

Rothstein v Air & Liquid Sys. Corp.

2022 NY Slip Op 32055(U)

June 24, 2022

Supreme Court, New York County

Docket Number: Index No. 190095/2016

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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STACEY ROTHSTEIN, and MARCY BRUCKSTEIN as co-executors for the Estate of PHILIP SCHER, and STACEY ROTHSTEIN and MARCY BRUCKSTEIN as co-executors for the Estate of STELLA SCHER

Plaintiffs

- v -

AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC., ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BIRD INCORPORATED, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC., CERTAINTIED CORPORATION, FOSTER WHEELER, L.L.C., GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GEORGIA PACIFIC LLC., GOODYEAR CANADA, INC, GOULDS PUMPS, INC., GRINNELL LLC, IMO INDUSTRIES, INC., ITT INDUSTRIES, INC., OWENS-ILLINOIS, INC, PFIZER, INC. (PFIZER), THE B.F. GOODRICH COMPANY, THE FAIRBANKS COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WARREN PUMPS, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that defendant The Goodyear Tire & Rubber Company's (hereinafter referred to as Goodyear Tire) motion for summary judgment is denied for the reasons set forth below.

The instant matter is premised on Decedent's alleged exposure to asbestos from the products of Goodyear Tire. Prior to Decedent's diagnosis of lung cancer in March of 2016, Decedent observed others installing floor tiles as a cabinet salesman from 1961 to 1963, and

when he operated his own construction company, Judmar Construction, from 1970 to 1977. The jobs in which Judmar Construction performed were exclusively floor tile work and sheetrock work. Some of Decedent's duties were to visit contractors and owners at residential apartments in order to make sales and measure kitchens. Decedent observed the installation of three brands of floor tiles, which included one brand from Goodyear. Decedent testified that he inhaled visual asbestos dust while observing and supervising the installation of Goodyear floor tiles during the course of his employment. The floor tiles in which Goodyear Tire manufactures are Deluxe-On-Grade (DOG), Homogeneous-On-Grade (HOG), Black Back, and Heavy-Duty-Homogeneous (HDH). Goodyear Tire contends that Plaintiff was not exposed to asbestos since the Goodyear floor tiles that Decedent was allegedly exposed to were 12" x 12" and non-homogeneous. According to Goodyear, the only floor tile that they manufactured as 12" x 12" and non-homogeneous is DOG, which never contained asbestos. Plaintiff, however, contends that not only 12" x 12" floor tiles were within his vicinity, but 9" x 9" as well. Goodyear Tire moves for summary judgment and Plaintiff opposes. Reply papers were filed.

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).

Preliminarily, pursuant to CPLR § 3212(b), an affidavit in support of a summary judgment motion “shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.” Goodyear Tire submitted the affidavit of Edmund D. Lutz, which states, in pertinent part, that Mr. Lutz “was employed by The Goodyear Tire & Rubber Company, continuously from 1952 until 1987, holding various sales and marketing positions in the Films and Flooring Division.” *See* Notice Of Motion, Exh. D, Affidavit of Edmund D. Lutz, dated Feb 26, 2008. Goodyear Tire proffers no probative evidence either in their support papers or reply that demonstrate Mr. Lutz has personal knowledge of the floor tiles in which Goodyear Tires manufactures. Plaintiff asserts that the personal knowledge of Mr. Lutz is based exclusively on the matters set forth in the affidavit, such as becoming personally familiar with the types, styles, and brands of floor tiles that were sold by Goodyear Tire. Plaintiff further contends that Mr. Lutz has never personally worked with the floor tiles, and that “Goodyear failed to produce, or specifically identify one document that forms even part of Mr. Lutz’s basis of knowledge to testify in the instant matter.” Affirmation In Opposition To Defendant The Goodyear Tire & Rubber Company’s Motion For Summary Judgment, p. 10, ¶ 23 (internal emphasis omitted). Therefore, Mr. Lutz’s affidavit holds minimal probative value.

Here, Goodyear Tire relies upon the deposition testimony of Mr. Russell T. Homes, a production supervisor and subsequently the development engineer for the vinyl products division

of Goodyear Tires between 1954 and 1979. “Mr. Holmes testified the DOG floor tile was the only floor tile with different surface and bottom that Goodyear manufactured in the 1970’s. . . Mr. Holmes testified that DOG never contained asbestos.” Reply Memorandum Of Law In Further Support Of Defendant The Goodyear Tire & Rubber Company’s Motion For Summary Judgment, p. 3. Plaintiff refers to Mr. Holmes’s deposition transcript to highlight the inconsistencies of Mr. Holmes’s recollection regarding the type of floor tiles manufactured by Goodyear Tire. Plaintiff argues that when asked if Mr. Holmes was able to tell the difference between HOG and HDH, his response was “[w]ell, I thought this was, but I was wrong.” See Notice Of Motion, Exh. C, Depo. Tr. Of Russel Holmes, pg. 117, ln 4. As such, Plaintiff contends that since “Mr. Holmes cannot distinguish the difference between defendant’s asbestos and non-asbestos floor tiles, Goodyear’s reliance on his deposition testimony is misplaced”. Affirmation In Opposition, *supra*, at p. 13, ¶ 29. Further, Mr. Holmes’ deposition testimony is ambiguous as to whether the Black Back tiles contained asbestos. When deposed on whether there was any other writing on the Black Back tile, Mr. Holmes responded “it must have been some kind of description that the marketing department wanted, and also a style number.” See Notice Of Motion, *Supra*, Exh. C, pg. 48, ln. 20 – ln. 22. Therefore, Mr. Holmes inconclusive testimony is insufficient to satisfy Goodyear’s heavy burden to establish prima facie entitlement to summary judgment.

Finally, Decedent testified at his deposition to the alleged exposure of asbestos. Notably “[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint”. *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dept 1996). Further, “[t]he function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination”. *Id.* Goodyear Tire contends that

Decedent’s testimony only fits the description of a non-homogeneous 12” x 12” floor tile, which can only be DOG. However, the Decedent testified “[i]t wasn’t any work that I performed but the fact is that I was in areas where they were cutting tile. They had boxes of either Amtico or Goodyear or B.F. Goodrich and it said asbestos on the box.” See Notice Of Motion, Exh. B., Depo. Tr. of Philip Scher, pg. 143, ln. 5 – ln. 10. Despite Goodyear Tire’s position that their floor tiles did not contain asbestos, Decedent’s testimony raises a genuine issue of fact. Therefore, Goodyear Tire’s motion for summary judgment is denied in its entirety.


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.

6/24/2022
DATE



ADAM SILVERA, J.S.C.

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"/>			