

Ferrari v A.O. Smith Water Prods. Co

Supreme Court of New York, New York County

March 27, 2023, Decided

INDEX NO. 190003/2021

Reporter

2023 N.Y. Misc. LEXIS 1386 *; 2023 NY Slip Op 30960(U) **

[1]** NICHOLAS FERRARI AS ADMINISTRATOR FOR THE ESTATE OF MARIO FERRARI AND ANGELA FERRARI, INDIVIDUALLY, Plaintiff, - v - A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSOURCE INC, COURTER & COMPANY INCORPORATED, FLOWSERVE US, INC. INDIVIDUALLY AND 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, GENERAL ELECTRIC COMPANY, IMO INDUSTRIES, INC, MARIO & DIBONO PLASTERING CO., INC, MORSE DIESEL, INC, NORTHROP GRUMMAN CORP. AS SUCCESSOR TO GEORGE A. FULLER COMPANY, O'CONNOR CONSTRUCTORS, INC., F/K/A THOMAS O'CONNOR & CONNOR & CO., INC, PFIZER, INC. (PFIZER); SKANSKA KOCH, INC, STRUCTURE TONE, TISHMAN LIQUIDATING CORP, TISHMAN REALTY & CONSTRUCTION CO., INC, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VRH CONSTRUCTION CORP, THE MARLEY-WYLAIN COMPANY, CRANE CO., PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, subcontractors, summary judgment motion, deposition transcript, issue of fact, asbestos,

argues, exposed to asbestos, asbestos dust, job site, asbestos-containing, encountered, employees, dangerous condition, general contractor, instant motion, matter of law, unequivocally, contributed, causation, documents, contends, sweeping, reveals, Notice, safe

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

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 145, 146, 147 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that defendant Structure Tone LLC's (hereinafter referred to as defendant "Structure Tone") instant motion for summary judgment, pursuant to CPLR 3212, is denied for the reasons stated below.

[2]** Here, defendant Structure Tone seeks summary judgment arguing that plaintiff has failed to establish that he was exposed to asbestos through his work with, or near, products used by moving defendant. Defendant Structure Tone contends that its answers to site specific interrogatories establish that it did not use asbestos on those job sites. Relying on plaintiff's deposition transcript, defendant Structure Tone argues that plaintiff testified he was not exposed to asbestos at either the 15 Broad Street or the 60 Wall Street locations. According to moving defendant, plaintiff testified that these two locations were the only two job sites where he encountered defendant **[*2]** Structure Tone as the

general contractor. In further support of its motion, moving defendant proffers, *inter alia*, the deposition transcript of Mr. John T. White, the executive vice president of defendant Structure Tone from December 17, 2010. According to Mr. White's 2010 testimony, defendant Structure Tone did not use any **asbestos**-containing materials and its subcontractors did not use any **asbestos** containing materials.

Plaintiff opposes the motion, arguing that issues of fact exist precluding summary judgment. Plaintiff contends that defendant Structure Tone is liable under common law negligence as well as [New York Labor Law §200](#). Plaintiff argues that defendant Structure Tone's own workers swept **asbestos** insulation and joint compound creating **asbestos** dust which plaintiff breathed in. Moreover, plaintiff alleges that he encountered defendant Structure Tone's employees at 20 to 30 different job sites, although he could only remember two specific addresses. Plaintiff testified that he was able to identify the employees of defendant Structure Tone, as such workers wore helmets with Structure Tone's name on them. Plaintiff argues that defendant Structure Tone's employees created the dangerous condition by **[*3]** sweeping up **asbestos** dust without any precautions. Defendant Structure Tone replies.

[3]** 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 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. *Id.* at [853](#). Additionally, summary judgment motions should be denied if the opposing party presents 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 \(1979\)](#).

The elements of a common-law **[*4]** negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting therefrom. See [Jimenez v Shahid](#), [83 AD3d 900 \(2d Dep't 2011\)](#). [Labor Law §200](#) is a codification of the common law duty that a landowner or general contractor is to provide workers with a reasonably safe place to work. See [Russin v Louis N. Picciano & Son](#), [54 NY2d 311, 316-317, 429 N.E.2d 805, 445 N.Y.S.2d 127 \(1981\)](#). An implicit precondition to this duty "is that the party charged with that responsibility have the **[**4]** authority to control the activity bringing about the injury". [Comes v New York State Elec. and Gas Corp.](#), [82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 \(1993\)](#), citing [Russin v Picciano](#).

Pursuant to [Labor Law § 200](#) a party charged with having a duty to provide individuals with a safe place to work must have the authority to control the activity which brought about the injury. 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 it[...]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, a review of the deposition transcripts submitted reveals that issues of fact exist as to whether defendant Structure Tone created a dangerous condition by sweeping **asbestos** dust and causing injury. Although defendant Structure Tone argues that plaintiff was not exposed to **asbestos** at **[*5]** two specific locations, namely 15 Broad Street and 60 Wall Street, plaintiff explicitly testified that he encountered moving defendant at numerous other locations. Moreover, while defendant Structure Tone relies on the deposition testimony of Mr. White, who asserted that defendant Structure Tone did not use any **asbestos**-containing materials and its subcontractors did not use any **asbestos** containing materials, Mr. White's deposition transcript unequivocally reveals that defendant "Structure Tone [n]ever inquired of its subcontractors whether or not they used **asbestos**-containing materials". Notice of Motion, Exh. G, Depo. Tr. of John T. White, dated December 17,

2010, p. 88, In. 11-16. Thus, Mr. White does not have personal knowledge of the materials used by defendant Structure Tone's subcontractors and his testimony regarding the materials used by its subcontractors is insufficient to support the instant motion for summary judgment. As defendant Structure Tone has failed to meet its initial burden in "unequivocally establish[ing] that... it[] could not have contributed to the causation of plaintiff's injury", *Reid*, **[**5]** *supra*, 212 AD2d at 463, and as issues of fact exist, moving defendant's motion for summary judgment **[*6]** is denied.

Accordingly, it is

ORDERED that defendant Structure Tone LLC's motion for summary judgment, pursuant to [CPLR 3212](#), seeking to dismiss plaintiff's Complaint and all cross-claims against it 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 defendant with notice of entry.

This Constitutes the Decision/Order of the Court.

3/27/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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