

Daly v Amchem Prods., Inc.

2024 NY Slip Op 30663(U)

March 4, 2024

Supreme Court, New York County

Docket Number: Index No. 190297/2019

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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MARY DALY, AS ADMINISTRATRIX FOR THE ESTATE
OF JOHN B DALY JR. AND MARY DALY, INDIVIDUALL,

INDEX NO. 190297/2019

MOTION DATE 12/12/2023

Plaintiff,

MOTION SEQ. NO. 003

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC
AG COMPANY, N/K/A BAYER CROPSCIENCE INC,
PARAMOUNT GLOBAL, F/K/A VIACOMCBS INC., F/K/A
CBS CORPORATION, A DELAWARE CORPORATION,
F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS
CORPORATION, A PENNSYLVANIA CORPORATION,
F/K/A WESTINGHOUSE ELECTRIC CORPORATION,
CERTAINTED CORPORATION, CLEAVER BROOKS
COMPANY, INC, CRANE CO, CRANE CO.
INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC
VALVES, CROSBY VALVE LLC, ELECTROLUX HOME
PRODUCTS, INC. INDIVIDUALLY, AND AS
SUCCESSOR TO TAPPAN AND COPES-VULCAN,
FISHER CONTROL VALVES, FISHER CONTROLS
INTERNATIONAL, LLC F/K/A FISHER CONTROLS CO.,
AS SUCCESSOR IN INTEREST TO FISHER GOVERNOR
COMPANY, FLOWSERVE US, INC. INDIVIDUALLY AND
SUCCESSOR TO ROCKWELL MANUFACTURING
COMPANY, EDWARD VALVE, INC., NORDSTROM
VALVES, INC., EDWARD VOGT VALVE COMPANY, AND
VOGT VALVE COMPANY, FOSTER WHEELER, L.L.C,
GENERAL ELECTRIC COMPANY, GOULDS PUMPS
LLC, IMO INDUSTRIES, INC, LANDIS & GYR, INC, PFIZER,
INC. (PFIZER), ROCKWELL AUTOMATION, INC.,
INDIVIDUALLY, AND AS SUCCESSOR TO ROCKWELL
INTERNATIONAL CORP., NORTH AMERICAN
ROCKWELL, AND ROCKWELL MANUFACTURING
COMPANY, ROCKWELL AUTOMATION, INC., AS
SUCCESSOR IN INTEREST TO ALLEN- BRADLEY
COMPANY, LLC, U.S. RUBBER COMPANY (UNIROYAL),
UNION CARBIDE CORPORATION, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., COURTER &
COMPANY INCORPORATED, INDUSTRIAL HOLDINGS
CORPORATION INDIVIDUALLY AND AS SUCCESSOR IN
INTEREST TO CARBORUNDUM, NORTON PACKO
INDUSTRIAL CERAMICS, INC., SAINT-GOBAIN
ABRASIVES, INC., INDIVIDUALLY, AND AS SUCCESSOR
TO NORTON COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 128, 129, 130, 131, 132, 133, 134, 135, 138, 153, 155, 158, 159, 160, 161, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the instant motion for partial summary judgment seeking dismissal of this certain claims in this action, pursuant to CPLR §3212(e), is denied for the reasons set forth below.

Here, defendant Fisher Controls International LLC (“Fisher”) moves to dismiss this action on the grounds that plaintiff John B. Daly, Jr. (“Mr. Daly”) cannot establish exposure to asbestos from any Fisher product, and has instead identified third-party products. Mr. Daly identified asbestos gaskets surrounding Fisher regulators during the course of his work as a mechanic for Consolidated Edison Company from 1976-2012. *See* Affirmation in Opposition to Defendant Fisher Controls International, LLC’s Motion for Summary Judgment, p. 2-5. Defendant Fisher states that it did not manufacture such asbestos-containing gaskets or sell, supply, or recommend them such that they should not be held liable for Mr. Daly’s exposure pursuant to *In re New York City Asbestos Litigation (Dummitt), Matter of New York City Asbestos Litig.*, 27 N.Y.3d 765, 799 (N.Y. 2016). *See* Memorandum of Law in Support of Fisher Controls International LLC’s Motion for Partial Summary Judgment, p. 5-9.

In opposition, plaintiff highlights Mr. Daly’s clear and unequivocal testimony regarding defendant Fisher’s regulators, as well as their exhibits with documentary evidence indicating defendant Fisher’s involvement with asbestos-containing gaskets. *See* Affirmation in Opposition, *supra*, p. 2-4.

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).

Ordinarily, the appropriate standard at summary judgment for moving defendant Fisher in an asbestos action would be that of *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. However, in the instant motion, defendant Fisher correctly identifies *In re New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 799 (N.Y. 2016) as the standard governing defendant's liability for solely third-party products.

The Court finds that Mr. Daly's testimony clearly identifies asbestos exposure from defendant Fisher's regulators, and that plaintiff has provided record evidence of moving defendant's recommendation of asbestos gaskets for used with such regulators. *See Affirmation in Opposition, supra*, Exh. 3, p. 16-17. Such evidence raises a sufficient question of fact as to defendant Fisher's involvement with the asbestos gaskets at issue herein and whether they "substantially participated" in integrating or recommending such gaskets with Fisher-manufactured regulators. *See Dummitt, supra*. As such, issues of fact exist sufficient to defeat summary judgment on such claims.

Accordingly, it is

ORDERED that defendant Fisher's motion for partial 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.



03/04/2024

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: