

Maryn v A.O. Smith Water Prods. Co
2022 NY Slip Op 33445(U)
October 3, 2022
Supreme Court, New York County
Docket Number: Index No. 190261/2019
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA

PART

13

Justice

X

INDEX NO. 190261/2019

MOTION DATE

MOTION SEQ. NO. 003

GLORIA A. MARYN,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSOURCE INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BARNES & JONES, INC, BLACKMAN PLUMBING SUPPLY COMPANY, INC, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, CLYDE UNION, INC, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CONBRACO INDUSTRIES, INC, CRANE CO, ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC. INDIVIDUALLY AND SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FOSTER WHEELER, L.L.C, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS, KAMCO SUPPLY CORP, KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LOCHNIVAR CORPORATION, NEW YORKER BOILER COMPANY, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PULSAFEEDER, R.W. BECKETT

DECISION + ORDER ON MOTION

CORPORATION, RED WHITE VALVE CORP, RHEEM MANUFACTURING COMPANY, RILEY POWER INC, ROCKWELL AUTOMATION, INC., AS SUCCESSOR IN INTEREST TO ALLEN- BRADLEY COMPANY, LLC, ROPER PUMP COMPANY, 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, SUPERIOR BOILER WORKS, INC, TACO, INC, THE J.R. CLARKSON COMPANY LLC SUCCESSOR BY MERGER TO IMI CASH VALVE, INC. (FORMERLY KNOWN AS AW CASH VALVE MANUFACTURING CORPORATION), U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC, WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, ZY-TECH GLOBAL INDUSTRIES, INC, AMERICAN INTERNATIONAL INDUSTRIES INC., BIRD INCORPORATED, J-M MANUFACTURING COMPANY, INC., KARNAK CORPORATION, LENNOX INDUSTRIES, INC., NESLEMUR, AS SUCCESSOR IN INTEREST TO CLUBMAN AND JERIS TALC, NESLEMUR, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CLUBMAN, ARMSTRONG PUMPS, INC., INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, LEVITON MANUFACTURING CO., INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 305, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 434, 435

were read on this motion to/for

JUDGMENT - SUMMARY

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

The instant matter is premised upon Plaintiff's alleged exposure to asbestos through the clothes of her son, Victor Arana, who worked with Armstrong's pumps. From approximately 2000 to 2014, Mr. Arana worked for NYPS as a plumber's helper. His duties included the removal of plumbing, boilers, pumps, valves and sewer pipes. Mr. Arana identified the manufacturer of the pump he was exposed to as Armstrong, since Armstrong's name was written on the pump itself. Mr. Arana contends that the removal of external insulation from Armstrong pumps caused his exposure to asbestos, as the insulation would turn into dust. Plaintiff concludes that she was exposed to asbestos through Armstrong's pumps from the laundering of her son's clothes. Armstrong moves for summary judgment, arguing that they have "no duty to warn of a danger arising from the use of Armstrong pumps in combination with asbestos-containing external insulation manufactured and supplied by a third party, the use of which was entirely unnecessary to enable Armstrong pumps to function as intended." Affirmation In Support Of Armstrong Pumps Inc.'s Motion For Summary Judgment, p. 4, ¶ 19. In opposition, Plaintiff argues that Armstrong's motion should be denied because Armstrong fails to meet their prima facie burden as Plaintiff has proffered evidence identifying exposure to asbestos from Armstrong's pumps. Armstrong 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).

First, Armstrong argues that they had no duty to warn Plaintiff of the hazards of asbestos. Armstrong refers to the affidavit of their corporate representative Mr. Jeffrey L. Martin, who contends that Armstrong did not specify the use of asbestos-containing external insulation on its pumps. Mr. Martin affirmed that “Armstrong never manufactured, sold, distributed, or supplied any external insulation for use with Armstrong pumps. Armstrong never directed, recommended, or specified the use of any external insulation on Armstrong pumps. Armstrong pumps did not require any external insulation in order to function as they were designed to function.” Notice of Motion, Exh. H, Affidavit of Jeffrey L. Martin, dated December 30, 2020, ¶ 12. However, Plaintiff argues that Armstrong admits that it not only sold pumps, valves, and heat exchangers replete with asbestos containing gaskets and packing, but Armstrong also sold asbestos containing replacement parts. *See* Affirmation In Opposition To Defendant Armstrong Pump’s Motion For Summary Judgment, p. 21, ¶ 48. According to the deposition of Mr. Martin, he testified that some Armstrong centrifugal pumps did in fact contain asbestos packing. *See* Affirmation In Opposition, Exh. 5, Depo. Tr. of Jeffrey L. Martin, dated June 23, 2020, p. 281, In 19 – 22. “It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues; issue-finding, rather than issue-determination, is the key to the procedure.” *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept

2007) (internal quotations omitted). Plaintiff further demonstrates that within the Armstrong's Circulating pumps installation and operating instructions, the Model SF and ST series are thermally protected. *See* Affirmation In Opposition, Exh. 14, Certificate of Incorporation of Armstrong Pumps Inc., p. 32. Thus, Armstrong knew that some of their products had to be insulated. Here, Armstrong has failed to establish that it did not specify the use of asbestos within their pumps. "[A] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known". *Matter of New York City Asbestos Litig.*, 27 NY3d 765, 788 (2016). Here, the Court, on this motion for summary judgment, must determine whether a reasonable jury may conclude that Armstrong had a duty to warn Plaintiff of the dangers of asbestos and its uses that are reasonably foreseeable.

In addition, Plaintiff argues that the affidavit of Mr. Martin is not of someone with personal knowledge of the relevant facts, and therefore Armstrong failed to meet their prima facie burden as a matter of law. Pursuant to CPLR § 3212(b), "[a] motion for summary judgment shall be supported by affidavit. . . by a person having knowledge of the facts". "A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden". *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-85 (2005). Notably, the affidavit of Jeffrey Martin, an employee of Armstrong, maintains that he "began working for Armstrong as a design engineering supervisor in 2007." Notice of Motion, Exh. H, Affidavit of Jeffrey L. Martin, dated December 30, 2020, ¶ 4. Plaintiff alleges that her exposure began in approximately 2000. Therefore, prior to 2007 Mr. Martin has no experience with Armstrong pumps nor with the company. Further, Mr. Martin concedes that he drafted and configured pumps based on designs that were acquired in 1999 by Armstrong from Armstrong Darling. These specifications were based upon historical Darling


pumps, and not historical Armstrong pump models. *See* Affirmation In Opposition, *supra*, at p. 13 – 14, ¶ 31. Strikingly, Mr. Martin testified at his deposition that he did not have first hand knowledge of Armstrong pumps, which is in direct contradiction to his affidavit. *See* Affirmation In Opposition, Exh. 5, Depo. Tr. of Jeffrey L. Martin, dated June 23, 2020, p. 235, ln 9 – 11. Thus, Armstrong has failed to support their motion for summary judgment with an affidavit of someone with personal knowledge. Plaintiff has proffered sufficient evidence demonstrating that Mr. Martin does not have the requisite personal knowledge to support a motion for summary judgment. As such, the instant motion 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.

10/03/2022

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