

Barlotta v A.O. Smith Water Prods. Co.

2024 NY Slip Op 34107(U)

November 13, 2024

Supreme Court, New York County

Docket Number: Index No. 190020/2021

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. 190020/2021

THOMAS BARLOTTA AND DEBRA BURKERT AS CO-ADMINISTRATORS FOR THE ESTATE OF ANTHONY T BARLOTTA,

MOTION DATE _____

MOTION SEQ. NO. 003

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, ADIENCE, INC., F/K/A BMI, INC, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC, AMERICAN HONDA MOTOR CO., INC. (AHM), BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUTDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CONWED CORPORATION, CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC, DAP, INC, DCO LLC F/K/A DANA COMPANIES, LLC, DOMCO PRODUCTS TEXAS, INC, EASCO BOILER CORP. INDIVIDUALLY, AND AS SUCCESSOR TO A.L. EASTMOND & SONS, INC. AND FEDERAL BOILERS, EASTMOND & SONS OF N.J. LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EASCO BOILER CORP. AND A.L. EASTMOND & SONS, INC., AND FEDERAL BOILER, ECR INTERNATIONAL, CORP., F/K/A DUNKIRK BOILERS AND UTICA BOILER COMPANY, EMPIRE-ACE INSULATION MFG. CORP, FITZGIBBONS BOILER 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, FORD MOTOR COMPANY, FOSTER WHEELER, L.L.C, FULTON BOILER WORKS, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, H.B. FULLER COMPANY, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, HONEYWELL INTERNATIONAL,

**DECISION + ORDER ON
MOTION**

INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, J.H. FRANCE REFRACTORIES COMPANY, KAISER GYPSUM COMPANY, INC, KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, MANNINGTON MILLS, INC, MARIO & DIBONO PLASTERING CO., INC, MORSE DIESEL, INC, MORSE TEC LLC, F/K/A BORG WARNER MORSE TEC LLC AND SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION, NISSAN NORTH AMERICA, INC, PB HEAT LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO PEERLESS INDUSTRIES, PFIZER, INC. (PFIZER), REYNOLDS METALS COMPANY, RILEY POWER INC, STANDARD MOTOR PRODUCTS, INC, SUPERIOR BOILER WORKS, INC, THE BETHLEHEM CORPORATION, F/K/A THE FEDERAL BOILER COMPANY, TISHMAN LIQUIDATING CORP, TISHMAN REALTY & CONSTRUCTION CO., INC, TOYOTA MOTOR SALES U.S.A., INC, UNION CARBIDE CORPORATION, U.S. RUBBER COMPANY (UNIROYAL), UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, 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, CRANE CO, ABB, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ITE CIRCUIT BREAKERS, INC., EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC., INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, ROCKWELL AUTOMATION, INC., AS SUCCESSOR BY MERGER TO ALLEN-BRADLEY COMPANY, LLC, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST TO SIEMENS ENERGY & AUTOMATION, INC., WEYERHAEUSER COMPANY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 274, 275, 276, 277, 278, 279, 280, 281, 283

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents and for the reasons set forth below, the Court denies the motion for summary judgment by defendant American Honda Motor Co. (“Defendant”), pursuant to CPLR § 3212.

A court must grant summary judgment if the movant establishes its claim “as a matter of law” and no “issue of fact” warranting trial remains. CPLR § 3212(b). The movant has the initial burden to show “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 Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant’s failure to meet its initial burden requires denial of the motion without probing the sufficiency of the opponent’s papers. *See id.* Furthermore, even if the movant makes a prima facie showing of entitlement to judgment as a matter of law, the court must deny a summary judgment motion if the opponent’s papers present admissible evidence establishing that a “material issue[] of fact” remains. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

“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), quoting *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dep’t 1990). The court’s role centers on “issue-finding, [not] issue-determination.” *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957), quoting *Esteve v Abad*, 271 AD 725, 727 (1st Dep’t 1947) (internal quotation marks omitted). As a result, and because it is a “drastic remedy,” *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012), summary judgment is rarely granted in negligence actions unless no conflict exists in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

In toxic tort cases, a plaintiff must show, among other things, that he was exposed to a toxin by the defendant. *See Dyer v Amchem Prods. Inc.*, 207 AD3d 408, 410 (1st Dep't 2022), citing *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 (2006). When a defendant moves for summary judgment in these cases, "the burdens of proof are virtually reversed." *Lopez v Gem Gravure Co., Inc.*, 50 AD3d 1102, 1108 (2d Dep't 2008, Lifson, J.P., dissenting). Thus, for the moving defendant to meet its initial burden on summary judgment, it must do more than "point[] to gaps in [the] opponent's evidence"; it must "affirmatively demonstrate the merit" of its position. *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 (1st Dep't 2016), quoting *Dalton v Educ. Testing Serv.*, 294 AD2d 462, 463 (2d Dep't 2002); *see also Dyer*, 207 AD3d at 409 (noting that a summary judgment movant does "not meet its prima facie burden by merely pointing to gaps or deficits in [the] plaintiff's case"); *Reid v Georgia-Pac. Corp.*, 212 AD2d 462, 463 (1st Dep't 1995) (denying summary judgment when the defendant "fail[ed] ... to unequivocally establish that its product could not have contributed to the ... plaintiff's injury").

Here, Defendant argues that the evidence proffered by plaintiff Thomas Barlotta ("Plaintiff"), as administrator for the estate of the decedent, Anthony T. Barlotta ("Decedent"), is insufficient as a matter of law to establish that Decedent was exposed to asbestos when he worked on cars manufactured by Defendant. *See* Affirmation of Defendant's attorney in support of Defendant's motion for summary judgment, dated April 21, 2022, at 4-7. Defendant cherry-picks Plaintiff's testimony to argue that, because Plaintiff was ostensibly absent when Decedent worked on Defendant's cars, "any claims of exposure are speculative." *Id.* at 5. But Defendant's claim does not hold water for a number of reasons.

First, Defendant ignores portions of Plaintiff's testimony indicating that, although he may not have always been next to Decedent when Decedent worked on Defendant's cars, he could

often “see him working.” Notice of Motion, Exh. D, Depo. Tr. of Thomas P. Barlotta, Dec. 14, 2021, at 87, lines 7-25. Second, Plaintiff specifically rebutted Defendant’s insinuation that he could not testify as to the work Decedent did on Defendant’s cars. *See id.* at 88, lines 1-8. Third, Defendant glosses over Decedent’s responses to Defendant’s interrogatories, which unequivocally state that Decedent “worked with asbestos brakes and clutches” on cars manufactured by Defendant. Plaintiff’s Supplemental Response to Defendants’ Fourth Amended Interrogatories and Request for Production of Documents ¶ 17.

At bottom, Defendant is “pointing to gaps in [Plaintiff’s] evidence,” which is insufficient to warrant summary judgment. *Koulermos*, 137 AD3d at 576. What is more, the parties’ competing accounts of Decedent’s alleged exposure to Defendant’s product shows that a “material issue[] of fact” remains. *Alvarez*, 68 NY2d at 324 (1986). And it is the jury’s job, not the Court’s, to “pass on issues of credibility.” *Garcia*, 180 AD2d at 580. Thus, summary judgment must be denied.

Accordingly, it is

ORDERED that Defendant’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.

11/13/2024

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE