Campise v. Arkema, Inc.

Supreme Court of New York, Erie County

April 28, 2023, Decided

Index No. 814239/2021

Reporter
2023 N.Y. Misc. LEXIS 2191 *; 2023 NY Slip Op 23139 **

[1]** Christopher R. Campise, as Executor of the Estate of Jeffrey Campise, Deceased, Plaintiff, against Arkema, Inc. et al., Defendants.

Core Terms

talc, ***asbestos***, exposure, mesothelioma, products, causation, argues, levels, summary judgment, Powder, issue of fact, punitive damages, exposed, talcum powder, scientific, consumer, estimate, submits, toxin

Counsel: **[*1]** For Plaintiff: Leah C. Kagan, Esq.

For Defendants: Christopher S. Kozak, Esq.

Judges: HON. RAYMOND W. WALTER, J.S.C.

Opinion by: RAYMOND W. WALTER

Opinion

Raymond W. Walter, J.

This matter comes before the Court on a Motion for Summary Judgement on behalf of the Defendant, Whittaker, Clark & Daniels, Inc., seeking dismissal of Plaintiff's (Christopher R. Campise, as Executor of the Estate of Jeffrey Campise) complaint pursuant to *CPLR § 3212*.

The Plaintiff claims that the decedent, Jeffrey Campise ("Jeff"), was exposed to ***asbestos*** through the use of consumer talcum powder products for nearly his entire life. From the time he was born until around 10 years old he would be around his mother when she applied talc products including Chanel No. 5 Body Powder, Jean Nate talcum powder, and Avon Imari and Skin So Soft talcum powders. His mother also used Caldesene powder during Jeff's diaper changes when he was an infant. Around the age of thirteen (13) Jeff began using Gold Bond Medicated Powder in a routine manner both at home and in the locker room.

Plaintiff brought this lawsuit against Defendant, Whitaker, Clark & Daniels Inc., as the supplier of ***asbestos***-containing talc for the manufacturers of Gold Bond Medicated Powder, Chanel **[*2]** No. 5 Body Powder, Jean Nate talcum powder, Avon Imari and Skin So Soft talcum powders, and Caldesene medicated powder. Plaintiff argues that due to a lifetime of exposure to these ***asbestos*** containing products, Jeff contracted mesothelioma and died on January 30, 2022, at the age of 42.

Defendant argues that while it sold talc to the companies who produced these consumer talc products it is only speculation as to whether its talc was in the specific products used by Jeff; that cosmetic talc does not cause mesothelioma; and that the levels of talc inhaled by Jeff were not enough to cause mesothelioma. Based on these facts, the Defendant argues there is no causal link between talc and Jeff's mesothelioma.

The Court recognizes that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact (*see Kelsey v. Degan, 266 AD2d 843, 697 N.Y.S.2d 426 [4th Dept. 1999]*; *McGraw v Ranieri* [3d Dept. 1994]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital, 68 NY2d 320, 501 N.E.2d*

572, 508 N.Y.S.2d 923 [1986]). On a motion for summary judgment, the court is not to determine credibility, **[*3]** but whether there exists a factual issue, or if arguably there is a genuine issue of fact (S.J. Capelin Assoc. v. Globe Manufacturing Corp., 34 NY2d 338, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]. To defeat a motion for summary judgment, the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact, and importantly mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Zuckerman v. City of New York, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

First, Defendant contends that it is unclear which supplier(s)' talc was used in the final batch formulations of the products that Jeff was exposed to. It will require, therefore, a jury to speculate as to the final batch formulations in order to hold the Defendant accountable. This argument is without merit. Records show that Defendant was a supplier of talc for the products in question during the time the Jeff was exposed. "Both the existence of a product defect as well as the identity of the manufacturer of the product are issues of fact capable of proof by circumstantial evidence" (Otis v. Bausch & Lomb, 143 AD2d 649, 650, 532 N.Y.S.2d 933 [2nd Dept. 1988]). The Defendant failed to meet its burden of establishing as a matter of law that it did not sell the talc in question to the manufacturers of the consumer products (*see* Horn v. Homier Distrib., 272 AD2d 909, 910, 707 N.Y.S.2d 582 [4th Dept. 2000]).

Next, the Defendant argues that the talc it distributed did **[*4]** not contain ***asbestos***. In support of this argument, they submit the Affidavit of Alan M. Seagrave, P.G. (Professional Geologist). Mr. Seagrave states that the sources of the Defendant's talc were known to be "***asbestos***-free" (Defense Exhibit N, NYSCEF Doc No. 171). In addition, Mr. Seagrave stated that the talc from these sources were tested prior to distribution and that these tests show that during the relevant times **[**2]** the talc in question did not contain detectable ***asbestos*** fibers (*id*.). In opposition, the Plaintiff submits contradicting evidence in various forms that the sources of the Defendant's talc did contain ***asbestos*** (Plaintiff Exhibits 40 — 116, NYSCEF Doc Nos. 363-439). Plaintiff also submits the affidavit of Dr. Jacqueline Moline ("Dr. Moline"), who summarizes the history of the presence of ***asbestos*** in talc, in addition to being the Plaintiff's causation expert (Plaintiff Exhibit 119, NYSCEF Doc No. 442).

While the Defendant's affidavit from Alan. M. Seagrave provides a *prima facie* showing that its talc did not contain ***asbestos***, the Plaintiff provides extensive evidentiary proof that establishes a triable issue of fact as it pertains to the question of the presence of ***asbestos*** **[*5]** in Defendant's talc.

Having determined that a triable issue of fact exists as to whether the Defendant's talc contained ***asbestos*** the Court turns to the question of causation. The New York Court of Appeals, in Parker v. Mobil Oil Corp., (7 NY3d 434, 857 N.E.2d 1114, 824 N.Y.S.2d 584 [2006]), established a three-part test for establishing causation in toxic tort cases, 1) that the Plaintiff was exposed to a toxin, 2) that the toxin is capable of causing the particular illness (general causation), and 3) that the Plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation).

More recently the Court of Appeals in Nemeth v. Brenntag North America, (38 NY3d 336, 173 N.Y.S.3d 511, 194 N.E.3d 266 [2022]), reaffirmed the Parker test. The Court stated that an expert opinion "must meet our requirements for establishing exposure to a toxin in an amount sufficient to cause decedent's peritoneal mesothelioma" (id. at 344). Conclusory assertions are insufficient to meet the Parker test and while a precise numerical value is not required there must be some "scientific expression linking decedent's actual exposure to ***asbestos*** to a level known to cause mesothelioma" (id. at 345-346).

In the instant case, the Defendant, citing Cornell v. 360 W.51st St. Realty, LLC, (22 NY3d 762, 783, 986 N.Y.S.2d 389, 9 N.E.3d 884 [2014]), argues that the general causation evidence needs to be product specific, and that evidence of a mere "association" is not enough. The Defendant **[*6]** argues that that the epidemiology related to talc use shows that it does not cause or increase the risk of developing mesothelioma (Report of Kenneth A. Mundt, Ph.D., Defense Exhibit O, NYSCEF Doc. No. 172). In addition, studies of talc miners and millers show no cases of mesothelioma (Defense Exhibits Q, R, S, T, and U; NYSCEF Doc Nos. 174-178) thereby establishing *prima facie* evidence supporting the Defendant's general causation claim.

Defendant goes on to argue that the instant case is similar to Parker in that there is no dispute that benzene caused AML, but the question was whether benzene contained within gasoline was capable of causing AML (Parker, NY3d at 449-450). Here, the Defendant argues that even if you accept that there was ***asbestos*** in the talc mined by the Defendant, there is no scientific

evidence, that rises to the *Parker* standards, that finds an increased risk of mesothelioma as a result of exposure to talc. The Plaintiff would, therefore, fail to meet the general causation prong of the *Parker* test and the Defendant would be entitled to summary **[**3]** judgment as a matter of law.

In order to survive the motion for summary judgement and create a triable issue of fact, the Plaintiff must present expert evidence that **[*7]** is sufficient to meet the general causation standard established in *Parker*. Specifically, Plaintiff must show a significant association between talc exposure and mesothelioma.

The Plaintiff's submits such evidence through the Affidavit of Dr. Moline and an article by Ronald E. Gordon, Sean Fitzgerald, & James Millette, ***Asbestos*** *in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women*, 20 Int'l J. Occupational & Envtl. Health No. 4 at 318, which concluded that "findings indicate that historic talcum powder exposure is a causative factor in the development of mesothelioma ." (Plaintiff Exhibit 118, NYSCEF Doc. No. 441). Dr. Moline's affidavit, in addition to referencing the *Gordon, et. al.*, article also references, several other published studies and reports that reference the link between exposure to ***asbestos*** through talc and mesothelioma (Plaintiff Exhibit 118 at ¶ 59, NYSCEF Doc. No 442). Such evidence is enough to create factual issues regarding general causation.

Finally, Defendant argues that Jeff and his mother's use of talc products was not sufficient to cause mesothelioma (specific causation). In support of this argument Defendant submits the report of Jennifer S. Pierce, **[*8]** M.S., Ph.D., (Defense Exhibit V, NYSCEF Doc. No. 234). Dr, Pierce references several reports and studies, (Defense Exhibits W — BB, NYSCEF Doc. Nos. 180-185), that present affirmative evidence that there are cumulative ***asbestos*** thresholds below which there is no risk of developing mesothelioma (*see* Defense Exhibit V, NYSCEF Doc. No. 234 at pp 103-106). Dr. Pierce argues that the Plaintiff's exposure "would have been (1) well below the cumulative ***asbestos*** exposure that is permitted by the federal government (in occupational settings), (2) below that associated with breathing ambient air, and (3) far too low to increase his risk of ***asbestos***-related disease" (Defense Exhibit V at p. 106).

As the Court of Appeals stated in *Nemeth, (38 NY3d at 347*) the plaintiff must "establish, using expert testimony based on generally accepted methodologies, sufficient exposure to a toxin to cause the claimed illness " (*citing Cornell 22 NY3d at 784*). In addition, the Plaintiff must establish this through more than general, subjective and conclusory assertions (*Parker, 7 NY3d at 449*).

The Plaintiff submits the affidavit of Dr. Moline who opined to a reasonable degree of medical certainty that the exposure to the dust from ***asbestos***-containing cosmetic talc products the **[*9]** Plaintiff was exposed to were above levels that have been shown to cause mesothelioma (Plaintiff Exhibit 119 at ¶ 74, NYSCEF Doc. No. 442). First, Dr. Moline discusses the "consensus among the overwhelming majority of medical and scientific professionals and organizations that ***asbestos*** fibers of any type or size can cause mesothelioma, including chrysotile fibers (*id*. at ¶ 42). Dr. Moline provides a detailed table of various ranges of ***asbestos*** exposure that are sufficient to cause mesothelioma (*id*. at ¶ 29). She also cites *Rodelsperger* that indicates exposures of 0.1 fibers per cubic centimeter ("f/cc") can cause disease (*id*. **[**4]** at ¶ 44) as well as *Lacourt* which determined a doubling of the risk of mesothelioma at exposures greater than 0 but less than 0.1 f/cc (*id*. at ¶ 49). In addition, Dr. Moline cites to a recent study that found a dose-response relationship with a 28 times increased risk of mesothelioma at the lowest exposure threshold of 0-0.5 f/mL-yrs (*id*. at ¶ 51).

Dr. Moline then reviewed ***asbestos*** exposure level data from talc products collected by material scientists and industrial hygienists and data published in peer reviewed literature (*id*. at ¶ 60). That data is then compared **[*10]** to background exposure as illustrated in peer reviewed public literature (*id*.). Such literature consistently shows levels of exposure magnitudes higher (1.11 f/cc to 4.25 f/cc), than background exposures (.00005 f/cc), as illustrated by specific data points (*id*. ¶ 61).

Using these exposure studies Dr. Moline was able to determine within a reasonable degree of medical certainty that the Plaintiff's exposure to ***asbestos*** from talc powder products were several orders of magnitude over background levels and above levels demonstrated to increase the risk of mesothelioma (*id*. at P62). Specifically, Dr. Moline, using the data from the published literature and the testimony of the Plaintiff and his mother, was able to produce a conservative estimate of the Plaintiffs exposure levels to each product (*id*. at ¶¶ 64-72). Gold Bond levels were estimated between .02 and 0.26 f/cc-yrs, Caldesene at 0.02 f/cc-yrs, Jean Nate and Chanel Talcum Powders at 0.03 f/cc-yrs, for a

combined conservative estimate of ***asbestos*** exposure from WCD talc of 0.07 f/cc-yrs (*id*. at ¶¶ 63-73). Dr. Moline calculated that this increased the Plaintiff's risk of developing mesothelioma by a range of 2.8 times to 7.9 times (**[*11]** *id*. at ¶ 29).

The *Nemeth* Court specifically and repeatedly states that "precise quantification of exposure is not always required" if the Plaintiff's expert establishes causation using methods that are generally accepted as reliable in the scientific community (*38 NY3d at 343*). Dr. Moline has, in fact exceeded this requirement by providing estimates of quantified exposure levels and comparing those estimates to levels demonstrated to cause mesothelioma. She does this using peer reviewed data produced by material scientists and industrial hygienists and comparing that data to the exposures claimed by the Plaintiff and his mother, then reducing that to a mathematical calculation. Such calculations meet the standard set forth in *Parker* and *Nemeth* and her opinion constitutes sufficient evidence of causation to overcome summary judgement.

Finally, the Defendant argues the Plaintiff is not entitled to punitive damages. "Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future" (*Ross v. Louise Wise Services, Inc., 8 NY3d 478, 489, 868 N.E.2d 189, 836 N.Y.S.2d 509 [2007]*). To warrant an award of punitive damages, there must be proof of recklessness, or a conscious disregard **[*12]** of the rights of others (*1B NY PJI3d 2:278 at 970 [2023]*).

Defendant argues that they had third-party laboratories test its talc for the presence of ***asbestos*** as soon as they were aware that it was a potential concern (*see* **[**5]** Affidavit of Allan Seagrave, P.G., Defense Exhibit N, NYSCEF Doc. No. 171). Defendant also references a letter from the FDA denying a petition requesting that talc products be labeled with an ***asbestos*** warning and stating that such products do not cause a health hazard (Defense Exhibit Y, NYSCEF Doc. No. 182). Defendant, thereby, meets its initial burden on the motion by establishing the absence of any conduct that could be viewed as a wanton and reckless act that demonstrates conscious indifference and utter disregard of its effect upon the health safety and rights of others (*see PJI 2:278*).

Plaintiff provides extensive discovery materials arguing that Defendant knew the talc they distributed for use in consumer products contained ***asbestos*** and that ***asbestos*** is hazardous (*see* Plaintiff's Statement of Facts ¶¶ 20-37, 42-43, 63-76, 77-82). Viewing this evidence in the light most favorable to the Plaintiff, it fails to meet the heavy burden necessary to find that the acts of the Defendant were wanton, reckless, **[*13]** and malicious.

The evidence shows that there was a debate in the scientific community regarding the safety of consumer talc products and that government agencies like the FDA merely had concerns over a *potential* safety hazard. While the industry failed to use the most cutting-edge technology available to detect ***asbestos*** in its talc, this is not enough to rise to a deliberate concealment of dangerous levels of ***asbestos***. Plaintiff, therefore, has failed to raise an issue of fact regarding punitive damages.

WHEREFORE, upon the foregoing, it is hereby

ORDERED, that Defendant's Motion for Summary Judgement is DENIED in its entirety except as to the issue of punitive damages; it is further

ORDERED, that Defendant's Motion for Summary Judgment dismissing the Plaintiff's claims for punitive damages is GRANTED; and it is further

ORDERED that this constitutes the Decision and Order of the Court.

DATED: APRIL 28, 2023

ENTER:

HON. RAYMOND W. WALTER, J.S.C.

End of Document