

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

2023 NY Slip Op 33389(U)

October 1, 2023

Supreme Court, New York County

Docket Number: Index No. 190150/2019

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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ROSEMARY TORIO, AS EXECUTRIX FOR THE ESTATE  
OF ANTHONY W. TORIO, AND ROSEMARY TORIO,  
INDIVIDUALLY,

**INDEX NO. 190150/2019**

**MOTION DATE 05/09/2023**

**MOTION SEQ. NO. 001**

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AERCO  
INTERNATIONAL, INC, AMCHEM PRODUCTS, INC.,  
N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER  
CROPSCIENCE INC, BMCE INC., F/K/A UNITED  
CENTRIFUGAL PUMP, BORGWARNER MORSE TEC  
LLC, CARRIER 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, CROWN BOILER  
CO., F/K/A CROWN INDUSTRIES, INC., DAP, INC,  
FOSTER WHEELER, L.L.C., GENERAL ELECTRIC  
COMPANY, HONEYWELL INTERNATIONAL, INC., F/K/A  
ALLIED SIGNAL, INC. / BENDIX, KAISER GYPSUM  
COMPANY, INC, KARNAK CORPORATION, LENNOX  
INDUSTRIES, INC., MORSE DIESEL, INC., PFIZER, INC.  
(PFIZER), RHEEM MANUFACTURING COMPANY, RUUD,  
SUPERIOR BOILER WORKS, INC., TISHMAN REALTY &  
CONSTRUCTION CO., INC, TURNER CONSTRUCTION  
COMPANY, U.S. RUBBER COMPANY (UNIROYAL),  
UNION CARBIDE CORPORATION, WEIL-MCLAIN, A  
WHOLLY OWNED SUBSIDIARY OF THE MARLEY  
COMPANY, LLC, YORK INTERNATIONAL CORPORATION,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 107, 108, 109, 110,  
111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 129, 130, 131, 132, 133,  
134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 151, 152, 153, 154

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. Plaintiff opposes, noting that moving defendant offers no evidence proving that its products could not have caused asbestos-related illness and highlighting the testimony from plaintiff-decedent, Anthony Torio (“Mr. Torio”)’s co-worker. 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' argument that plaintiff's claim is speculative, defendant DAP relies upon an affidavit from 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 of Defendant DAP, Inc. k/n/a La Mirada Products Co., Inc.'s Motion for Summary Judgment, Exh. B, Affidavit of Ward Treat dated March 1, 2011, ¶ 17. Mr. Treat does not possess the requisite personal knowledge to establish that no DAP products containing asbestos were in circulation and used by Mr. Torio. Moreover, the affidavit does not address DAP talc or other types of asbestos-containing products. In fact, Mr. Ward confirms that some formulations of DAP caulk contained asbestos. Additionally, Mr. Torio's colleague, Mr. Roy Trempey, consistently testified that Mr. Torio was exposed to DAP asbestos-containing caulk, such that sufficient issues of fact exist to preclude summary judgment.

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. Torio's actual exposure and work timeline. This is plainly insufficient to meet defendant's burden at summary judgment as set forth in *Dyer v Amchem Products Inc.*, 207 AD3d 408, 409 (1st Dept. 2022). Contrarily, plaintiff's expert,

Mark Ellis Ginsburg, MD, specifically reviewed Mr. Torio's case, and medical history along with an analysis of his occupational history. *See* Affirmation in Opposition to Defendant DAP, Inc.'s Motion for Summary Judgment, Exh. 11, Affidavit and Report of Mark Ellis Ginsburg, MD, dated Dec. 5, 2021-July 6, 2022.

Defendant DAP further misstates plaintiff's burden at 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. Defendants incorrectly state that plaintiffs have 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 Amhem Products Inc.*, *supra*. 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 were a contributing cause of Mr. Torio'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.

ADAM SILVERA, J.S.C.

10/01/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: