

## Togher v. AO. Smith Corp.

Supreme Court of New York, New York County

September 19, 2023, Decided

Index No. 190460/2018

### Reporter

2023 N.Y. Misc. LEXIS 5643 \*; 2023 NY Slip Op 33285(U) \*\*

**[\*\*1]** MICHELLE TOGHER AND PETER VINCENT, AS, Plaintiff, - v - A.O. SMITH CORPORATION, A.W. CHESTERTON COMPANY, AERCO INTERNATIONAL, INC., ARMSTRONG INTERNATIONAL, INC., AURORA PUMP COMPANY, AURORA PUMP COMPANY, BALTIMORE AIRCOIL COMPANY INC., BMCE INC., IN ITSELF AND AS SUCCESSOR TO UNITED CENTRIFUGAL PUMP CO., BURNHAM LLC, CARRIER CORPORATION INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO BRYANT HEATING & COOLING SYSTEMS, CBS CORPORATION, A DELAWARE CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAIN-TEED CORPORATION, CRANE CO., FAIRBANKS COMPANY, FLOWSERVE US INC., SOLELY AS SUCCESSOR TO EDWARD VALVES INC., ROCKWELL MANUFACTURING COMPANY, NORDSTROM VALVES INC. AND MCCCANNA CORPORATION, FMC CORPORATION, FOSTER WHEELER ENERGY CORPORATION, GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INCORPORATED, GREENE TWEED & CO. INC., INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM, INGERSOLL-RAND COMPANY, ITT LLC, JOHN CRANE INC., KOHLER COMPANY, METROPOLITAN LIFE INSURANCE COMPANY, MILWAUKEE VALVE COMPANY INC, NASH ENGINEERING COMPANY, PECORA CORPORATION, PEERLESS INDUSTRIES, INC., RHEEM MANUFACTURING COMPANY, SPIRAX SARCO, INC., SPX COOLING TECHNOLOGIES, INC., STERLING FLUID SYSTEMS (USA), LLC, TRANE U.S. INC. F/K/A AMERICAN STANDARD INC., UNION CARBIDE CORPORATION, WEIL-MCLAIN INC., A DIVISION OF THE MARLEY-WYLAIN COMPANY, WEIR VALVES & CONTROLS USA, INC., D/B/A ATWOOD & MORRILL, YORK INTERNATIONAL CORPORATION, INDIVIDUALLY

AND AS SUCCESSOR-IN-INTEREST TO YORK CORPORATION, JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS), Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### Core Terms

summary judgment, causation, summary judgment motion, instant motion, issue of fact, matter of law, **asbestos** exposure, fail to meet, unequivocal, documents, products, punitive, Notice, facie

**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 004) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 239, 240, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the instant motion for summary judgment seeking dismissal of this action is denied for the reasons set forth below.

Here, defendant SPX Cooling Technologies, Inc., individually and as successor to Marley Cooling Technologies, Inc. ("Marley") moves for summary

judgment to dismiss this action on the basis that plaintiff has failed to establish causation, and that 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 [\*2] 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, 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 \(1st Dep't 1990\)](#). [\*3] 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 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 Marley has misstated plaintiff's burden in the instant motion as the standard set forth in [Nemeth v Brenntag](#) which [\*3] 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. At summary judgment, plaintiff's opposition need only raise a triable issue of fact concerning specific causation. Further, the appropriate standard on 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 Marley fails to meet their burden on summary judgment as set forth in [Dyer](#). Defendant offers no expert opinions, reports, or other evidence upon which to base their claim that there was no causation.

Conversely, plaintiff provides clear and unequivocal testimony regarding exposure history to Marley products and proffers three expert reports regarding plaintiff-decedent's quantification of **asbestos** exposure, causation analysis, and pathology and medical history [\*4] respectively. See Plaintiff's Memorandum [\*4] of Law in Opposition to Defendant SPX Cooling Technologies, Inc.'s Motion for Summary Judgment, p. 3-8; Exh. 9-11, 13. This is more than sufficient to raise issues of fact as to causation.

Regarding dismissal of plaintiff's punitive damages claim, plaintiffs noted their intention to pursue punitive damages in the initial complaint and affirmed it again in the trial readiness conference form, more than two years prior to the filing of the instant motion. See Notice of Motion, Exh. T, Trial Readiness Conference Form dated Jan. 31, 2020.

As defendant Marley has failed to meet its burden in the instant motion for summary judgment, and as a reasonable juror could decide that **asbestos** exposure from Marley products were a contributing cause of plaintiffs illness, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Marley's motion for summary judgment seeking to dismiss 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.

**09/19/2023**

**DATE**

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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