

Ferrari v A.O. Smith Water Prods. Co

2023 NY Slip Op 30960(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 190003/2021

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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NICHOLAS FERRARI AS ADMINISTRATOR FOR THE
ESTATE OF MARIO FERRARI AND ANGELA FERRARI,
INDIVIDUALLY,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID
SYSTEMS CORPORATION, AS SUCCESSOR-BY-
MERGER TO BUFFALO PUMPS, INC, AMCHEM
PRODUCTS, INC., N/K/A RHONE POULENC AG
COMPANY, N/K/A BAYER CROPS SCIENCE INC,
COURTER & COMPANY INCORPORATED, 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,
GENERAL ELECTRIC COMPANY, IMO INDUSTRIES, INC,
MARIO & DIBONO PLASTERING CO., INC, MORSE
DIESEL, INC, NORTHROP GRUMMAN CORP. AS
SUCCESSOR TO GEORGE A. FULLER COMPANY,
O'CONNOR CONSTRUCTORS, INC., F/K/A THOMAS
O'CONNOR & CONNOR & CO., INC, PFIZER, INC.
(PFIZER); SKANSKA KOCH, INC, STRUCTURE TONE,
TISHMAN LIQUIDATING CORP, TISHMAN REALTY &
CONSTRUCTION CO., INC, TURNER CONSTRUCTION
COMPANY, U.S. RUBBER COMPANY (UNIROYAL),
UNION CARBIDE CORPORATION, VRH CONSTRUCTION
CORP, THE MARLEY-WYLAIN COMPANY, CRANE CO.,
PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 145, 146, 147

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendant Structure Tone LLC's (hereinafter referred to as defendant "Structure Tone") instant motion for summary judgment, pursuant to CPLR 3212, is denied for the reasons stated below.

Here, defendant Structure Tone seeks summary judgment arguing that plaintiff has failed to establish that he was exposed to asbestos through his work with, or near, products used by moving defendant. Defendant Structure Tone contends that its answers to site specific interrogatories establish that it did not use asbestos on those job sites. Relying on plaintiff's deposition transcript, defendant Structure Tone argues that plaintiff testified he was not exposed to asbestos at either the 15 Broad Street or the 60 Wall Street locations. According to moving defendant, plaintiff testified that these two locations were the only two job sites where he encountered defendant Structure Tone as the general contractor. In further support of its motion, moving defendant proffers, *inter alia*, the deposition transcript of Mr. John T. White, the executive vice president of defendant Structure Tone from December 17, 2010. According to Mr. White's 2010 testimony, defendant Structure Tone did not use any asbestos-containing materials and its subcontractors did not use any asbestos containing materials.

Plaintiff opposes the motion, arguing that issues of fact exist precluding summary judgment. Plaintiff contends that defendant Structure Tone is liable under common law negligence as well as New York Labor Law §200. Plaintiff argues that defendant Structure Tone's own workers swept asbestos insulation and joint compound creating asbestos dust which plaintiff breathed in. Moreover, plaintiff alleges that he encountered defendant Structure Tone's employees at 20 to 30 different job sites, although he could only remember two specific addresses. Plaintiff testified that he was able to identify the employees of defendant Structure Tone, as such workers wore helmets with Structure Tone's name on them. Plaintiff argues that defendant Structure Tone's employees created the dangerous condition by sweeping up asbestos dust without any precautions. Defendant Structure Tone replies.

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. *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 (1st Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st 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).

The elements of a common-law negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting therefrom. *See Jiminez v Shahid*, 83 AD3d 900 (2d Dep’t 2011). Labor Law §200 is a codification of the common law duty that a landowner or general contractor is to provide workers with a reasonably safe place to work. *See Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 (1981). An implicit precondition to this duty “is that the party charged with that responsibility have the

authority to control the activity bringing about the injury". *Comes v New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993), citing *Russin v Picciano*.

Pursuant to Labor Law § 200 a party charged with having a duty to provide individuals with a safe place to work must have the authority to control the activity which brought about the injury. 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 it[]...could not have contributed to the causation of plaintiff's injury". *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dep't 1995).

Here, a review of the deposition transcripts submitted reveals that issues of fact exist as to whether defendant Structure Tone created a dangerous condition by sweeping asbestos dust and causing injury. Although defendant Structure Tone argues that plaintiff was not exposed to asbestos at two specific locations, namely 15 Broad Street and 60 Wall Street, plaintiff explicitly testified that he encountered moving defendant at numerous other locations. Moreover, while defendant Structure Tone relies on the deposition testimony of Mr. White, who asserted that defendant Structure Tone did not use any asbestos-containing materials and its subcontractors did not use any asbestos containing materials, Mr. White's deposition transcript unequivocally reveals that defendant "Structure Tone [n]ever inquired of its subcontractors whether or not they used asbestos-containing materials". Notice of Motion, Exh. G, Depo. Tr. of John T. White, dated December 17, 2010, p. 88, ln. 11-16. Thus, Mr. White does not have personal knowledge of the materials used by defendant Structure Tone's subcontractors and his testimony regarding the materials used by its subcontractors is insufficient to support the instant motion for summary judgment. As defendant Structure Tone has failed to meet its initial burden in "unequivocally establish[ing] that... it[] could not have contributed to the causation of plaintiff's injury", *Reid*,

supra, 212 AD2d at 463, and as issues of fact exist, moving defendant's motion for summary judgment is denied.

Accordingly, it is

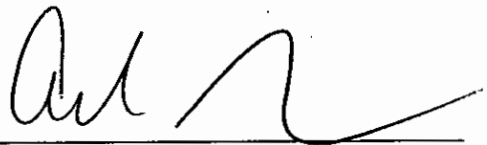
ORDERED that defendant Structure Tone LLC's motion for summary judgment, pursuant to CPLR 3212, seeking to dismiss plaintiff's Complaint and all cross-claims against it is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendant with notice of entry.

This Constitutes the Decision/Order of the Court.

3/27/2023

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: