

Togher v A.O. Smith Corp.

2023 NY Slip Op 33285(U)

September 19, 2023

Supreme Court, New York County

Docket Number: Index No. 190460/2018

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

X

MICHELLE TOGHER AND PETER VINCENT, AS,

Plaintiff,

INDEX NO. 190460/2018

MOTION DATE 05/16/2023

MOTION SEQ. NO. 004

- v -

A.O. SMITH CORPORATION, A.W. CHESTERTON COMPANY, AERCO INTERNATIONAL, INC., ARMSTRONG INTERNATIONAL, INC., AURORA PUMP COMPANY, AURORA PUMP COMPANY, BALTIMORE AIRCOIL COMPANY INC., BMCE INC., IN ITSELF AND AS SUCCESSOR TO UNITED CENTRIFUGAL PUMP CO., BURNHAM LLC, CARRIER CORPORATION INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO BRYANT HEATING & COOLING SYSTEMS, CBS CORPORATION, A DELAWARE CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAIN-TEED CORPORATION, CRANE CO., FAIRBANKS COMPANY, FLOWSERVE US INC., SOLELY AS SUCCESSOR TO EDWARD VALVES INC., ROCKWELL MANUFACTURING COMPANY, NORDSTROM VALVES INC. AND MCCCANNA CORPORATION, FMC CORPORATION, FOSTER WHEELER ENERGY CORPORATION, GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INCORPORATED, GREENE TWEED & CO. INC., INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM, INGERSOLL-RAND COMPANY, ITT LLC, JOHN CRANE INC., KOHLER COMPANY, METROPOLITAN LIFE INSURANCE COMPANY, MILWAUKEE VALVE COMPANY INC, NASH ENGINEERING COMPANY, PECORA CORPORATION, PEERLESS INDUSTRIES, INC., RHEEM MANUFACTURING COMPANY, SPIRAX SARCO, INC., SPX COOLING TECHNOLOGIES, INC., STERLING FLUID SYSTEMS (USA), LLC, TRANE U.S. INC. F/K/A AMERICAN STANDARD INC., UNION CARBIDE CORPORATION, WEIL-MCLAIN INC., A DIVISION OF THE MARLEY-WYLAIN COMPANY, WEIR VALVES & CONTROLS USA, INC., D/B/A ATWOOD & MORRILL, YORK INTERNATIONAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO YORK CORPORATION, JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS),

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 239, 240, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259

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 is denied for the reasons set forth below.

Here, defendant SPX Cooling Technologies, Inc., individually and as successor to Marley Cooling Technologies, Inc. ("Marley") moves for summary judgment to dismiss this action on the basis that plaintiff has failed to establish causation, and that defendant has established a *prima facie* case for a lack thereof, under *Nemeth v Brenntag North America*, 38 NY3d 336 (2022).

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 Marley has misstated plaintiff's burden in the instant motion as the standard set forth in *Nemeth v Brenntag* which represents an extraordinary post-trial remedy to set aside a jury verdict, rather than the well settled burden on a motion for summary judgment. 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 on a motion for summary judgment for defendant can be found in *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.* Here, defendant Marley fails to meet their burden on summary judgment as set forth in *Dyer*. Defendant offers no expert opinions, reports, or other evidence upon which to base their claim that there was no causation.

Conversely, plaintiff provides clear and unequivocal testimony regarding exposure history to Marley products and proffers three expert reports regarding plaintiff-decedent's quantification of asbestos exposure, causation analysis, and pathology and medical history

respectively. See Plaintiff's Memorandum of Law in Opposition to Defendant SPX Cooling Technologies, Inc.'s Motion for Summary Judgment, p. 3-8; Exh. 9-11, 13. This is more than sufficient to raise issues of fact as to causation.

Regarding dismissal of plaintiff's punitive damages claim, plaintiffs noted their intention to pursue punitive damages in the initial complaint and affirmed it again in the trial readiness conference form, more than two years prior to the filing of the instant motion. See Notice of Motion, Exh. T, Trial Readiness Conference Form dated Jan. 31, 2020.

As defendant Marley has failed to meet its burden in the instant motion for summary judgment, and as a reasonable juror could decide that asbestos exposure from Marley products were a contributing cause of plaintiff's illness, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Marley's motion for summary judgment seeking to dismiss 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.

ADAM SILVERA, J.S.C.

09/19/2023
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: