

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

2023 NY Slip Op 31929(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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**INDEX NO.** 190295/2019

BARBARA PUETZER,

**MOTION DATE** 11/05/2021

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE 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, CERTAINTEED 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 001) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174

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 denied for the reasons set forth below.

Here, defendant Perkins Engines, Inc. (hereinafter referred to as defendant “Perkins”) moves to dismiss this action on the grounds that plaintiff decedent (Mr. Puetzer) was not exposed to asbestos from any Perkins product during his time working at a Shell gas station repairing cars. Defendant Perkins argues that the gaskets attributed to it by Mr. Puetzer’s testimony did not match any available Perkins product during the relevant period. Specifically, Defendant Perkins has alleged that Mr. Puetzer only testified to replacing gaskets on cars with gasoline engines while Perkins exclusively manufactured gaskets for diesel engines.

In opposition, plaintiff alleges that defendant Perkins failed to establish that its products did not contain asbestos and that it did not manufacture, supply, or sell asbestos containing gaskets for engines worked on by plaintiff. Plaintiff further argues that the testimony relied upon by moving defendant was in reference only to plaintiff’s personal vehicle and not a blanket attestation to only working with gasoline engines. Defendant Perkins replies.

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. *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 has failed to meet its initial burden in establishing that its product did not contain asbestos and could not have contributed to plaintiff's asbestos exposure. Rather, defendant Perkins relies upon plaintiff's unclear and ambiguous testimony regarding diesel engines, and upon the affidavit of Michael E. Reinhart dated October 14, 2021. With respect to plaintiff's ambiguous deposition testimony, 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).

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 of Defendant Perkins Engines, Inc.'s Motion for Summary Judgment, dated Nov. 5, 2021, 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 engines could have been supplied for use on gasoline engines. As a reasonable juror could decide that plaintiff's deposition testimony did not rule out diesel engines or use of Perkins gaskets, an issue of fact exists to preclude summary judgment.

Additionally, Mr. Puetzer's testimony indicated his recollection and knowledge of various prominent auto-part manufacturers during his tenure at the Shell station including Perkins. See Affirmation in Support, *supra*, Exh. D, Plaintiff's Deposition Transcript, Volume 3, p. 281, ln. 14-p. 282, ln. 10. He made clear that all his parts were sourced from local auto-part retail shops that carried multiple common brands. *Id.* He also testified that new gaskets were labeled with manufacturer's names via boxed or clear plastic packaging. *Id.* at p. 321, ln. 1-25.

Defendant Perkins, in claiming that they did not manufacture any products that could have been used by Mr. Puetzer, relies solely on an affidavit from an individual that both: (1) did not work in Perkins manufacturing, and (2) was not associated with the company during the period relevant to Mr. Puetzer’s potential use of Perkins products. This provides an insufficient basis to dispel with certainty any material issues of fact. Defendant Perkins has failed to establish both: (1) that they did not manufacture any asbestos-containing gaskets during the time Mr. Puetzer worked at the Shell station; and (2) that any asbestos-containing gaskets manufactured by them could not have been available to or used by Mr. Puetzer.

The Court finds that a triable issue of fact exists as to whether Mr. Puetzer worked with any Perkins products and to what extent he was exposed to asbestos by them.

Accordingly, it is

ORDERED that defendant Perkins’ motion for summary judgment on the issue of causation is denied in its entirety; and it is further

ORDERED that within 30 days of entry defendant shall serve plaintiff 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:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  FIDUCIARY APPOINTMENT  REFERENCE

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN