Thomas v Avon Prods., Inc.

Supreme Court of New York, New York County

December 11, 2023, Decided

INDEX NO. 190126/2020

Reporter
2023 N.Y. Misc. LEXIS 23017 *; 2023 NY Slip Op 34319(U) **

[1]** CHRISTINA THOMAS, Plaintiff, - v - AVON PRODUCTS, INC., CHANEL, INC, CLINIQUE LABORATORIES, LLC, ESTEE LAUDER INC., IMI FABI (DIANA) LLC, KOLMAR LABORATORIES, INC., L'OREAL USA, INC., REVLON INC., INDIVIDUALLY AND AS SUCCESSORIN-INTEREST TO CHARLES OF THE RITZ, THE ESTEE LAUDER COMPANIES INC., YVES SAINT LAURENT AMERICA, INC., Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

manufactured, products, summary judgment, summary judgment motion, causation, matter of law, confirmed, contributed, contractor, documents, exposure, Reply, usage

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 007) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 445, 446, 447, 448, 449 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 denied for the reasons set forth below.

Here, defendant Port Jervis Laboratories, Inc., s/h/a Kolmar Laboratories, Inc. (-Kolmar") moves for summary judgment to dismiss this action on the grounds that plaintiff Christina Thomas has not established that **[*2]** she was exposed to any ***asbestos***-containing product manufactured by Kolmar, that any such exposure has not been adequately linked to causation, and that any such product was manufactured per the specifications of Johnson & Johnson and for which defendant Kolmar would not be liable. *See* Memorandum of Law in Support of Motion for **[**2]** Summary Judgment by Port Jervis Laboratories, Inc. s/h/a Kolmar Laboratories, Inc., p. 1-2. In opposition, plaintiff notes that defendant has confirmed its manufacturing role in a product at issue herein and has had a significant role in manufacturing such product, that plaintiff's experts have offered exposure evidence regarding ***asbestos*** in the products at issue, and that defendant Kolmar can be held liable for a product it manufactured regardless of its contractor status. *See* Memorandum of Law in Support of Plaintiff's Opposition to Defendant Kolmar Laboratories, Inc.'s Motion for Summary Judgment, p. 9-10. Defendant Kolmar replies, highlighting its expert affidavits from corporative representatives emphasizing that it was only one of many manufacturers for the products at issue herein and that plaintiff's use of such products both pre-dated and post-dated **[*3]** defendant Kolmar's manufacturing period of it. *See* Reply Memorandum of Law in Support of Motion for Summary Judgment by Port Jervis Laboratories, Inc. s/h/a Kolmar Laboratories, Inc., p. 5.

Moving defendant further notes that plaintiff has offered no expert testimony specific to defendant Kolmar or its products, and that plaintiff relies heavily on the opinion of Dr. Moline. *Id.* at p. 9-10. Finally, moving defendant reiterates its "contractor" defense. *Id.* at 11.

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 motion. *See* id. at 853.

[3]** 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 **[*4]** 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 Kolmar 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.* The Appellate Division, First Department, recently affirmed this Court's 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 **[*5]** of the experts' sufficient to raise a question of fact, and to preclude summary judgment.

Moving defendant's arguments focus largely on plaintiffs evidence and lack of ability to pinpoint the proportion of products used that may have been actually manufactured by defendant **[**4]** Kolmar, if any, while confirming simultaneously that they were manufacturers of such products and that products of their manufacturing were available prior to plaintiff's usage period in the 1990s. This is plainly insufficient to meet moving defendant's standard at summary judgment and defendant Kolmar has failed to "establish that its products could not have contributed to the causation of plaintiff's injury." *Reid v Georgia-Pacific Corp., supra*.

Plaintiff's expert reports establish conflicting evidence regarding the dangers of the talc used by moving defendant and moving defendant's knowledge of such dangers. Further, plaintiffs testimony clearly identifies products that moving defendant has in fact been a manufacturer of, and described her usage of such products during time periods after moving defendant's confirmed involvement.

Accordingly, it is

ORDERED that defendant Kolmar's motion for summary judgment is denied **[*6]** 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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