

Reeves v. Amchem Prods., Inc.

Supreme Court of New York, New York County

July 25, 2024, Decided

INDEX NO. 190006/2020

Reporter

2024 N.Y. Misc. LEXIS 3542 *; 2024 NY Slip Op 32601(U) **

[1]** JOHN P REEVES, Plaintiff, - v - AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, BLACKMER, BORGWARNER MORSE TEC LLC, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTED CORPORATION, CRANE CO, DAP, INC, GENERAL ELECTRIC COMPANY, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, PFIZER, INC. (PFIZER), U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, causation, summary judgment motion, **asbestos**, matter of law, exposure, products, caulk, issue of fact, speculation, illness

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

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

Upon the foregoing documents, it is hereby ordered that Defendant DAP, Inc.'s (hereinafter referred to as "DAP") motion for summary judgment is denied for the reasons set forth below.

The case at issue arises from plaintiff's 2019 diagnosis of lung cancer, which plaintiff alleges was caused by DAP **asbestos** containing caulk from serving in the U.S. Navy aboard the USS Forrestal from 1961 to 1964, as well as caulking work plaintiff performed on various occasions in his home, and DAP **asbestos** containing window glazing from renovating his home **[**2]** between 1966 and 1967. DAP moves to dismiss this action on the basis that plaintiff's claim is "speculative" because not all DAP caulks historically contained **asbestos**, and that plaintiff failed to establish specific causation. See Memorandum of Law in Support of Defendant DAP, Inc. k/n/a La Mirada Products Co., Inc.'s Motion for Summary Judgment, p. 2. Plaintiff opposes, arguing that moving defendant did not prove that its products could not have caused **asbestos**-related illness to plaintiff and highlighting plaintiff's testimony, as well as that of plaintiff's experts. Defendant **[*2]** replies and withdraws its speculation argument.

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 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 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).

[3]** 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, **[*3]** 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 plaintiffs injury". [Reid v Georgia-Pacific Corp., 212 AD2d 462, 463, 622 N.Y.S.2d 946 \(1st Dep't 1995\)](#).

As to causation, DAP's expert affidavit and report from Robert C. Adams, CIH, CSP, FAIHA, is not case-specific and forms no opinions based on plaintiff's actual exposure and work timeline. See Memorandum of Law in Support, *supra*, Exh. K, Affidavit and Report of Robert C. Adams, CIH, CSP, FAIHA, dated October 5, 2023 and September 19, 2023, respectively. This is plainly insufficient to meet defendant's burden at summary judgment. Contrarily, plaintiffs expert, Dr. Mark Ginsburg, specifically reviewed plaintiff's exposure and occupational history to provide causation analysis. See Affirmation in Support, *supra*, Exh. M, Report and Affidavit of Dr. Mark Ginsburg's, MD, dated March 13, 2023 and April 3, 2023, respectively.

Moreover, the appropriate standard at summary judgment for defendant DAP can be found in [Dyer v Amchem Prods. Inc., 207 A.D.3d 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 **[*4]** 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., 221 A.D.3d 491, 199 N.Y.S.3d 56, 2023 NY Slip Op 05796 \(1st Dep't 2023\)](#), stating that "the parties' competing causation evidence constituted the classic 'battle of the experts'" sufficient to raise a question of fact, and to preclude summary judgment. Here, defendant DAP fails to meet their burden on summary judgment as set forth in [Dyer](#).

[4]** As a reasonable juror could decide that **asbestos** exposure from DAP products was a contributing cause of plaintiffs illness, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

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 Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

7/25/2024

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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