

**Toth v Amchem Prods., Inc.**

2024 NY Slip Op 32824(U)

August 9, 2024

Supreme Court, New York County

Docket Number: Index No. 190039/2021

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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ROBERT L TOTH,

Plaintiff,

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC  
AG COMPANY, N/K/A BAYER CROPSCIENCE INC,  
ATWOOD & MORRILL COMPANY, CBS CORPORATION,  
F/K/A VIACOM INC., SUCCESSOR BY MERGER TO  
CBS CORPORATION, F/K/A WESTINGHOUSE  
ELECTRIC CORPORATION, CLEAVER BROOKS  
COMPANY, INC, CRANE CO, CROSBY VALVE  
LLC, FOSTER WHEELER, L.L.C, GENERAL ELECTRIC  
COMPANY, GOULDS PUMPS LLC, ITT LLC.,  
INDIVIDUALLY AND AS SUCCESSOR TO BELL &  
GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE  
MANUFACTURING CO., INC, MILTON ROY COMPANY,  
PFIZER, INC. (PFIZER), UNION CARBIDE  
CORPORATION, U.S. RUBBER COMPANY (UNIROYAL),  
WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN  
COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE  
MARLEY COMPANY, LLC,

Defendant.

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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76, 77, 91, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 130, 131, 132, 133, 134, 135

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 for summary judgment to dismiss this action on the grounds that plaintiff did not identify defendant Crosby as a manufacturer of any asbestos-containing products he was exposed to during the course of his work as a sheet metal worker at various Con Ed powerhouses from 1961-1991. Moving defendant's motion rests

entirely upon challenging plaintiff's evidence implicating defendant Crosby as a manufacturer in plaintiff's asbestos exposure. Plaintiff opposes on the basis of external depositions in which Crosby valves have been identified at Con Ed powerhouses, including those that plaintiff specifically worked at. *See* Affirmation in Opposition to Crosby Valve, LLC's Motion for Summary Judgment, p. 8-10. Defendant Crosby replies, reiterating their argument that plaintiff did not mention Crosby and that the external depositions should not be considered and do not include sufficient details connecting plaintiff to Crosby.

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 Crosby 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 NYSlipOp 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, the Court notes that plaintiff's affidavit in which he identified several Con Ed Powerhouses at which he worked is dated July 23, 2020, he was deposed on April 11, 2023, and he remains alive today at age 86. See Affirmation in Opposition, *supra*, p. 6-8. Despite the extenuating circumstances, plaintiff provided clear and unequivocal details regarding his work history from approximately 1961-1991, including the locations of powerhouses he worked at, what his role was, and which specific categories of products he was exposed to. *Id.* 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.* Similarly, the First Department noted in *Krok v AERCTO International, Inc., et. al*, 146 AD3d 700, 700 (1st Dep't 2017) that “reliance on the decedent's inability to identify its product as a source of his exposure to asbestos is misplaced” and that “plaintiffs raised an issue of fact by submitting evidence that defendant's asbestos-containing pumps were present on the ship to which the decedent was assigned as a boiler tender fireman.” *See also* Affirmation in Opposition, *supra*, p. 8-10. Plaintiffs have met the standard set forth by the Appellate Division to sufficiently raise a question of fact. The weight of the evidence is an issue for the trier of fact, but for purposes of summary judgment, the depositions raise issues of fact.

Further, defendant Crosby 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 plaintiff'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 plaintiff was exposed to asbestos-containing valves manufactured by defendant Crosby from his work at various Con Ed powerhouses, and that such exposure could have contributed to his lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Crosby Valve, LLC'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.

8/9/2024

DATE

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: