inferred," but the opposition papers fail to provide sufficient proof to create an inference as to 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]).

Decedent identified ABI's Amtico vinyl asbestos floor tiles as a source of his exposure to asbestos, however, he could not recall the details as to what the tiles looked like, the type of box, the labeling on the box or one of the locations where he specifically recalled the tiles (Mot. Reinhardt Aff. Exh. A, pgs. 368, 385-387, 389-393). Thus, Plaintiffs' have not shown "facts and conditions from which [ABI's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), or raise any issues of fact.

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 granted, and it is further,

ORDERED that plaintiff's claims asserted against American Biltrite, Inc. are severed and dismissed, and it is further,

ORDERED that all cross-claims asserted against American Biltrite, Inc. are severed from this action and dismissed, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

Dated: January 29, 2019



MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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