

**Learmond v Aerco Intl., Inc**

2023 NY Slip Op 33385(U)

October 1, 2023

Supreme Court, New York County

Docket Number: Index No. 190009/2021

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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REGINA LEARMOND, AS ADMINISTRATRIX FOR THE  
ESTATE OF THOMAS LEARMOND AND REGINA  
LEARMOND, INDIVIDUALLY,

Plaintiff,

INDEX NO. 190009/2021

MOTION DATE 06/13/2023,  
06/13/2023

MOTION SEQ. NO. 002 002

- v -

AERCO INTERNATIONAL, INC, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, BLACKMER, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CRANE CO, DAP, INC, ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC. INDIVIDUALLY AND SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, GENERAL ELECTRIC COMPANY, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, KAISER GYPSUM COMPANY, INC, KAMCO SUPPLY CORP, KARNAK CORPORATION, MORSE TEC LLC, NATIONAL BULK CARRIERS, PFIZER, INC. (PFIZER), REYNOLDS METALS COMPANY, ROPER PUMP COMPANY, THE NASH ENGINEERING COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UNIVERSE TANKSHIPS, VIKING PUMP, INC, WARREN PUMPS, LLC,

Defendant.

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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

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 DAP, Inc. k/n/a La Mirada Products Co., Inc. (“DAP”) moves to dismiss this action on the basis that plaintiff’s claim is “speculative” because not all DAP caulks historically contained asbestos, and that plaintiff’s causation is insufficient. *See* Memorandum of Law in Support of Defendant DAP, Inc. k/n/a La Mirada Products Co., Inc.’s Motion for Summary Judgment, p. 2. Plaintiff opposes, noting that moving defendant offers no evidence proving that its products could not have caused asbestos-related illness to plaintiff-decedent, Mr. Learmond. Defendant 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. *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 (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).

In support of its motion, defendant DAP relies upon an affidavit from a former DAP employee, Ward Treat, to establish that “[b]y the end of 1978, DAP no longer manufactured or sold any products that contained asbestos.” *See* Memorandum of Law in Support, *supra*, Exh. B, Affidavit of Ward Treat dated March 1, 2011. Mr. Treat does not possess the requisite personal knowledge to establish that no DAP products containing asbestos were in circulation and used by Mr. Learmond. Furthermore, the affidavit fails to address DAP talc or other types of asbestos-containing products, and rather, it confirms that some formulations of DAP caulk contained asbestos. Given the unequivocal testimony of Mr. Learmond, sufficient issues of fact exist to preclude summary judgment. *See* Affirmation in Opposition to Defendant DAP, Inc.’s Motion for Summary Judgment, p. 4.

As to causation, DAP’s expert affidavit from Robert C. Adams, CIH, CSP, FAIHA, is not case-specific and forms no opinions based on Mr. Learmond’s actual exposure and work timeline. *See* Affirmation of Andrew J. Kornblau in Support of Defendant DAP, Inc. k/n/a La

Mirada Products Co., Inc's Motion for Summary Judgment, Exh. J, Affidavit of Robert C. Adams, CIH, CSP, FAIHA, dated November 24, 2020. This is plainly insufficient to meet defendant's burden at summary judgment. Contrarily, plaintiff's expert, Mark Ellis Ginsburg, MD, specifically reviewed Mr. Learmond's case, and medical history along with an analysis of his occupational history. *See* Affirmation in Opposition, *supra*, Exh. 10, Addendum Report of Mark Ellis Ginsburg, MD, dated December 7, 2022.

Defendant DAP further misstates plaintiff's burden in opposition to summary judgment as the standard set forth in *Nemeth v Brenntag*, 38 NY3d 336 (2022), 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. Defendant incorrectly states that plaintiff has failed to prove specific causation herein, at the summary judgment stage. At summary judgment, plaintiff's opposition need only raise a triable issue of fact concerning specific causation. It is defendant's affirmative burden to prove that their asbestos-containing products could not have caused plaintiff's illness. The appropriate standard in a motion for summary judgment for defendant can be found in *Dyer v Amchem Products Inc.*, 207 AD3d 408, 40 (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 DAP fails to meet their burden on summary judgment as set forth in *Dyer*.

As a reasonable juror could decide that asbestos exposure from DAP products was a contributing cause of Mr. Learmond's illness, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant DAP'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.



10/01/2023  
DATE

ADAM SILVERA, J.S.C.

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"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE		