

Rothenbucher v Aerco Intl., Inc.

2023 NY Slip Op 34018(U)

November 9, 2023

Supreme Court, New York County

Docket Number: Index No. 190238/2020

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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ELISABETH ROTHENBUCHER, AS ADMINISTRATRIX
FOR THE ESTATE OF REINHOLD J ROTHENBUCHER
AND ELISABETH ROTHENBUCHER, INDIVIDUALLY,

Plaintiff,

- v -

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, BURNHAM, LLC, INDIVIDUALLY,
AND AS SUCCESSOR TO BURNHAM
CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED
SUBSIDIARIES, GENERAL ELECTRIC COMPANY,
GOODYEAR CANADA, INC, GOULDS PUMPS
LLC, HARSCO CORPORATION, AS SUCCESSOR TO
PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY
AND D/B/A PATTERSON-KELLEY, HUBBELL
INCORPORATED, AS SUCCESSOR IN INTEREST TO
THE BRYANT ELECTRIC COMPANY, AND HUBBELL
INCORPORATED, INDIVIDUALLY, ITT LLC.,
INDIVIDUALLY AND AS SUCCESSOR TO BELL &
GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE
MANUFACTURING CO., INC, KAISER GYPSUM
COMPANY, INC, KOHLER CO, LEVITON
MANUFACTURING CO., INC, PFIZER, INC. (PFIZER),
RHEEM MANUFACTURING COMPANY, THE GOODYEAR
TIRE AND RUBBER COMPANY, UNION CARBIDE
CORPORATION, U.S. RUBBER COMPANY (UNIROYAL),
UTICA BOILERS, INC., INDIVIDUALLY AND AS
SUCCESSOR TO UTICA RADIATOR CORPORATION,
WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN
COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE
MARLEY COMPANY, LLC, WEYERHAEUSER COMPANY,
CRANE CO., THE MARLEY-WYLAIN COMPANY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 73, 74, 75, 76, 77,
78, 79, 80, 81, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105,
106, 107, 108, 109, 110, 111, 112

were read on this motion to/for JUDGMENT - SUMMARY

DECISION + ORDER ON MOTION

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 Reinhold Rothenbucher’s (“Mr. Rothenbucher”) lung cancer. *See* Memorandum of Law in Support of Defendant The Goodyear Tire & Rubber Company’s Motion for Summary Judgment, p. 1. Defendant Goodyear highlights that plaintiff had no personal work exposure to any Goodyear product and only witnessed installation of Goodyear floor tiles, and also had a significant history of smoking and secondhand smoke exposure. *See id.* Defendant Goodyear 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 2-4.

Plaintiff opposes, highlighting the close proximity of Mr. Rothenbuchers exposure to Goodyear tile installation and the use of asbestos in various Goodyear floor tiles. *See* Affirmation in Opposition to Defendant Goodyear’s Motion for Summary Judgment, p. 5-7. Defendant replies, reiterating concerns with plaintiff’s testimony and observations and contesting the record evidence on asbestos in its products. *See* Reply Memorandum of Law in Further Support of Defendant The Goodyear Tire & Rubber Company’s Motion for Summary Judgment.

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).

The appropriate standard at summary judgment for moving defendant Goodyear 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.*

Moving defendant’s arguments focus entirely on plaintiff’s testimony and evidence as opposed to affirmatively establishing that their products could not have causally contributed to plaintiff’s lung cancer. As conflicting evidence has been presented herein with regards to

defendant Goodyear’s floor tile varieties and their asbestos content, as well as their manufacturing of such product during the period of Mr. Rothenbucher’s exposure, issues of fact exist to preclude summary judgment. Moreover, 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, Mr. Rothenbucher has provided clear and unequivocal testimony regarding his close exposure to Goodyear’s floor tiles and the basis for his belief that such tiles contained asbestos, including his exposure to visible dust well-recognized as asbestos particles.

As a reasonable juror could decide that asbestos exposure from Goodyear floor tiles was a contributing cause of Mr. Rothenbucher’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.

ADAM SILVERA, J.S.C.

11/09/2023

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: