

Moutal v A.O. Smith Water Prods. Co

Supreme Court of New York, New York County

October 26, 2023, Decided

INDEX NO. 190086/2019

Reporter

2023 N.Y. Misc. LEXIS 12064 *; 2023 NY Slip Op 33828(U) **

[1]** PAUL MOUTAL, Plaintiff, - v - A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., AMERICAN BILTRITE INC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CERTAINTeed CORPORATION, CLYDE UNION, INC, COMPU DYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO., CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., DAVID FABRICATORS INC A/K/A DAVID **ASBESTOS** CORP, DOMCO PRODUCTS TEXAS, INC, 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, G.S. BLODGETT CORPORATION, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS, MANNINGTON MILLS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC, RHEEM MANUFACTURING COMPANY, SLANT/FIN CORPORATION, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, 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, AERCO INTERNATIONAL, INC., BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BIRD INCORPORATED, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

causation, renew, summary judgment motion, exposure, flooring, summary judgment, **asbestos** fiber, instant motion, expert report, **asbestos**

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 006) 441, 442, 443, 444, 445, 446, 447, 449, 452, 454, 455, 456, 457 were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 441, 442, 443, 444, 445, 446, 447, 449, 452, 454, 455, 456, 457 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents, it is ordered that the instant motion for renewal is decided for the reasons set forth below.

Here, defendant Mannington Mills, Inc. ("Mannington") moves for renewal of its motion for summary judgment

arguing that the Court of Appeals' decision in [Nemeth v Brenntag N. Am.](#), 38 NY3d 336, 173 N.Y.S.3d 511, 194 N.E.3d 266 (2022) and its related "floor tile" decisions in the First Department changed the law such that this Court's prior Decision/Order, dated Dec. 1, 2022, must be reversed. See Memorandum of Law in Support of Mannington Mills, Inc.'s Motion for Leave to Renew Argument On Its Prior Motion for Summary Judgment, p. 2. Preliminarily, the Court notes that defendant Mannington erroneously labels, and continuously reiterates that the instant motion is one [*2] for reargument. However, the instant motion clearly seeks renewal, and thus, is considered herein as a motion to renew.

Defendant Mannington argues that the Court did not consider defendant expert Mark Durham's quantification of plaintiff's **asbestos** exposure based on the Stanford Research Institute study from 1979 regarding **asbestos** fiber released from sheet flooring installation. *Id.* at 2-3. Defendant Mannington further argues that the *Dyer* standard at summary judgment does not require defendant to proffer a simulation study using their own product, and that the sheet flooring used in the 1979 study used the same **asbestos**-felt backing as Mannington's sheet [**3] flooring and was a "uniform product used industry wide". *Id.* at 7. Finally, defendant Mannington argues that plaintiff did not quantify **asbestos** exposure to the standard necessitated by the [Nemeth](#) decision and its progeny. *Id.* at 9-10.

Plaintiff opposes, arguing that defendant Mannington has not "proffered [any] expert medical witness on the issue of the specific causation of Mr. Moutal's lung cancer," unlike the defendants in the post-[Nemeth](#) Amtico tile cases. See Affirmation in Opposition to Mannington's Motion for Leave to Renew, and in Support [*3] of Plaintiff's Cross-Motion for Leave to Submit Supplemental Expert Analysis, p. 3. Plaintiff further argues that the original opposition papers sufficiently rebutted defendant Mannington's evidence regarding the type of **asbestos** fibers released from its product and that defendant's second expert, Dominik D. Alexander, relies on a discredited "asbestosis" theory of causation. *Id.* at 5-6. Finally, plaintiff cross-moves to include a supplemental expert report in light of the updated caselaw. *Id.*

[CPLR § 2221\(e\)](#) permits a party to move for leave to renew a decision to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination". [CPLR §](#)

Here, the Court notes that defendant Mannington has failed to show how their motion would be decided differently under [Nemeth](#) and its following decisions. Defendant Mannington has misstated plaintiff's burden in opposing a summary judgment motion 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. Moving defendant incorrectly [*4] states that plaintiff failed to prove specific causation in the original motion. However, it is well settled that at summary judgment, plaintiff's opposition need only [**4] raise a triable issue of fact concerning specific causation. Further, the appropriate standard in a motion 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.* Defendant Mannington fails to meet their burden on summary judgment as set forth in *Dyer*. Moving defendant has offered insufficient evidence upon which to base their claim that there was affirmatively no causation.

