

## [Daly v. Amchem Prods., Inc.](#)

Supreme Court of New York, New York County

March 4, 2024, Decided; March 13, 2024, Published

190297/2019

### Reporter

2024 NYLJ LEXIS 760 \*

Daly v. Amchem Prods., Inc.

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(Daly v. Amchem Prods., Inc., NYLJ, Mar. 13, 2024 at p.17, col.2)

### Core Terms

gaskets, regulators, summary judgment, asbestos, recommend, partial summary judgment, summary judgment motion, causation, question of fact, issue of fact, matter of law, asbestos-containing, involvement, third-party, products, exposure to asbestos, asbestos exposure, motion to dismiss, record evidence, instant motion, integrating, manufacture, unequivocal, documents, exposure, mechanic, grounds, defeat

**Judges:** [\*1] Judge: Justice Adam Silvera

### Opinion

Defendant Fisher Controls International LLC ("Fisher") moved to dismiss this action on the grounds that plaintiff John B. Daly, Jr. ("Mr. Daly") cannot establish exposure to asbestos from any Fisher product and has instead identified third-party products. Mr. Daly identified asbestos gaskets surrounding Fisher regulators during the course of his work as a mechanic for Consolidated Edison Company from 1976-2012. Defendant Fisher stated that it did not manufacture such asbestos-containing gaskets or sell, supply, or recommend them such that they should not be held liable for Mr. Daly's exposure. The motion was denied. The court held Mr. Daly's testimony clearly identified asbestos exposure from defendant Fisher's regulators, and that plaintiff provided record evidence of moving defendant's recommendation of asbestos gaskets for used with

such regulators. Such evidence raised a sufficient question of fact as to defendant Fisher's involvement with the asbestos gaskets at issue and whether they substantially participated in integrating or recommending such gaskets with Fisher-manufactured regulators. As such, issues of fact existed sufficient to defeat summary [\*2] judgment.

Full Case Digest Text

The following e-filed documents, listed by NYSCEF document number (Motion 003) 128, 129, 130, 131, 132, 133, 134, 135, 138, 153, 155, 158, 159, 160, 161, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

### DECISION

ORDER ON MOTION Upon the foregoing documents, it is ordered that the instant motion for partial summary judgment seeking dismissal of this certain claims in this action, pursuant to [CPLR §3212 \(e\)](#), is denied for the reasons set forth below. Here, defendant Fisher Controls International LLC ("Fisher") moves to dismiss this action on the grounds that plaintiff John B. Daly, Jr. ("Mr. Daly") cannot establish exposure to asbestos from any Fisher product, and has instead identified third-party products. Mr. Daly identified asbestos gaskets surrounding Fisher regulators during the course of his work as a mechanic for Consolidated Edison Company from 1976-2012. See Affirmation in Opposition to Defendant Fisher Controls International, LLC's Motion for Summary Judgment, p. 2-5. Defendant Fisher states that it did not manufacture such asbestos-containing gaskets or sell, supply, [\*3] or recommend them such that they should not be held liable for Mr. Daly's exposure pursuant to [In re New York City Asbestos Litigation \(Dummitt\), Matter of New York City Asbestos Litig., 27 N.Y.3d 765, 799 \(N.Y. 2016\)](#). See Memorandum of Law in Support of Fisher Controls International LLC's Motion for Partial Summary Judgment, p. 5-9.

In opposition, plaintiff highlights Mr. Daly's clear and unequivocal testimony regarding defendant Fisher's regulators, as well as their exhibits with documentary evidence indicating defendant Fisher's involvement with **asbestos**-containing gaskets. See Affirmation in Opposition, supra, p. 2-4.

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 (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](#).

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 (1980). "In determining [\*4] 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 (1st Dep't 1992), citing [Dauman Displays, Inc. v. Masturzo](#), 168 AD2d 204 (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 (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 (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 (1st Dep't 1995).

Ordinarily, the appropriate standard at summary judgment for moving defendant Fisher in an **asbestos** action would be that of [Dyer v. Amchem Products Inc.](#), 207 AD3d 408, 409 (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 [\*5] causation evidence constituted the classic 'battle of the experts'" sufficient to raise a question of fact, and to preclude summary judgment. However, in the instant motion, defendant Fisher correctly identifies [In re New York City Asbestos Litigation \(Dummitt\)](#), 27 NY3d 765, 799 (N.Y. 2016) as the standard governing defendant's liability for solely third-party products.

The Court finds that Mr. Daly's testimony clearly identifies **asbestos** exposure from defendant Fisher's regulators, and that plaintiff has provided record evidence of moving defendant's recommendation of **asbestos** gaskets for used with such regulators. See Affirmation in Opposition, supra, Exh. 3, p. 16-17. Such evidence raises a sufficient question of fact as to defendant Fisher's involvement with the **asbestos** gaskets at issue herein and whether they "substantially participated" in integrating or recommending such gaskets with Fisher-manufactured regulators. See [Dummitt, supra](#). As such, issues of fact exist sufficient to defeat summary judgment on such claims.

Accordingly, it is

ORDERED that defendant Fisher's motion for partial 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. [\*6]

This constitutes the Decision/Order of the Court.

CHECK ONE: CASE DISPOSED X NON-FINAL DISPOSITION GRANTED X DENIED GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Dated: March 4, 2024

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