

Lombardo v Amchem Prods., Inc.

2023 NY Slip Op 33929(U)

October 31, 2023

Supreme Court, New York County

Docket Number: Index No. 190033/2018

Judge: Adam Silvera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

SALVATORE LOMBARDO,

Plaintiff,

INDEX NO. 190033/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC,
BEAZER EAST, INC., BIRD INCORPORATED, CBS
CORPORATION, F/K/A VIACOM INC., CERTAINTEED
CORPORATION, DAP, INC, DOMCO PRODUCTS TEXAS,
INC, GENERAL ELECTRIC COMPANY, GOODYEAR
CANADA, INC, KARNAK CORPORATION, MANNINGTON
MILLS, INC, OWENS-ILLINOIS, INC, PFIZER, INC.
(PFIZER), REYNOLDS METALS COMPANY, SCHNEIDER
ELECTRIC USA, INC. FORMERLY KNOWN AS, THE B.F.
GOODRICH COMPANY, THE GOODYEAR TIRE AND
RUBBER COMPANY, U.S. RUBBER COMPANY
(UNIROYAL), UNION CARBIDE CORPORATION,
WEYERHAEUSER COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

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 The Goodyear Tire & Rubber Company (“Goodyear”) files a motion for summary judgment seeking to dismiss this action on the basis that no Goodyear product could have caused plaintiff Salvatore Lombardo’s (“Mr. Lombardo”) lung cancer. *See* Memorandum of Law in Support of Defendant The Goodyear Tire & Rubber Company’s Motion for Summary Judgment, p. 1. Defendant Goodyear argues that plaintiff’s testimony was insufficient to identify

any Goodyear product as a source of asbestos exposure. *See id.* Defendant Goodyear emphasizes that plaintiff could not describe the difference between an asbestos-containing floor tile and a non-asbestos containing floor tile. *See id.* at 4. Moving defendant additionally notes that plaintiff's physical description of floor tiles attributed to Goodyear do not match any asbestos-containing varieties manufactured by them. *See id.* at 5.

Plaintiff opposes, stating that defendant Goodyear has "submitted no evidence to show that [plaintiff's] description of Goodyear tiles...could only be of tiles that were asbestos free" and highlighting that all Goodyear tiles were contaminated with asbestos. Affirmation in Opposition to Defendant Goodyear's Motion for Summary Judgment, p. 2. Defendant replies, re-identifying uncertainties in plaintiff's testimony, refuting plaintiff's evidence that all Goodyear tiles contained asbestos, and reiterating that the Goodyear tile matching plaintiff's descriptions did not contain asbestos. *See Reply Memorandum of Law in Further Support of Defendant The Goodyear Tire & Rubber Company's Motion for Summary Judgment*, p. 3-6.

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 Goodyear relies heavily on the affidavit of their former employee to establish that asbestos was not an ingredient in their vinyl floor tiles in the 1970s. *See Affirmation in Support of The Goodyear Tire & Rubber Company’s Motion for Summary Judgment*, Exh. D, Affidavit of Joseph A. Kemmerling, dated June 27, 2012. While Mr. Kemmerling clearly had personal knowledge of floor tiling during the time of his employment, the affidavit is insufficient to establish as a matter of law that Mr. Lombardo could not have been exposed to asbestos from any Goodyear tile. Preliminarily, the affidavit is a general one, and dated six years prior to the instant matter with no sworn statements responsive to Mr. Lombardo’s testimony. Moreover, defendant Goodyear proffers no other evidence that Mr. Lombardo’s descriptions could not have applied to any other type of Goodyear tile, or that any asbestos-containing formula (even if manufactured prior to the 1970s) could not have still been in circulation or in use with other varieties of tiles during Mr. Lombardo’s work. Defendant Goodyear additionally calls plaintiff’s evidence insufficient, but does not proffer any experts or

evidence to rebut plaintiff's documents regarding the presence of asbestos in Goodyear floor tiles as of the 1990s. *See Affirmation in Opposition, supra*, Exh. 7, Goodyear floor tile analysis.

Thus, defendant Goodyear 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, as a reasonable juror could decide that asbestos exposure from Goodyear products was a cause of Mr. Lombardo's lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Goodyear's 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.

10/31/2023
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE