

## Catapano v AERCO Intl., Inc

Supreme Court of New York, New York County

March 29, 2022, Decided

INDEX NO. 190283/2020

### Reporter

2022 N.Y. Misc. LEXIS 1164 \*; 2022 NY Slip Op 30761(U) \*\*

[\*\*1] FERDINAND CATAPANO, Plaintiff, -v- AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC, DAP, INC, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, KAISER GYPSUM COMPANY, INC, LEVITON MANUFACTURING CO., INC, MORSE DIESEL, INC, MORSE TEC LLC, OTIS ELEVATOR COMPANY, PFIZER, INC. (PFIZER), PULSAFEEDER, THE B.F. GOODRICH COMPANY, (GOODRICH CORPORATION), THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF

THE MARLEY COMPANY, LLC, WEYERHAEUSER COMPANY, THE W.W. HENRY COMPANY, Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### Core Terms

---

floor tile, summary judgment motion, asbestos, manufactured, tiles, summary judgment, carpenter, deposition testimony, exposed to asbestos, issue of fact, contends, Notice, color, genuine issue of material fact, issue of material fact, instant matter, matter of law, prima facie, non-homogeneous, non-moving, documents, exposure, products, opposes

**Judges:** [\*1] HON. ADAM SILVERA, Justice.

**Opinion by:** ADAM SILVERA

### Opinion

---

#### DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for JUDGMENT - SUMMARY

[\*\*2] Upon the foregoing documents, it is hereby ordered that defendant The Good Year Tire & Rubber Company's (hereinafter referred to as Goodyear) motion for summary judgment is denied for the reasons set forth below.

The instant matter is premised on Plaintiffs alleged exposure to asbestos from the products of Goodyear. Prior to Plaintiff's diagnosis of lung cancer in March of 2020, Plaintiff was a carpenter who worked with his brother-in-law between the years of 1964 to the early 1970's and the Carpenter's Union, Local 257. Plaintiff worked as a carpenter at various commercial and residential locations throughout New York from 1969 until he retired in 2007. The product in which Plaintiff alleges exposure is a Goodyear floor tile that is approximately 12" x 12" with non-homogeneous color patterns which he encountered during the late 1960s and early 1970s. The floor [\*2] tiles which were installed by Plaintiff were identified as a product of Goodyear. The floor tiles in which Goodyear manufactures are Deluxe-On-Grade (DOG), Homogeneous-On-Grade (HOG), Black Back, and Heavy-Duty-Homogeneous (HDH). However, Goodyear ceased manufacturing the Black Back floor tiles in the 1950's, prior to when Plaintiff was allegedly exposed to asbestos. Further, the Black Back was only manufactured in 9" x 9" inch. Goodyear moves for summary judgment, contending there is no genuine issue of material fact that Plaintiff was exposed to asbestos by one of their products. Plaintiff opposes.

Pursuant to *CPLR 3212(b)*, a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he

proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact".

*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833, 988 N.Y.S.2d 86, 11 N.E.3d 159 (2014) (internal [\*3] citations omitted). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed [\*3] in the light most favorable to the non-moving party". *Id.* "If the moving party meets this burden, the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action". *Id.* "The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

In the instant matter, Goodyear contends that there is no genuine issue of material fact as the floor tiles that plaintiff worked with did not contain any asbestos whatsoever. According to Goodyear, the only viable floor tile Plaintiff worked with was DOG, since that was the floor tile available when Plaintiff was allegedly exposed to asbestos. "DOG. . . which was Goodyear Tire's primary flooring product in the 1960s and 1970s, was not only non-homogenous but was also manufactured in the 12" by 12" size." Memorandum of Law In Support of Defendant The Goodyear Tire & Rubber Company's Motion For Summary Judgment, p.5. Goodyear further contends that "regardless of the time period, and regardless of with whom [Plaintiff] was working with, [\*4] the physical appearance of the Goodyear-brand floor tile remained the same: it was 12" by 12" in dimension, with various colors or pattern on the surface, while the bottom of the floor tile remained a dark, almost black color." *Id.* at p.4.

Notably "[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 the complaint". [Dollas v W R. Grace and Co., 225 AD2d 319, 321, 639 N.Y.S.2d 323 \(1st Dept 1996\)](#). Further, "[t]he function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination". *Id.* The Plaintiff stated within his testimony that he knew Goodyear's tiles contained asbestos as the box of tiles "said — **[\*\*4]** vinyl asbestos tile on it." Notice of Motion, Exh. B, Ferdinand Catapano Depo. Tr. p. 751 In 25 — p.752 In 1. Plaintiffs deposition testimony demonstrates an issue as to whether the floor tiles provided by Goodyear contain asbestos, and whether such tiles were a proximate cause of Plaintiff's injury.

Furthermore, the HDH floor tile was manufactured in 9 x 9 inch as well as 12 x 12 inch tiles, and HDH floor tile contained approximately 5% asbestos according to the interrogatories filed by Goodyear. *See* Plaintiffs Affirmation in Opposition **[\*5]** to Defendant The Good Year Tire & Rubber Company's motion For Summary Judgment, Exh. 6, p. 9. As such, an issue of fact exists as to the type of floor tiles Plaintiff came into contact with as HDH was manufactured in the same size as DOG.

Additionally, the deposition testimony was taken of Russell T. Holmes (hereinafter referred to as Holmes), a former Goodyear employee who served as Goodyear's floor tile development engineer. Holmes testified that HDH was removed from the market in 1975, but "even after we quit, we would get a special order from somebody." Notice of Motion, Exh. D, Russell Holmes Depo. Tr., p. 71, In 2-3. Thus, Plaintiff was working as a carpenter during the time HDH floor tiles that contained asbestos were available, and even after its discontinuance, the HDH floor tiles were still being produced. As issues of fact exist, Goodyear's motion for summary judgment is denied.

Accordingly, it is

ORDERED that the 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 a copy of this decision/order upon all parties with notice of entry.

**[\*\*5]** This constitutes the decision / order of the Court. **[\*6]**

/s/ Adam Silvera

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

**DATE 3/29/2022**

---

End of Document