

Dembski v American Biltrite, Inc.

2021 NY Slip Op 31162(U)

April 5, 2021

Supreme Court, New York County

Docket Number: 190158/2018

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

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DENNIS DEMBSKI,

Plaintiff,

- v -

INDEX NO. 190158/2018

MOTION DATE 01/21/2021,
01/21/2021

MOTION SEQ. NO. 005 006

AMERICAN BILTRITE, INC, ARMSTRONG INTERNATIONAL, INC, ARMSTRONG PUMPS, INC., ARVINMERITOR, INC, ASBESTOS CORPORATION LIMITED, AURORA PUMP COMPANY, BAYER CROPSCIENCE INC, BORG WARNER MORSE TEC LLC, BRIDGESTONE FIRESTONE AMERICA'S HOLDING INC, BWDAC INC FKA BWD AUTOMOTIVE CORPORATION, CARBOLINE COMPANY, CBS CORPORATION, A DELAWARE CORP, CERTAIN-TEED CORPORATION, CLEAVER-BROOKS, CONTINENTAL TEVES, COPEX VULCAN, INC, CRANE COMPANY, CROWN CORK & SEAL USA, INC, DANA COMPANIES, LLC, DAP PRODUCTS INC, DOW CHEMICAL COMPANY, EMERSON AUTOMATION SOLUTIONS, ESSEX SPECIALTY PRODUCTS, LLC, BW/IP, INC, FLOWSERVE CORPORATION, FLOWSERVE U.S., INC, FORD MOTOR COMPANY, FOSTER WHEELER CORPORATION, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOODYEAR TIRE & RUBBER CO, THE GORMAN RUPP COMPANY, GOULDS PUMPS (IPG), LLC, GRINNELL, LLC, HEDMAN RESOURCES LIMITED, HOMASOTE COMPANY, HONEYWELL INTERNATIONAL, INC, IMO INDUSTRIES, INC., INGERSOLL RAND COMPANY, ITT CORPORATION, JAMES WALKER MFG CO, J.H. FRANCE REFRACTORIES, CO, J-M MANUFACTURING COMPANY, INC, JOHN CRANE, INC, JOHNSTON BOILER, THE J.R. CLARKSON COMPANY LLC, KAISER-GYPSUM COMPANY, INC, KCG, INC., AS SUCCESSOR-IN-INTEREST TO REW, KEELER-DORR OLIVER BOILER COMPANY, KROGH PUMP COMPANY, INC, LEAR SIEGLER DIVERSIFIED HOLDINGS CORP, 3M COMPANY, MAGID GLOVE AND SAFETY MANUFACTURING COMPANY, L.L.C, MAREMONT CORPORATION, METSO MINERALS INDUSTRIES, INC, MORTON INTERNATIONAL, LLC, NAGLE PUMPS, INC, NELSON PIPING CO, NOOTER CORPORATION, PFIZER, INC, PLASTICS ENGINEERING COMPANY, PNEUMO ABEX LLC, ROSS OPERATING VALVE COMPANY, THE SHERWIN-WILLIAMS COMPANY, SPENCE ENGINEERING COMPANY, INC, SPIRAX SARCO INC, STERLING FLUID SYSTEMS (USA), LLC, SULZER PUMPS

**DECISION + ORDER ON
MOTION**

(US) INC, SUPERIOR BOILER WORKS, INC, TENNECO AUTOMOTIVE OPERATING, TENOVA CORE INC, TRANE US, INC, UNION CARBIDE CORPORATION, UNIROYAL, INC, VELLUMOID, INC, VIAD CORPORATION, WARREN PUMPS, LLC, WARREN RUPP, INC. A UNIT OF IDEX CORPORATION, THE WILLIAM POWELL COMPANY, YORK INTERNATIONAL CORPORATION, ZURN INDUSTRIES, L.L.C. F/K/A ZURN INDUSTRIES INC, METROPOLITAN LIFE INSURANCE CO

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 272, 273, 274, 275, 276, 277, 278, 279, 310

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 281, 282, 283, 284, 285, 286, 287, 288, 289, 311

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that defendant James Walker Mfg. Co.'s motion (mot. seq. no. 005) and defendant Nagle Pumps Inc.'s motion (mot. seq. no. 006), both for summary judgment to dismiss the instant action, are 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, defendants James Walker Mfg. Co. and Nagle Pumps Inc. move separately to dismiss plaintiff's complaint arguing that plaintiff failed to produce any evidence to link moving defendants' products with plaintiff's asbestos exposure. In support of the motions, defendants James Walker Mfg. Co. and Nagle Pumps Inc. proffer, *inter alia*, plaintiff's deposition transcript. Defendant James Walker Mfg. Co. also proffers plaintiff's answers to interrogatories. A review of such documents reveals that plaintiff did not identify any products manufactured, sold, or distributed by defendants James Walker Mfg. Co. and Nagle Pumps Inc. which exposed plaintiff to asbestos. Thus, moving defendants have both 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 defendants met their 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 both motions such that no issues of fact have been raised. As such, defendants James Walker Mfg. Co. and Nagle Pumps Inc.'s motions for summary judgment of dismissal are granted without opposition.

Accordingly, it is

ORDERED that defendant James Walker Mfg. Co.'s motion (mot. seq. no. 005) for summary judgment to dismiss this action as against it is granted and this action is dismissed as to defendant James Walker Mfg. Co.; and it is further

ORDERED that defendant Nagle Pumps Inc’s motion (mot. seq. no. 006) for summary judgment to dismiss this action as against it is granted and this action is dismissed as to defendant Nagle Pumps Inc.; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants James Walker Mfg. Co. and Nagle Pumps Inc. dismissing the claims and cross-claims made against them 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 defendants James Walker Mfg. Co. and Nagle Pumps Inc. 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, defendants James Walker Mfg. Co. and Nagle Pumps Inc. shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

4/5/2021

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