SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **13**

Justice

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INDEX NO. 190195/2020

MOTION DATE 09/26/2023

MOTION SEQ. NO. 002

PETER MARINO,

Plaintiff,

- v -

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, BLACKMER, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC, COLUMBIA BOILER COMPANY OF POTTSTOWN, CONWED CORPORATION, CRANE CO, 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, FOSTER WHEELER, L.L.C, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC.,IMO INDUSTRIES, INC, INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, KAISER GYPSUM COMPANY, INC, PB HEAT LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO PEERLESS INDUSTRIES, PFIZER, INC. (PFIZER), TACO, INC, THE B.F. GOODRICH COMPANY, (GOODRICH CORPORATION), THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN LIQUIDATING CORP, TISHMAN REALTY & CONSTRUCTION CO., INC, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WARREN PUMPS, LLC,WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC,WEYERHAEUSER COMPANY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 157, 158, 159, 160, 161, 162, 163, 164

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 Peter Marino's lung cancer. *See* Memorandum of Law in Support of Defendant The Goodyear Tire & Rubber Company's Motion for Summary Judgment, p. 1-4. Defendant Goodyear highlights that plaintiff did not recall seeing Goodyear packaging and identified only potential exposure to Goodyear without surrounding details or confirmation. *Id.* at p. 4. Defendant Goodyear additionally notes that floor tiles manufactured by Goodyear during the time period relevant herein did not contain asbestos. *See id.* at 5.

Plaintiff opposes, highlighting Mr. Marino's clear identification of Goodyear as a product brand he encountered during the course of his work as a general contractor from 1959 to the late 1980s. *See* Affirmation in Opposition to Defendant The Goodyear Tire & Rubber Company's Motion for Summary Judgment, p. 2-6. Defendant replies, reiterating concerns with plaintiff's testimony and repeating that not all Goodyear tiles contained 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).

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.* The Appellate Division, First Department, recently affirmed this Court's

decision in *Sason v Dykes Lumber Co., Inc., et. al.,* 2023 NY Slip Op 05796 (1st Dep't 2023), stating that "the parties' competing causation evidence constituted the classic 'battle of the experts'" sufficient to raise a question of fact, and to preclude summary judgment.

Here, the Court notes that Mr. Marino is a living asbestos plaintiff who is ninety-four years old. He was deposed three years ago, as a ninety-one-year-old lung cancer patient, about the specific details of his work history occurring between thirty and sixty years ago. *See* Affirmation in Opposition, *supra*, p. 6. Despite the extenuating circumstances, Mr. Marino provided a clear identification of moving defendant's brand, including two specific locations at which he believed to have encountered defendant's products. *Id.* at p. 7. Defendant Goodyear's attempts to discredit Mr. Marino's testimony on the basis that he could not "describe the packaging" wholly fails to satisfy its burden on summary judgment. *See* Reply Memorandum of Law, *supra*, p. 4.

Moreover, plaintiff has offered evidence regarding the asbestos content of various tiles manufactured by defendant Goodyear. *See* Affirmation in Opposition, *supra,* at p. 9-10. Plaintiffs have met the standard set forth by the Appellate Division to sufficiently raise issues of fact.

Defendant Goodyear makes no attempt to meet their initial burden on a motion for summary judgment by proving that any asbestos-containing floor tile manufactured by them was not located at any of Mr. Marino's worksites or that they did not contain asbestos. 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. Rather, moving defendant continues to reiterate that it was not manufacturing *new* tile varieties during the time period at issue herein which contained asbestos, but has proffered

no evidence that its previously manufactured and potentially asbestos-containing varieties were not still in distribution or could not have been encountered by Mr. Marino. *See* Reply Memorandum of Law, *supra*, p. 6. Thus, moving defendant has failed to "establish that its products could not have contributed to the causation of plaintiff's injury." *Reid v Georgia-Pacific Corp.*, *supra*.

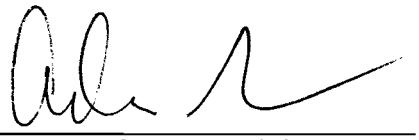
As conflicting evidence has been presented herein, and a reasonable juror could decide that Mr. Marino was exposed to asbestos-containing products manufactured by defendant Goodyear, and that such exposure could have contributed to his illness, sufficient issues of fact exist to preclude summary judgment.

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 plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.



11/27/2023
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