

Enz v A.O. Smith Water Prods. Co.

2023 NY Slip Op 34213(U)

December 4, 2023

Supreme Court, New York County

Docket Number: Index No. 190105/2019

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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INDEX NO. 190105/2019
MOTION DATE 09/19/2023
MOTION SEQ. NO. 002

DENISE ENZ, MARGARET ANN POYFAIR,

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, ARMSTRONG INTERNATIONAL, INC, AURORA PUMP COMPANY, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC, CRANE CO, CROSBY VALVE LLC, FLOWSERVE US, INC. SOLELY AS 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, GOULDS PUMPS LLC, GRINNELL LLC, IMO INDUSTRIES, INC, ITT INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., JENKINS BROS, KEELER-DORR-OLIVER BOILER COMPANY, MARIO & DIBONO PLASTERING CO., INC, MORSE DIESEL, INC, NATIONAL GRID GENERATION LLC D/B/D NATIONAL GRID, O'CONNOR CONSTRUCTORS, INC., F/K/A THOMAS O'CONNOR & CONNOR & CO., INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RILEY POWER INC, ROPER PUMP COMPANY, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, TACO, INC, TISHMAN REALTY &

**DECISION + ORDER ON
MOTION**

CONSTRUCTION CO., INC, TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VIKING PUMP, INC, WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, ATWOOD & MORRILL COMPANY, ELECTROLUX HOME PRODUCTS, INC., INDIVIDUALLY AND AS SUCCESSOR TO TAPPAN AND COPEL- VULCAN, MCWANE INC. AND ITS WHOLLY OWNED SUBSIDIARY CLOW VALVE CO., MILWAUKEE VALVE COMPANY, THE WILLIAM POWELL COMPANY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, LONG ISLAND LIGHTING COMPANY D/B/A LIPA,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

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 McWane, Inc. on behalf of its unincorporated division Clow Valve Company (“Clow”) files a motion for summary judgment seeking to dismiss this action on the basis that no Clow product has been identified that could have caused plaintiff-decedent Ronald Poyfair’s lung cancer. *See* Memorandum of Law in Support of Motion for Summary Judgment By Defendant McWane, Inc., p. 1-3. Defendant Clow argues that plaintiff’s testimony did not sufficiently specify where he was exposed to Clow valves, and that his description of such valves did not match defendant’s record of Clow valve products in use. *Id.* at p. 2-3.

Plaintiff opposes, highlighting Mr. Poyfair’s clear and unequivocal testimony identifying Clow valves as a source of asbestos exposure, noting the lack of personal knowledge in moving defendant’s affidavits from corporate representatives, and identifying documentary history from

defendant Clow confirming their manufacturing of some asbestos-containing products as well as inconsistent historical records regarding valves sales. *See Affirmation in Opposition to Defendant McWane Inc.'s Motion for Summary Judgment*, p. 2-3. Defendant replies, reiterating the sufficiency of its affidavits and emphasizing plaintiff's lack of proof of causation, uncertainties in plaintiff's testimony regarding identification of Clow valves, and noting the affidavit from its corporate representative. *See Reply Memorandum of Law in Support of Motion for Summary Judgment by Defendant McWane, Inc.*, p. 4-10.

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 Clow 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, defendant Clow relies heavily on the affidavits of its corporate representatives to establish that Clow did not manufacture valves for use in the circumstances identified by Mr. Poyfair. See Notice of Motion, Exh. A-B, Affidavits of Matthew Dykema and Jerry Bottenfield, dated Jan. 6, 2023 and July 16, 2010 respectively. Mr. Dykema's affidavit does not indicate the requisite personal knowledge relevant to the time period of Mr. Poyfair's exposure. It makes conclusions based on products which Clow currently manufactures without indicating any review of the manufacturing history, supplemental parts history, or anything specific to the time period relevant herein. Mr. Bottenfield's affidavit is thirteen years old and entirely non-specific to Mr. Poyfair's case. Notably, both affidavits use the ambiguous phrasing "Clow did not typically provide flange gaskets" (emphasis added) as opposed to unequivocally stating that Clow has never been connected to the use or distribution of such gaskets. Thus, defendant Clow

has failed to meet its burden to establish that its products could not have been the cause of plaintiff's illness. *See Reid v Georgia-Pacific Corp., supra.*

Moreover, plaintiff has provided contradicting evidence in opposition including Mr. Poyfair's testimony, documentary evidence regarding defendant's products, and an expert opinion regarding the causation of Mr. Poyfair's illness. *See Affirmation in Opposition, supra,* Exh. 1, 6, and 9; *see Sason v Dykes Lumber Co., supra.*

As a reasonable juror could decide that asbestos exposure from a Clow valve was a contributing cause of Mr. Poyfair's illness, sufficient issues of fact exist to preclude summary judgment.


Accordingly, it is

ORDERED that defendant Clow'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.

12/04/2023
DATE


ADAM SILVERA, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE