

Smith v Advance Auto Parts, Inc.

2023 NY Slip Op 32528(U)

July 21, 2023

Supreme Court, New York County

Docket Number: Index No. 190261/2016

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

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Justice

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INDEX NO. 190261/2016

CAROLINE SMITH, CAROLINE SMITH,

MOTION DATE 06/26/2023

Plaintiff,

MOTION SEQ. NO. 019

- v -

ADVANCE AUTO PARTS, INC., AIR & LIQUID SYSTEMS CORPORATION, ALCOA, INC., ALCO PRODUCTS, INC., ALPHA WIRE CORP., AMERICAN BILTRITE INC., AMERICAN INSULATED WIRE CORP., A.O. SMITH WATER PRODUCTS COMPANY, AMERICAN STANDARD, INC., ARMSTRONG INTERNATIONAL, INC., ARMSTRONG PUMPS, INC., ASBEKA INDUSTRIES, INC., AURORA PUMP COMPANY, A.W. CHESTERTON CO., INC., AWC 1997 CORP., BELDEN WIRE & CABLE CO., BORG WARNER CORPORATION, BURNHAM HOLDINGS, INC., BW/IP, INC., CARBORUNDUM INC., CARRIER CORPORATION, CBS CORPORATION, CCX, INC., CERTAINTED CORPORATION, CIRCUIT BREAKER SALES, INC., CLEAVER-BROOKS INC., COOPER INDUSTRIES INC., COURTER'S COMPANY, CRANE CO., CRANE PUMPS & SYSTEMS, INC., CYTEC INDUSTRIES INC., DANA CORPORATION, DEMING PUMPS, DUREZ CORPORATION, EATON ELECTRICAL, INC., ELECTRIC SWITCHBOARD CO., INC., ERICSSON, INC., FEDERAL PACIFIC ELECTRIC COMPANY, FEDERAL PACIFIC EQUIPMENT INC., FEDERAL PUMP COMPANY, FEDERAL PUMP CORPORATION, FISCHBACH & MOORE, INC., FMC CORPORATION, FLUOR CORPORATION, FLOWSERVE CORPORATION, FORD MOTOR COMPANY, FORT KENT HOLDINGS, INC., FOSTER WHEELER, LLC, GARDNER DENVER, INC., GENERAL CABLE CORPORATION, GENERAL ELECTRIC COMPANY, GENERAL REFRACTORIES CO., GENERAL WIRE & CABLE, GENERAL WIRE PRODUCTS, INC., GENUINE PARTS COMPANY, GEORGIA-PACIFIC LLC, GOULDS PUMPS INCORPORATED, GRAYBAR ELECTRIC COMPANY INC., GRUNDFOS PUMPS CORPORATION, HATZEL & BUEHLER INC., HENRY VOGT MACHINE CO., HONEYWELL INTERNATIONAL, INC., HOWDEN BUFFALO, INC., HUBBELL POWER SYSTEMS INC., IMO INDUSTRIES, INC., INGERSOLL RAND COMPANY, J.H. FRANCE REFRACTORIES CO., JOHNSON CONTROLS, INC., KAISER GYPSUM INC., KEYSpan ENERGY CORPORATION, KING INSULATION INC., LEVITON MANUFACTURING CO., LIGHTOLIER INC., METROPOLITAN INSURANCE COMPANY, MINE

