

Deroy v Aerco Intl., Inc.

Supreme Court of New York, New York County

October 5, 2023, Decided

INDEX NO. 190329/2019

Reporter

2023 N.Y. Misc. LEXIS 7448 *; 2023 NY Slip Op 33491(U) **

[1]** JOSEPH M DEROY, Plaintiff, - v - AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, ARMOR KONE ELEVATOR INC, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BURLINGTON ELEVATOR CO, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTTEED CORPORATION, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CUTLER-HAMMER, INC, ELEVATOR CONTROLS CORP, ELEVATOR SYSTEMS, INC, FUJITEC AMERICA, INC., INDIVIDUALLY AND AS SUCCESSOR TO SERGE ELEVATORS, G.A.L. MANUFACTURING CORPORATION LLC, GENERAL ELECTRIC COMPANY, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, HOLLISTER-WHITNEY ELEVATOR CORPORATION, MOTION CONTROL ENGINEER, INDIVIDUALLY AND AS SUCCESSOR TO O. THOMPSON ELEVATORS, NATIONAL ELEVATOR CAB & DOOR CORP, OTIS ELEVATOR COMPANY, PARKLINE ELEVATOR CAB INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), SCHINDLER ELEVATOR CORP, SEABERG ELEVATOR CO, THE PEELLE COMPANY, THYSSENKRUPP ELEVATOR CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO DOVER ELEVATOR COMPANY, TITAN MACHINE CORPORATION, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VANTAGE ELEVATOR SOLUTIONS, WESTINGHOUSE AIR BRAKES COMPANY, F/K/A UNION SWITCH & SIGNAL CO, GUARDSMAN ELEVATOR CO., INC., HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. /

BENDIX, A.O. SMITH WATER PRODUCTS CO., ARMSTRONG INTERNATIONAL, INC., ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CARRIER CORPORATION, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., CRANE CO., CROSBY VALVE LLC, CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., ECR INTERNATIONAL, CORP., F/K/A DUNKIRK BOILERS AND UTICA BOILER COMPANY, 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, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC., GOULDS PUMPS LLC, IMO INDUSTRIES, INC., ITT INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, KOHLER CO., LENNOX INDUSTRIES, INC., RILEY POWER INC, ROPER PUMP COMPANY, SLANT/FIN CORPORATION, STOCKHOLM VALVES & FITTINGS INC., SUPERIOR BOILER WORKS, INC., 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, ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, Defendant.

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

Core Terms

summary judgment, valves, summary judgment motion, **asbestos**-containing, products, issue of fact, unequivocal, insulation, corporate representative, deposition testimony, exposed to **asbestos**, matter of law, recommendation, constitutes, contributed, causation, documents

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) 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 302, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400

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, pursuant to [CPLR §3212](#), is denied for the reasons set forth below.

Here, defendant Crosby Valve, LLC ("Crosby") moves to dismiss this action on the grounds that plaintiff, Joseph DeRoy ("Mr. DeRoy") was not exposed to **asbestos** from any Crosby product and that Crosby had no duty to warn regarding **asbestos**-containing insulation used on its valves. In opposition, plaintiff highlights Mr. DeRoy's clear and unequivocal testimony identifying Crosby as a manufacturer of **asbestos**-containing valves which he was [****3**] exposed to. See Affirmation in Opposition to Defendant Crosby Valve, LLC's Motion for Summary Judgment, p. 3-7. Plaintiff also cites to the deposition of defendant's corporate representative as well as documentary [****2**] evidence to indicate Crosby's knowledge and recommendation of **asbestos**-containing insulation to be used with their valves. See *id.* at p. 9-11.

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, 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 [****3**] 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 [****4**] burden "to unequivocally establish that its product could not have contributed to the causation of plaintiffs injury". [Reid v Georgia-Pacific Corp.](#), 212 AD2d 462, 463, 622 N.Y.S.2d 946 (1st Dep't 1995).

With respect to plaintiff's deposition testimony, the Appellate Division, First Department, has held that "[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. 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).

The Court finds that Mr. DeRoy provided unequivocal

testimony identifying defendant Crosby products as a source of his asbestos exposure and that defendant Crosby's corporate representative and historical Crosby catalogue confirmed the presence and circulation of Crosby's asbestos-containing products. Thus, defendant Crosby has failed to "establish [***4**] that its products could not have contributed to the causation of plaintiff's injury." *Reid v Georgia-Pacific Corp.*, *supra*.

Moreover, as conflicting evidence has been presented herein, and a reasonable juror could decide that Mr. DeRoy was exposed to asbestos from the use of Crosby products, and that Crosby was aware of and recommended the use of asbestos-containing insulation with its valves, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Crosby's motion for summary judgment is denied in its entirety; and it is further

[****5**] 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.

10/05/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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