Toth v Amchem Prods., Inc.

Supreme Court of New York, New York County

August 9, 2024, Decided

Index No. 190039/2021

Reporter
2024 N.Y. Misc. LEXIS 3732 *; 2024 NY Slip Op 32823(U) **

[1]** ROBERT L TOTH, Plaintiff, - v - AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, ATWOOD & MORRILL COMPANY, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC, CRANE CO, CROSBY VALVE LLC,FOSTER WHEELER, L.L.C, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC.ITT LLC, INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, MILTON ROY COMPANY, PFIZER, INC. (PFIZER), UNION CARBIDE CORPORATION, U.S. RUBBER COMPANY (UNIROYAL), 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Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.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, summary judgment motion, ***asbestos***-containing, ***asbestos***, products, pumps

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

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 136 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 Milton Roy, LLC (Milton Roy) moves to dismiss this action on the grounds that plaintiff Robert Toth did not identify Milton Roy as a manufacturer of any ***asbestos***-containing products he was exposed to during the course of his work as a sheet metal worker at various Con Ed powerhouses from 1961-1991. Moving defendant's motion rests entirely upon **[**2]** challenging plaintiff's evidence implicating Milton Roy as a manufacturer in plaintiff's ***asbestos*** exposure. *See* Memorandum of Law in Support of Defendant Milton Roy, LLC's Motion for Summary Judgment, p. 9-10. Defendant Milton Roy proffers the affidavit of their corporate representative to indicate that the varieties of pumps shipped to plaintiff's **[*2]** former jobsites did not utilize ***asbestos***-containing gaskets or other parts. *See* Notice of Motion, Exh. H, Affidavit of James B. Carling, dated Dec. 29, 2023, p. 12.

Plaintiff opposes on the basis of external depositions in which Milton Roy products have been identified at Con Ed powerhouses, including those that plaintiff specifically worked at. *See* Affirmation in Opposition to Milton Roy, LLC's Motion for Summary Judgment, p. 8-10. Plaintiff also proffers excerpts from Milton Roy documents indicating the use of ***asbestos***-containing pumps and noting defendant's responsibility for replacement parts that contained ***asbestos***. *See* Affirmation in Opposition, *supra*, p. 10-12. Defendant Milton Roy replies, reiterating their argument that plaintiff did not mention Milton Roy and that the external depositions should not be considered and do not include

sufficient details connecting plaintiff to Milton Roy. Defendants also redirect the court to Mr. Carling's affidavit noting that the pumps supplied to Con Ed locations did not contain ***asbestos*** packing. *See* Reply Affirmation, p. 6.

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently **[*3]** established that it is warranted as a matter of law. *See* *Alvarez v Prospect Hasp., 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*.

[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 (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 (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 **[*4]** to the causation of plaintiffs injury". *Reid v Georgia-Pacific Corp., 212 AD2d 462, 463 (1st Dep't 1995)*.

The appropriate standard at summary judgment for moving defendant Milton Roy can be found in *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 *Sawn v Dykes Lumber Co., Inc., et. al., 221 AD3d 491 (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. *Sason, 221 AD3d at 492*.

[4]** Here, the Court notes that plaintiff's affidavit in which he identified several Con Ed Powerhouses at which he worked is dated July 23, 2020, he was deposed on April 11, 2023, and he remains alive today at age 86. *See* Affirmation in Opposition, *supra*, p. 6-7. Despite the extenuating circumstances, plaintiff provided clear and unequivocal details regarding his work history from approximately 1961-1991, including the locations of powerhouses he worked at, what his role was, and which specific categories of products he was exposed to. *Id.* at p. 6-8. The Appellate Division, First **[*5]** Department has affirmed denials of summary judgment in similar instances. In *Koulermos v A.O. Smith Water Prods., 137 AD3d 575, 576 (1st Dep't 2016)*, the court noted that defendant's "contention rested on evidence of plaintiff's inability to remember precisely when he worked at the facility" and stated that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment".

Moreover, the appellate court stated that the defendants affirmatively "failed to present evidence... [regarding] when their employees were present at the facility and whether or not those employees used ***asbestos***-containing products". *Id.* Similarly, the First Department noted in *Krok v AERCTO International Inc., et. al, 146 AD3d 700, 700 (1st Dep't 2017)* that "reliance on the decedent's inability to identify its product as a source of his exposure to ***asbestos*** is misplaced" and that "plaintiffs raised an issue of fact by submitting evidence that defendant's ***asbestos***-containing pumps were present on the ship to which the decedent was assigned as a boiler tender fireman." *See also* Affirmation in Opposition, *supra*, p. 8-10. Plaintiffs have met the standard set forth by the Appellate Division to sufficiently raise a question of fact. The weight of the evidence is an issue for the trier of fact, but for purposes **[*6]** of summary judgment, the non-party testimony and documentary evidence regarding defendant Milton Roy's products raise **[**5]** issues of fact. While Mr. Carling's affidavit provides sufficient detail to establish moving defendant's *prima facie* case, plaintiff presents contradicting evidence.

As conflicting evidence has been presented herein, and

a reasonable juror could determine that ***asbestos*** exposure from Milton Roy's pumps was a contributing cause of plaintiff's lung cancer, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Milton Roy, LLC'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.

8/9/2024

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.
