

Sason v Dykes Lumber Co., Inc.

Supreme Court of New York, New York County

July 21, 2023, Decided

Index No. 190257/2017

Reporter

2023 N.Y. Misc. LEXIS 3736 *; 2023 NY Slip Op 32526(U) **

[1]** RAPHAEL SASON, Plaintiff, - v - DYKES LUMBER COMPANY, INC, GEORGIA PACIFIC LLC (DELAWARE) AS SUCCESSOR-IN-INTEREST TO GEORGIA PACIFIC CORPORATION, GEORGIA PACIFIC LLC (NORTH CAROLINA) AS SUCCESSOR-IN-INTEREST TO GEORGIA PACIFIC CORPORATION, GEORGIA PACIFIC LLC, UNION CARBIDE CORPORATION, VANDERBILT MINERALS, LLC, CANCOS TILE TILE CORPORATION, DAP, INC., DONALD DURHAM COMPANY, NATIONAL PLYWOOD CO., INC/THE PRINCE LUMBER CO., INC., BESTWALL LLC, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, FLETCHER BUILDINGS HOLDING USA, INC. INDIVIDUALLY AS SUCCESSOR IN INTEREST TO THE FORMICA GROUP AND FORMICA CORPORATION, PREMARK INTERNATIONAL LLC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO RALPH WILSON PLASTICS COMPANY A DIVISION OF DART INDUSTRIES F/K/A REXALL DRUG I/K/A DART AND KRAFT, TRANOSLIW INTERNATIONAL INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO WILSONART INTERNATIONAL INC. AND RALPH WILSON PLASTICS COMPANY, UNILEVER U.S., INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO NATIONAL STARCH, WILSONART LLC WYETH HOLDINGS CORP. F/K/A AMERICAN CYANAMID, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, summary judgment motion, causation, **asbestos**, **asbestos** exposure, simulation, exposure, products

Judges: **[*1]** PRESENT: 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 006) 232, 233, 234, 235, 236, 237, 238, 239, 257, 258, 259, 260, 261, 262, 267 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that the instant motion for summary judgment seeking dismissal of this action, pursuant to [CPLR §3212](#), is decided in accordance with the decision below.

[2]** Here, defendant Dykes Lumber Company, Inc. ("Dykes Lumber") moves to dismiss this action on the basis that plaintiff has failed to establish causation and defendant has established a *prima facie* case for a lack thereof under [Nemeth v Brenntag North America, 38 NY3d 336, 173 N.Y.S.3d 511, 194 N.E.3d 266 \(2022\)](#).

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 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, [*2] 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). 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 [**3] 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).

Defendant Dykes Lumber has misstated its burden in the instant motion as the standard set forth in *Nemeth v Brenntag* which represents an extraordinary post-trial remedy to set aside a jury verdict, rather than the well settled burden on a motion for summary judgment. Defendants incorrectly state that plaintiffs have failed to prove causation herein, at the summary judgment stage. [*3] At summary judgment, plaintiff's opposition need only raise a triable issue of fact concerning specific causation. Further, the appropriate standard in a motion for summary judgment for defendant can be found in *Dyer v AmChem Products Inc.*, 207 AD3d 408, 409, 171 N.Y.S.3d 498 (1st Dep't 2022). In *Dyer*, defendants were granted summary judgment not by "simply argu[ing] that plaintiff could not affirmatively prove causation" but by "affirmatively prov[ing], as a matter of law, that there was no causation." *Id.* Here, defendant Dykes Lumber fails to meet their burden on summary judgment as set forth in *Dyer*.

Defendant relies upon their two experts, Victor L. Roggli, MD, and Neva F.B. Jacobs, MSPH, CIH. Dr. Roggli opines that exposure to chrysotile **asbestos**, a

category of **asbestos** fiber present in Dykes Lumber products used by plaintiff-decent, Uziel Sason, does not cause peritoneal mesothelioma. See Notice of Motion, Exh. C, Report of Victor L. Roggli, MD, Exh. 2 at p. 1. In opposition, plaintiff's expert, Mark E. Ginsburg, MD, analyzes a variety of **asbestos** fibers released by specific contested products, not just limited to chrysotile but amphibole fibers as well, and cites contradicting evidence that chrysotile **asbestos** contributes to peritoneal mesothelioma. See Affirmation [*4] in Opposition to Defendant Dykes Lumber Company, Inc.'s Motion for Summary Judgment, Exh. 3, Report of Mark Ellis Ginsburg, MD, at p. 10-15. This difference of opinion is sufficient to raise a question of fact.

[**4] Ms. Jacobs' calculations conclude that Mr. Sason's cumulative exposure to **asbestos** from the various products at issue herein was insufficient to have contributed to his illness. See Notice of Motion, Exh. D, Report of Neva F.B. Jacobs, MSPH, CIH, Exh. 2 at p. 11. However, the studies relied upon to estimate **asbestos** exposure to plaintiff do not meet the *Dyer* standard. Defendants in *Dyer* proffered a simulation study that measured the amount of **asbestos** released from cutting the exact tiles manufactured by them and at issue in the case. See *Dyer, supra*, 207 AD3d at 411. Further, their study simulated a worker's exposure "in an isolation chamber" and with "[a]ir sample cassettes.. .attached to the worker and the helper in each of their breathing zones." *Id.*

Here, Ms. Jacobs merely relies upon a newsletter report regarding **asbestos** exposure from Durham Company Wood Putty, but notes that "[d]etails regarding the study location, age of the putty product, tools used during work tasks, sampling instrumentation used, and [*5] analytical method used were not described." Report of Neva F.B. Jacobs, *supra*, at p. 13. She further acknowledges that there are "[n]o peer-reviewed [studies]...regarding potential **asbestos** exposure during the use of wood putty products." *Id.* This clearly does not meet the level of specificity for a simulation study under *Dyer*. It is unconvincing that one newsletter article, with no methodology details available, is sufficient to accurately calculate exposure from Durham wood putty.

The *Dyer* court specifically noted that "[t]he methodology employed in the [simulation] study provides for the placement of the air cassettes specifically designed to capture **asbestos** fibers created by the simulated activity in the breathable ones of the participating worker and helper." *Dyer, supra*, at 412.

Plaintiff's expert, Dr. Ginsburg, also notes that the cumulative **asbestos** exposure calculated by Ms. Jacobs is higher than exposure amounts known to cause **[**5]** mesothelioma. See Affirmation in Opposition, *supra*, Exh. 3, Report of Mark Ellis Ginsburg, MD, at p. 16. This is sufficient to raise a question of fact.

As a reasonable juror could decide that **asbestos** exposure from products purchased from Dykes Lumber were a contributing cause **[*6]** of Mr. Sason's mesothelioma, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Dykes Lumber's motion for summary judgment seeking to dismiss based on causation is denied in its entirety; and it is further

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

This constitutes the Decision/Order of the Court.

07/21/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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