

Cioni v. Avon Prods., Inc.

Supreme Court of New York, New York County

September 22, 2022, Decided

INDEX NO. 190069/2019

Reporter

2022 N.Y. Misc. LEXIS 5381 *; 2022 NY Slip Op 33197(U) **

[1]** ELLYN CIONI, Plaintiff, - v - AVON PRODUCTS, INC., COLGATE-PALMOLIVE COMPANY, CYTEC INDUSTRIES, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO FIBERITE, INC., EATON ELECTRICAL, INC. F/K/A CUTLER HAMMER, INC., A SUBSIDIARY OF THE EATON CORPORATION; OCCIDENTAL CHEMICAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOOKER CHEMICALS & PLASTIC CORPORATION, SUCCESSOR-IN-INTEREST TO DUREZ PLASTICS & CHEMICALS CO., PLASTICS ENGINEERING COMPANY, ROCKWELL AUTOMATION, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST FOR ALLEN BRADLEY COMPANY AND ROSTONE CORPORATION, ROGERS CORPORATION, SAINT-GOBAIN ABRASIVES, INC., AS SUCCESSOR TO NORTON COMPANY, UNION CARBIDE CORPORATION, WHITTAKER, CLARK & DANIELS, INC., JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER INC., Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

asbestos, causation, exposure, mesothelioma, summary judgment motion, argues, levels, punitive damages, epidemiological, exposed, exposure to **asbestos**, talcum powder, studies, toxin, talc

Judges: **[*1]** PRESENT: HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

Upon the foregoing documents, it is hereby ordered that Defendant Colgate-Palmolive Company's (hereinafter referred to as "Colgate") motion for summary judgment is denied in part and granted in part for the reasons set forth below.

[2]** The instant matter is premised upon decedent Maryann Purser's alleged exposure to **asbestos** through Colgate's product known as Cashmere Bouquet talcum powder (hereinafter referred to as "CB"), resulting in her diagnosis of pleural mesothelioma. Decedent testified that she remembers initially using powder at the age of six. See Notice Of Motion, Exh. 2, Depo. Tr. of Maryann Purser, p. 151, In. 1-17. Decedent could not remember the name of the manufacturer but identified the product as CB. See *Id.* at p. 153, In. 4-6. Decedent further testified that she used CB all the time until she moved into Kings Park in 1969. See *Id.* at p. 188, In. 1-5. From approximately 1969 to 1982, Decedent used CB "on and off". *Id.* at p. 188, In. 13-16. Decedent also testified that the last time she ever used CB was approximately in the year 2000. See *Id.* at p. 188, In. 22-25.

Colgate contends that decedent's exposure **[*2]** to CB does not cause mesothelioma, and that decedent was not exposed to sufficient levels of **asbestos** from her use of CB to have caused her mesothelioma. Conversely, Plaintiff argues that decedent was exposed to levels of **asbestos** sufficient to cause mesothelioma resulting from her use of CB. Plaintiff also argues that punitive damages are warranted against Colgate, as decedent's alleged exposure to **asbestos** through her use of CB was a result of Colgate's reckless and wanton disregard for the health and safety of its product's users. However, Colgate contends that Plaintiff is not entitled to punitive damages, as Colgate has taken affirmative steps to ensure that CB was safe for consumer use.

Colgate moves for summary judgment and Plaintiff opposes. Colgate replies.

Pursuant to [CPLR 3212\(b\)](#), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to **[**3]** judgment as a matter of law, tendering sufficient evidence to demonstrate **[*3]** the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". [Jacobsen v New York City Health & Hosps. Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86, 11 N.E.3d 159 \(2014\)](#) (internal citations and quotations omitted). "The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers". [Vega v Restani Constr. Corp., 18 NY3d 499, 503, 965 N.E.2d 240, 942 N.Y.S.2d 13 \(2012\)](#) (internal emphasis omitted).

In the case at bar, Colgate maintains that it has met its prima facie burden arguing that there is no causation between decedent's use of CB and her development of mesothelioma. The Court of Appeals in [Parker v Mobil Oil Corp., 7 NY3d 434, 448, 857 N.E.2d 1114, 824 N.Y.S.2d 584 \(2006\)](#), which held that "[i]t is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)". First, Colgate argues that "general causation does not exist **[*4]** unless there is epidemiological evidence that the alleged toxin (i.e. **asbestos**), as a component of the product in dispute (i.e. talcum powder), is capable of causing the alleged disease (i.e. mesothelioma)." Memorandum Of Law In Support Of Colgate-Palmolive Company's Motion For Summary Judgment, p. 8. (internal emphasis omitted). Colgate furthers their argument by claiming that there has been no epidemiological study which demonstrates an increased risk of mesothelioma despite the content of talcum powder products. See *Id.* Colgate refers to contrasting peer-reviewed epidemiological studies of **[**4]** talc miners who work within talc mines which conclude there

is no causal relationship between high exposure of talc and the development of mesothelioma. See *Id.*

In opposition, Plaintiff argues that their expert Dr. Jacqueline Moline relies upon well linked scientific studies that **asbestos** causes mesothelioma and that **asbestos** was found in the CB, resulting in her opinion that **asbestos** containing talc causes mesothelioma. See Memorandum In Opposition To Colgate-Palmolive Company's Motion For Summary Judgment, p. 32. It has been previously held in toxic tort cases "that epidemiological studies specific **[*5]** to a profession, or even epidemiological studies in general, are not necessary to prove causation, and that an expert need not submit or cite to epidemiological studies related to the specific profession at issue . . . in order to prove causation." [In re New York City Asbestos Litig., 48 Misc 3d 460, 483-84, 11 N.Y.S.3d 416 \(Sup Ct, NY Cty 2015\)](#). Further, the Court of Appeals in [Nemeth v Brenntag N. Am., 2022 NY Slip Op 02769 \(2022\), 38 N.Y.3d 336, 194 N.E.3d 266](#), citing [Parker, supra](#), held that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community".

Here, Plaintiff's expert Dr. Moline relies upon peer reviewed articles in which she states within her report [e]xposure to **asbestos** fibers of all types and lengths are toxic, and short fibers more readily reach the mesothelial target cells of the pleura." Memorandum In Opposition, Exh. 67, Report of Dr. Moline dated April 20, 2020, p. 12. Colgate contends that their "industrial hygiene expert, Jennifer Salunel emphasizes exposures to ambient **asbestos** concentrations of any fiber type are not associated with a significantly increased incidence of **asbestos**-related diseases". Memorandum of Law In Support, *supra*, at p. 9 (internal quotations omitted). **[*6]** However, Plaintiff has proffered evidence generally accepted within the scientific community **[**5]** which provides that a toxin (**asbestos**) is capable of causing the illness (pleural mesothelioma). Thus, Plaintiff's expert's report is sufficient to raise genuine issues of fact as to general causation.

As to specific causation, Colgate contends that "Mrs. Purser was not exposed to sufficient levels of **asbestos** from her use of Cashmere Bouquet cosmetic talcum powder, even if there was such contamination, to have caused her disease." *Id.* at p. 11. Colgate refers to Ms. Sahmel's mathematical modeling in which assuming the worst-case scenario of **asbestos** exposure from the use

of CB, such exposure was not the specific cause of decedent's disease. See *Id.* Colgate also argues that Ms. Sahmel's scientific analysis demonstrates that, even assuming every container of CB decedent was exposed to contained upper bound levels of **asbestos**, it would still not exceed cumulative background levels of exposure that the general population experienced in the United States. See *Id.* at p. 12. (internal emphasis omitted). In [Dyer v Amchem Products Inc., 207 AD3d 408, 171 N.Y.S.3d 498 \(1st Dept 2022\)](#), the Appellate Court held that defendant therein met its burden on summary judgment by, *inter* **[*7]** *alia*, proffering an industrial hygiene expert as a witness who tendered a study regarding decedent's exposure to **asbestos**, which "involved a worker and a helper who cut, scored/snapped Amtico tiles in an isolation test chamber, simulating an eight-hour 'shift'. . . Based upon the results of the 2007 EPI study and their review of other materials, publications and decedent's deposition, [Defendant]'s experts concluded that the decedent's time weighted average exposure to chrysotile **asbestos** was below the OSHA eight-hour permissible exposure limit (PEL) of 0.1 f/cc, and also indistinguishable from 0.00000033 f/cc the lifetime cumulative exposure that the general public is exposed to in the ambient air that we all breathe." Unlike the case at bar, the study referenced by the defendants in [Dyer](#) established specific levels of respirable **asbestos** with regards to the specific moving defendant's product in the specific work **[**6]** environment of the plaintiff at issue. In contrast, Colgate relies upon the assumption of a worst-case scenario of decedent's exposure to **asbestos** through her use of CB, without establishing the exposure decedent suffered. Thus, Colgate fails to establish their prima facie **[*8]** case as to specific causation pursuant to the Appellate Division, First Department holdings. Moreover, Colgate's reliance on the Court of Appeals decision in [Nemeth v Brenntag, supra](#), also fails. Colgate confuses plaintiff's burden at trial with their own burden, as moving defendants, on a motion for summary judgment. The Court of Appeals in *Nemeth* held that the plaintiff's expert therein "failed to demonstrate [plaintiff's] level of exposure to **asbestos** in a manner that established causation" after trial and was insufficient to support the jury verdict. [Nemeth, supra](#). Here, no jury trial has commenced, and no verdict has been rendered. In front of the Court now is only Colgate's motion for summary judgment, the standard of which is well settled. As such, Colgate's reliance on *Nemeth* is misplaced. As Colgate failed to meet its initial burden, the portion of the instant motion seeking to dismiss the complaint is denied.

Finally, Plaintiff argues that they are entitled to punitive damages. Namely, Plaintiff argues that "Colgate continuously and intentionally placed corporate profits above the health and safety of its product end users. . . and that Cashmere Bouquet tested positive for **asbestos**." Memorandum In Opposition, *supra*, at p. **[*9]** 40. However, Colgate argues that "[w]hen concerns about cosmetic talcum powder were first raised in the early 1970s (30 years after Mrs. Purser began using Cashmere Bouquet), Colgate instituted a rigorous testing protocol to prevent **asbestos** contamination in its talc." Memorandum Of Law In Support, *supra*, at p. 15. The level of conduct required for punitive damages in **asbestos** litigation is a "negligence standard, requiring that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow **[**7]** and has done so with conscious indifference to the outcome." [Matter of Matter of New York City Asbestos Litig., Maltese v Westinghouse Elec. Corp., 89 NY2d 955, 956-57, 678 N.E.2d 467, 655 N.Y.S.2d 855 \(1997\)](#) (internal quotations omitted). Colgate conducted independent testing performed under the guidance of the federal government and took preemptive measures to test for **asbestos** contamination. See Memorandum Of Law In Support, *supra*, at p. 17. Colgate's continuation of their business endeavors with CB does not warrant punitive damages herein. As such, the instant motion is granted in part only as to dismissal of punitive damages claims against Colgate.

Accordingly, it is

ORDERED that Defendant Colgate Palmolive Company's motion **[*10]** for summary judgment is hereby denied on the issue of causation; and it is further

ORDERED that Defendant Colgate Palmolive Company's motion for summary judgment is hereby granted on the issue of punitive damages, and the cause of action for punitive damages is dismissed against defendant Colgate Palmolive Company only; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the court.

9/22/2022

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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