

Esposito v ABB, Inc.
2021 NY Slip Op 31163(U)
March 31, 2021
Supreme Court, New York County
Docket Number: 190163/2019
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

-----X

LORETTA ESPOSITO, AS EXECUTRIX OF THE ESTATE
OF NICHOLAS J. ESPOSITO, JR., DECEASED, LORETTA
ESPOSITO,

INDEX NO. 190163/2019MOTION DATE 12/7/2020MOTION SEQ. NO. 001

Plaintiff,

- v -

ABB, INC., AIR & LIQUID SYSTEMS CORPORATION,
ARMSTRONG INTERNATIONAL, INC., AURORA PUMP
COMPANY, BEAZER EAST INC., BELDEN WIRE & CABLE
COMPANY, LLC, BW/IP, INC., CBS CORPORATION,
CLARK-RELIANCE CORPORATION, CLEAVER-BROOKS
INC., CONVAL, INC., COPES-VULCAN INC., CRANE CO.,
INDIVIDUALLY AND AS SUCCESSOR TO AND DOING
BUSINESS AS, CRANE ENVIRONMENTAL, INC., CRANE
PUMPS & SYSTEMS, INC., CROSBY VALVE, LLC, EATON
CORPORATION, ELLIOTT COMPANY, ERICSSON
INC., FLOWSERVE CORPORATION, FLOWSERVE US,
INC., FMC CORPORATION, GARDNER DENVER,
INC., GENERAL CABLE CORPORATION, GENERAL
ELECTRIC COMPANY, GEROSA, INCORPORATED,
GOULD ELECTRONICS, INC., GOULDS PUMPS,
LLC, GRAYBAR ELECTRIC COMPANY INC., GRINNELL
LLC, ITT LLC, INDIVIDUALLY, DOING BUSINESS AS AND
SUCCESSOR TO ITT CORPORATION, BELL & GOSSETT
COMPANY AND/OR BELL & GOSSETT DIVISION, FLOJET
CORPORATION, THE HOFFMAN SPECIALTY
MANUFACTURING COMPANY, ITT FLUID PRODUCTS
CORPORATION, J.R. CLARKSON COMPANY, THE,
LLC, JENKINS BROS., MINE SAFETY APPLIANCES
COMPANY, LLC, MUNACO SEALING SOLUTIONS,
INC., NASH ENGINEERING COMPANY, THE, OKONITE
COMPANY, INC., THE, OLYMPIC GLOVE AND SAFETY
CO., INC., RSCC WIRE & CABLE LLC, SCHNEIDER
ELECTRIC USA, INC., SIEMENS INDUSTRY, INC., SPIRAX
SARCO, INC., TRANE US, INC., FORMERLY KNOWN AS
AMERICAN STANDARD, INC., INDIVIDUALLY, AS
SUCCESSOR TO AND DOING BUSINESS AS,
TREADWELL CORPORATION, TRIANGLE PWC,
INC., UNION CARBIDE CORPORATION, VELAN VALVE
CORP., VIKING PUMP INC., WARREN PUMPS LLC, WEIL-
MCLAIN, WEIR VALVES & CONTROLS USA, INC.,
WILLIAM POWELL COMPANY, THE, YUBA HEAT
TRANSFER LLC, ZY-TECH GLOBAL INDUSTRIES,
INC., JOHN DOE 1 THROUGH JOHN DOE 75, CUMMINS
INC., INDIVIDUALLY, AS SUCCESSOR TO AND DOING

**DECISION + ORDER ON
MOTION**

BUSINESS AS CUMMINS ENGINE COMPANY AND ONAN
CORPORATION,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 253, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 278

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Before the Court is defendant The William Powell Company's ("Powell") motion for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's Complaint and all cross-claims, based on plaintiffs alleged failure to make a prima facie showing that plaintiff Nicholas J Esposito, Jr. ("Decedent") was actually exposed to fibers released from a product sold, supplied and/or distributed by Powell. Plaintiffs oppose the motion.

Powell's motion contends that plaintiff has failed to establish that a Powell product was a substantial factor in causing plaintiff's alleged injuries. The case at issue arises from Decedent's May 2019 diagnosis of inoperable Stage IV lung cancer, that unfortunately led to his death on November 16, 2019, which plaintiffs allege, was caused by decedent's exposure from asbestos containing valves manufactured by Powell.

Decedent worked at Kips Bay Steam Generating Station as well as Astoria and Ravenswood Power Generating Stations where he testified to working with Powell asbestos containing valves. Decedent specifically identified Powell asbestos containing valves. Here, upon motion for summary judgment, Powell alleges that it did not cause plaintiffs' injuries.

"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]).

Here, Powell argues that Decedent unequivocally denied ever working with a Powell valve. Powell argues that Decedent "passively failed to identify Powell" as a source of his asbestos exposure because Decedent did not initially identify Powell as a manufacturer of valves he had worked with (Mot, ¶ 29; Exh E at 34-35; 78). Powell attempts to raise a feigned issue of fact by alleging that Decedent "actively denied exposure to Powell valves at least four (4) separate times during his discovery deposition" (Mot, ¶ 30). Upon examination of Decedent's deposition, the Court finds that Decedent did, in fact, identify Powell valves.

The four times in Decedent's testimony that Powell refers to are merely points in Decedent's deposition where he was asked if he remembered making statements regarding Powell valves earlier in his deposition (Mot, Exh H at 503; 577-579). Powell has attached the deposition of Decedent in which he clearly identifies Powell as a manufacturer of the valves that Decedent encountered as a mechanic at Kips Bay (Mot, Exh J at 26, ¶¶ 8-18; at 79, ¶¶ 9-11). Based upon the subject papers, Powell has failed to meet its burden to show that its product could not have contributed to the causation of plaintiff's asbestos-related injuries (*In re New York City Asbestos Litig.: DiSalvo v. A.O. Smith Water Prods.*, 123 AD3d 498, 499 [1st Dept 2014])

Notably, a defendant cannot satisfy this burden by merely pointing to gaps in a plaintiff's proof (*Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524, 525 [1st Dept 2009]). Here, the Court notes that Powell's motion relies solely on gaps in plaintiff's proof in attempt to meet its burden. Powell has made conclusory allegations that Decedent testified to not having worked

with Powell valves. Powell has provided no evidence that its valves, which Decedent testified were present at the various stations where Decedent worked, were not manufactured with asbestos.

Further, Powell has provided no evidence that their product did not create visible asbestos dust which Decedent testified being exposed to (Mot, Exh E at 49-66). Powell contests causation, but does not provide a single report from any industrial hygienist, physician or medical expert, in support of its motion. Powell “bears the initial burden to establish that exposure to the asbestos from [its products] could not have contributed to [mesothelioma] or that [Decedent] was not exposed to levels of asbestos sufficient to contribute to the development of his disease” (*Pogacnik v A.O. Smith Water Prods. Co.*, 60 Misc. 3d 1208[A], 2018 NY Slip Op 51026[U], *2 [Sup Ct, NY County 2018]). Powell has merely pointed to gaps in plaintiffs’ proof and has failed to provide evidence to prove that Decedent was not exposed to asbestos through one of Powell’s products. Thus, Powell has failed to meet its burden for summary judgment and Powell’s motion to dismiss plaintiffs’ Complaint and all cross-claims is denied.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Powell on the grounds that plaintiff has failed to put forth legally sufficient evidence to establish an issue of material fact as to whether any product manufactured, sold or distributed by Powell caused or contributed to plaintiff’s mesothelioma and to dismiss plaintiff’s Complaint and all cross-claims against Powell is denied; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this Decision/Order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court


ADAM SILVERA, J.S.C.

3/31/2021

DATE

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