

**Scandaliato v ABB, Inc.**

2024 NY Slip Op 32748(U)

August 2, 2024

Supreme Court, New York County

Docket Number: Index No. 190085/2021

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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INDEX NO. 190085/2021

PAUL SCANDALIATO,

MOTION DATE 04/29/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

ABB, INC, AIR & LIQUID SYSTEMS CORPORATION, ARMSTRONG INTERNATIONAL, INC., AURORA PUMP COMPANY, BEAZER EAST INC, BELDEN WIRE & CABLE COMPANY, LLC, BW/IP, INC., CLARK-RELIANCE CORPORATION, CLEAVER-BROOKS INC., CONVAL, INC., COPES-VULCAN INC., CRANE CO., CRANE ENVIRONMENTAL, INC., CRANE PUMPS & SYSTEMS, INC., CRESCENT ELECTRIC SUPPLY COMPANY, INC. OF NEW YORK, CROSBY VALVE, LLC, DAV CORPORATION, EATON CORPORATION, ELLIOTT COMPANY, ERICSSON, INC., FLOWSERVE US, INC., FMC CORPORATION, GARDNER DENVER, INC., GENERAL CABLE CORPORATION, GEROSA INCORPORATED, GOULD ELECTRONICS, INC, GOULD PUMPS, LLC, GRAYBAR ELECTRIC COMPANY INC., GRINNELL LLC, ITT LLC, INDIVIDUALLY, DOING BUSINESS AS AND SUCCESSOR TO ITT CORPORATION, BELL & GOSSETT COMPANY AND/OR BELL & GOSSETT DIVISION, FLOJET CORPORATION, THE HOFFMAN SPECIALTY MANUFACTURING COMPANY, ITT FLUID PRODUCTS CORPORATION, J.R. CLARKSON COMPANY, THE, LLC, JENKINS BROS., JOHN E. POTENTE & SONS, INC., KENNEDY ELECTRICAL SUPPLY CORP., MERITOR, INC., MINE SAFETY APPLIANCES COMPANY, LLC, MUNACO SEALING SOLUTIONS, INC., NASH ENGINEERING COMPANY, THE, OKONITE COMPANY, INC., THE, OLYMPIC GLOVE AND SAFETY CO., INC., RSCC WIRE & CABLE LLC, SCHNEIDER ELECTRIC USA, INC., SIEMENS INDUSTRY, INC., SPIRAX SARCO, INC, TREADWELL CORPORATION, TRIANGLE PWC, INC., UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, VIACOMBCBS, INC., VIKING PUMP INC., WARREN PUMPS LLC, WEIL-MCLAIN, WEIR VALVES & CONTROLS USA, INC., WILLIAM POWELL COMPANY, THE, YUBA HEAT TRANSFER LLC, ZY-TECH GLOBAL INDUSTRIES, INC., AERCO INTERNATIONAL, INC., BMCE, INC., FORMERLY KNOWN AS UNITED CENTRIFUGAL PUMPS, JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS)

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 250, 251, 252, 253, 254, 255, 256, 259, 269, 270, 271, 272, 273, 274, 275, 276

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 denied for the reasons set forth below.

Here, defendant Kennedy Electrical Supply Corp. (Kennedy) moves for summary judgment seeking to dismiss this action on the grounds that plaintiff was not exposed to asbestos from any Kennedy products during the course of his employment with Con Edison from 1963 through 2005 based on his deposition testimony. Plaintiff opposes, arguing that Kennedy has failed to meet their prima facie burden on causation that exposure to Kennedy's products could not have resulted in plaintiff's diagnosis of lung cancer. Kennedy replies.

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 plaintiffs injury”. *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dep't 1995).

The appropriate standard at summary judgment for moving defendant Kennedy 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.*, 221 AD3d 491 (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. *Sason*, 221 AD3d at 492.

With respect to plaintiff's deposition testimony, the Appellate Division, First Department, has held that “[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint. The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not

the admissibility of the testimony.” *Dollas v W. R. Grace and Co.*, 225 AD2d 319, 321 (1st Dep't 1996) (internal citations omitted).

Here, Kennedy has failed to affirmatively establish that plaintiff's alleged exposure to asbestos from Kennedy products could not have contributed to plaintiff's illness, but rather points to gaps in plaintiff's proof. Kennedy contends that plaintiff recanted his identification of Kennedy as an asbestos-containing product in his deposition testimony and thus cannot establish causation. *See* Memorandum of Law of Defendant Kennedy Electrical Supply Corp. in Support of its Motion for Summary Judgment, p. 2. However, as correctly argued by plaintiff, an issue of fact exists as to whether plaintiff merely misidentified Kennedy as a supplier of wire and cable specifically, rather than all asbestos products. *See* Memorandum of Law in Opposition to Kennedy Electrical Supply Corp.'s Motion for Summary Judgment, p. 2. Plaintiff also identified Kennedy as a supplier in his Answer to Interrogatories. *See* Memo in Opposition, *supra*, at p. 3.

Additionally, Kennedy has wholly failed to meet its initial burden on a motion for summary judgment. Kennedy has not submitted any evidence that its products did not contain asbestos and could not have caused asbestos exposure. Thus, Kennedy has failed to “establish that its products could not have contributed to the causation of plaintiffs injury.” *Reid v Georgia-Pacific Corp.*, *supra*. Plaintiff has raised sufficient issues of fact to preclude summary judgment and moving defendant has not met their burden as set forth by the Appellate Division in *Reid* and *Dyer*, *supra*. As a reasonable juror could determine that asbestos exposure from Kennedy's products was a contributing cause of plaintiff's lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Kennedy Electrical Supply Corp.'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.

ADAM SILVERA, J.S.C.

8/2/2024  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
				<input type="checkbox"/>	FIDUCIARY APPOINTMENT