

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

Supreme Court of New York, New York County

November 21, 2023, Decided

INDEX NO. 190346/2017

### Reporter

2023 N.Y. Misc. LEXIS 22788 \*; 2023 NY Slip Op 34176(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, WEIL-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 motion, summary judgment, air compressor, issue of fact, matter of law, lung cancer, manufacturing, causation, **asbestos**, gaskets, **asbestos**-containing, Additionally, highlighting, contributed, documents, exposure, products, replaced, utilized

**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 007) 404, 405, 406, 407, 408, 409, 410, 417, 512, 514, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 580, 581, 582, 583 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 Campbell Hausfeld, LLC ("Campbell") files a motion for summary judgment seeking to dismiss this action on the basis that no Campbell Hausfeld product has been identified in relation to plaintiff Kenneth Nankervis' ("Mr. Nankervis") lung cancer. See Memorandum of Law in Support of Campbell Hausfeld, LLC's Motion for Summary Judgment, p. 2. Defendant Campbell highlights that plaintiff has a long history of cigarette use, and that plaintiff cannot prove he was exposed to **asbestos** from his work replacing gaskets on air compressors manufactured by moving defendant. See *id.* Defendant Campbell additionally notes that plaintiff's description of gaskets replaced in defendant's [\*2] air compressors would not have contained **asbestos**. See *id.* at p. 4.

[\*\*3] Plaintiff opposes, highlighting defendant Campbell's manufacturing of air compressors that utilized **asbestos**-containing gaskets through the time period of Mr. Nankervis' work as a roofer and matching his description. See Affirmation in Opposition to Defendant Campbell Hausfeld, LLC's Motion for Summary Judgment, p. 5. Defendant Campbell's reply references an entirely different plaintiff from the instant matter and, thus, is irrelevant herein. See Memorandum of Law in Further Support of CH Transition Company, LLC f/k/a Campbell Hausfeld, LLC's Motion for Summary Judgment, p. 2 ("Plaintiff Francesco Sparano").

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 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the [\*3] 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.

[\*\*4] 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 Campbell 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.*

Moving defendant's arguments [\*4] focus entirely on plaintiff's testimony as opposed to affirmatively establishing that their products could not have causally contributed to plaintiff's lung cancer. As conflicting evidence has been presented herein with regards to defendant Campbell's manufacturing of air compressors utilizing **asbestos**-containing parts during the period of Mr. Nankervis' exposure, issues of fact exist to preclude summary judgment. Moreover, defendant Campbell has

wholly failed to meet its burden to establish that its products could not have been the cause for Mr. Nankervis' illness. See *Reid v Georgia-Pacific Corp.*, *supra*.

As a reasonable juror could decide that **asbestos** exposure from defendant Campbell's air compressors or compressor parts was a contributing cause of Mr. Nankervis' lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Campbell'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.

**11/21/2023**

**DATE**

/s/ Adam Silvera

**ADAM SILVERA, J.S.C. [\*5]**

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