

[Avakian v Aerco Intl., Inc.](#)

Supreme Court of New York, New York County

January 18, 2022, Decided

INDEX NO. 190036/2018

**Reporter**

2022 N.Y. Misc. LEXIS 202 \*; 2022 NY Slip Op 30126(U) \*\*

[\*\*1] LAURA AVAKIAN, Plaintiff, - v - AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC.,AMERICAN BILTRITE INC, BMCE INC.,BORGWARNER MORSE TEC LLC,BRIGGS & STRATTON CORP, CARRIER CORPORATION, CERTAINTEED CORPORATION, COMPUDYNE CORPORATION, CROWN BOILER CO., DANA COMPANIES, LLC,DOMCO PRODUCTS TEXAS, INC, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC,HONEYWELL INTERNATIONAL, INC.,ITT LLC., KARNAK CORPORATION, KOHLER CO., MANNINGTON MILLS, INC, NISSAN NORTH AMERICA, INC, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC,SUCCESSOR IN INTEREST, RHEEM MANUFACTURING COMPANY, SEARS, ROEBUCK AND CO, SLANT/FIN CORPORATION, STANDARD MOTOR PRODUCTS, INC, TECUMSEH POWER, TECUMSEH PRODUCTS COMPANY, TENNECO AUTOMOTIVE OPERATING COMPANY INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TOYOTA MOTOR SALES U.S.A INC.,U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, FEDERAL - MOGUL ASBESTOS PERSONAL INJURY TRUST AS A

SUCCESSOR TO FELT PRODUCTS MFG. CO., Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**Core Terms**

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summary judgment, prior decision, reargue, issue of fact, misapprehended, overlooked, asbestos, visible, dust, defendant argues, asbestos fiber, concentrations, REARGUMENT, mistakenly, quotations, documents, particles, exposure

**Judges:** [\*1] ADAM SILVERA, J.S.C.

**Opinion by:** ADAM SILVERA

**Opinion**

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**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 360, 361, 362, 363 were read on this motion to/for REARGUMENT/RECONSIDERATION

Upon the foregoing documents, it is ordered that defendant American Biltrite Inc.'s (hereinafter referred to

as "defendant American Biltrite") motion to reargue this Court's prior decision dated April 8, 2021 (hereinafter referred to as the "Prior Decision") is decided below. **L FILED: NEW YORK COUNTY CLERK 01**

**[\*\*2]** Plaintiff commenced this action against defendant American Biltrite seeking monetary damages for personal injuries resulting from plaintiff's exposure to asbestos allegedly from moving defendant's products. By prior motion (mot. seq. no. 005), defendant American Biltrite moved for summary judgment to dismiss this action. Such motion was denied by the Prior Decision.

Here, defendant American Biltrite moves to reargue the Prior Decision and seeks, upon reargument, the dismissal of plaintiff's summons and complaint as against it. Moving defendant argues that the Court overlooked and misapprehended the facts and law. CPLR 2221(d)(2) permits a party to move for leave to reargue a decision **[\*2]** upon a showing that the court misapprehended the law or facts in rendering its initial decision. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27, 588 N.Y.S.2d 8 (1st Dep't 1992), appeal denied in part, dismissed in part 80 NY2d 1005 (1992) (internal quotations omitted).

Preliminarily, the Court notes that defendant American Biltrite fails to establish that the Court, in the Prior Decision, misapprehended or overlooked the facts or law in determining that issues of fact existed to preclude summary judgment. Moving defendant argues that there is no evidence to show that cutting asbestos tiles releases sufficient levels of chrysotile fibers to cause plaintiff's illness. Defendant American Biltrite argues that the Court mistakenly relied upon the report of Dr. Mark

Ginsburg. According to moving defendant, Dr. Ginsburg's report did not quantify decedent's asbestos exposure and, thus, plaintiff failed to establish that decedent was exposed to a sufficient level of asbestos to cause lung cancer.

**[\*\*3]** Preliminarily, the Court finds that **[\*3]** the report of Dr. Ginsburg was sufficient to establish an issue of fact to preclude summary judgment. The law on summary judgment is well settled. 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, 501 N.E.2d 572, 508 N.Y.S.2d 923 (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, 580 N.Y.S.2d 294 (1st Dep't 1992), citing Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 562 N.Y.S.2d 89 (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, 144 N.E.2d 387, 165 N.Y.S.2d 498 (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, 386 N.E.2d 1324, 414 N.Y.S.2d 304 (1979).

Here, as held in the Prior Decision, there is an issue of fact, as well as a clear conflict in the evidence, precluding summary judgment. In arguing that the Court erred in the Prior Decision, defendant American Biltrite ignores all the studies cited to by Dr. Ginsburg in his report dated February 9, 2020. Specifically, Dr. Ginsburg's report speaks to visible dust particles and the asbestos fiber concentrations contained in visible dust, which plaintiff testified **[\*4]** that he saw and breathed in visible dust particles as he was performing

the duties of his job. Dr. Ginsburg's report makes clear that the amount of asbestos fiber concentrations in visible dust significantly exceeded OSHA standards. The conflicting medical reports raise a genuine triable issue of fact. Thus, defendant American Biltrite failed to establish that the Court misapprehended or overlooked the facts or law in determining that issues of fact existed to preclude summary judgment such that the motion to reargue is denied.

**[\*\*4]** Accordingly, it is

ORDERED that defendant American Biltrite Inc.'s motion to reargue this Court's Prior Decision is denied in its entirety; and it is further

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

This constitutes the Decision and Order of the Court.

**1/18/2022**

**DATE**

/s/ Adam Silvera

**ADAM SILVERA, J.S.C.**

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