

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

2024 NY Slip Op 34111(U)

November 14, 2024

Supreme Court, New York County

Docket Number: Index No. 190346/2017

Judge: Adam Silvera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

KENNETH NANKERVIS,

Plaintiff,

INDEX NO. 190346/2017

MOTION DATE _____

MOTION SEQ. NO. 011

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., BURNHAM, LLC, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CERTAINTIED CORPORATION, CLEAVER BROOKS COMPANY, INC, COMPUDYNE CORPORATION, CONSOLIDATED EDISON COMPANY, CRANE CO, CRANE CO., ECR INTERNATIONAL, CORP., FLOWSERVE US, INC., FMC CORPORATION, FORT KENT HOLDINGS, INC., FOSTER WHEELER, L.L.C., FULTON BOILER WORKS, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, ITT INDUSTRIES, INC., ITT LLC., OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, SUPERIOR BOILER WORKS, INC., THE FAIRBANKS COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VIKING PUMP, INC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR BY MERGER TO BUFFALO PUMPS, INC., AMERICAN BILTRITE INC., AMERICAN HONDA MOTOR CO., INC. (AHM), ARVINMERITOR, INC., INDIVIDUALLY AND AS SUCCESSOR TO ROCKWELL AUTOMOTIVE, AURORA PUMP COMPANY, BEAZER EAST, INC., F/K/A KOPPERS COMPANY INC., BIRD INCORPORATED, BLACK & DECKER CORPORATION, BLACK & DECKER US, INC., BRIGGS & STRATTON CORP., CAMPBELL HASUFELD, LLC, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, COOPER CROUSE-HINDS, CROSBY VALVE LLC, CUMMINS, INC., DEWALT INDUSTRIAL TOOL CO., EMERSON ELECTRIC CO., FORD MOTOR COMPANY, GARDNER DENVER, INC., GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, GRINNELL LLC., HARLEY- DAVIDSON INC., HARLEY- DAVIDSON MOTOR CO., INC. F/K/A HARLEY- DAVIDSON MOTOR COMPANY SALES INC., HARLEY- DAVIDSON MOTOR COMPANY OPERATIONS INC., HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC./BENDIX, KAISER GYPSUM COMPANY,

**DECISION + ORDER ON
MOTION**

INC., KARNAK CORPORATION, LENNOX INDUSTRIES,
 INC., LEVITON MANUFACTURING CO.
 INC., MANNINGTON MILLS, INC., MARMON HOLDINGS,
 INC., PERKINS ENGINES, INC., PNEUMO ABEX
 LLC, SUCCESSOR IN INTEREST TO ABEX
 CORPORATION (ABEX), R.W. BECKETT CORPORATION,
 RILEY POWER INC., SCHNEIDER ELECTRIC USA, INC.
 FORMERLY KNOWN AS SQUARE D COMPANY,
 SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST
 TO SIEMENS ENERGY & AUTOMATION, INC., SLANT/FIN
 CORPORATION, STANLEY BLACK & DECKER, INC., TDY
 INDUSTRIES, INC. F/K/A TELEDYNE INDUSTRIES, INC,
 INDIVIDUALLY AND AS SUCCESSOR TO FARRIS
 ENGINEERING, TRIUMPH MOTOCYCLES AMERICA
 LIMITED, ZY-TECH GLOBAL INDUSTRIES, INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 011) 591, 592, 593, 594, 595, 596, 597, 606, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons set forth below, the Court denies the motion for summary judgment by defendant Fulton Boiler Works, Inc. (“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, as here, a plaintiff must show that he was exposed to a toxin by the defendant, “that the toxin is capable of causing a particular illness (general causation) and that [he] was exposed to sufficient levels of the toxin to cause the illness (specific causation).” *Dyer v Amchem Prods. Inc.*, 207 AD3d 408, 410 (1st Dep’t 2022), quoting *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 contends that it never produced the boilers that exposed Plaintiff to asbestos and that, as such, it could not have contributed to Plaintiff’s cancer. *See* Memorandum of Law in Support of Defendant Fulton Boiler Works, Inc.’s Motion for Summary Judgment at 4-9. In opposition, Plaintiff claims to be sure that he worked on Defendant’s asbestos-laden boilers because Defendant’s name was inscribed on the boilers. *See* Affirmation in Opposition to Defendant Fulton Boiler Works, Inc.’s Motion for Summary Judgment (“Opposition”) ¶¶ 3-12; testimony of Kenneth Nankervis, Sept. 11, 2019, at 1518, lines 15-19. Plaintiff also assails the testimony of Defendant’s corporate representative. Opposition ¶¶ 27-45. Defendant replies that it has met its burden on summary judgment, reiterating the arguments in its original motion. *See* Reply Affirmation in Support of Fulton Boiler Works, Inc.’s Motion for Summary Judgment at 2-7.

At bottom, Defendant is “pointing to gaps in [Plaintiff’s] evidence,” which is insufficient to warrant summary judgment. *Koulermos*, 137 AD3d at 576. In addition, there is conflicting testimony from Plaintiff and Defendant’s corporate representative. The Appellate Division, First Department, has spoken, in the context of summary judgment, as to the effect of deposition testimony that purportedly conflicts with other evidence in the record:

The 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 witness[’s] 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 & Co., 225 AD2d 319, 321 (1st Dep’t 1996) (internal citation omitted). It is the jury’s job, not the Court’s, to “pass on issues of credibility.” *Garcia*, 180 AD2d at 580,

quoting *Dauman*, 168 AD2d at 204. In any event, Defendant failed, as an initial matter, “to unequivocally establish that its product could not have contributed to the ... [P]laintiff’s injury.” *Reid*, 212 AD2d at 463. As Defendant has failed to meet its initial burden on a motion for summary judgment, and issues of fact exist, 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.

11/14/2024
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: