

Hickey v 3M Co.

2024 NY Slip Op 33594(U)

October 9, 2024

Supreme Court, New York County

Docket Number: Index No. 190014/2024

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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INDEX NO. 190014/2024

RAYMOND HICKEY, TANA HICKEY,

MOTION DATE 02/27/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

3M COMPANY, ABB, INC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO BAILEY CONTROLS, ABCO PEERLESS SPRINKLER CORP., AEW CAPITAL MANAGEMENT, L.P., AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC., ANCHOR/DARLING VALVE COMPANY, A.O. SMITH WATER PRODUCTS COMPANY, INC., ARMSTRONG INTERNATIONAL, INC., BEAZER EAST, INC., BLACKMAN PLUMBING SUPPLY COMPANY, INC. N/K/A FERGUSON PLUMBING, BROOKFIELD OFFICE PROPERTIES, INC., BRUCE SUPPLY CORP., BURNHAM, LLC, BW/IP INC., AND ITS WHOLLY OWNED SUBSIDIARIES, BYRON JACKSON PUMPS AND BORGWARNER, CANVAS MW, LLC, FORMERLY KNOWN AS THE MARLEY-WYLAIN COMPANY, LLC, CARRIER CORPORATION, CASHCO, INC., CEN-TECH, INC., CHINA INVESTMENT CORPORATION, CLARK RELIANCE CORPORATION AS SUCCESSOR TO JERGUSON, CLEAVER-BROOKS, INC., CLYDE UNION, INC., COLUMBIA BOILER COMPANY OF POTTSTOWN, COLUMBIA UNIVERSITY, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., COURTER & COMPANY INCORPORATED, CROSBY VALVE LLC, DAVIS & WARSHOW, INC., DCO LLC, (F/K/A DANA COMPANIES, LLC), DELPHI PLUMBING & HEATING, INC., ECR INTERNATIONAL, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO DUNKIRK, DUNKIRK BOILERS, AND UTICA BOILERS, EMERSON FINAL CONTROLS US HOLDING LLC, INDIVIDUALLY AND AS SUCCESSOR TO KEYSTONE VALVES & CONTROLS, ELECTROLUX HOME PRODUCTS, INC., INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPE-S-VULCAN, FAIRBANKS COMPANY, FERGUSON ENTERPRISES, LLC, FERGUSON PLUMBING SUPPLY, F/K/A BLACKMAN PLUMBING SUPPLY COMPANY, FISHER CONTROLS INTERNATIONAL, LLC, FLAMEMASTER AEROSPACE CORPORATION, FLOWSERVE US, INC., SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD

