

Rodriguez v Amchem Prods., Inc.
2022 NY Slip Op 31925(U)
June 15, 2022
Supreme Court, New York County
Docket Number: Index No. 190279/2019
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART 13

Justice

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NELSON RODRIGUEZ,

Plaintiff,

INDEX NO. 190279/2019

MOTION DATE 06/14/2021

MOTION SEQ. NO. 002

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC
AG COMPANY, N/K/A BAYER CROPSCIENCE INC,
CERTAINTEED CORPORATION, GENERAL ELECTRIC
COMPANY, PEERLESS INDUSTRIES, INC, PFIZER, INC.
(PFIZER), U.S. RUBBER COMPANY (UNIROYAL), UNION
CARBIDE CORPORATION, BAYSIDE FUEL OIL
CORPORATION, MELJOHN REALTY, INC.,RAS BUILDING
CORP., THE HAVEN HEIGHTS GROUP, A.O. SMITH
WATER PRODUCTS CO., 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, CLEAVER
BROOKS COMPANY, INC.,COMPUDYNE CORPORATION,
INDIVIDUALLY, AND AS SUCCESSOR TO YORK
SHIPLEY, INC,CRANE CO., CROWN BOILER CO., F/K/A
CROWN INDUSTRIES, INC.,ECR INTERNATIONAL,
CORP., F/K/A DUNKIRK BOILERS AND UTICA BOILER
COMPANY, FMC CORPORATION, ON BEHALF OF ITS
FORMER CHICAGO PUMP & NORTHERN PUMP
BUSINESSES, GRINNELL LLC,LEVITON
MANUFACTURING CO., INC.,POTDEVIN MACHINE CO.,
RHEEM MANUFACTURING COMPANY, WEIL-MCLAIN, A
DIVISION OF THE MARLEY-WYLAIN COMPANY, A
WHOLLY OWNED SUBSIDIARY OF THE MARLEY
COMPANY, LLC,LENNOX INDUSTRIES, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 81, 82, 83, 84, 85, 86, 87, 88, 89, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that Defendant ViacomCBS Inc.'s (hereinafter referred to as ViacomCBS) motion for summary judgment is denied for the reasons set forth below.

Plaintiff Nelson Rodriguez worked from 1995 to 1998 for a boiler maintenance company as a helper. Plaintiff was required to remove and dispose of electrical panels throughout residential areas in New York City. In order to remove the electrical panels, Plaintiff had to break the panels due to their large size. As a consequence, Plaintiff was subsequently exposed to dust containing asbestos by panels from Westinghouse Electric Corporation, the predecessor to CBS Corporation which merged with Viacom Inc. The surviving corporation is now ViacomCBS Inc., who moves for summary judgment arguing that the exposure was not a result of the intended, or unintended but reasonably foreseeable, use of Westinghouse's product. Plaintiff opposes and ViacomCBS 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 judgment as a matter of law, tendering sufficient evidence to demonstrate 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 and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations 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 (2012) (internal emphasis omitted).

The Appellate Division, First Department in *Hockler v William Powell Co.*, 129 AD3d 463, 465 (1st Dept 2015) enumerates the facts and circumstances which survive a summary judgment motion when dealing with use of an asbestos containing product. In *Hockler*, the Court stated the following:

The plaintiff. . . was a scrap metal salvage worker who came into injurious contact with polychlorinated biphenyls (PCBs) while dismantling junked electrical transformers. Citing section 402A, the Supreme Court of Florida found no liability under the plaintiff's strict products liability claim holding that dismantling is not an intended use of a product. . . To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and 'the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable. As plaintiff did not use Powell's manufactured product in a reasonably foreseeable manner and his salvage work was not an intended use of the product, the complaint should have been dismissed. (internal citations and quotations omitted)

ViacomCBS contends that Plaintiff's own admissions sufficiently establish that ViacomCBS is entitled to summary judgment as a matter of law. Namely that Plaintiff testified his only exposure to asbestos containing material was during the removal and destruction of the electrical panel boxes. ViacomCBS argues that the instant matter is synonymous to *Hockler*, as dismantling a product is not an intended or unintended but reasonably foreseeable use.

However, Plaintiff distinguishes the facts of this case from *Hockler*, as "[t]his was not salvage yard work or work that entailed salvaging scrap metal to sell. Mr. Rodriguez was removing old electrical panels that needed to be disposed." Affirmation In Opposition To Defendant ViacomCBS Inc.'s Motion For Summary Judgment, p. 6, ¶ 13. Further, "[t]he salvage work in the context of *Hockler* was concerning salvage yard workers and salvaging parts to sell for scrap metal." *Id.* at ¶ 14. The facts must be viewed in the light most favorable to the Plaintiff. Therefore, there is a genuine issue of fact raised as to whether the activities Plaintiff was engaged in was intended or unintended but reasonably foreseeable, as "[f]oreseeability is

generally a question of fact for the jury". *Karamarios v Bernstein Mgmt. Corp.*, 204 AD2d 139, 140 (1st Dept 1994). Thus, the question of whether it was foreseeable that the subject large electrical panels would be broken down to facilitate their removal is a question of fact to be determined by the jury at trial. As genuine issues of fact exist, ViacomCBS's motion for summary judgment is denied.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff 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.

6/15/2022
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	