

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

Supreme Court of New York, New York County

October 6, 2023, Decided

INDEX NO. 190087/2019

Reporter

2023 N.Y. Misc. LEXIS 7443 *; 2023 NY Slip Op 33487(U) **

[**1] DACKASHAY WALDON AS EXECUTOR FOR THE ESTATE OF ROBERT O WALDON, Plaintiff, - v - A.O. SMITH WATER PRODUCTS CO., AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BLACKMER, BORGWARNER MORSE TEC LLC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, CRANE CO, CROSBY VALVE LLC, EATON CORPORATION, AS SUCCESSOR-IN-INTEREST TO CUTLER-HAMMER, INC., ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC. SOLELY AS 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, FOSTER WHEELER, LLC, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC., GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, IMO INDUSTRIES, INC, ITT INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, ITT LLC, INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, NELES-JAMESBURY INC, PEERLESS INDUSTRIES, INC, PFIZER, INC.

(PFIZER), ROPER PUMP COMPANY, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, THE NASH ENGINEERING COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, VIKING PUMP, INC., WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, GOODYEAR CANADA, INC., THE GOODYEAR TIRE AND RUBBER COMPANY, TYCO INTERNATIONAL (US) INC., PARAMOUNT GLOBAL, F/K/A VIACOMCBS INC., F/K/A 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, REDCO CORP. F/K/A CRANE CO., THE MARLEY-WYLAIN COMPANY, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment motion, summary judgment, products, asbestos, gasket, matter of law, lung cancer, manufactured, causation, asbestos exposure, question of fact, medical doctor, expert report, issue of fact, fail to meet, non-friable, industrial, documents, hygienist, proffered, exposure, genuine, sheet

Judges: [*1] 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) 248, 249, 250, 251, 252, 253, 254, 255, 256, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 274 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 The Goodyear Tire & Rubber Company ("Goodyear") files a motion for summary judgment seeking to dismiss this action on the basis that its products could not have caused plaintiff-decedent Robert Waldon's ("Mr. Waldon") lung cancer. See Memorandum of Law in Support of Defendant The Goodyear Tire & Rubber Company's Motion for Summary Judgment, p. 4. Defendant Goodyear proffers the expert reports of industrial hygienist John Spencer, CIH, CSP and medical doctor Robert Sussman, MD, FCCP to establish that any **asbestos** exposure from Goodyear manufactured products was not the cause of Mr. Waldon's lung cancer. See Affirmation in Support of the Goodyear Tire & Rubber Company's Motion for Summary Judgment, dated December 1, 2022, Exhs. D & E. Plaintiffs oppose, noting Mr. Waldon's specific testimony identifying Goodyear gaskets, defendant Goodyear's manufacturing history regarding **asbestos**-containing sheet gasket material, and submitting the expert reports of industrial hygienist Kenneth Garza, CIH, MS and medical doctor Mark E. Ginsburg, MD. See Affirmation in Opposition to The Goodyear Tire & Rubber Company's Motion for Summary Judgment, p. 9; 20-23.

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, [**3] 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 [**4] 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).

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 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 Goodyear 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](#).

Here, defendant Goodyear's [**4] reliance on the affidavit of John Spencer is insufficient to dispel any questions of fact regarding Mr. Waldon's exposure to **asbestos** from Goodyear gasket material. Plaintiffs highlight a significant conflicting opinion from their expert, Dr. Ginsburg, regarding the amount of **asbestos** releasable from "non-friable products," which is contrary to Goodyear's primary defense that its non-friable gasket sheets significantly reduced the potential release of **asbestos** and could not have caused Mr. Waldon's cancer. See Affirmation in Opposition, *supra*, p. 14-15. Such conflict is sufficient to establish genuine questions of fact. Further, defendant Goodyear's second expert opinion from Dr. Sussman does not provide an estimate of Mr. Waldon's exposure to Goodyear products as

required by *Dyer*. See *supra* at p. 16-17.

Thus, defendant Goodyear 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*.

[5]** Furthermore, as a reasonable juror could decide that ***asbestos*** exposure from Goodyear products was a cause of Mr. Waldon's lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, **[*5]** it is

ORDERED that defendant Goodyear's 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.

10/06/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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