

**Radovic v Amchem Prods., Inc.**

2023 NY Slip Op 34368(U)

December 12, 2023

Supreme Court, New York County

Docket Number: Index No. 190277/2019

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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JOSIP L. RADOVIC,

Plaintiff,

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC
AG COMPANY, N/K/A BAYER CROPSCIENCE INC,
AMERICAN BILTRITE INC, BMCE INC., F/K/A UNITED
CENTRIFUGAL PUMP, CERTAINTEED CORPORATION,
CRANE CO, DOMCO PRODUCTS TEXAS, INC., EMPIRE-
ACE INSULATION MFG. CORP, GENERAL ELECTRIC
COMPANY, GOULDS PUMPS LLC, GRINNELL
LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED
SIGNAL, INC. / BENDIX, 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, MANNINGTON MILLS, INC,
PFIZER, INC. (PFIZER), U.S. RUBBER COMPANY
(UNIROYAL), UNION CARBIDE CORPORATION,
WEYERHAEUSER COMPANY, GOODYEAR CANADA,
INC., KAISER GYPSUM COMPANY, INC., THE GOODYEAR
TIRE AND RUBBER COMPANY,

Defendant.

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INDEX NO. 190277/2019
MOTION DATE 04/25/2023
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 221, 227, 228, 229, 230

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 Domco Product Texas Inc. ("Domco") moves for summary judgment to dismiss this action on the grounds that plaintiff Josip L. Radovic ("Mr. Radovic") did not

identify Domco as a manufacturer of any asbestos-containing products he was exposed to during his work as a laborer installing floor tiles in various buildings in the Rockefeller Center complex from approximately 1970 to 1979. Moving defendant's motion rests entirely upon challenging plaintiff's evidence implicating defendant Domco as a manufacturer in Mr. Radovic's asbestos exposure. *See* Memorandum of Law in Support of Domco Product Texas Inc.'s Motion for Summary Judgment, p. 6-10. Plaintiff has introduced depositions from other cases in which defendant Domco's product, Azrock, has been identified as an asbestos-containing product at Rockefeller Center locations that Mr. Radovic worked at. *See* Plaintiff's Opposition to Azrock's Motion for Summary Judgment and Counterstatement of Material Facts, p. 7-8. Plaintiff opposes on the basis of the external depositions, along with some interrogatory responses from moving defendant confirming that some Domco products contained asbestos, arguing that such evidence raises issues of fact concerning the presence of defendant Domco's products in the locations and time period of Mr. Radovic's exposure, and thus, precludes summary judgment. *Id.* at 10. Defendant Domco replies, reiterating their argument that Mr. Radovic did not mention Domco and that the other depositions should be disregarded.

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 Domco 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.* 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 (1<sup>st</sup> 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. Radovic is a living asbestos plaintiff who is eighty-eight years old. *See Plaintiff’s Opposition, supra*, p. 2. He was deposed three years ago, as an eighty-

five-year-old cancer patient, about specific details of his work history occurring between forty and fifty years ago. *Id.* In his deposition testimony, Mr. Radovic provided clear and unequivocal testimony regarding his work history from approximately 1970 through 1979 in that he worked “all around Rockefeller center” and “was around flooring”, seeing it first done in 1971 and last done in 1978. *Id.* at 4-6. He further stated in his deposition testimony that he saw boxes of tiles which said “asbestos” on them. *Id.* at 6. The Appellate Division, First Department has affirmed denials of summary judgment in similar instances. In *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 (1st Dep’t 2016), the court noted that defendant’s “contention rested on evidence of plaintiff’s inability to remember precisely when he worked at the facility” and stated that “pointing to gaps in an opponent’s evidence is insufficient to demonstrate a movant’s entitlement to summary judgment”. Moreover, the appellate court stated that the defendants affirmatively “failed to present evidence...[regarding] when their employees were present at the facility and whether or not those employees used asbestos-containing products”. *Id.* Plaintiffs have met the standard set forth by the Appellate Division to sufficiently raise a question of fact. The weight of the evidence is for the trier of fact to determine, but for purposes of summary judgment, the depositions raise an issue of fact.

Further, defendant Domco makes no attempt to meet their initial burden on a motion for summary judgment by proving that their products were not located at any of Mr. Radovic’s worksites or that they did not contain asbestos. 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 determine that Mr. Radovic was exposed to asbestos-containing products manufactured by

defendant Domco from his work at various Rockefeller Center buildings, 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 Domco'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.

12/12/2023

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