

Munoz v A.O. Smith Water Prods. Co

2023 NY Slip Op 34171(U)

November 21, 2023

Supreme Court, New York County

Docket Number: Index No. 190063/2020

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

MARIA MUNOZ,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, A DELAWARE CORP., F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORP., F/K/A WESTINGHOUSE ELECTRIC CORP., AS SUCCESSOR IN INTEREST TO THE BRYANT ELECTRIC COMPANY, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO, CROSBY VALVE LLC,DAP, INC, DOMCO PRODUCTS TEXAS, INC, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC, FLOWSERVE US, INC. INDIVIDUALLY AND SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC.,NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, GOULDS PUMPS LLC,GRINNELL LLC,HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, KAISER GYPSUM COMPANY, INC, KEELER-DORR-OLIVER BOILER COMPANY, LEVITON MANUFACTURING CO., INC, MANNINGTON MILLS, INC, MORSE TEC LLC,PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO

INDEX NO. 190063/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 003 003

**DECISION + ORDER ON
MOTION**

ABEX LLC, SUCCESSOR IN INTEREST TO ABEX CORPORATION (ABEX), RHEEM MANUFACTURING COMPANY, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST TO SIEMENS ENERGY & AUTOMATION, INC, THE B.F. GOODRICH COMPANY, (GOODRICH CORPORATION), U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 336, 337, 339

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 336, 337, 339

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 for summary judgment to dismiss this action on the basis that plaintiff-decedent, Jose Munoz’s (Mr. Munoz) claim is “speculative” because not all DAP caulks historically contained asbestos, no DAP plaster product contained asbestos, and that plaintiff’s causation for mesothelioma is insufficient. See Memorandum of Law in Support of Defendant DAP, Inc. k/n/a La Mirada Products Co., Inc.’s Motion for Summary Judgment, p. 2-4. Plaintiff opposes, noting that moving defendant offers no evidence proving that its products could not have caused Mr. Munoz’s mesothelioma, highlighting plaintiff’s deposition testimony specifically recalling asbestos dust

from defendant DAP's products, and noting their expert evidence regarding causation. *See* Affirmation in Opposition to Defendant DAP, Inc.'s Motion for Summary Judgment, p. 2-4. Defendant replies, highlighting the affidavit from their corporate representative, and reiterating the different formulations of their caulk products.

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).

In support of its motion, defendant DAP relies heavily upon an affidavit from a 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, *supra*, 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. Munoz. Furthermore, the affidavit fails to address DAP plaster, and rather, it confirms that some formulations of DAP caulk contained asbestos. Given the unequivocal testimony of Mr. Munoz, sufficient issues of fact exist to preclude summary judgment. See Affirmation in Opposition, *supra*.

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. Munoz's actual exposure and work timeline. See Memorandum of Law in Support, *supra*, Exh. J, Affidavit of Robert C. Adams, CIH, CSP, FAIHA, dated November 24, 2020. This is plainly insufficient to meet defendant's burden at summary judgment. Contrarily, plaintiff's expert, David Zhang, specifically reviewed Mr. Munoz's exposure and occupational history to provide causation analysis. See Affirmation in Opposition, *supra*, Exh. 15, Report and Affidavit of David Y. Zhang, MD, PhD, MPH, dated September 17, 2020.

Moreover, the appropriate standard at summary judgment for defendant DAP can be found in *Dyer v Amchem Products Inc.*, 207 AD3d 408, 40 (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 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 was a contributing cause of Mr. Munoz’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.

11/21/2023

DATE

ADAM SILVERA, J.S.C.

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: