

Moutal v A.O. Smith Water Prods. Co

Supreme Court of New York, New York County

December 12, 2022, Decided

Index No. 190086/2019

Reporter

2022 N.Y. Misc. LEXIS 7798 *; 2022 NY Slip Op 34208(U) **

[1]** PAUL MOUTAL, Plaintiff, - v - A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., AMERICAN BILTRITE INC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CERTAINTIED CORPORATION, CLYDE UNION, INC, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO., CROWN BOILER CO., F/K/A CROWN INDUSTRIES, 1NC., DAVID FABRICATORS INC A/K/A DAVID **ASBESTOS** CORP, DOMCO PRODUCTS TEXAS, INC, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, G.S. BLODGETT CORPORATION, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, 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, JENKINS BROS, MANNINGTON MILLS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC, RHEEM MANUFACTURING COMPANY, SLANT/FIN CORPORATION, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC, WEIL-MCLAIN, A DIVISION OF THE MARLEY WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY,

LLC, AERCO INTERNATIONAL, INC., BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BIRD INCORPORATED, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

floor tile, summary judgment motion, **asbestos**, exposed, tiles, summary judgment

Judges: **[*1]** PRESENT: HON. Adam Silvera, J.S.C.

Opinion by: Adam Silvera

Opinion

DECISION + ORDER ON MOTION

[2]** The following e-filed documents, listed by NYSCEF document number (Motion 002) 163, 164, 165, 166, 167, 168, 169, 170, 171, 222, 250, 251, 252, 253, 254, 255, 256, 257, 261, 262, 263, 264, 265, 266 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that Defendant The Goodyear 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 upon Plaintiff Paul M. Moutal's alleged exposure to **asbestos** as a result of his work with Goodyear floor tiles. Plaintiff was diagnosed with lung cancer on January 9, 1999. At his deposition, Plaintiff testified that he worked as a handyman in Mahopac Woods, New York from 1969 to 1975. Thereafter, Plaintiff worked in Brooklyn, Queens, and

Staten Island as both a laborer and a carpenter from 1971 to 1978. Plaintiff further testified that he was exposed to **asbestos** when he cut and installed tiles by Goodyear to fit the shapes and fixtures within the rooms he has renovated. Plaintiff described that he was exposed to Goodyear's product by cutting, [*2] heating, and cracking floor tiles which created debris. Plaintiff only learned about the dangers of **asbestos** in the early 1990s, and did not wear a protective mask or respirator until that time. Goodyear moves for summary judgment, arguing that Plaintiff was not exposed to **asbestos** from a Goodyear brand floor tile. Namely, Goodyear contends that Plaintiff cannot establish that Goodyear's floor tiles contain **asbestos**, and whether Plaintiff actually worked with floor tiles manufactured by Goodyear. Plaintiff opposes, and Goodyear replies.

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 [**3] 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. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden [**3] then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". [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 citations and quotations omitted). "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 Constr. Corp., 18 NY3d 499, 503, 965 N.E.2d 240, 942 N.Y.S.2d 13 \(2012\)](#) (internal emphasis omitted).

Preliminarily, Goodyear's assertion that Plaintiffs testimony is based off of inadmissible hearsay is without merit. "[H]earsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition". [Fountain v Ferrara, 118 AD3d 416, 416, 987 N.Y.S.2d 55 \(1st Dept 2014\)](#). The Court may consider hearsay evidence in light of Plaintiffs other submissions herein, such as Goodyear's interrogatory responses revealing tremolite **asbestos** in their floor tiles.

First, Goodyear contends that Plaintiff "has no personal knowledge of working with Goodyear-brand floor tile." Memorandum Of Law In Support Of Defendant The Goodyear Tire & Rubber Company's Motion For Summary Judgment, p. 5. More specifically, Plaintiff never saw the Goodyear name on the tile itself, never had any role in purchasing the floor tile, and believes he [*4] worked with Goodyear-brand floor tile according to an unidentified source. See *Id.* Conversely, Plaintiff argues that according to his deposition testimony, he worked with [**4] Goodyear floor tiles, describing the tiles as 1/8" to 3/16" thick, and saw the boxes in which the tiles were packaged. See Affirmation In Opposition To Defendant Goodyear's Motion For Summary Judgment, p. 9, ¶ 27. According to the Appellate Division, First Department, "[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 \(1st Dept 1996\)](#). Plaintiff testified that he worked with Goodyear flooring tile as a handy man. See Affirmation In Opposition, *supra*, Exh 1., Depo. Tr. of Paul M. Moutal, dated July 30, 2019, p. 361, In. 2 - 5. Plaintiff further testified that he generally recalled installing Goodyear floor tiles as a handyman when he was a teenager. See *Id.* at p. 361, In. 17 - 21. On a motion for summary judgment, it is not within the discretion of the court to determine the credibility of the Plaintiff's testimony and make a factual finding. "A court's function on a motion for summary judgment involves issue finding rather than issue determination". [*5] [Farias v Simon, 122 AD3d 466, 468, 997 N.Y.S.2d 28 \(1st Dept 2014\)](#). In the case at bar, Plaintiff identifies Goodyear as the manufacturer of the floor tiles Plaintiff used to renovate residences as a handyman and repairman. As such, Goodyear's argument that Plaintiff lacked personal knowledge summarily fails.

Next, Goodyear contends that assuming *arguendo* Plaintiff installed Goodyear floor tiles, there is no evidence to suggest that those floor tiles in fact contains **asbestos**. More specifically, Goodyear argues that the description of the floor tile provided by Plaintiff matches the Deluxe-On-Grade ("DOG") floor tile, which does not contain **asbestos**. According to Goodyear, the only homogeneous flooring products it manufactured contained marbled patterns, and not a dark colored bottom as testified to by Plaintiff. Plaintiff argues otherwise, contending that his description of the floor tiles from the 1960s through the 1970s portrays Goodyear's Heavy-Duty-Homogeneous [**5] ("HDH") floor tile, which contains **asbestos**. Importantly, when

asked whether the floor tile had a pattern, Plaintiff could not recall. See Affirmation In Opposition, *supra*, Exh. 1, p. 371, ln. 16 - 20. Here, Goodyear has failed to proffer evidence that the only floor tile Plaintiff [*6] would have been exposed to was non-**asbestos** DOG floor tile. On a motion for summary judgment, "the court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility". [Pantote Big Alpha Foods, Inc. v Schefman, 121 AD2d 295, 297, 503 N.Y.S.2d 58 \(1st Dept 1986\)](#) (internal citations omitted). Plaintiff has clearly testified that he was exposed to **asbestos** from installing Goodyear tiles while working in residential areas. Furthermore, Goodyear has not met their prima facie burden that Plaintiff was not exposed to **asbestos** from one of its products. It is well established that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment". *Koulermos v A.O. Smith Water Products*, 137 AD3d 575, 576, 27 N.Y.S.3d 157 (1st Dept 2016). Goodyear's reliance on Plaintiff's testimony that the floor tile had a dark colored bottom is inadequate to demonstrate that the only floor tile Plaintiff was exposed to was non-**asbestos** containing. The Court notes that on a motion for summary judgment, it is movant's heavy burden to first establish entitlement to judgment as a matter of law. 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 [*7] to the causation of plaintiff's injury." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463, 622 N.Y.S.2d 946 (1st Dept 1995). Thus, Goodyear has failed to demonstrate their prima facie burden that summary judgment is warranted herein.

Accordingly, it is

ORDERED that Defendant The Goodyear Tire & Rubber Company's motion for summary judgment is hereby denied in its entirety; and it is further

[6]** ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision / order of the Court

12/12/2022

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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