

Puetzer v A.O. Smith Water Prods. Co.

2023 NY Slip Op 31928(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 190295/2019

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 PUETZER,

Plaintiff,

- v -

INDEX NO. 190295/2019

MOTION DATE 12/14/2022

MOTION SEQ. NO. 003

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPS SCIENCE INC, AURORA PUMP COMPANY, BORGWARNER MORSE TEC LLC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTIED CORPORATION, CLEAVER BROOKS COMPANY, INC, CRANE CO, CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, CROSBY VALVE LLC, DANA COMPANIES, LLC, FLOWSERVE US, INC. INDIVIDUALLY AND SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FORD MOTOR COMPANY, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, J-M MANUFACTURING COMPANY, INC, KOHLER CO, MARIO & DIBONO PLASTERING CO., INC, MCCORD CORPORATION, NORTHROP GRUMMAN CORP. AS SUCCESSOR TO GEORGE A. FULLER COMPANY, PEERLESS INDUSTRIES, INC, PERKINS ENGINES, INC, PFIZER, INC. (PFIZER), ROCKWELL AUTOMATION, INC., AS SUCCESSOR IN INTEREST TO ALLEN-BRADLEY COMPANY, LLC, STANDARD MOTOR PRODUCTS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN REALTY & CONSTRUCTION CO., INC, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VIKING PUMP, INC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, ZURN INDUSTRIES LLC

DECISION + ORDER ON MOTION

INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON
WORKS A/K/A ERIE CITY BOILERS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 238, 239, 240, 241, 242, 243, 244 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the instant motion for summary judgment seeking dismissal of this action, pursuant to CPLR §3212, is decided in accordance with the decision below.

Here, defendant Perkins Engines, Inc. (hereinafter referred to as defendant “Perkins”) moves to dismiss this action on the basis that plaintiff has failed to establish causation and defendant has established a *prima facie* case for a lack thereof under *Nemeth v Brenntag North America*, 38 NY3D 336 (2022). Defendant relies primarily on an expert report by Catherine E. Simmons stating that plaintiff’s exposure to asbestos, from changing gaskets, was of insufficient quantity to have caused his cancer.

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 (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).

Defendant Perkins has misstated its burden in the instant motion as the standard from *Nemeth v Brenntag* which represents an extraordinary post-trial remedy to set aside a jury verdict. Defendants incorrectly state that plaintiffs have failed to prove causation herein, at the summary judgment stage. At summary judgment, plaintiff’s opposition need only raise a triable issue of fact concerning specific causation. Further, the appropriate standard at summary judgment for defendant is *Dyer v AmChem Products Inc.*, 207 AD3d 408, 409 (1st Dep’t 2022). In *Dyer*, defendants were granted summary judgment not by “simply argu[ing] that plaintiff could not affirmatively prove causation” but by “affirmatively prov[ing], as a matter of law, that there was no causation.” *Id.* Defendants in *Dyer* proffered a simulation study that measured the amount of asbestos released from cutting the exact tiles manufactured *by them* and at issue in the case. See *id.* at 411. Here, defendant Perkins fails to meet their burden on summary judgment as set forth in *Dyer*.

Defendant Perkins relies upon its expert, Catherine E. Simmons, CIH, FAIHA, who cites simulation studies on asbestos exposure from gaskets that are not specifically Perkins-produced. *See* Affirmation in Support of Defendant Perkins Engines, Inc.'s Second Motion for Summary Judgment on Causation, dated Dec. 2, 2022, Exh. G, Report of Catherine E. Simmons, CIH, FAIHA, at p. 15. The first study analyzes gaskets manufactured by the companies Victor and GM. *See* Affirmation in Support, Exh. H, Exposure Assessment Engine Gaskets Removal and Replacement 1963/1964 Chevrolet Impala, Jan. 27, 2004, at p. 6-7. The second study discusses the removal of asbestos-containing gaskets from diesel engines which are, again, not Perkins brand. *See* Affirmation in Support, Exh. I, Asbestos exposure from gaskets during disassembly of a medium duty diesel engine, Jun. 28, 2004. The third study similarly discusses asbestos exposure from removing and replacing gaskets and fails to mention Perkins. *See* Affirmation in Support, Exh. J, Assessment of airborne asbestos exposure during the servicing and handling of automobile asbestos-containing gaskets, Apr. 3, 2006. Moving defendant fails to even include an explanation of the similarities between Perkins-manufactured gaskets and those studied in the three simulations relied upon to argue their accuracy or relevance to the instant issue.

Ms. Simmons' report also concludes that the exposure to asbestos-containing gaskets represented in the studies does not meet the level of exposure typically associated with lung cancer. However, this does not conclusively prove that gasket exposure could not have contributed to the causation of Mr. Puetzer's lung cancer. Along similar lines, defendant Perkins tries to highlight Mr. Puetzer's history with smoking as to dispute their causation of his cancer, but even if Mr. Puetzer was at a higher risk of developing lung cancer, it would not be dispositive of moving defendant's gaskets having contributed to causing its ultimate development.

Additionally, Perkins has offered no evidence to suggest that they have never manufactured asbestos-containing gaskets or that any such gaskets could not have been available to Mr. Puetzer during his work. Ms. Simmons' report relies entirely on an affidavit from Michael E. Reinhart dated October 14, 2021, submitted in defendant's first motion for summary judgment, to conclude that Mr. Puetzer's exposure from Perkins gaskets was "zero." Mr. Reinhart does not possess the personal knowledge required to dispel with any issues of fact regarding Perkins gaskets. He did not work in Perkins manufacturing and was not associated with the company during the period relevant to Mr. Puetzer's potential use of Perkins products.

Further, defendant Perkins mistakenly relies upon Mr. Puetzer's deposition testimony as definitive proof that he never worked on a diesel engine. Mr. Puetzer repeatedly made clear, throughout his testimony, that the car manufacturers he recalled working on were likely not an exclusive list. When asked which "specific make or model of car that [plaintiff] recall[ed] installing a Perkins gasket on", he replied that they were "customers' cars" and he "couldn't recall." *See* Affirmation in Support, *supra*, dated Dec. 2, 2022, Exh. E, Plaintiff's Deposition Transcript, Volume 4, p. 518, ln. 4-6. He then noted that "[i]t was several, it was Ford, could be a Chrysler product." *Id.* at ln. 7-8. This testimony does not indicate an exclusive list that precludes, as a matter of law, an interpretation that plaintiff worked on diesel engines or that Perkins gaskets could have been supplied for use on gasoline engines.

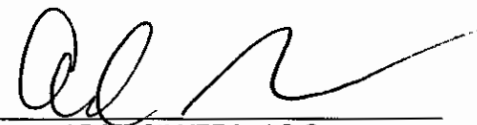
As a reasonable juror could decide that asbestos exposure from Perkins gaskets was a cause of Mr. Puetzer's lung cancer, and that plaintiff's deposition testimony did not rule out diesel engines or use of Perkins gaskets on other engines, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Perkins' motion to dismiss based on causation is denied in its entirety; and it is further

ORDERED that within 30 days of entry defendants shall serve plaintiffs with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.



ADAM SILVERA, J.S.C.

6/6/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				