

<b>Yohe v Amchem Prods., Inc.</b>
2022 NY Slip Op 32058(U)
June 29, 2022
Supreme Court, New York County
Docket Number: Index No. 190148/2020
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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INDEX NO. 190148/2020

BARBARA YOHE,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, GENERAL ELECTRIC COMPANY, PFIZER, INC. (PFIZER), U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, A.O. SMITH WATER PRODUCTS CO., AERCO INTERNATIONAL, INC., AMERICAN VALVE, INC., ARMSTRONG PUMPS, INC., ATLANTIC RICHFIELD COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO WALWORTH VALVES, BARNES & JONES, INC., BLACKMAN PLUMBING SUPPLY COMPANY, INC., BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BRADFORD WHITE CORPORATION, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CARRIER CORPORATION, CLEAVER BROOKS COMPANY, INC., COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., CONBRACO INDUSTRIES, INC. INDIVIDUALLY AND D/B/A APOLLO VALVES, CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, DUNHAM-BUSH, INC., INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO IRON FIREMAN AND POWER COMPANY, EASCO BOILER CORP. INDIVIDUALLY, AND AS SUCCESSOR TO A.L. EASTMOND & SONS, INC. AND FEDERAL BOILERS, EASTMOND & SONS OF N.J. LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EASCO BOILER CORP. AND A.L. EASTMOND & SONS, INC., AND FEDERAL BOILER, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, GORDON-PIATT ENERGY GROUP, GOULDS PUMPS LLC, GRINNELL LLC, H.B. SMITH COMPANY, INCORPORATED, HALE PRODUCTS, INC., HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, HOFFMAN-NEW YORKER, INC., HUBBELL ELECTRIC HEATER COMPANY, INDUSTRIAL COMBUSTION, LLC, ITT INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING

DECISION + ORDER ON MOTION

CO., INC., JENKINS BROS., JOHN ZINK COMPANY, LLC INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE GORDON PIATT ENERGY GROUP, KAMCO SUPPLY CORP., KEELER-DORR-OLIVER BOILER COMPANY, LAARS HEATING SYSTEMS CO., LENNOX INDUSTRIES, INC., LOCHINVAR, LLC, MESTEK, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO H.B. SMITH, NEW YORKER BOILER COMPANY, INC., NIBCO, NYC PUMPS PM LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO FEDERAL PUMP CORPORATION AND FEDERAL PUMP REPAIR COMPANY INC., NYC PUMPS PMF LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO FEDERAL PUMP CORPORATION AND FEDERAL PUMP REPAIR COMPANY, INC., NYC PUMPS REPAIR PM LLC INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO FEDERAL PUMP CORPORATION AND FEDERAL PUMP REPAIR COMPANY, INC., PB HEAT LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO PEERLESS INDUSTRIES, PEERLESS INDUSTRIES, INC., POWER FLAME INC., PUMPMAN HOLDINGS LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO FEDERAL PUMP CORPORATION AND FEDERAL PUMP REPAIR COMPANY, INC., PUMPMAN INTERMEDIATE HOLDINGS, LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO FEDERAL PUMP CORPORATION AND FEDERAL PUMP REPAIR COMPANY, INC., R.W. BECKETT CORPORATION, RHEEM MANUFACTURING COMPANY, SID HARVEY SUPPLY CO., SLANT/FIN CORPORATION, SPENCE ENGINEERING COMPANY, INC. INDIVIDUALLY AND AS A DIVISION OF CIRCOR INTERNATIONAL INC., SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, STATE INDUSTRIES LLC, TACO, INC., THE J.R. CLARKSON COMPANY LLC SUCCESSOR BY MERGER TO IMI CASH VALVE, INC. (FORMERLY KNOWN AS AW CASH VALVE MANUFACTURING CORPORATION), THE WALWORTH COMPANY F/LDA EMPRESAS LANZAGORTA, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, XYLEM INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO FLYGT PUMPS, ZY-TECH GLOBAL INDUSTRIES, INC., AMERICAN MANAGEMENT CORPORATION INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE PEERLESS HEATER COMPANY, PEERLESS HEATER COMPANY, PEERLESS INDUSTRIES, INC., ESTATE CONSULTANTS, INC., THE EASTERN FOUNDRY COMPANY, EAFCO, AND DOE COMPANY, ATLANTIC SHORES CORPORATION INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO BOYERTOWN PRODUCTS CO., INC., PEERLESS HEATER COMPANY, THE PEERLESS HEATER COMPANY, AMERICAN MANAGEMENT CORPORATION, PEERLESS

INDUSTRIES, INC., ESTATE CONSULTANTS, INC., BOILER PRODUCTS CO., INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO BOYERTOWN PRODUCTS CO., INC., PEERLESS HEATER COMPANY, AMERICAN MANAGEMENT CORPORATION, PEERLESS INDUSTRIES, INC., ESTATE CONSULTANTS, INC., ATLANTIC SHORES CORPORATION, BOYERTOWN FOUNDRY COMPANY INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EAFCO, EASTERN FOUNDRY COMPANY, PEERLESS HEATER COMPANY, THE PEERLESS HEATER COMPANY, PEERLESS INDUSTRIES, INC., AND DOE COMPANY., EAFCO INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE EASTERN FOUNDRY COMPANY, THE PEERLESS HEATER COMPANY, PEERLESS HEATER COMPANY, AMERICAN MANAGEMENT COMPANY PEERLESS INDUSTRIES, ESTATE CONSULTANTS, INC. AND DOE COMPANY., JEFFREY ALEXANDER INDIVIDUALLY AND AS VICE PRESIDENT/DIRECTOR OF BOYERTOWN PRODUCTS A/K/A PEERLESS HEATER COMPANY, PB HEAT LLC, AND DOE COMPANY., MESTEK, INDIVIDUALLY AS SUCCESSOR IN INTEREST TO H.B. SMITH, EAFCO, EASTERN FOUNDRY COMPANY, PEERLESS HEATER COMPANY, THE PEERLESS HEATER COMPANY, PEERLESS INDUSTRIES, INC., AND DOE COMPANY., MICHAEL ALAN FISH, INDIVIDUALLY, AND AS SECRETARY OF PEERLESS INDUSTRIES, INC. AND DOE COMPANY., NORITZ USA CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO PB HEAT LLC, BOYERTOWN PRODUCTS CO., INC., PEERLESS HEATER COMPANY, THE PEERLESS HEATER COMPANY, AMERICAN MANAGEMENT CORPORATION, PEERLESS INDUSTRIES, INC. ESTATE CONSULTANT INC., PB HEAT, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO BOYERTOWN PRODUCTS CO., INC., PEERLESS HEATER COMPANY, THE PEERLESS HEATER COMPANY, AMERICAN MANAGEMENT CORPORATION, PEERLESS INDUSTRIES, INC. ESTATE CONSULTANTS, INC., THE EASTERN FOUNDRY, COMPANY, PEERLESS BOILERS LLC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE EASTERN FOUNDRY COMPANY, EAFCO, PEERLESS HEATER COMPANY, THE PEERLESS HEATER COMPANY, AMERICAN MANAGEMENT COMPANY, PEERLESS INDUSTRIES, ESTATE CONSULTANTS, INC., AND DOE COMPANY, PEERLESS HEATER CO. INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO BOYERTOWN PRODUCTS CO., INC. AND DOE COMPANY., ROBERT FISH, INDIVIDUALLY AND AS SHAREHOLDER/DIRECTOR OF PEERLESS HEATER COMPANY, BOILER PRODUCTS, CO., PEERLESS INDUSTRIES, INC., ATLANTIC SHORES CORP., AND DOE COMPANY, STANLEY BLOOM INDIVIDUALLY AND AS VICE PRESIDENT OF PEERLESS INDUSTRIES, INC. AND

DOE COMPANY.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 247, 272, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 312, 313, 314, 315, 316, 317

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

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

Plaintiffs Christopher Yohe (hereinafter referred to as Mr. Yohe) and Barbara Yohe (hereinafter collectively referred to as Plaintiffs) filed suit against Power Flame claiming personal injury due to alleged exposure to asbestos from Power Flame's products. At the age of 64, Mr. Yohe was diagnosed with lung cancer on May 27, 2020. *See* Affirmation And Memorandum Of Law In Opposition To Defendant Power Flame, Inc.'s Motion For Summary Judgment, Exh. 1, Pathology Report. During discovery, Mr. Yohe was deposed for approximately nine days in which he testified that he joined the Plumber's Union in 1980, was a member of the Nassau County Plumbing Department, and worked various jobs for plumbing contractors. Subsequently, Mr. Yohe started his own plumbing business in 2003. In commercial settings, he worked on approximately 18 to 20 Power Flame Burners which he described to be "a rectangular box with the controls and then a cylinder tube that mounted to the boiler mounting plate, and it was on a stand." *Id.* at Exh. 2, Depo. Tr. Of Christopher Yohe, p. 1005, ln. 12 – 21. When describing removing the asbestos gaskets from the Power Flame burners, he testified that "[a]fter the burner was removed, cleaning the gasket off the burner flange and the boiler mounting plate on the boiler. You'd use a scraper and a grinder with a wire wheel to get the rest

if you couldn't get it all off with a scraper." *See Id.* at p. 1061, ln. 12-16. Mr. Yohe further testified that the result was breathing in asbestos dust. Plaintiffs allege causes of action sounding in negligence, breach of warranty, strict products liability, enterprise / market share liability, fraud and civil conspiracy, premises liability and violations of labor law and the industrial code, claims against personal respiratory protection ("dust mask") defendants, and spousal loss of services. Power Flame contends that Mr. Yohe was not exposed to any Power Flame product, and that no Power Flame product contains asbestos. Power Flame moves for summary judgment. Plaintiffs oppose and Power Flame 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).

Power Flame contends that Plaintiffs cannot establish a claim for negligence, breach of express warranty, strict products liability, and fraud / civil conspiracy because "Mr. Yohe cannot

establish a genuine issue of fact concerning his alleged exposure to asbestos from Power Flame products. The undisputed facts show that Power Flame did not design, manufacture, sell, or assemble the burner or gasket to which Mr. Yohe was allegedly exposed.” Memorandum Of Law In Support Of Defendant Power Flame, Inc.’s Motion For Summary Judgment, p. 6. Power Flame relies upon Mr. Yohe’s testimony that he worked on Power Flame burners from 1985 to 1999, yet “Astec did not even form Power Flame until 2016, and Power Flame did not begin manufacturing products until 2016, nearly two decades after Mr. Yohe was allegedly exposed to the ‘Power Flame’ burner.” *Id.* at p. 6 – 7. Also, Power Flame contends that even if Mr. Yohe was exposed by a Power Flame burner, Power Flame burners “do not contain asbestos gaskets or seals, and the boiler companies to whom Power Flame sells its burners may incorporate gaskets or seals onto the burners after purchase.” *Id.* at p. 7. Power Flame further supports their contentions by providing a sworn declaration from the current Systems Engineer Manager for Power Flame, Sean M. Hizey. Mr. Hizey declares that “Power Flame did not begin manufacturing products until on or about July 15, 2016[,] . . . Power Flame’s burners do not contain any asbestos gaskets or seals. . . [, and] the boiler companies to whom Power Flame sells its burners may incorporate gaskets or seals onto the burners after purchase.” *See* Notice of Motion, Exh. 4, Declaration of Sean M. Hizey, ¶¶ 7, 10, and 11. The Appellate Division, First Department in *Republic Nat’l. Bank of New York v Luis Winston, Inc.*, 107 A.D.2d 581, 582 (1st Dept. 1985), held that the personal knowledge from an affiant must not be “obtained either from unnamed and unsworn employees or from unidentified and unproduced work records.” However, in their reply, Power Flame argues that “Mr. Hizey’s declaration relies upon the incorporation documents for Power Flame (TN) that have been publicly filed with the Tennessee Secretary of State. These incorporation documents show that Power Flame (TN) was formed in 2016.” Reply

Memorandum Of Law In Further Support Of Defendant Power Flame, Inc.'s Motion For Summary Judgment, p. 3. According to Power Flame's Articles of Amendment, Power Flame was formed on August 3, 2016. *See* Aff. In Opp., Exh. 13, Name Change PF Acquisition to Power Flame.

However, Plaintiff correctly argues that Power Flame has failed to establish that none of the four bases for successor liability are applicable herein. *See Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.*, 78 AD3d 801, 802 (2d Dept 2010). Here, the mere continuation doctrine applies. The Appellate Division, First Department, has held that a "plaintiff sufficiently plead[s] the mere continuation exception to the rule against successor liability by showing that [defendant] has acquired. . . [the] business location, employees, management and good will [of the predecessor company]." *NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 411 (1st Dept 2010). In the instant action, following the purchase of Power Flame, Inc. in 2016, the prior Power Flame, Inc. transferred its burner manufacturing business, its contracts, warehouse and inventory, leases, goods and equipment, its employees including its president, books and records, insurance, and its good will. In fact, the current Power Flame changed its name to take on the name of the predecessor company once such former company changed its name to Sandstone Aviation. Thus, Power Flame has failed to establish that successor liability is inapplicable here.

Turning to Power Flame's argument that its burners do not contain asbestos, an issue of fact exists precluding summary judgment. According to Mr. Yohe's testimony, he doesn't know "whether or not the Power Flame burners have seals on them". *See* Aff. and Memo. In Opp., Exh. 2, *supra.*, p. 1005, ln. 8-9. Mr. Yohe further testifies that he has "no reason to believe that the Power Flame burners themselves had any asbestos". *Id.* at p. 1007, ln. 7-8. In further support, Power Flame has provided an affirmation to establish that the burners themselves do not contain

asbestos. In opposition, Plaintiff proffers, *inter alia*, a Power Flame brochure for a Model C gas / oil burner which explicitly states that “[t]he burner mounting flange must be securely attached to the front plate with suitable gasket or asbestos rope packing.” *Id.* at Exh. 24, Power Flame Division Inc., Model C brochure, p. C-4. It is well settled that summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-76 (1979). Thus, issues of fact exist to preclude the granting of 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, Power Flame Inc. 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.

6/29/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE