

**Woods v Amchem Prods., Inc.**

2023 NY Slip Op 34174(U)

November 21, 2023

Supreme Court, New York County

Docket Number: Index No. 190215/2020

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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KEVIN WOODS, AS SUCCESSOR IN INTEREST TO THE  
ESTATE OF PAUL R. WOODS,

Plaintiff,

INDEX NO. 190215/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC  
AG COMPANY, N/K/A BAYER CROPSCIENCE INC,  
GENERAL ELECTRIC COMPANY, PFIZER, INC. (PFIZER),  
UNION CARBIDE CORPORATION, U.S. RUBBER  
COMPANY (UNIROYAL), VICTORY REAL ESTATE  
DEVELOPMENT CORPORATION (VRED), VICTORY REAL  
ESTATE DEVELOPMENT CORPORATION,  
INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO  
AND FORMERLY KNOWN AS VICTORY CARRIERS, INC.,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19,  
20, 21, 22, 23, 24, 25, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48

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 denied for the reasons set  
forth below.

Here, defendant Victory Real Estate Development Corporation (“VRED”) moves for  
summary judgment to dismiss this action on the grounds that plaintiff-decedent, Paul Woods  
 (“Mr. Woods”) has not established that he was exposed to any asbestos or asbestos-containing  
products during his work on defendant’s SS Lynn Victory ship in the 1960s. *See* Memorandum  
of Law in Support of Defendant Victory Real Estate Development Corporation’s Motion for  
Summary Judgment, p. 5-6. In opposition, plaintiff offers multiple affidavits and evidence based  
on the review of records from other “Victory” class ships, all built contemporaneously to the SS

Lynn Victory at issue herein. Such evidence and affidavits indicate the presence of asbestos-containing products on all “Victory” ships and the necessary exposure to asbestos involved in working aboard any such ship. *See* Affirmation in Opposition to Defendant, Victory Real Estate Development Corporation’s, Motion for Summary Judgment, p. 16-20. Defendant VRED replies, noting that it is a successor in interest to “Victory Carriers,” the actual owner and former operator of the SS Lynn Victory. Defendant emphasizes that Victory Carriers went out of business prior to merging with VRED, and that moving defendant VRED has never owned or operated any ships itself. Defendant also reiterates that plaintiff must prove the existence of asbestos-containing materials on the SS Lynn Victory and prove that such exposure caused Mr. Woods’ illness. Finally, defendant argues that plaintiff’s affidavits should be disregarded due to being out-of-state. *See* Reply Memorandum of Law in Further Support of Defendant Victory Real Estate Development Corporation’s Motion for Summary Judgment, p. 1-3.

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 (1<sup>st</sup> Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1<sup>st</sup> 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 (1<sup>st</sup> Dep’t 1995).

The appropriate standard at summary judgment for moving defendant VRED can be found in *Dyer v Amchem Products Inc.*, 207 AD3d 408, 409 (1<sup>st</sup> 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, plaintiff highlights the doctrine in *Noseworthy v City of New York*, 298 NY 76, 80 (1948) wherein the Court of Appeals stated that “in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence”. The Appellate Division, First Department applied *Noseworthy* to an asbestos action in *Taylor v A.C.&S, Inc., et al.*, 304 AD2d 403, 404 (1<sup>st</sup> Dep’t 2003). It is unfortunate, but commonplace, in asbestos actions for a plaintiff to have passed away, and while this doctrine is not widely applied in every such matter, the difficulty is especially heightened in the instant matter where plaintiff was unable to give a *de bene esse* deposition or provide any form of testimony in his own case prior to his passing. In light of this, the Court finds that the lack of

certificate of conformity from plaintiff's counsel regarding the out-of-state affidavits provided is a correctable defect pursuant to CPLR § 2001. *See cf. JPMorgan Chase Bank v Diaz*, 56 Misc. 3d 1136, 1139 (Supreme Court, Suffolk County 2017) (“a defective out-of-state affidavit, which is defective because it is not accompanied by a certificate of conformity, may be waived or cured under CPLR § 2001” if jurisdiction is not at issue). As jurisdiction is not at issue, the out-of-state affidavits are considered herein, and plaintiff's exhibits establish a question of fact regarding Mr. Woods' asbestos exposure and any causation resulting from such exposure on the SS Lynn Victory. *See* Affirmation in Opposition, *supra*, Exh. A-C.

Moreover, even if plaintiff's out-of-state affidavits were not considered, defendant VRED's motion for summary judgment would still be denied. As successor in interest to the now-defunct Victory Carriers, defendant VRED remains the proper party to this litigation. Moreover, defendant VRED offers no affirmative evidence proving that there was no asbestos aboard the SS Lynn Victory per *Dyer*. 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. Woods was exposed to asbestos from his work on the SS Lynn Victory, and that such exposure could have contributed to his fatal illness, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

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