The Court has not overlooked defendant Mannington's reference to the 1979 Stanford sheet flooring study, but rather finds it insufficient on its own to affirmatively prove a lack of causation. In fact, this Court's prior Decision/Order, dated Dec. 1, 2022, specifically listed the SRI study at issue (NYSCEF doc. No. 274) as a document read and considered. Plaintiff correctly points out that defendant Mannington has offered no evidence on [*5] medical causation specific to Mr. Moutal. Defendant Mannington's expert report from Mark F. Durham, industrial hygienist, emphasizes the accuracy of the 1979 study in relation to Mannington's flooring product and provides an estimated quantification of Mr. Moutal's exposure. Mr. Durham also relies on defendant Mannington's product history descriptions to assert that chrysotile **asbestos** was the only type of **asbestos** fiber at issue and that it does not cause disease. See the initial motion, mot. seq. no. 005, Notice of Motion, Exh. D, Affidavit of Mark F. Durham, dated Feb. 4, 2021, with Exhibits. Defendant Mannington's expert report from Dominik D. Alexander, epidemiologist, does not provide any analysis specific to plaintiff, and similarly concludes on a general basis that chrysotile fibers would not cause disease at the estimated exposure levels [**5] without

the presence of asbestosis. See *id.*, Exh. F, Affidavit of Dominik D. Alexander, dated June 22, 2020, and Expert Report of Dominik D. Alexander, PhD, MSPH, dated Feb. 26, 2019.

Contrarily, in the initial motion, plaintiff's opposition papers provided clear and unequivocal expert testimony regarding Mr. Moutal, his exposure history to [*6] Mannington products, the level of asbestos fibers at issue, and an opinion on causation based on cumulative exposure thereto. See the initial motion, mot. seq. no. 005, Affirmation in Opposition to Defendant Mannington Mills, Inc.'s Motion for Summary Judgment, Exh. 28, Affidavit of Mark Ellis Ginsburg, MD, dated April 29, 2021, and report of Dr. Ginsburg dated April 26, 2021. Dr. Ginsburg specifically rebuts the claim that cumulative exposure to chrysotile asbestos cannot cause disease at the levels estimated by defendant's experts. *Id.* This is more than sufficient to raise issues of fact as to causation. Additionally, plaintiff's second expert, Brent C. Staggs, MD, concluded that asbestos exposure was a substantial contributing factor to plaintiff's illness. See *id.*, Exh. 29, Affidavit of Brent C. Staggs, MD, dated April 15, 2016, and report of Dr. Staggs dated Aug. 22, 2019. Plaintiff's supplemental expert report further addresses the concentration of asbestos fibers at issue pursuant to the updated caselaw but is unnecessary to the instant motion as issues of fact were sufficiently raised in the prior motion. See Affirmation in Opposition, *supra*, Exh. 1, Ginsburg Report, dated May [*7] 12, 2023.

It is undisputed that there is "new" law available regarding defendant Mannington's underlying motion for summary judgment. However, defendant has failed to prove that such new law would change the outcome of the initial motion. In fact, the new law in [Dyer, supra](#), has unequivocally set the standard for moving defendants on a motion for summary judgment; a standard which defendant Mannington has failed to meet. As such, the instant motion to renew is denied.

[**6] Accordingly, it is

ORDERED that defendant Mannington's motion to renew their summary judgment motion 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.

10/26/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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