

Avakian v Aerco Intl., Inc.

Supreme Court of New York, New York County

April 8, 2021, Decided

190036/2018

Reporter

2021 N.Y. Misc. LEXIS 1644 *; 2021 NY Slip Op 31159(U) **

[**1] LAURA AVAKIAN, Plaintiff, - v - AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC, BMCE INC., BORGWARNER MORSE TEC LLC, BRIGGS & STRATTON CORP, CARRIER CORPORATION, CERTAINTTEED CORPORATION, COMPUDYNE CORPORATION, CROWN BOILER CO., DANA COMPANIES, LLC, DOMCO PRODUCTS TEXAS, INC, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, HONEYWELL INTERNATIONAL, INC., ITT LLC., KARNAK CORPORATION, KOHLER CO., MANNINGTON MILLS, INC, NISSAN NORTH AMERICA, INC, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, RHEEM MANUFACTURING COMPANY, SEARS, ROEBUCK AND CO, SLANT/FIN CORPORATION, STANDARD MOTOR PRODUCTS, INC, TECUMSEH POWER, TECUMSEH PRODUCTS COMPANY, TENNECO AUTOMOTIVE OPERATING COMPANY INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TOYOTA MOTOR SALES U.S.A ., INC., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, FEDERAL - MOGUL **ASBESTOS** PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO., Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

lung cancer, causation, **asbestos**, exposure, exposed, exposure to **asbestos**, summary judgment, chrysotile, fibers, toxin

Judges: [*1] PRESENT: HON. ADAM SILVERA, J.S.C.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 269, 270, 271, 272, 273, 274, 277, 348, 349 were read on this motion to/for **DISMISSAL** .

Before the Court is defendant Nissan North America, Inc.'s ("Nissan") motion for summary judgment, pursuant to [CPLR 3212](#), for a finding in favor of Nissan 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 Nissan. Plaintiff opposes the motion.

[**2] Nissan's motion contends that plaintiff decedent, Donald Avakian, has failed to establish specific causation for plaintiff's lung cancer in relation to

Nissan's Datsun-branded products. The case at issue arises from plaintiff's August 17, 2017 diagnosis with fatal lung cancer, which led to his death on June 2, 2019. Plaintiff alleges that the lung cancer was caused by his exposure to **asbestos** over the course of his career working at Mobil Milburn Service Center in Baldwin, New York. This work included removing and replacing brakes, clutches, mufflers and gaskets [*2] on Datsun vehicles.

Here, upon motion for summary judgment, Nissan alleges that it did not cause or substantially contribute to Mr. Avakian's lung cancer. Nissan avers that plaintiff has failed to establish general or specific causation against Nissan. "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 \[1985\]](#)). A defendant seeking summary judgment in a products liability case involving **asbestos** must make a prima facie case that its product could not have contributed to the causation of the plaintiff's injury ([Reid v Georgia-Pacific Corp., 212 AD2d 462 \[1st Dept 1995\]](#)). An opinion on causation in a toxic tort should set forth: (1) a plaintiff's exposure to a toxin; (2) that the toxin is capable of causing the particular illness, or "general causation"; and (3) that plaintiff was exposed to sufficient levels of the toxin to cause the illness, or "specific causation" ([Parker v Mobil Oil Corp., 7 NY3d 434 \[2006\]](#)).

"It is not enough for a plaintiff in a toxic tort action for damages to show that a certain agent sometimes causes the kind of harm that he or she is complaining of; at a minimum, there must be evidence from which the factfinder [*3] can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered" [**3] ([Cornell v 360 West 51st Street Realty, LLC, 22 NY3d 762, 784 \[2014\]](#) quoting [Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1107 \[8th Cir.1996\]](#)).

Here, defendant argues that plaintiff's Complaint fails to demonstrate specific causation. Specific causation may not be established where a plaintiff's exposure to a toxin released from a defendant's product was "below the practical threshold for the dose necessary to [cause the plaintiff's disease]" ([Parker, 7 NY3d at 443](#)). Nissan alleges that Decedent's cumulative exposure to Datsun-branded products would have been below the permissible exposure limits provided by the

Occupational Safety and Health Administration ("OSHA") and that said exposure would not have increased his risk of developing cancer.

Nissan attaches the expert report of Coreen A. Robbins, MHS, PhD, CIH, who concluded that Decedent's potential exposure to **asbestos** and risk of lung cancer from his part-time occupational vehicle mechanic work "would be similar or less than that of vehicle mechanics, for whom exposures are already insignificant and who are not at increased risk of lung cancer" (Mot, Exh D at 21). Ms. Robbins concludes that Decedent was at "a significantly elevated risk of lung [*4] cancer due to his exposure (starting at a young age) to tobacco smoke from his 20 to 40 pack-year history (approximate) of smoking cigarettes" (*id.*).

Further in support of their motion, Nissan attach the affidavit and report of epidemiologist Dr. Dominik Alexander, an expert with regard to occupational and environmental epidemiology, including exposure to **asbestos** and **asbestos**-related diseases, who noted that "there is no scientific basis to conclude that Mr. Avakian's motor vehicle work, including his work with brakes and clutches, increased his risk of lung cancer" (Mot, Exh E at 17). Dr. Alexander also concluded that "[t]he attributable risk of lung cancer among individuals with a 30 or more pack-year history of cigarette smoking [like Decedent] is close to 100%" (*id.*).

[**4] Dr. Alexander affirmed that "[w]ith regard to chrysotile **asbestos** fibers, epidemiologic studies have shown that workers heavily exposed to chrysotile **asbestos** fibers (typically well-above 25 f/cc years) may be at increased risk of lung cancer, however, excess risk may only occur in the presence of asbestosis" (*id.* at 1). Dr. Alexander notes that Mr. Avakian was never diagnosed with asbestosis (*id.*).

In opposition plaintiff demonstrates that [*5] Mr. Avakian was exposed to **asbestos**; that the toxin is capable of causing lung cancer; and that plaintiff was exposed to sufficient levels of **asbestos**. Plaintiff submits the report of Dr. Mark Ellis Ginsburg, a medical causation expert who noted that **asbestos** alone is a recognized substantial contributing cause of primary lung cancer (Aff in Op, Exh 5 at 14). Dr. Ginsburg concluded, to a reasonable degree of medical certainty, that cumulative exposure to **asbestos** from defendant's product was a substantial contributing factor in the development of Mr. Avakian's primary lung cancer (*id.*). Contrary to defendant's assertion that plaintiff's cumulative exposure to **asbestos** cannot be deemed a

substantial contributing factor to plaintiff's lung cancer, Dr. Ginsburg asserts that "[t]here is no safe minimal level of exposure to asbestos with respect to lung cancer" (*id.* at 11 internal citations omitted). Dr. Ginsburg states that "there is a general consensus among the scientific community, science organizations, and health agencies that exposure to all forms of asbestos including chrysotile, increase the likelihood of developing cancer" (*id.* at 12).

Dr. Ginsburg notes that plaintiff was exposed to visible dust [*6] from asbestos-containing products and that the presence of visible dust represents a hazard (*id.* at 6-7 & 14). He further notes that manipulation and/or disturbances of asbestos-containing materials can result in the release of asbestos fibers that are exponentially greater than the ambient level of exposure (*id.* at 14). Mr. Avakian testified that he was exposed to asbestos containing dust when he repaired and [**5] replaced various component parts in Nissan's Datsun-brand automobiles during his employment at the Mobil Milburn Service Center in Baldwin, New York (Aff in Opp, Exh 1 at 58, 64, 65-72, 76-78, 84, 86-87).

Plaintiff has demonstrated that the defendant's Datsun brakes were disturbed and manipulated causing visible dust. Dr. Ginsburg's report conflicts with the expert reports proffered by Nissan. Dr. Ginsburg's report establishes general causation, in that chrysotile asbestos is capable of causing lung cancer. The report cites to many of the same scientific organizations, researchers, and studies cited by defendant's experts.

The fact that plaintiff and defendant's experts disagree on the underlying science raises a credibility issue that cannot be resolved without jury consideration. Conflicting testimony [*7] 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 AD3d 439 [2011]). In *Marzigliano v Amchem Products, Inc., et al.*, Index No. 190134/2017 Motion Sequence 003, the Honorable Manuel J. Mendez ruled that conflicting affidavits regarding a plaintiff's exposure to chrysotile asbestos fibers raises issues of fact on general causation. Further, as to specific causation the Court noted that "[p]laintiffs are not required to show the precise causes of damages as a result of [plaintiff's] exposure to [defendant's] product, only 'facts and conditions from which defendant's liability may be reasonably inferred'" (*id.* at 6).

Here, like the plaintiff in *Marzigliano*, plaintiff cites to Mr. Avakian's testimony, which identified Datsun-brand

automobile components as the source of his exposure to asbestos (Aff in Opp, Exh 1 at 58, 64, 65-72, 76-78, 84, 86-87). Mr. Avakian's deposition combined with the report of Dr. Ginsburg has created "facts and conditions from which [Nissan's] liability may be reasonably inferred" and raises issues of fact (*Reid v Ga.- Pacific Corp.*, 212 AD2d 462 [1st [*6] Dept. 1995]). Thus, plaintiff has provided evidence of causation stating that chrysotile fibers cause lung cancer, and the conflicting [*8] testimony warrants the denial of defendant's motion for summary judgment.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to [CPLR 3212](#), for a finding in favor of Nissan 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 Nissan 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.

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

4/8/2021

DATE

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