DECISION + ORDER ON MOTION

SAFETY APPLIANCES COMPANY, NATIONAL GRID, NATIONAL GRID GENERATOR, LLC, NATIONAL LIGHTING COMPANY, O'CONNOR CONSTRUCTORS, INC., PEERLESS ELECTRIC COMPANY, PEERLESS INDUSTRIES, INC., PENT AIR PUMP GROUP, INC., PFIZER INC., PLASTICS ENGINEERING COMPANY, PRESCOLITE, INC., PROGRESS LIGHTING, INC., RILEY POWER INC., ROCKBESTOS SUPRENANT CABLE CORP., ROCKWELL AUTOMATION INC., RSCC WIRE & CABLE, LLC, SCHNEIDER ELECTRIC CORP., SHELL OIL, SIEMENS ENERGY & AUTOMATION, INC., SPIRAX SARCO, INC., SQUARE D COMPANY, SPX COOLING TECHNOLOGIES, INC., TACO, INC., THE FULTON COMPANIES, THE OKONITE COMPANY, THE TRANE COMPANY, THE WM POWELL COMPANY, THERMO ELECTRIC CO., INC., TREADWELL CORPORATION, TYCO FLOW CONTROL, INC., TYCO VALVES & CONTROLS, INC., UNION CARBIDE CORP., UNITED STATES STEEL CORPORATION, VELAN VALVE CORPORATION, VICTOR WIRE & CABLE CORP., VIKING PUMP CO., INC., WARREN PUMPS, WEIL MCLAIN, YARWAY CORPORATION, YORK INDUSTRIES INC., YORK INTERNATIONAL, YUBA HEAT TRANSFER, LLC, AC LIGHTING & ELECTRICAL SUPPLIES, LLC, COOPER CROUSE-HINDS, LLC; FOR ITS CHICO X BRAND PRODUCTS, GEICO CORPORATION, MACY'S, INC., SEARS ROEBUCK & COMPANY, GOULD ELECTRONICS, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO GOULD., INC., AS SUCCESSOR IN INTEREST TO I-T-E IMPERIAL CORP AND BULLDOG ELECTRIC PRODUCTS CO, EX-FM, INC. FORMERLY KNOWN AS FISCHBACH AND MOORE, INCORPORATED, LONG ISLAND POWER AUTHORITY, LONG ISLAND LIGHTING COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 019) 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 820, 824, 852, 853, 854, 855, 856, 857, 858, 859, 860, 867, 870, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ordered that defendant Long Island Lighting Company d/b/a LIPA, a wholly owned subsidiary of the Long Island Power Authority s/h/a Long Island Lighting Company's (hereinafter referred to as "LILCO") motion for conditional summary judgment on its cross-claim for contractual indemnification is hereby denied without prejudice to re-file for the reasons set forth below.

Here, defendant LILCO moves for conditional summary judgment arguing that conditional summary judgment should be granted against defendant Courter & Company, Inc. on defendant LILCO's cross-claim for contractual indemnification. Defendant Courter & Company, Inc. opposes and defendant LILCO 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).

Preliminarily, the Court notes that defendant LILCO proffers the Decision and Order of Honorable Martin Shulman, dated March 13, 2015, in *North v Air & Liquid Systems Corp., et*

al., Index No. 190114/2013, which granted the portion of defendant National Grid Generation LLC’s post-verdict motion for contractual indemnification against O’Connor Constructors, Inc. Judge Shulman’s March 13, 2015 decision was appealed and affirmed by the Appellate Division, First Department, on June 28, 2016. See *In Re New York City Asbestos Litigation, North v Air & Liquid Sys. Corp.*, 142 AD3d 408 (1st Dep’t 2016). Such decisions, while addressing an identical indemnification provision, were decided post-verdict after all of the facts were determined at trial.

Here, issues of fact exist as to whether the indemnification clause in the January 2, 1974 agreement between defendant LILCO and defendant Courter & Company, Inc. is triggered by the undisputed facts in this action. Here, issues of fact exist regarding defendants’ work and plaintiff’s exposure to asbestos precluding summary judgment at this time. As such, defendant LILCO’s instant motion for conditional summary judgment is hereby denied without prejudice to re-file after verdict or settlement of this action.

Accordingly, it is

ORDERED that defendant LILCO’s motion for summary judgment seeking contractual indemnification from defendant Courter & Company, Inc. is denied in its entirety, without prejudice to re-file within 45 days after a verdict or settlement of this action; 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.



ADAM SILVERA, J.S.C.

7/21/2023

DATE

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