

Gutierrez v Amchem Prods., Inc.
2022 NY Slip Op 32054(U)
June 22, 2022
Supreme Court, New York County
Docket Number: Index No. 190083/2019
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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ZABEDA GUTIERREZ, AS ADMINISTRATOR OF THE
ESTATE OF JOSEPH DEPASQUALE

Plaintiff,

INDEX NO. 190083/2019

MOTION DATE 10/15/2021

MOTION SEQ. NO. 001

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC
AG COMPANY, N/K/A BAYER CROPSCIENCE
INC., AMERICAN HONDA MOTOR CO., INC. (AHM),
ARVINMERITOR, INC., INDIVIDUALLY AND AS
SUCCESSOR-IN-INTEREST TO ROCKWELL
AUTOMOTIVE, BORGWARNER MORSE TEC LLC.,
CERTAINTEED CORPORATION, CUMMINS, INC, DANA
COMPANIES, LLC, EATON CORPORATION, AS
SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER,
INC, FORD MOTOR COMPANY, GENERAL ELECTRIC
COMPANY, HENNESSY INDUSTRIES, INC.
INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO
AMMCO, HONEYWELL INTERNATIONAL, INC., F/K/A
ALLIED SIGNAL, INC. / BENDIX, MCCORD
CORPORATION, NISSAN NORTH AMERICA, INC,
PACCAR, INC., INDIVIDUALLY AND THROUGH ITS
DIVISION, PETERBILT MOTORS CO, PERKINS
ENGINES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX
LLC, SUCCESSOR IN INTEREST TO ABEX
CORPORATION (ABEX), STANDARD MOTOR
PRODUCTS, INC, TOYOTA MOTOR SALES U.S.A., INC,
U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE
CORPORATION,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 111, 112, 113, 114,
115, 116, 117, 118, 119, 120, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137,
138

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that Defendant Perkins Engines,
Inc.'s (hereinafter referred to as "Perkins Engines") motion for summary judgment seeking
dismissal of this action pursuant to CPLR § 3212 is denied in its entirety for the reasons set forth
below.

Plaintiff filed suit against Perkins Engines claiming personal injuries sustained due to alleged exposure to asbestos. Here, Perkins Engines moves to dismiss this action against it on the grounds that plaintiff was not exposed to asbestos through any of Perkins Engines' products. Defendant Perkins Engines argues that decedent Joseph DePasquale's own testimony fails to establish that decedent worked with or around Perkins Engines' products during his activities as an auto mechanic. Specifically, "[b]ased on Mr. Depasquale's own testimony, he could not have used [Perkins Engines'] products that he identified in connection with his work, inasmuch as [Perkins Engines] only supplied gaskets for use on Perkins diesel engines and Mr. DePasquale made no mention of Perkins or diesel engines in his testimony." Memorandum Of Law In Support Of Defendant Perkins Engines, Inc.'s Motion For Summary Judgment, p. 5. Perkins Engines contends that their argument establishes decedent's testimony as erroneous rather than pointing to gaps in their opponent's proof.

In opposition, Plaintiff argues that decedent has established a material issue of fact as to whether Perkins Engines exposed decedent to asbestos through their product. Namely, decedent "testified that he was exposed to Perkins gaskets. Mr. Depasquale performed mechanic work where he would remove and replace gaskets when he overhauled transmissions and worked with manifold gaskets. Throughout his testimony Plaintiff stated that the gaskets would never fit and they had to be cut and shaped creating dust." Affirmation In Opposition To Defendant Perkins Engines, Inc.'s Motion For Summary Judgment, p. 6, ¶ 16.

Perkins Engines replies, referencing an affidavit from Michael Reinhart, who is a retired sales and marketing manager who worked with Perkins Engines from 1997 to 2000. Within the affidavit "Mr. Reinhart states that [Perkins Engines] only supplied gaskets for use on Perkins diesel engines." Affirmation In Reply To Plaintiff's Opposition And In Further Support Of

Defendant Perkins Engines, Inc.'s Motion For Summary Judgment, p. 3, ¶ 8. Perkins Engines further argues that “[decedent]. . . never mentioned Perkins engines or diesel engines in his testimony” *Id.* at ¶ 9.

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 and quotations 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).

Here, Perkins Engines has failed to meet its initial burden in establishing that their product did not expose decedent to asbestos, resulting in his illness. Rather, moving defendant relies upon supposed contradictory testimony that should be scrutinized by a competent trier of fact. The Appellate Division, First Department has held that on a motion for summary judgment, it is moving defendant's burden “to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury”. *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dep't 1995). It is further important to note that inconsistencies in decedent's testimony

do not warrant a dismissal of the case through a summary judgment motion. In *Taylor v A.C.S., Inc.*, 306 AD2d 202, 202 (1st Dept 2003), the Appellate Division, First Department stated that:

Taylor claimed that he was first exposed to AO's asbestos products as a teenager in the Virgin Islands at Par Construction (Par) in 1974 and later at Hess Oil Refinery (Hess) in 1978. Such employment predates Taylor's Social Security records, which list his first job as commencing in 1975. Taylor later stated that he was exposed to AO's products at Dunhill Food Products (Dunhill) and another unspecified company from 1974 through 1979 in Brooklyn, New York. His Social Security records, however, indicate that Taylor worked at Dunhill, plus two other Brooklyn companies, in 1981. Taylor further contended that he used AO's asbestos products at Babcock & Wilcox Company (Babcock) in Indiana from 1989 to about 1996. His Social Security records reveal that he worked there from 1989 through 1995.

The motion court erred in granting summary judgment dismissing the complaint against AO since the direct evidence identifying AO's asbestos products was sufficient to create a triable issue of fact, notwithstanding the inconsistencies in decedent's testimony.”

According to Mr. Reinhart's affidavit, Perkins Engines “only supplied gaskets for use on Perkins diesel engines and Mr. DePasquale makes no mention of Perkins or diesel engines in his testimony.” *See* Notice of Motion, Exh. G, Affidavit of Michael Reinhart, ¶ 19. However, on Perkins Engines' website, they have designed and manufactured both gas and diesel engine components which powered more than over 5,000 different applications. *See* Affirmation In Opposition, *supra*, Exh. 11, Perkins Website. Therefore, even if there was an inconsistency in decedent's testimony as alleged by Perkins Engines, decedent's identification of Perkins Engines' product creates a triable issue of fact.

Further, Reinhart lacks personal knowledge. Pursuant to CPLR § 3212(b), an affidavit supporting a motion for summary judgment “shall” demonstrate that the affiant is “a person having knowledge of the facts”. In their reply papers, Perkins Engines argues that Mr. Reinhart has the requisite knowledge since he has over forty years of experience in the industry. However, Mr. Reinhart concedes, in his affidavit, that he worked for Perkins Engines for merely three

years, and not during the relevant time decedent was allegedly exposed to asbestos. Moreover, Mr. Reinhart was a sales and marketing manager during his employment, which does not include any experience in manufacturing or production of the gaskets or any insight as to the materials used in the products. As such, Mr. Reinhart does not have the requisite personal knowledge to ascertain whether the decedent was exposed to asbestos by Perkins Engines' products. As such, Mr. Reinhart's affidavit is insufficient to support the instant motion for summary judgment.

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.

6/22/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: