

Gregory S McPolin As Ex'r for the Est. of v. Air

Supreme Court of New York, New York County

July 26, 2024, Decided

INDEX NO. 190003/2020

Reporter

2024 N.Y. Misc. LEXIS 3502 *; 2024 NY Slip Op 32600(U) **

[1]** GREGORY S MCPOLIN AS EXECUTOR FOR THE ESTATE OF PAUL J MCPOLIN AND EVANGELINE MCPOLIN, INDIVIDUALLY, Plaintiff, - v - 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, BLACKMER, BRYANT HEATING & COOLING SYSTEMS, CARRIER CORPORATION, CERTAINTTEED CORPORATION, CRANE CO, OAP, INC, DOMCO PRODUCTS TEXAS, INC, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FOSTER WHEELER, L.L.C, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, LENNOX INDUSTRIES, INC, PFIZER, INC. (PFIZER), ROCKWELL AUTOMATION, INC., AS SUCCESSOR IN INTEREST TO ALLEN- BRADLEY COMPANY, LLC, STOCKHOLM VALVES & FITTINGS INC, TISHMAN REALTY & CONSTRUCTION CO., INC, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VIKING PUMP, INC, WARREN PUMPS, LLC, FLOWSERVE US, INC. INDIVIDUALLY AND SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, VIACOMCBS INC. F/K/A CBS CORPORATION, A DELAWARE CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL

NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

products, summary judgment motion, summary judgment, **asbestos**, personal knowledge, issue of fact, documents, prima facie burden, matter of law, manufacture, unequivocal, conclusory, proponent, exposed

Judges: **[*1]** 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) 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 103, 104, 105, 106 were read on this motion to/for DISMISS

[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 decided in accordance with the decision below.

Here, defendant DAP, Inc. k/n/a La Mirada Products Co., Inc. ("DAP") moves for summary judgment arguing that plaintiff is unable to demonstrate that any of defendant DAP's products exposed him to **asbestos**. Defendant DAP states that it did not manufacture or sell any product that resembles the product described by plaintiff. Thus, according to defendant DAP, plaintiff cannot establish that he was exposed to **asbestos** from its products. In support, defendant DAP proffers, *inter alia*, two affidavits of Mr. Ward Treat, who contends that defendant DAP did not manufacture, sell, or supply the

products described by plaintiff. See Memorandum of Law in Support of Defendant DAP, Inc. k/n/a La Miranda Products Co., Inc.'s Motion for Summary Judgment, pp. 2-4.

Plaintiff [*2] opposes, arguing that issues of fact exist as plaintiff testified that he worked with asbestos-containing DAP products. A review of plaintiff's deposition transcript reveals that he identified defendant DAP's products, specifically joint compound. Plaintiff also notes that moving defendant offers no evidence proving that its products could not have caused asbestos-related illness. See Affirmation in Opposition to DAP, Inc.'s Motion for Summary Judgment, p. 2-4. Defendant replies. 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 [**3] 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 [**3] 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 Duuman Displays Inc. v. Masturzo, 168 AD2d 204 (1st Dep't 1990). The court's role is "issue-finding, rather than issue-determination". Sillman 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 Uguriza 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, 622 N.Y.S.2d 946 (1st Dep't 1995).

With respect to the two affidavits from Mr. Ward Treat on which DAP relies to establish that DAP products did not contain asbestos by the end of 1978, the Court finds that Mr. Treat does not possess the requisite personal knowledge to establish that no DAP products containing asbestos were in circulation and used by plaintiff at the time of plaintiff's exposure. See Memorandum of Law in Support, *supra*, Exhs. B and C. Affidavits of Ward Treat dated January [**4] 28, 2012 and November 28, 2009, respectively. Mr. Treat attests that he has acquired knowledge about [**4] DAP products throughout his employment and that he has personal knowledge of the facts set forth herein. Pursuant to CPLR § 3212(b), "[a] motion for summary judgment shall be supported by affidavit. . . by a person having knowledge of the facts". "A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden". JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 384-85, 828 N.E.2d 604, 795 N.Y.S.2d 502 (2005). The First Department, Appellate Division has held "that affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief". Castro New York Univ., 5 AD3d 135, 136, 773 N.Y.S.2d 29 (1st Dept 2004) (internal citations omitted). Here, Mr. Treat's affidavits fail to assert, with any specificity, the information he has acquired through his personal knowledge or experiences with DAP. Mr. Treat's conclusory statements regarding DAP products are insufficient to establish entitlement to summary judgment absent any supporting statements or documents as to how he obtained such knowledge. Furthermore, the affidavits confirm that some formulations of DAP products contained asbestos. Thus, DAP has failed to meet its prima facie burden. Moreover, given the unequivocal testimony of plaintiff, [**5] sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is hereby

ORDERED that defendant DAP'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 [**5] Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

7/26/24

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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