

Defonce v A.O. Smith Water Prods. Co.
2021 NY Slip Op 31116(U)
April 1, 2021
Supreme Court, New York County
Docket Number: 190232/2015
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

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BELINDA DEFONCE, AS ADMINISTRATRIX FOR THE ESTATE OF PATRICK J. DEFONCE JR., AND BELINDA DEFONCE, INDIVIDUALLY,

Plaintiff,

INDEX NO. 190232/2015
MOTION DATE 10/01/2020
MOTION SEQ. NO. 004

- v -

A.O. SMITH WATER PRODUCTS CO., AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC.,AZROCK INDUSTRIES, A DIVISION OF DOMCO, INC, BIRD INCORPORATED, BORGWARNER MORSE TEC LLC,BRYANT HEATING & COOLING SYSTEMS, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, DANA COMPANIES, LLC, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC.,NORDSTROM VALVES, INC.,EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FORD MOTOR COMPANY, FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, GEORGIA PACIFIC LLC,GOULDS PUMPS, INC.,HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT INDUSTRIES, INC., INDIVIDUALLY, AND AS SUCCESSOR TO BELL & GOSSETT COMPANY AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., KAISER GYPSUM COMPANY, INC., KOHLER CO., LENNOX INDUSTRIES, INC., MACK TRUCKS, INC., MANNINGTON MILLS, INC., MAREMONT CORP., NAVISTAR, INC., A/K/A INTERNATIONAL TRUCK & ENGINE CORP. F/K/A INTERNATIONAL HARVESTER, INC, OAKFABCO, INC., OWENS-ILLINOIS, INC., PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO ABEX CORPORATION (ABEX), RHEEM MANUFACTURING COMPANY, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, THE B.F. GOODRICH COMPANY, (GOODRICH CORPORATION), TISHMAN REALTY & CONSTRUCTION CO., INC, TURNER CONSTRUCTION

DECISION + ORDER ON MOTION

COMPANY, U.S. RUBBER COMPANY (UNIROYAL),
UNION CARBIDE CORPORATION, WEIL-MCLAIN, A
DIVISION OF THE MARLEY-WYLAIN COMPANY, A
WHOLLY OWNED SUBSIDIARY OF THE MARLEY
COMPANY, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 150, 151, 152, 153,
154, 155, 156, 157, 158

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that defendant Foster Wheeler Corporation’s
motion for summary judgment to dismiss the instant action is granted without opposition.

The standards of summary judgment are well settled. To grant summary judgment, it
must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth
Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). “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). Once such entitlement has been
demonstrated by the moving party, the burden shifts to the party opposing the motion to
“demonstrate by admissible evidence the existence of a factual issue requiring a trial of the
action or tender an acceptable excuse for his failure...to do [so]”. *Zuckerman v City of New York*,
49 NY2d 557, 560 (1980).

Here, defendant Foster Wheeler Corporation moves to dismiss plaintiff’s complaint
arguing that plaintiff failed to link moving defendant’s product with plaintiff’s asbestos
exposure. In support of its motion, defendant Foster Wheeler Corporation proffers, *inter alia*,
plaintiff’s deposition transcript as well as plaintiff’s answers to interrogatories. A review of such
documents reveals that plaintiff’s answers to interrogatories identified defendant Foster Wheeler

Corporation as one of seventeen manufacturers of boilers which plaintiff worked around. Plaintiff's deposition testimony reveals that plaintiff speculated that the boilers in question, which exposed him to asbestos, could have been a Foster Wheeler boiler. *See* Notice of Motion, Exh. B, EBT Tr. of Patrick DeFonce, Jr. p.26, ln. 4-5. During plaintiff's deposition, plaintiff's counsel put on the record that, as plaintiff could not be sure of Foster Wheeler boilers, a stipulation of discontinuance would be signed with regards to defendant Foster Wheeler. *See* Notice of Motion, Exh. C, EBT Tr. of Patrick DeFonce, Jr., p. 188, ln. 1-9. Thus, moving defendant has established entitlement to summary judgment of dismissal on the ground that it did not contribute to, or cause plaintiff to, be exposed to asbestos, and, thus, is not liable for any injury or harm suffered by plaintiff as a result of asbestos exposure.

As moving defendant met its prima facie burden, the burden shifts to plaintiff to establish a genuine triable issue of fact. In a products liability case, plaintiff must "come forward with evidence of an evidentiary nature to...creat[e] a reasonable inference that [plaintiff was exposed to asbestos] from [defendant's] product." *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dep't 1994). Here, plaintiff failed to oppose the instant motion such that no issues of fact have been raised. As such, defendant Foster Wheeler Corporation's motion for summary judgment of dismissal is granted without opposition.

Accordingly, it is

ORDERED that defendant Foster Wheeler Corporation's motion for summary judgment to dismiss this action as against it is granted and this action is dismissed as to defendant Foster Wheeler Corporation only; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Foster Wheeler Corporation dismissing the claims and cross-claims made against it in this action, together


with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and amend the caption to remove defendant Foster Wheeler Corporation only; and it is further

ORDERED that the said claims against the remaining defendants are severed and the balance of the action shall continue; and it is further

ORDERED that within 30 days of entry, defendant Foster Wheeler Corporation shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

4/1/2021
DATE


ADAM SILVERA, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

GRANTED DENIED GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE