

Yohe v Amchem Prods., Inc.

2022 NY Slip Op 32059(U)

July 1, 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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BARBARA YOHE,

Plaintiff,

- v -

INDEX NO. 190148/2020

MOTION DATE 07/22/2021

MOTION SEQ. NO. 006

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPS SCIENCE 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 006) 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 309, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328

were read on this motion to/for

JUDGMENT - SUMMARY.

Upon the foregoing documents, it is hereby ordered that defendant American Valve Inc.'s (hereinafter referred to as American Valve) motion for summary judgment is 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 American Valve claiming personal injury due to alleged exposure to asbestos from American Valve'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 American Valve, Inc.'s Motion For Summary Judgment, Exh. 1, Pathology Report. Mr. Yohe 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. During his deposition, Mr. Yohe testified that while performing his duties, he scraped off asbestos gaskets and asbestos insulation from the body of the valve. Within his interrogatory responses, Mr. Yohe answered that he was exposed to asbestos dust during his time in commercial and industrial settings between 1985 and 1999. 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. American Valve contends that Mr. Yohe was not exposed to any American Valve product, and that no American Valve product contains asbestos. American Valve moves for summary judgment. Plaintiffs oppose and American Valve 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 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).

American Valve contends that “[t]he undisputed facts show that American Valve did not design, manufacture, sell, or assemble the products to which Mr. Yohe was allegedly exposed to between 1985 and 1990 or 1991.” Memorandum of Law in Support of Defendant American Valve, Inc.’s Motion for Summary Judgment, p. 7. Conversely, Plaintiffs contend that “Defendant has failed to: 1) Produce, as it must, an affidavit by a person with firsthand knowledge of the relevant facts to support this claim; and/or 2) Produce authenticated documentary evidence that illustrates that the Defendant’s product could not have contributed to

Mr. Yohe's illness." Affirmation and Memorandum of Law in Opposition to Defendant American Valve, Inc.'s Motion for Summary Judgment, p. 7, ¶ 27.

Preliminarily, CPLR 3212(b) states in relevant part "[a] motion for summary judgment shall be supported by [an] affidavit. . . The affidavit shall be by a person having knowledge of the facts". Here, American Valve provides an affidavit from corporate representative, Seth Guterman. Within his affidavit, Mr. Guterman states that summary judgment should be granted "because (1) [American Valve] was not in existence until well after Plaintiff's exposure and (2) because even Plaintiff does not connect American Valve, Inc. to the asbestos products that he claims to have been to." Defendant's Affidavit In Support of Motion for Summary Judgment, dated July 9, 2021, p. 2, ¶ 6. Conversely, Plaintiffs rely upon the Appellate Division, First Department's decision in *Republic Nat'l. Bank of New York v Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept. 1985), which held that personal knowledge to support an affidavit may not be "obtained either from unnamed and unsworn employees or from unidentified and unproduced work records." Here, Plaintiffs correctly argue that Mr. Guterman's affidavit is not supported by personal knowledge, as "the affiant has failed to identify any non-hearsay source of his knowledge and has not produced any authenticated documents which support his statements." Affirmation and Memorandum of Law in Opposition, *supra*, at p. 11, ¶ 38. Within the affidavit, Mr. Guterman claims personal knowledge of facts and circumstances surrounding the case. However, in both of Mr. Guterman's affidavits, his personal knowledge is based solely on his status as President of American Valve and that his "father, Frederick L. Guterman and a business partner, Morris R. Beschloss, formed American Valve, Inc. in March of 1990 in the State of Illinois and it was thereafter dissolved in 1995." Defendant's Affidavit In Support, *supra*, at p. 2, ¶ 7. As stated above, the Appellate Division, First Department, has made clear that the position

of president of a corporation does not automatically confer the assumption that such president has personal knowledge, and that such knowledge must be supported by more than “unsworn employees or from unidentified and unproduced work records.” *Republic Nat’l Bank of New York, supra*, 107 AD2d at 582. While Mr. Guterman states that American valve has not manufactured or sold products containing asbestos, Mr. Guterman has wholly failed to establish any personal knowledge regarding American Valve’s manufacturing or product selling procedures. The Court notes that Mr. Guterman’s second affidavit dated September 2, 2021 attempts to cure the insufficiency of his first affidavit by stating that he has been employed by American Valve since 1990. However, such affidavit does not provide any facts sufficient to establish that Mr. Guterman has personal knowledge. Thus, Mr. Guterman’s affidavits have no probative value and are insufficient to support the instant motion for summary judgment.

Moreover, American Valve refers to Mr. Yohe’s deposition testimony, in which he does not identify the product as American Valve, but just as American. However, it is settled law that moving defendants have the burden “to unequivocally establish that its product could not have contributed to the causation of Plaintiff’s injury.” *Reid v Georgia-Pac., Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Here, American Valve has failed to proffer sufficient proof to establish entitlement to summary judgment as a matter of law.

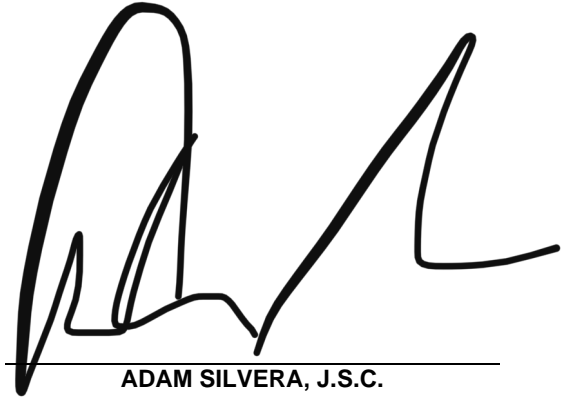
Finally, “[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint”. *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dept 1996). Plaintiff’s reference to American Valve as “American” raise issues of fact as to whether American Valve was in fact the company that manufactured the product the Plaintiff was allegedly exposed to. Thus, American Valve’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, 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.

7/01/2022

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