

Torio v A.O. Smith Water Prods. Co

Supreme Court of New York, New York County

October 1, 2023, Decided

INDEX NO. 190150/2019

Reporter

2023 N.Y. Misc. LEXIS 6395 *; 2023 NY Slip Op 33389(U) **

[1]** ROSEMARY TORIO, AS EXECUTRIX FOR THE ESTATE OF ANTHONY W. TORIO, AND ROSEMARY TORIO, INDIVIDUALLY, Plaintiff, - v-A.O. SMITH WATER PRODUCTS CO, AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTIED CORPORATION, CLEAVER BROOKS COMPANY, INC, CRANE CO, CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., DAP, INC, FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, KAISER GYPSUM COMPANY, INC, KARNAK CORPORATION, LENNOX INDUSTRIES, INC., MORSE DIESEL, INC., PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, RUUD, SUPERIOR BOILER WORKS, INC., TISHMAN REALTY & CONSTRUCTION CO., INC, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, YORK INTERNATIONAL CORPORATION, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, products, summary judgment motion, causation, **asbestos**, issue of fact, matter of

law, **asbestos**-containing, illness, caulk, plaintiff's claim, speculative, documents, exposure

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 001) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 151, 152, 153, 154 were read on this motion to/for JUDGMENT - SUMMARY.

[2]** 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 DAP, Inc. k/n/a La Mirada Products Co., Inc. ("DAP") moves to dismiss this action on the basis that plaintiff's claim is "speculative" because not all DAP caulks historically contained **asbestos**, and that plaintiff's causation is insufficient. Plaintiff opposes, noting that moving defendant offers no evidence proving that its products could not have caused **asbestos**-related illness and highlighting the testimony from plaintiff-decedent, Anthony Torio ("Mr. Torio")'s co-worker. Defendant replies.

The Court notes that summary judgment is a drastic remedy and should only be granted **[*2]** 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). **[**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 **[*3]** 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).

In support of its' argument that plaintiff's claim is speculative, defendant DAP relies upon an affidavit from former DAP employee, Ward Treat, to establish that "[b]y the end of 1978, DAP no longer manufactured or sold any products that contained **asbestos**." See Memorandum of Law in Support of Defendant DAP, Inc. k/n/a La Mirada Products Co., Inc.'s Motion for Summary Judgment, Exh. B, Affidavit of Ward Treat dated March 1, 2011, ¶ 17. Mr. Treat does not possess the requisite personal knowledge to establish that no DAP products containing **asbestos** were in circulation and used by Mr. Torio. Moreover, the affidavit does not address DAP talc or other types of **asbestos**-containing products. In fact, Mr. Ward confirms that some formulations of DAP caulk contained **asbestos**.

Additionally, Mr. Torio's colleague, Mr. Roy Trempy, consistently testified that Mr. Torio was exposed to DAP **asbestos**-containing caulk, such that sufficient issues of fact exist to preclude summary judgment.

As to causation, DAP's expert affidavit from Robert C. Adams, CIH, CSP, FAIHA, is not case-specific and forms no opinions based on Mr. Torio's **[*4]** actual exposure and work timeline. This is plainly insufficient to meet defendant's burden at summary judgment as set forth in [Dyer v Amchem Products Inc.](#), 207 AD3d 408, 409, 171 N.Y.S.3d 498 (1st Dept. 2022). Contrarily, plaintiff's expert, **[**4]** Mark Ellis Ginsburg, MD, specifically reviewed Mr. Torio's case, and medical history along with an analysis of his occupational history. See Affirmation in Opposition to Defendant DAP, Inc.'s Motion for Summary Judgment, Exh. 11, Affidavit and Report of Mark Ellis Ginsburg, MD, dated Dec. 5, 2021-July 6, 2022.

Defendant DAP further misstates plaintiff's burden at summary judgment as the standard set forth in [Nemeth v Brenntag](#), 38 NY3d 336, 173 N.Y.S.3d 511, 194 N.E.3d 266 (2022), 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 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. The appropriate standard in a motion for summary judgment for defendant can be found in [Dyer v Arnhem Products \[*5\] Inc.](#), *supra*. 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 DAP fails to meet their burden on summary judgment as set forth in [Dyer](#).

As a reasonable juror could decide that **asbestos** exposure from DAP products were a contributing cause of Mr. Torio's illness, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant DAP'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.

10/01/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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