

**Frederick v Amchem Prods., Inc.**

2023 NY Slip Op 30523(U)

February 17, 2023

Supreme Court, New York County

Docket Number: Index No. 190203/2018

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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WINFIELD P FREDERICK,

Plaintiff,

- v -

AMCHEM PRODUCTS, INC., AMERICAN HONDA MOTOR CO., INC. (AHM), ARVINMERITOR, INC., BORGWARNER MORSE TEC LLC, CERTAINTEED CORPORATION, DANA COMPANIES, LLC, EATON CORPORATION, AS SUCCESSOR -IN-INTEREST TO, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, HONEYWELL INTERNATIONAL, INC., OWENS-ILLINOIS, INC., PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, TOYOTA MOTOR SALES U.S.A., INC., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, FEDERAL- MOGUL ASBESTOS PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO., PEPBOYS, PERKINS ENGINES, INC., ROYAL CARIBBEAN CRUISE LINE INC., INDIVIDUALLY AND SUCCESSOR TO YARMOUTH CRUISE LINE INC. AND EASTERN STEAMSHIP CORPORATION, ROYAL CARRIBEAN CRUISE LINE, LTD. INDIVIDUALLY AND SUCCESSOR TO YARMOUTH CRUISE LINE INC. AND EASTERN STEAMSHIP CORPORATION, STANDARD MOTOR PRODUCTS, INC., WESTERN AUTO SUPPLY COMPANY INC., NAVISTAR, INC., A/K/A INTERNATIONAL TRUCK & ENGINE CORP. F/K/A INTERNATIONAL HARVESTER, INC.,

Defendant.

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**INDEX NO.** 190203/2018  
**MOTION DATE** 11/15/2022  
**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 136, 155, 156, 158, 159, 160, 161, 162, 163, 164, 165, 166, 169, 170, 171

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, and after oral arguments, it is ordered that the instant motion for partial summary judgment, pursuant to CPLR §3212, is decided below.

Here, defendant Perkins Engines, Inc. moves for partial summary judgment alleging it has established that plaintiff was not exposed to asbestos through any of Perkins Engines' brakes, clutches, or gasoline engine gaskets. Defendant Perkins Engines contends that plaintiff's deposition testimony, which states that he worked with Perkins Engines brakes, clutches, and gaskets, is incorrect. According to moving defendant, plaintiff testified that he worked with new disc brakes, new drum brakes, and new clutch assemblies, manufactured by defendant Perkins Engines. Moving defendant further points out that plaintiff testified that he used defendant Perkins Engines gaskets on both gasoline and diesel engines. Moving defendant argues that plaintiff could not have used its brakes, clutches, or gasoline engine gaskets. In support, defendant Perkins Engines proffers, *inter alia*, the affidavit of Mr. Kevin Klein, a Technical Coordinator in Litigation Technical Support for Caterpillar Inc. Mr. Klein asserts that defendant Perkins Engines never manufactured, designed, or distributed any brakes or clutches, and that it supplied gaskets only for diesel engines. According to defendant Perkins Engines, partial summary judgment must be granted.

In opposition, plaintiff concedes partial summary judgment as to defendant Perkins Engines' brakes. As to moving defendants' claims regarding clutches and gasoline engine gaskets, plaintiff argues that defendant Perkins Engines failed to meet its prima facie burden as to clutches and gaskets, and that issues of fact exist. According to plaintiff, the affidavit of Mr. Klein is insufficient to establish entitlement to summary judgment, as such statements are unsupported by any documentation. Plaintiff argues that moving defendants' website states that it sold and distributed engine components for diesel and gasoline engines, and that moving defendants' documents show that it sold asbestos-containing clutches. Defendant Perkins Engines replies, stating that Mr. Klein has over 30 years of industry knowledge, and, thus, has

personal knowledge of the facts. Moving defendant further argues that its website refers only to “gas” engines rather than “gasoline” engines. According to defendant Perkins Engines’ attorney, the “gas” engines referred to on its website refers to natural gas. In support of this argument, defendant Perkins Engines proffers the Operator’s Handbook – Gas Models, 4000 Series Vee-Form Engines. As to clutches, defendant Perkins Engines alleges that its discovery responses indicate that industrial clutches were supplied rather than automotive clutches.

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). “The 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 eliminate any material issues of fact from the case”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *See id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1<sup>st</sup> Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1<sup>st</sup> Dep’t 1990). The court’s role is “issue-finding, rather than issue-determination”. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, 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, 475-476 (1979). Furthermore, 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 (1<sup>st</sup> Dep't 1995).

Here, defendant Perkins Engines has failed to meet its initial burden in establishing that its product did not contain asbestos and could not have contributed to plaintiff's injury. *See DiSalvo v AO Smith Water Products*, 123 AD3d 498, 499 (1<sup>st</sup> Dep't 2014). "While defendant's representative proffered an affidavit in which he states that it was impossible for plaintiff to have...[been exposed to asbestos through defendant Perkins Engines' clutches and gasoline engine gaskets], the affidavit was conclusory and without specific factual basis, and thus did not establish the prima facie burden of a proponent of a motion for summary judgment". *Id.* Moreover, a review of plaintiff's deposition transcript reveals that plaintiff testified that he inhaled visible dust from working with defendant Perkins Engines' clutches and gaskets. The Appellate Division, First Department, has held that "[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. The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony." *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1<sup>st</sup> Dep't 1996)(internal citations omitted). Thus, as defendant Perkins Engines has failed to meet its initial burden, and as triable issues of fact exist, the instant motion is denied in part as to clutches and gasoline engine gaskets. The portion of defendant Perkins Engines' motion which was conceded to by plaintiff, with regards to brakes, is granted.

Accordingly, it is

ORDERED that the portion of defendant Perkins Engines' motion for partial summary judgment seeking dismissal of the portion of the complaint with regards to its clutches and gasoline engine gaskets is denied; and it is further

ORDERED that the portion of defendant Perkins Engines' motion for partial summary judgment seeking dismissal of the portion of the complaint with regards to its brakes is granted; 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.



2/17/2023

DATE

ADAM SILVERA, J.S.C.

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