

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

Supreme Court of New York, New York County

December 11, 2023, Decided

INDEX NO. 190082/2019

Reporter

2023 N.Y. Misc. LEXIS 23015 *; 2023 NY Slip Op 34318(U) **

[1]** ANTHONY W MORALE, Plaintiff, - v -A.O. SMITH WATER PRODUCTS CO., AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO., CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, CRANE CO., INDIVIDUALLY, AND AS SUCCESSOR TO CYCLOTHERM CORPORATION, FULTON BOILER WORKS, INC, GENERAL ELECTRIC COMPANY, 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, KOHLER CO, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, SLANT/FIN CORPORATION, TACO, INC, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, boilers, summary judgment motion, causation, matter of law, unequivocal, challenges, exposure, issue of fact, work history, Additionally,

contributed, documents, asbestos, exposed, Reply, facie

Judges: **[*1]** PRESENT: 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) 114, 115, 116, 117, 118, 119, 120, 121, 122, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 195, 197 were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

[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 denied for the reasons set forth below.

Here, defendant Fulton Boiler Works, Inc. ("Fulton") moves for summary judgment to dismiss this action on the grounds that plaintiff-decedent, Anthony Morale ("Mr. Morale") did not establish exposure to any Fulton boilers during his career as a heating technician from the late 1940s-1980s. Moving defendant's motion relies primarily upon challenging Mr. Morale's testimony which implicates defendant Fulton as a manufacturer of products which exposed him to asbestos. See Affirmation in Support of Defendant Fulton Boiler Works, Inc.'s Motion for Summary Judgment, p. 2-6. Defendant Fulton additionally proffers the affidavit of their corporate representative to indicate that Fulton **[*2]** boilers did not require the type of servicing/assembly noted in plaintiff's testimony and were not sold for use in the environments of Mr. Morale's exposure. See *id.*, Exh. E, Affidavit of

Ronald B. Palm, dated Jan. 16, 2020, p.1-2.

In opposition, plaintiff highlights Mr. Morale's clear and unequivocal testimony identifying Fulton boilers by label and specifics, as well as his work history on them in commercial environments. See Affirmation in Opposition to Defendant Fulton Boiler Works Motion for Summary Judgment, p. 8-10. Plaintiff also challenges the personal knowledge in Mr. Palm's affidavit. *Id.* at p. 11. Defendant Fulton replies, reiterating its challenges to plaintiff's evidence and redirecting the court to Mr. Palm's affidavit. See Reply Affirmation in Support of Fulton Boiler Works, Inc.'s Motion for Summary Judgment, p. 2-5.

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 [*3] 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 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

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 at summary judgment for moving defendant Fulton 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 [*4] prove causation" but by "affirmatively prov[ing], as a matter of law, that there was no causation." *Id.* The Appellate Division, First Department, recently affirmed this Court's [*4] decision in Sason v Dykes Lumber Co., Inc., et. al., 2023 NY Slip Op 05796 (1st Dep't 2023), stating that "the parties' competing causation evidence constituted the classic 'battle of the experts' sufficient to raise a question of fact, and to preclude summary judgment.

Here, the Court notes that Mr. Morale was deposed within a few months of his lung cancer diagnosis and passed away within the same year. See Affirmation in Opposition, *supra*, p. 3. Despite the extenuating circumstances, Mr. Morale provided clear and unequivocal details regarding his work history beginning from over sixty years ago, including describing Fulton boilers and identifying them by name. *Id.* at p. 8.

While Mr. Palm's affidavit provides sufficient detail to establish moving defendant's *prima facie* case, plaintiff presents clear contradicting testimony. The weight of such testimony remains an issue for the trier of fact and not one for summary judgment. As conflicting evidence has been presented herein, and a reasonable juror could decide [*5] that Mr. Morale was exposed to **asbestos** from his work with Fulton boilers in various contexts, and that such exposure could have contributed to his fatal illness, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Fulton's motion for summary judgment 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.

12/11/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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