

Koehler v ABB, Inc.

2024 NY Slip Op 31005(U)

March 25, 2024

Supreme Court, New York County

Docket Number: Index No. 190166/2020

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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CHARLES H KOEHLER,

Plaintiff,

INDEX NO. 190166/2020

MOTION DATE 12/12/2023

MOTION SEQ. NO. 003

- v -

ABB, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ITE CIRCUIT BREAKERS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AERCO INTERNATIONAL, INC, ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BEAZER EAST, INC., F/K/A KOPPERS COMPANY INC, BLACKMER, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC, CLYDE UNION, INC, COURTER & COMPANY INCORPORATED, CRANE CO, CROSBY VALVE LLC, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC, ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, ELLIOTT 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, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FOSTER WHEELER, L.L.C, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GOULD ELECTRONICS INC, GRINNELL LLC, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS, MILWAUKEE VALVE COMPANY, MORSE TEC LLC, NATIONAL GRID GENERATION LLC D/B/D

**DECISION + ORDER ON
MOTION**

NATIONAL GRID, O'CONNOR CONSTRUCTORS, INC.,
 F/K/A THOMAS O'CONNOR & CONNOR & CO., INC,
 PFIZER, INC. (PFIZER), PULSAFEEDER, RESEARCH-
 COTTRELL INCORPORATED, N/K/A AWT AIR
 COMPANY INC, ROPER PUMP COMPANY, SPENCE
 ENGINEERING COMPANY, INC. INDIVIDUALLY AND AS
 A DIVISION OF CIRCOR INTERNATIONAL INC, SPIRAX
 SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO
 SARCO COMPANY, TACO, INC, TREADWELL
 CORPORATION, U.S. RUBBER COMPANY (UNIROYAL),
 UNION CARBIDE CORPORATION, UNITED CONVEYOR
 CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY
 AND AS SUCCESSOR TO UTICA RADIATOR
 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, ZURN INDUSTRIES
 LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY
 IRON WORKS A/K/A ERIE CITY BOILERS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 259, 261, 262

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 Crosby Valve, LLC (“Crosby”) moves to dismiss this action on the grounds that plaintiff-decedent, Charles Koehler (“Mr. Koehler”) cannot establish exposure to asbestos from any Crosby product. Mr. Koehler identified asbestos-containing parts surrounding Crosby valves as the primary source of his exposure, and moving defendant proffers that they did not manufacture or supply external insulation or gaskets containing asbestos. *See* Memorandum of Law in Support of Crosby Valve, LLC’s Motion for Summary Judgment, p. 4-5. Defendant Crosby also states that no asbestos-containing insulation or gaskets were required for use of Crosby valves.

In opposition, plaintiff highlights Mr. Koehler's clear and unequivocal testimony which included his specific identification of Crosby valves as a source of his exposure to asbestos. *See* Affirmation in Opposition to Defendant Crosby Valve, LLC's Motion for Summary Judgment, p. 15-16.

Further, plaintiff notes that defendant Crosby has not provided affirmative proof that their products could not have caused such exposure, and proffers evidence that Crosby manufactured asbestos-containing gaskets, and were aware of asbestos-containing insulation being used or packaged with their valves. *See id.* at p. 4-7.

Defendant Crosby's reply focuses on the evidence provided by their corporate representative and argues that plaintiff has not raised any issues of fact under *Dummitt*. *See* Reply Memorandum of Law of Defendant Crosby Valve, LLC in Support of its Motion for Summary Judgment.

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 standard for summary judgment is well settled. In *Dyer v Amchem Products Inc.*, 207 AD3d 408, 409 (1st Dep’t 2022), 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. Moreover, *In re New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 799 (N.Y. 2016) provides the standard governing defendant’s liability for products manufactured by a third-party.

Here, the Court finds that plaintiff has proffered sufficient evidence to raise issues of fact surrounding moving defendant’s active involvement with the asbestos gaskets or insulation at issue herein or “substantial[] participat[ion]” in integrating such products with Crosby-manufactured valves. See *Dummitt, supra*. Defendant Crosby confirmed in its interrogatory

responses that some of the products it manufactured “incorporated gaskets and packing manufactured by its suppliers that...may have contained encapsulated asbestos”. *See* Affirmation in Opposition, *supra*, Exh. 4, p. 27. This raises a question of fact regarding moving defendant’s knowledge of the asbestos-containing products, while simultaneously selling those parts with the products it manufactured. Further, moving defendant’s corporate representative clearly stated that parts being sold with or incorporated with Crosby-manufactured products, such as gaskets, were tested for asbestos and found to contain asbestos. *See id.* Exh. 5, Deposition of Robert James Martin, dated May 8, 2012, p. 30.

Mr. Koehler provided unequivocal testimony identifying defendant Crosby’s products as a source of his asbestos exposure, and moving defendant’s corporate representative and interrogatories confirm defendant Crosby’s knowledge of asbestos-containing products in use with and circulation with its manufactured parts. Thus, defendant Crosby has failed to “establish that its products could not have contributed to the causation of plaintiff’s injury.” *Reid v Georgia-Pacific Corp., supra.*

Moreover, as conflicting evidence has been presented herein, plaintiff has offered sufficient evidence to raise issues of fact as to defendant Crosby’s “substantial participation” under *Dummitt* in recommending or incorporating known asbestos-containing products with its manufactured valves. As such, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Crosby’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.

03/25/2024

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