

Horvath v A.W. Chesterton Co.

2023 NY Slip Op 33729(U)

October 23, 2023

Supreme Court, New York County

Docket Number: Index No. 190002/2021

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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SUSAN HORVATH,

Plaintiff,

INDEX NO. 190002/2021

MOTION DATE 08/01/2023

MOTION SEQ. NO. 005

- v -

A.W. CHESTERTON COMPANY, AERCO INTERNATIONAL, INC., AIR & LIQUID SYSTEMS CORPORATION, BUFFALO PUMPS DIVISION, AMERON INTERNATIONAL CORPORATION, ARMSTRONG INTERNATIONAL, INC., AURORA PUMP COMPANY, BLACKMER PUMP COMPANY, BMCE INC., IN ITSELF AND AS SUCCESSOR TO UNITED CENTRIFUGAL PUMP CO., BRYAN STEAM LLC, BURNHAM LLC, BWIP, INC., 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, CRANE CO., CROWN CORK & SEAL COMPANY, INC., DEZURIK, INC., ECR INTERNATIONAL, INC., FLOWSERVE US INC., SOLELY AS SUCCESSOR TO EDWARD VALVES INC., ROCKWELL MANUFACTURING COMPANY, NORDSTROM VALVES INC. AND MCCANNA CORPORATION, FMC CORPORATION, FOSTER WHEELER ENERGY CORPORATION, GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INCORPORATED, GREENE TWEED & CO. INC., GRINNELL LLC, HERCULES, LLC, IMO INDUSTRIES, INC., INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM COMPANY, ITT LLC, JOHN CRANE, INC., JOHN E. POTENTE & SONS, INC., KOHLER COMPANY, MARIO & DIBONO FIREPROOFING CORP., MARIO & DIBONO PLASTERING CO. INC., MILWAUKEE VALVE COMPANY INC., MORSE TEC LLC, F/K/A BORGWARNER MORSE TEC LLC, AND SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION, MORSE-DIESEL CONSTRUCTION CO., INC., NASH ENGINEERING COMPANY, PECORA CORPORATION, RHEEM MANUFACTURING COMPANY, SPIRAX SARCO, INC., SPX COOLING TECHNOLOGIES, INC., STERLING FLUID SYSTEMS (USA) LLC, TISHMAN CONSTRUCTION CORPORATION, TISHMAN LIQUIDATING CORPORATION, TISHMAN REALTY & CONSTRUCTION CO., INC., TURNER CONSTRUCTION

**DECISION + ORDER ON
MOTION**

COMPANY, UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN INC., A DIVISION OF THE MARLEY-WYLAIN COMPANY, WEIR VALVES & CONTROLS USA, INC. D/B/A ATWOOD & MORRILL CO., INC., WILLIAM POWELL COMPANY, YORK INTERNATIONAL CORPORATION, JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS), NEW YORK PLUMBING SUPPLY LLC, RUBEN MANAGEMENT SERVICES, LLC, WEBSTER PLUMBING SUPPLY INC., LARAMELS REALTY, INC., LAWRENCE RUBEN COMPANY, INC., D/B/A RUBEN COMPANIES, RUBEN CAPITAL MANAGEMENT L.L.C.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 321, 322

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ordered that the instant motion for summary judgment seeking dismissal of this action, pursuant to CPLR §3212, is denied for the reasons set forth below.

Defendant Ameron International Corporation (“Ameron”) moves to dismiss this asbestos action on the grounds that plaintiff-decedent, Rudolf Horvath (“Mr. Horvath”), was not exposed to asbestos from “Bondstrand” pipes manufactured by defendant during plaintiff’s work as a plumber in New York City from the 1960s to 1990s. Defendant Ameron’s motion is based primarily on the fact that Mr. Horvath mentioned exposure to Bondstrand pipes in the West Side area and that the sole sewage treatment plant on the West side of Manhattan was built in 1985, a time period after asbestos was removed from Bondstrand pipes. *See* Memorandum of Law in Support of Ameron International Corporation’s Summary Judgment Motion, p. 2-4. In opposition, plaintiff highlights Mr. Horvath’s declining condition due to mesothelioma at the time of his deposition, and his lack of commitment to a single, specific location or worksite of exposure. *See* Plaintiff’s Memorandum of Law in Opposition to Defendant Ameron International

Corporation's Motion for Summary Judgment, p. 3-4; 7-8. Additionally, plaintiff notes that Mr. Horvath testified unequivocally as to his exposure occurring prior to 1978 (a time in which defendant Ameron was still manufacturing asbestos-containing Bondstrand pipes) and identified Bondstrand pipes with clear, specific details. *See id.*, p. 3-4.

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).

Here, defendant Ameron’s motion rests heavily on the deceased plaintiff’s deposition testimony. With respect to plaintiff’s deposition testimony, the Appellate Division, First Department, has held that “[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint. The assessment of the value of a witnesses’ testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony.” *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dep’t 1996) (internal citations omitted).

The statement at issue herein from Mr. Horvath’s deposition (in response to where he recalled exposure from chemical pipes, including Bondstrand) was: “I think I did once for the City, contracted from the City, in, I think, the West Side area, a chemical plant where they took raw sewage and created -- you know, make that drinkable and stuff like that.” Affirmation of John B. Wetmore in Support of Plaintiff’s Opposition to Defendant Ameron International Corporation’s Motion for Summary Judgment, dated July 21, 2023, Exh. 1, Volume 2 Virtual Deposition of Rudolf Horvath, dated June 29, 2021, p. 147, ln. 22-25.

This sole statement, in which Mr. Horvath did not identify specific worksite exposure locations, does not cancel out the rest of his unequivocal testimony clearly identifying the years of his exposure and Bondstrand pipes as a source of exposure as a matter of law. *See* Plaintiff’s Memorandum of Law in Opposition, *supra*, p. 4. It is for the jury to determine what Mr. Horvath meant by this statement, and whether it carries any weight against his other testimony. Moreover,

Mr. Horvath’s specific identification of Bondstrand pipes, their relevant details, and his years of exposure is sufficient to raise questions of fact so as to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Ameron’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.

10/23/2023
DATE

ADAM SILVERA, J.S.C.

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