

Yohe v Achem Prods., Inc.

2023 NY Slip Op 31126(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 190148/2020

Judge: Adam Silvera

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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

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INDEX NO. 190148/2020

BARBARA YOHE,

MOTION DATE 01/10/2023

Plaintiff,

MOTION SEQ. NO. 009

- 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 009) 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 459, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 524, 525, 526

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendant Lochinvar Corporation's (hereinafter referred to as "Lochinvar") motion for summary judgment to dismiss this action is hereby denied for the reasons set forth below.

Here, defendant Lochinvar moves for summary judgment arguing that there is no evidence that any of defendant Lochinvar's products exposed plaintiff to asbestos. Defendant Lochinvar states that it did not sell, supply, manufacture, or distribute any product which exposed plaintiff to asbestos. Thus, according to moving defendant, plaintiff cannot establish that exposure to asbestos from defendant Lochinvar's products, and further asserts that its boilers were free from asbestos. In support, defendant Lochinvar proffers, *inter alia*, plaintiff's deposition transcript in which plaintiff testifies that he was exposed to asbestos through defendant Lochinvar's boilers from 1987 to 1994, while replacing or repairing portions of such boilers. Moving defendant further proffers the affidavit of Mr. Thomas Vallett, the former Vice President of defendant Lochinvar, who contends that defendant Lochinvar began manufacturing Copper Fin boilers in 1981, prior to which no boilers were manufactured. Mr. Vallett states that moving defendant did not manufacture other boilers such as sectional boilers. Defendant Lochinvar further proffers the affidavit of Mr. Al Gatlin, former Vice President/LTC Products for moving defendant. According to Mr. Gatlin, he was employed by Thermo-Pak from 1966 to

1977, and that the boilers manufactured by Thermo-Pak were labeled by defendant Lochinvar. Such boilers were the same as the Copper Fin boilers which moving defendant began to manufacture in 1981. Mr. Gatlin states that the boilers sold to defendant Lochinvar from Thermo-Pak did not contain asbestos. Moving defendant further proffers the affidavit of Mr. John Wilton, the President of Refractory Sales & Service, who asserts that its product, Dixie Crete 18 does not contain any asbestos. Finally, defendant Lochinvar proffers a report from Boelter & Yates, dated August 17, 2005, regarding testing of cement firebox panel components which were being stored in its facility plant. Such testing showed no asbestos in the components.

In opposition, plaintiff argues that issues of fact exist as defendant Lochinvar failed to establish entitlement to summary judgment. According to plaintiff, although defendant Lochinvar began manufacturing boilers in 1981, it sold, rebranded, and distributed other models of boilers which contained asbestos since 1936. Plaintiff further argues that the testing of samples taken from boilers and components which plaintiff never worked on, and cement boards stored in moving defendants' facilities without a specified timeframe, is insufficient to support the instant motion. Defendant Lochinvar replies.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). "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). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the

action or tender an acceptable excuse for his failure...to do [so]”. *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). 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 (1st Dep’t 1995).

Contrary to defendant Lochinvar’s arguments, issues of fact exist as to whether defendant Lochinvar’s products, or products sold by it, exposed plaintiff to asbestos. While defendant Lochinvar proffered evidence that it did not manufacture boilers until 1981, and only manufactured one type of boiler, plaintiff explicitly testified that he was exposed to visible dust while working on defendant Lochinvar’s boilers. Plaintiff testified that, as a master plumber and after training, he was able to differentiate asbestos and non-asbestos materials. As there is conflicting testimony with regards to the products for which defendant Lochinvar sold, and which exposed plaintiff to asbestos, summary judgment is precluded. Furthermore, defendant Lochinvar erroneously relies upon the testing of materials which are not specific to plaintiff’s exposure to asbestos, and, thus, have no probative value herein. As such, defendant Lochinvar’s motion for summary judgment seeking to dismiss the complaint is denied.

Accordingly, it is

ORDERED that defendant Lochinvar Corporation's motion for summary judgment 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 defendants with notice of entry.

This constitutes the Decision/Order of the Court.

4/11/2023

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