

## McCabe v ABB, Inc.

Supreme Court of New York, New York County

March 31, 2023, Decided

INDEX NO. 190036/2019

### Reporter

2023 N.Y. Misc. LEXIS 1502 \*; 2023 NY Slip Op 31046(U) \*\*

**[\*\*1]** ROBERT MCCABE, Plaintiff, - v - ABB, INC., AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC, BRYANT HEATING & COOLING SYSTEMS, CARRIER CORPORATION, CBS CORPORATION, A DELAWARE CORP., F/K/A VIACOM INC., CBS CORPORATION, F/K/A VIACOM INC., CERTAINTIED CORPORATION, COOPER INDUSTRIES, INC., DOMCO PRODUCTS TEXAS, INC, EATON CORPORATION, AS SUCCESSOR-IN-INTEREST TO, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULD ELECTRONICS INC, GOULDS PUMPS LLC, LEVITON MANUFACTURING CO., INC, MARIO & DIBONO PLASTERING CO., INC, MORSE DIESEL, INC, NORTHROP GRUMMAN CORP. AS SUCCESSOR, PFIZER, INC. (PFIZER), ROCKWELL AUTOMATION, INC., AS SUCCESSOR IN INTEREST, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS, SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST TO, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN LIQUIDATING CORP, TISHMAN REALTY & CONSTRUCTION CO., INC, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEYERHAEUSER COMPANY, KAISER GYPSUM COMPANY, INC., FISHER BROTHERS MANAGEMENT CO. LLC, Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### Core Terms

summary judgment, summary judgment motion, general contractor, instant motion, personal knowledge, issue of fact, affirmation, deposition, documents, proffers, sites, initial burden, matter of law, fail to meet, job site, constitutes, contributed, unavailing, alleges, Notice

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

**Opinion by:** ADAM SILVERA

### Opinion

#### **DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 147, 149, 150, 151, 153, 154 were read on this motion to/for SUMMARY JUDGMENT AFTER JOINDER.

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.

**[\*\*2]** Here, defendant Tishman Liquidating Corporation (hereinafter referred to as defendant "Tishman Liquidating") moves to dismiss this action against it on the grounds that it is not responsible for any of the three (3) job sites which plaintiff testified "Tishman" was the general contractor, and, thus, not liable for any injury plaintiff allegedly sustained from such sites. Defendant Tishman Liquidating contends that during his deposition, plaintiff speculated that "Tishman" was the general contractor at 3 specific sites where he worked, namely the World Trade Center, 130 John Street, and 55 Water Street. As to 130 John Street and 55 Water Street, moving defendant proffers New York Times articles which report the **[\*2]** general contractors at those two sites to be companies other than defendant Tishman Liquidating. As to the World Trade Center, defendant Tishman Liquidating proffers a letter, dated November 8, 2010, from Mr. James A. Edwards on Ahmuty, Demers & McManus letterhead, to establish that defendant Tishman Realty & Construction Co., Inc. is

liable for any alleged injury suffered by plaintiff at the World Trade Center.

In opposition, plaintiff alleges that defendant Tishman Liquidating failed to establish that it is free from liability and could not have caused plaintiff's illness. Plaintiff further alleges that plaintiff encountered moving defendant at numerous worksites throughout his career from the mid-1950s through the 1980s. Defendant Tishman Liquidating replies.

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 (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 [\*3] [\*\*3] 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 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 (Pt 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". [Salmon 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 Tishman Liquidating has failed to meet its initial burden in establishing that it is free from liability

and that it could not have contributed to plaintiff's injury. See [DiSalvo v AO Smith Water Products](#), 123 AD3d 498, 499 (1st Dep't 2014). Although defendant Tishman Liquidating argues that it has proffered sufficient [\*4] evidence to support the instant motion, even without an affidavit from someone with personal knowledge, the Court notes that attorneys' affirmations and letters are unavailing. "[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing." [Zuckerman v City of New York](#), 49 NY2d 557, 563, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. See *Di [\*\*4] Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561, 438 N.Y.S.2d 334 (1 Dept 1981), aff'd 54 NY2d 715, 426 N.E.2d 484, 442 N.Y.S.2d 990 (1981). Here, Mr. Edwards' letter, in which none of the contents are affirmed to, fails to demonstrate that he has any personal knowledge, is unsupported by any documentation, and does not conclusively establish that moving defendant is free from any liability. As defendant Tishman Liquidating failed to establish entitlement to summary judgment, the instant motion is denied.

Moreover, a review of plaintiffs deposition transcript reveals that plaintiff testified he worked hundreds of job sites. See Notice of Motion, Ex. B., Depo. Tr. of Robert McCabe, dated October 17, 2019, p. 125, ln. 9-10. Plaintiff further testified that he was exposed to **asbestos** through work done by employees of general contractors, and that certain work would be performed [\*5] in his presence hundreds of times. See *id.* at p. 744, ln. 5. Plaintiff testified that he was able to identify the workers based upon the hard hats that were worn, and that Tishman was one such contractor. *Id.* at in. 20-23. The Appellate Division, First Department, has held that "Vile 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. 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). Thus, as defendant Tishman Liquidating 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 Tishman Liquidating Corporation's motion for summary judgment seeking dismissal of the instant action is hereby denied in its entirety; and it is further

**[\*\*5]** 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 **[\*6]** the Decision/order of the Court.

**3/31/2023**

**DATE**

/s/ Adam Silvera

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

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