

Nankervis v A.O. Smith Water Prods. Co.

Supreme Court of New York, New York County

October 4, 2023, Decided

INDEX NO. 190346/2017

Reporter

2023 N.Y. Misc. LEXIS 7390 *; 2023 NY Slip Op 33444(U) **

[1]** KENNETH NANKERVIS, Plaintiff, -v- A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., BURNHAM, LLC, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, COMPUDYNE CORPORATION, CONSOLIDATED EDISON COMPANY, CRANE CO, CRANE CO., ECR INTERNATIONAL, CORP., FLOWSERVE US, INC., FMC CORPORATION, FORT KENT HOLDINGS, INC., FOSTER WHEELER, L.L.C., FULTON BOILER WORKS, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, ITT INDUSTRIES, INC., ITT LLC., OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, SUPERIOR BOILER WORKS, INC., THE FAIRBANKS COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VIKING PUMP, INC, WELL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR BY MERGER TO BUFFALO PUMPS, INC., AMERICAN BILTRITE INC., AMERICAN HONDA MOTOR CO., INC. (AHM), ARVINMERITOR, INC., INDIVIDUALLY AND AS SUCCESSOR TO ROCKWELL AUTOMOTIVE, AURORA PUMP COMPANY, BEAZER EAST, INC., F/K/A KOPPERS COMPANY INC., BIRD INCORPORATED, BLACK & DECKER CORPORATION, BLACK & DECKER US, INC., BRIGGS & STRATTON CORP., CAMPBELL HASUFELD, LLC, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, COOPER CROUSE-HINDS, CROSBY VALVE LLC, CUMMINS, INC., DEWALT INDUSTRIAL TOOL CO., EMERSON ELECTRIC CO., FORD MOTOR COMPANY, GARDNER DENVER, INC., GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, GRINNELL LLC., HARLEY- DAVIDSON INC., HARLEY- DAVIDSON MOTOR CO., INC. F/K/A

HARLEY- DAVIDSON MOTOR COMPANY SALES INC., HARLEY- DAVIDSON MOTOR COMPANY OPERATIONS INC., HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC./BENDIX, KAISER GYPSUM COMPANY, INC., KARNAK CORPORATION, LENNOX INDUSTRIES, INC., LEVITON MANUFACTURING CO. INC., MANNINGTON MILLS, INC., MARMON HOLDINGS, INC., PERKINS ENGINES, INC., PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO ABEX CORPORATION (ABEX), R.W. BECKETT CORPORATION, RILEY POWER INC., SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST TO SIEMENS ENERGY & AUTOMATION, INC., SLANT/FIN CORPORATION, STANLEY BLACK & DECKER, INC., TDY INDUSTRIES, INC. F/K/A TELEDYNE INDUSTRIES, INC, INDIVIDUALLY AND AS SUCCESSOR TO FARRIS ENGINEERING, TRIUMPH MOTOCYCLES AMERICA LIMITED, ZY-TECH GLOBAL INDUSTRIES, INC., Defendant.

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

Core Terms

summary judgment, causation, gaskets, summary judgment motion, lung cancer, products, expert report, issue of fact, matter of law, contributed, **asbestos**, exposure, illness, studies, exposure to **asbestos**, **asbestos** exposure, fail to prove, fail to meet, **asbestos**-containing, manufactured, simulation, documents, cancer, facie

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

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

[**2] The following e-filed documents, listed by NYSCEF document number (Motion 012) 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 671, 672, 673, 674 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 decided in accordance with the decision below.

Here, defendant Perkins Engines, Inc. (hereinafter referred to as defendant "Perkins") files a second motion for summary judgment seeking 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). Defendant Perkins relies primarily on expert reports by Jennifer Sahmel, PhD, CIH, CSP, FAIHA and Mark J. Utell, M.D. concluding respectively that plaintiff's exposure to **asbestos** from Perkins gaskets was of insufficient quantity to have caused his cancer. Plaintiff opposes, and relies on the report of Dr. Mark Ellis Ginsburg to establish [*2] medical causation from plaintiff's use of Perkins gaskets.

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 \[**3\] 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 (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 Dept 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, [*3] 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 Perkins misstates plaintiff's burden at summary judgment as the standard set forth in [Nemeth v Brenntag](#), *supra*, 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 specific causation herein, at the summary judgment stage. At summary judgment, plaintiff's opposition need only raise a triable [**4] issue of fact concerning specific causation. It is defendant's affirmative burden to prove that their **asbestos**-containing products could not have caused plaintiff's illness. Plaintiff has provided expert testimony specifically opining that exposure to visible **asbestos** dust from Perkins gaskets could have caused plaintiff's illness.

The appropriate standard for summary judgment for moving 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 arguing] that plaintiff [**4] could not affirmatively prove causation" but by "affirmatively prov[ing], as a matter of law, that there was no causation." *Id.* Here, defendant Perkins fails to meet their burden on summary judgment as set forth in [Dyer](#). 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 [id. at 411](#).

Defendant Perkins relies upon its industrial hygiene expert who cites to simulation studies on **asbestos** exposure from gaskets that are not Perkins-produced. See Affirmation in Support of Defendant Perkins Engines, Inc.'s Second Motion for Summary Judgment on Causation, dated Dec. 2, 2022, Exh. M, Expert Report of Jennifer Sahmel, PhD, CIH, CSP, FAIHA at p. 27-32. Moving defendant fails to include an explanation of the similarities between Perkins-manufactured gaskets and those used in the studies relied upon to argue their accuracy or relevance to the instant case. The expert report states that Perkins gaskets could not have been an issue, and then quantifies Mr. Nankervis' exposure based on estimations of other gaskets used in these studies. Such unsupported statements fail to prove that exposure to [*5] Perkins products could not have contributed to the causation of Mr. Nankervis' lung cancer.

Similarly, moving defendant's second expert, Mark J. Utell, M.D. concludes that Mr. Nankervis' history of smoking increased his risk of developing lung cancer. However, such [**5] statement is not dispositive of whether **asbestos** from Perkins products has contributed to causing the cancer's ultimate development. At issue herein is whether, and to what extent, exposure to **asbestos** from Perkins caused Mr. Nankervis' lung cancer. This is insufficient to affirmatively prove that there was no causation under the [Dyer](#) standard.

Additionally, Perkins has offered no evidence to suggest that they have never manufactured **asbestos**-containing gaskets or that any such gaskets could not have been available to Mr. Nankervis during his work. Thus, defendant Perkins has failed to meet its burden to establish that its products could not have been the cause for plaintiff's illness. See *Reid v Georgia-Pacific Corp.*, *supra*.

As a reasonable juror could determine that **asbestos** exposure from Perkins gaskets was a cause of Mr. Nankervis' lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

[*6] ORDERED that defendant Perkins' motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry defendants shall serve plaintiffs with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

10/04/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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