

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

Supreme Court of New York, New York County

December 12, 2023, Decided; December 13, 2023, Filed

INDEX NO. 190061/2019

Reporter

2023 N.Y. Misc. LEXIS 23099 *; 2023 NY Slip Op 34363(U) **

[1]** MARIE BASSI RYDER, 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, AMERICAN BILTRITE INC, ARCONIC, INC, ARMSTRONG INTERNATIONAL, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BEAZER EAST, INC., F/K/A KOPPERS COMPANY INC, BLACKMER, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, 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, CERTAINTIED CORPORATION, CLEAVER BROOKS COMPANY, INC, CLYDE UNION, INC, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., COURTER & COMPANY INCORPORATED, CRANE CO, CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, CROLL REYNOLDS ENGINEERING CO., INC, CROSBY VALVE LLC, CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC, CUPPLES PRODUCTS CORPORATION, DANA COMPANIES, LLC, DOMCO PRODUCTS TEXAS, 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, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC, FOSTER WHEELER, L.L.C, GENERAL ELECTRIC COMPANY, GOODYEAR

CANADA, INC, GOULDS PUMPS LLC, GRINNELL LLC, H.H. ROBERTSON COMPANY, HACON, INC. INDIVIDUALLY AND AS SUCCESSOR TO CUPPLES PRODUCTS CORPORATION, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LENNOX INDUSTRIES, INC, MARIO & DIBONO PLASTERING CO., INC, MILTON ROY COMPANY, MORSE DIESEL, INC, NORTHROP GRUMMAN CORP. AS SUCCESSOR TO GEORGE A. FULLER COMPANY, O'CONNOR CONSTRUCTORS, INC., F/K/A THOMAS O'CONNOR & CONNOR & CO., INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RESEARCH-COTTRELL INCORPORATED, N/K/A AWT AIR COMPANY INC, RILEY POWER INC, SEQUOIA VENTURES, INC., F/K/A BECHTEL CORPORATION, SLANT/FIN CORPORATION, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, SUPERIOR BOILER WORKS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN LIQUIDATING CORP, TISHMAN REALTY & CONSTRUCTION CO., INC, TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UNITED CONVEYOR 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, YUBA HEAT TRANSFER LLC, ZY-TECH GLOBAL INDUSTRIES, INC., PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, summary judgment motion, fire-proofing, notice, spray, memo, working conditions, **asbestos**-containing, construction manager, exposed to **asbestos**, general contractor, issue of fact, matter of law, sub-contractor, **asbestos**-free, contractors, indicates, switch, unsafe

Judges: [*1] PRESENT: HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

[*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 Arconic, Inc. f/k/a Alcoa, Inc. ("ALCOA") moves for summary judgment to dismiss on the basis that **asbestos**-containing fire-proofing material was not in use at the World Trade Center during plaintiff's employment and that ALCOA, as a general contractor, [*3] did not supervise or control plaintiff's work as a sub-contractor employee. See Memorandum of Law, dated June 15, 2023, p. 2-4. Plaintiff decedent, Kevin Ryder ("Mr. Ryder") opposes, noting that a general contractor can be held liable for injury when it has actual or constructive notice of an unsafe work condition or created such working conditions. See Plaintiff's Opposition to Defendant ALCOA's Motion for Summary Judgment, p. 13-14. Defendant replies, reemphasizing that fire-proofing spray was **asbestos**-free after 1970.

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 [*2] 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). 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 Schmieder](#), 46 NY2d 471, 475-476, 386 N.E.2d 1324, 414 N.Y.S.2d 304 (1979). Furthermore, the Appellate Division, [*4] 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 [*3] injury". [Reid v Georgia-Pacific Corp.](#), 212 AD2d 462, 463, 622 N.Y.S.2d 946 (1st Dep't 1995).

Defendant ALCOA fails to meet its burden at summary judgment. Defendant's motion relies primarily on one memo from 1970 from the construction manager of the World Trade Center discussing contracts and use of **asbestos** fire-proofing spray. See Memorandum of Law, *supra*, at p. 3. This memo indicates that an agreement was reached between the construction manager and contractors regarding the costs necessary to switch over to **asbestos**-free fire-proofing spray. Such memo does not indicate a firm date by which the switch must take place nor any confirmation that use of **asbestos**-containing spray was not resumed for a time period after this 1970 internal evaluation and discussion with contractors. Defendant ALCOA further relies on Mr. Ryder's social security records which indicates his employment at the World Trade Center beginning in 1970. Despite defendant ALCOA's arguments, this is not dispositive of whether Mr. Ryder was exposed to **asbestos** during his employment.

Plaintiffs have offered sufficient documentary evidence to raise a question of fact as to the extent of **asbestos**-containing material in use at the World Trade Center post-1970, its proximity to plaintiffs work, and whether [*4] defendant ALCOA had notice of, or

created, the dangerous condition. See Plaintiff's Opposition, *supra*, at p. 13-15. It is also clear via the many 1970 memos in both parties' Exhibits that defendant ALCOA was well-aware of risks surrounding the use of **asbestos**-products. See *id.* at p. 6-7. Finally, there is apparent evidence that defendant ALCOA was involved in selecting the materials used by its sub-contractors. *Id.*

As a reasonable juror could determine that Mr. Ryder was exposed to **asbestos** during his work at the World Trade Center and that defendant ALCOA had notice of an unsafe work **[**5]** condition to render it liable for Mr. Ryder's injuries, issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant ALCOA'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.

12/12/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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