**DECISION + ORDER ON
MOTION**

VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO CHICAGO PUMP COMPANY, NORTHERN PUMP COMPANY, CROSBY PUMP COMPANY, AND PEERLESS PUMP COMPANY, FORT KENT HOLDINGS, INC., F/K/A DUNHAM-BUSH, INC., FOSTER WHEELER, L.L.C., FULTON BOILER WORKS, INC., GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GEROSA INC., GRAYBAR ELECTRIC COMPANY INC., GREENE TWEED & COMPANY, INC., GRINNELL LLC, HONEYWELL, INC., IMO INDUSTRIES, INC., HYDROTHERM CORPORATION, ITT CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO BELL & GOSSETT, KENNEDY VALVE MFG. CO. INC., AND HOFFMAN STEAM TRAPS, JENKINS BROS, INC., J.J. WHITE, INC., JPMORGAN CHASE & CO., JOHN E. POTENTE & SONS, INC., JOHNSON CONTROLS, INC., JOY GLOBAL UNDERGROUND MINING, LLC F/K/A JOY TECHNOLOGIES, LLC, KAISER GYPSUM COMPANY, INC., KEELER DORR-OLIVER BOILER COMPANY, KOHLER CO., LAARS HEATING SYSTEMS COMPANY, LENNOX INDUSTRIES, INC., MESTEK, INC., MILTON ROY COMPANY, MILWAUKEE VALVE COMPANY, INC., MONTGOMERY STREET PARTNERS, MUNACO SEALING SOLUTIONS, INC., INDIVIDUALLY, AS SUCCESSOR TO AND DOING BUSINESS AS MUNACO PACKING & RUBBER CO, INC., NATIONAL GRID GENERATION LLC D/B/D NATIONAL GRID, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK-PRESBYTERIAN BROOKLYN METHODIST HOSPITAL, NEW YORK UNIVERSITY TISCH SCHOOL OF THE ARTS, NIBCO INC., O'CONNOR CONSTRUCTORS, INC., F/K/A THOMAS O'CONNOR & CONNOR & CO., INC., PACE UNIVERSITY, 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, PECORA CORPORATION, PERMA-PIPE, INC., A SUBSIDIARY OF MFRI, INC., BY ACQUISITION OF RICWIL PIPING SYSTEMS LIMITED PARTNERSHIP AND RICWIL, INC., RAEI AUTOMATIC SPRINKLER CO., REDCO CORPORATION F/K/A CRANE CO., INDIVIDUALLY AND AS SUCCESSOR TO CYCLOTHERM, INC., PACIFIC VALVES, THE NATIONAL RADIATOR COMPANY, NATIONAL US RADIATOR CORPORATION, AND STOCKHOLM VALVES & FITTINGS, INC., RESEARCH-COTTRELL, INC., N/K/A AWT AIR COMPANY, RETIREMENT SYSTEMS OF ALABAMA, RIGGS DISTLER & COMPANY, INC., RHEEM MANUFACTURING INC., RILEY POWER, INC., ROBERTSHAW CONTROLS COMPANY INDIVIDUALLY, AND AS SUCCESSOR TO FULTON SYLPHON COMPANY, ROMAN STONE CONSTRUCTION,

R.W. BECKETT CORPORATION, SEQUOIA VENTURES, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO BECHTEL POWER CORPORATION AND BECHTEL CORPORATION, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, SPX COOLING TECHNOLOGIES, INC. INDIVIDUALLY AND AS SUCCESSOR TO MARLEY COOLING TECHNOLOGIES AND MARLEY COOLING TOWERS, SUPERIOR BOILER WORKS, INC., TENNECO, INC., TENNECO AUTOMOTIVE OPERATING COMPANY INC., TDY INDUSTRIES, INC. F/K/A TELEDYNE INDUSTRIES, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO FARRIS ENGINEERING, THE GOLDMAN SACHS GROUP, INC., THE J.R. CLARKSON COMPANY LLC, INDIVIDUALLY AND AS SUCCESSOR BY MERGER TO KUNKLE INDUSTRIES, INC., AND J.R. LONGERAN CO., TISHMAN LIQUIDATING CORP., TISHMAN REALTY & CONSTRUCTION CO., INC., TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, VERIZON COMMUNICATIONS, INC., VERIZON NEW YORK, INC., VIKING PUMPS, LLC, WARREN PUMPS LLC, WATSON MCDANIEL COMPANY, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, VALVES & CONTROLS USA, INC. D/B/A ATWOOD & MORRILL, WILLIAM POWELL COMPANY, YORK INTERNATIONAL CORPORATION, ZURN INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ERIE CITY IRON WORKS, 353W57 1704, LLC, 356W58 GROUND LESSOR LLC, CSC HUDSON, LLC, EC 58TH STREET LLC, HENRY HUDSON HOLDINGS, LLC, HUDSON 1701/1706, LLC, HUDSON 1702, LLC, JDP MECHANICAL, INC., MSP CAPITAL INVESTMENTS, L.L.C., THE CITY OF NEW YORK, OFFICE OF THE NEW YORK CITY COMPTROLLER, THE CITY UNIVERSITY OF NEW YORK, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, CITY UNIVERSITY CONSTRUCTION FUND, BOROUGH OF MANHATTEN COMMUNITY COLLEGE, NEW YORK CITY OFFICE OF ENVIRONMENTAL PROTECTION, NEW YORK HEALTH & HOSPITALS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 81, 82, 83, 84, 85, 86, 87, 88, 99, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 115, 135

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is ordered that defendant Montgomery Street Partners' motion to dismiss the complaint pursuant to CPLR §3211(a)(1) is denied for the reasons set forth below.

This case arises out of alleged asbestos exposure by plaintiff Raymond Hickey who worked as a steamfitter at the subject premises, 353 West 57th Street ("the Property") when it was formerly known as the Henry Hudson Hotel. *See* Affirmation in Opposition to Defendant Montgomery Street Partners' Motion to Dismiss, p. 1-2. Mr. Hickey was diagnosed with lung cancer on September 22, 2023. *Id.* at p. 1. Plaintiffs allege that moving defendant is a purchaser of the Property as per the Assignment, Assumption and Modification of Purchase and Sale Agreement dated May 3, 2022. *Id.* at 2. The Agreement names 356W58 Ground Lessor, LLC, known as "MSP Purchaser", as a purchaser of the Property. *Id.* Moving defendant Montgomery Street Partners allege that it has been incorrectly sued and is not responsible for any alleged asbestos exposure and does not, nor has ever, previously owned, operated, occupied, or controlled the Property. *See* Memorandum of Law in Support of Defendant Montgomery Street Partners' Motion to Dismiss the Complaint, p. 4. Moving defendant seeks dismissal pursuant to CPLR §3211(a)(1) based upon the documentary evidence.

Under CPLR §3211(a)(1), dismissal is warranted when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fortis Financial Services, LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 (1st Dept. 2002); *see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 (1st Dept. 2014). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and

(3) its contents are ‘essentially undeniable.’ See *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 (1st Dept. 2019).

In support, moving defendant submits the complaint, a standard asbestos complaint, an affidavit from Chief Operating Officer of Montgomery Street Partners Erin O’Grady, and the Assignment, Assumption and Modification of Purchase and Sale Agreement and Purchase and Sale Agreement (hereinafter collectively referred to as “The Agreements”). It is well settled that affidavits do not constitute documentary evidence within the meaning of CPLR 3211(a)(1). See *Bou v Llamaza*, 173 AD3d 575, 575 (1st Dept. 2019); *Asmar v 20th and Seventh Assocs., LLC*, 125 AD3d 563, 564 (1st Dept. 2015); *Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 (1st Dept. 2014); *Tsimerman v Janoff*, 40 AD3d 242, 242 (1st Dept. 2007). The Court notes, however, that in her affidavit, Ms. O’Grady incorrectly states that the Assignment, Assumption and Modification of Purchase and Sale Agreement was entered into by and between EC 58th Street LLC as the seller and CSC Hudson, LLC as the only purchaser, whereas a review of the document itself reveals that there were two additional purchasers – 353W57 1704, LLC (“CSC Store Unit Purchaser”) and 356W58 Ground Lessor LLC (“MSP Purchaser”).

Plaintiffs argue that there is ambiguity regarding 356W58 Ground Lessor LLC’s use of the alleged alias MSP Purchaser in the Assignment, Assumption and Modification of Purchase and Sale Agreement, and point out that moving defendant offers no explanation. See Affirmation in Opposition, *supra*, p. 4-5. Plaintiffs further argue that the Assignment, Assumption and Modification of Purchase and Sale Agreement states that the parties are entering into a “99-year ground lease...pursuant to which MSP Purchaser, as landlord shall lease to Ground Tenant”, which indicates that MSP Purchaser has control over, owns, and possesses, the referenced property. *Id.* at 2-3.

As the moving defendants' submissions fail to "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim" *Fortis Financial Services, LLC v Fimat Futures USA, supra* at 383, moving defendant's motion to dismiss is denied.

Accordingly, it is hereby

ORDERED that defendant Montgomery Street Partners' motion to dismiss pursuant to CPLR 3211(a)(1) is denied in its entirety, and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

10/9/2024
DATE


ADAM SILVERA, J.S.C.

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