

**Frederick v Amchem Prods., Inc.**

2023 NY Slip Op 33441(U)

October 4, 2023

Supreme Court, New York County

Docket Number: Index No. 190203/2018

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**

**13**

*Justice*

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WINFIELD P FREDERICK,

Plaintiff,

**INDEX NO. 190203/2018**

**MOTION DATE 07/18/2023**

**MOTION SEQ. NO. 004**

- v -

AMCHEM PRODUCTS, INC., AMERICAN HONDA MOTOR CO., INC. (AHM), ARVINMERITOR, INC., BORGWARNER MORSE TEC LLC, CERTAINTEED CORPORATION, DANA COMPANIES, LLC, EATON CORPORATION, AS SUCCESSOR -IN-INTEREST TO, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, HONEYWELL INTERNATIONAL, INC., OWENS-ILLINOIS, INC., PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, TOYOTA MOTOR SALES U.S.A., INC., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, FEDERAL- MOGUL ASBESTOS PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO., PEPBOYS, PERKINS ENGINES, INC., ROYAL CARIBBEAN CRUISE LINE INC., INDIVIDUALLY AND SUCCESSOR TO YARMOUTH CRUISE LINE INC. AND EASTERN STEAMSHIP CORPORATION, ROYAL CARRIBEAN CRUISE LINE, LTD. INDIVIDUALLY AND SUCCESSOR TO YARMOUTH CRUISE LINE INC. AND EASTERN STEAMSHIP CORPORATION, STANDARD MOTOR PRODUCTS, INC., WESTERN AUTO SUPPLY COMPANY INC., NAVISTAR, INC., A/K/A INTERNATIONAL TRUCK & ENGINE CORP. F/K/A INTERNATIONAL HARVESTER, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 190, 191, 192, 193, 194, 195, 196, 197, 198

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 Perkins Engines, Inc. (hereinafter referred to as defendant “Perkins”) files a second motion for summary judgment seeking to dismiss this action on the basis that its products could not have caused plaintiff, Winfield P. Frederick’s (“Mr. Frederick) lung cancer. Defendant Perkins further contends that plaintiff has failed to establish causation, and defendant has established an affirmative 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 (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).

As to its product identification claim, defendant Perkins relies upon the report of its expert, Catherine E. Simmons, CIH, FAIHA, who asserts that "Perkins gaskets are associated only with Perkins diesel engines" and that she is "unaware that [Perkins] manufactured or supplied friction products including brakes and clutches." *See* Affirmation in Support of Defendant Perkins Engines, Inc.'s Second Motion for Summary Judgment on Causation, dated Dec. 2, 2022, Exh. F, Report of Catherine E. Simmons, CIH, FAIHA, at p. 12. There is no indication that Ms. Simmons possesses personal knowledge of Perkins' manufacturing and product history as relevant to the time-period of plaintiff's exposure, or that she consulted any materials to confirm such history. Defendant Perkins provides no other evidence to prove that Perkins did not manufacture any products or that such products could not have been available to Mr. Frederick during his work. This is plainly insufficient to establish moving defendant's burden on a motion for summary judgment.

Regarding causation, defendant Perkins misstates plaintiff's burden at summary judgment as the standard set forth in *Nemeth v Brenntag, supra*, 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.

Plaintiff has provided expert testimony specifically stating that exposure to Perkins products could have caused plaintiff's illness.

The appropriate standard for summary judgment for moving 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 Perkins fails to meet their burden on summary judgment as set forth in *Dyer*. Defendants in *Dyer* proffered a simulation study that measured the amount of asbestos released from cutting the exact tiles manufactured by them and at issue in the case. *See id.* at 411.

Moving defendant further relies on the expert report of Ms. Simmons to establish that plaintiff's exposure to asbestos from Perkins products was of insufficient quantity to have caused his cancer. However, the studies relied on in such report discuss gaskets that are not specifically Perkins-produced. *See Affirmation in Support, supra*, Exh. F, Report of Catherine E. Simmons, CIH, FAIHA, at p. 13-16. Moving defendant fails to include an explanation of the similarities between Perkins-manufactured gaskets and those used in the studies relied upon to argue their accuracy or relevance to the instant case. This does not conclusively prove that exposure to Perkins products could not have contributed to the causation of Mr. Frederick's lung cancer. Thus, defendant Perkins has failed to meet its burden to establish that its products could not have been the cause for plaintiff's illness. *See Reid v Georgia-Pacific Corp., supra*.

Furthermore, a reasonable juror could decide that asbestos exposure from Perkins products was a cause of Mr. Frederick's lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Perkins' motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry defendants shall serve plaintiffs with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

10/04/2023

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