

Cutrone v Aerco Intl., Inc.

Supreme Court of New York, New York County

January 14, 2022, Decided

INDEX NO. 190190/2019

Reporter

2022 N.Y. Misc. LEXIS 206 *; 2022 NY Slip Op 30127(U) **

[1]** FREDERICK CUTRONE, Plaintiff, -v- AERCO INTERNATIONAL, INC., AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., CERTAINTTEED CORPORATION, DYKES LUMBER COMPANY, INC., GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., KAISER GYPSUM COMPANY, INC., KAMCO SUPPLY CORP., KELLY MOORE PAINT COMPANY, INC, PFIZER, INC. (PFIZER), THE PRINCE LUMBER CO., INC., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

asbestos, compound, summary judgment, summary judgment motion, instant motion, issue of fact, products, proffer, deposition testimony, reasonable inference, exposed to asbestos, initial burden, matter of law, fail to meet, constitutes, contributed, speculates, causation, exposure, alleges, exposed, illness, Notice, argues

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

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

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 Dykes Lumber Company, Inc. (hereinafter referred to as "defendant Dykes Lumber") moves to dismiss this action against it on the grounds that plaintiff is not able to establish that he was exposed to asbestos through joint compound sold by defendant Dykes Lumber or, alternatively, that there is insufficient evidence to establish specific causation. Defendant Dykes Lumber contends that plaintiff's deposition testimony, which states that he worked with asbestos containing joint compound sold by moving defendant, is pure speculation **[**2]** and insufficient to identify any of the products defendant Dykes Lumber sold. Moving defendant further argues that any exposure plaintiff may have had with asbestos containing products sold by defendant Dykes Lumber was limited, *de minimis*

exposure. In support, defendant Dykes Lumber proffers, *inter alia*, the report of Dr. Rabinovitz who opined that "within a reasonable degree of scientific certainty...Mr. [*2] Cutrone was not exposed to a dose of asbestos that would increase his risk of developing lung cancer". Notice of Motion, Exh. G, Report of Sheldon H. Rabinovitz, PhD, CIH, dated December 29, 2020, p. 5.

In opposition, plaintiff alleges that defendant Dykes Lumber failed to establish that its joint compound product could not have exposed plaintiff to asbestos and could not have caused plaintiff's illness. Plaintiff further alleges that he has proffered evidence to establish that plaintiff used asbestos containing joint compound products which were supplied by defendant Dykes Lumber. Defendant Dykes Lumber replies, stating that plaintiff failed to address its argument that plaintiff merely speculates that defendant Dykes Lumber sold the joint compound used by plaintiff. Moving defendant further argues that it is plaintiff's burden to establish that he was exposed to asbestos from defendants' product.

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, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter [*3] 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, 476 N.E.2d 642, 487 N.Y.S.2d 316 (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 [*3] admissible evidence establishing that there is a genuine issue of fact remaining. See

Zuckerman v City of New York, 49 NY2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595 (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, 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). 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, 622 N.Y.S.2d 946 (1st Dep't 1995).

Here, defendant Dykes Lumber has failed to meet its initial burden in establishing that its product did not contain asbestos and could [*4] not have contributed to plaintiff's injury. See DiSalvo v AO Smith Water Products, 123 AD3d 498, 499 (1st Dep't 2014). Rather, moving defendant relies on plaintiff's inability to testify as to the exact location the product in question was purchased. Defendant Dykes Lumber has failed to proffer any evidence to establish that its joint compound did not contain asbestos or that it could not have caused plaintiff's illness. As moving defendant failed to establish entitlement for summary judgment, the instant motion is denied.

Moreover, a review of plaintiff's deposition transcript reveals that plaintiff testified that he inhaled visible dust

from the joint compound which was sold by defendant Dykes Lumber. The Appellate Division, First Department, has held that "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing **[**4]** the complaint. The assessment of the value of a witnesses' 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 and Co.*, 225 AD2d 319, 321, 639 N.Y.S.2d 323 \(1st Dep't 1996\)](#)(internal citations omitted). It is well settled that "[t]he plaintiff is not required **[*5]** to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred". *Reid supra*. Thus, as defendant Dykes Lumber has failed to meet its initial burden, and as triable issues of fact exist, the instant motion is denied.

Accordingly, it is

ORDERED that defendant Dykes Lumber's motion for summary judgment seeking dismissal of the instant action is hereby denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/order of the Court.

1/14/2022

DATE

/s/ Adam Silvera **ADAM SILVERA, J.S.C.**