

Yohe v Amchem Prods., Inc.

2023 NY Slip Op 32266(U)

July 5, 2023

Supreme Court, New York County

Docket Number: Index No. 190148/2020

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 YOHE,

Plaintiff,

- v -

INDEX NO. 190148/2020

MOTION DATE 09/20/2022

MOTION SEQ. NO. 012

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPS SCIENCE 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 012) 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 551, 556, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 595

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(b), is denied for the reasons set forth below.

Here, defendant Bradford White moves to dismiss this action on the grounds that plaintiff decedent, Mr. Christopher Yohe, was not exposed to asbestos from any Bradford White product during his employment as a plumber from the 1980s to the 2000s. Defendant Bradford White argues that Mr. Yohe's testimony identifies water heater parts that would not have contained asbestos.

In opposition, plaintiff notes that defendant Bradford White's affidavit is insufficient and it does not deny historically manufacturing asbestos containing water heaters.

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).

Here, defendant Bradford White 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 Bradford White relies solely upon an insufficient affidavit and understates the plaintiff’s consistent and unequivocal testimony regarding their products.

With respect to plaintiff’s 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 (1st Dep’t 1996) (internal citations omitted).

The Court finds that plaintiff clearly identified Bradford White water heaters and recalled seeing their label tags or metal plates. *See* Affirmation & Memorandum of Law in Opposition to Defendant Bradford White Corporation's Motion for Summary Judgment, Exh. 3, Yohe Deposition dated September 25, 2020 at p. 585. Mr. Yohe also gave unequivocal testimony on the differences between asbestos containing parts in older water heaters and non-asbestos containing parts in newer models. *See id.* at p. 594-595. Mr. Yohe was specifically trained in identifying asbestos and relevant materials during the course of his professional experience. *See id.* at p. 1043-1045.

Defendant Bradford White further relies on the affidavit of Mark Taylor dated September 19, 2022. This affidavit does not indicate the requisite personal knowledge of the relevant period to dispel with certainty all questions of fact. Specifically, the affidavit merely asserts Mr. Taylor's familiarity with Bradford White's historical water heater products. Mr. Taylor does not claim to have firsthand knowledge with Bradford White manufacturing, nor does he cite any documentary evidence reviewed. Plaintiff correctly points out that the affidavit of Mr. Taylor only describes Bradford White's activities in the present-tense. He fails to support, or even address, the claim that Bradford White has never historically manufactured products containing asbestos.

Without any further details, this affidavit is insufficient to establish with certainty that historical Bradford White water heaters did not contain asbestos, and that any asbestos containing Bradford White parts could not have been encountered by Mr. Yohe.

As a reasonable juror could decide that plaintiff was exposed to asbestos from a Bradford White-manufactured water heater or part, issues of fact exist to preclude summary judgment.

The Court finds that triable issues of fact exist as to whether Mr. Yohe worked with an asbestos containing Bradford White product and to what extent he was exposed to asbestos from it.

Accordingly, it is

ORDERED that defendant Bradford White’s motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

07/05/2023
DATE


ADAM SILVERA, J.S.C.

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