

Pefanis v. A.O. Smith Water Prods. Co

Supreme Court of New York, New York County

October 2, 2024, Decided

INDEX NO. 190302/2020

Reporter

2024 N.Y. Misc. LEXIS 8361 *; 2024 NY Slip Op 33502(U) **

[1]** JENNIFER PEFANIS, AS EXECUTRIX FOR THE ESTATE OF ANNA M. BUCZYNSKI, Plaintiff, - v - A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, DAP, INC, DONALD DURHAM COMPANY, GENERAL ELECTRIC COMPANY, H.M. ROYAL, INC, PFIZER, INC. (PFIZER), PECORA CORPORATION, R.T.VANDERBILT HOLDING COMPANY, INC, SHERWIN WILLIAMS COMPANY, 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, VANDERBILT MINERALS LLC INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO INTERNATIONAL TALC COMPANY, INC., Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

asbestos, products, summary judgment, causation, summary judgment motion, exposure, caulking

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 003) 114, 115, 116, 117,

118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214

were read on this motion to/for DISMISSAL.

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 instant matter is premised upon plaintiff Anna M. Buczynski's alleged exposure to asbestos as a result of laundering her former husband Anthony Buczynski's clothing. From 1976 to 2000, Mr. Buczynski used DAP's caulking and glazing products in various homes he shared with plaintiff, as well as for servicing customers of his hardware business. Mr. Buczynski **[**2]** testified that asbestos dust would cover his clothes from work, which he would wear home, and that Ms. Buczynski did the laundry the majority of the time they were married. Plaintiff was subsequently diagnosed with mesothelioma on December 11, 2017, and passed away on March **[*2]** 21, 2018.

DAP moves to dismiss this action on the basis that plaintiffs 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. 11-14. Plaintiff opposes, arguing that moving defendant did not prove that its products could not have caused plaintiff asbestos-related illness and highlighting plaintiff's former husband's testimony, as well as that of plaintiffs experts. Defendant 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 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](#), [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 **[*3]** 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 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](#), **[**3]** [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 plaintiffs 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 defendant DAP can be found in [Dyer v Amchem Products Inc.](#), [207 AD3d 408](#), [40 \(1st Dep't 2022\)](#). 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.](#), [221 AD3d 491](#), [492](#), [199 N.Y.S.3d 56 \(1st Dep't 2023\)](#), stating that "the parties' **[*4]** 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 has failed to affirmatively establish that Mr. Buczynski's alleged exposure to **asbestos** from DAP products could not have contributed to plaintiff's illness. The Court finds that Mr. Buczynski provided unequivocal testimony identifying defendant DAP products as a source of his **asbestos** exposure. See Plaintiff's Affirmation in Opposition to Defendant DAP Inc's Motion for Summary Judgment, p. 4-8. In addition, defendant DAP relies heavily upon three affidavits from a former DAP employee, Ward Treat, to establish that **[**4]** **asbestos** was removed from DAP, Inc's entire product lines by 1978. See Memorandum of Law in Support, *supra*, Exhs. B, C, and D, Affidavits of Ward Treat dated March 1, 2011, Sept. 16, 2009, and April 15, 2014, respectively. Mr. Treat does not possess the requisite personal knowledge to establish that no DAP products containing **asbestos** were in circulation and used by Mr. Buczynski. Furthermore, it confirms that some formulations of DAP caulk contained **asbestos**. Given the unequivocal testimony of Mr. Buczynski, **[*5]** and the conflicting statements of Mr. Treat, sufficient issues of fact exist to preclude summary judgment. See Plaintiff's Affirmation in Opposition, *supra*.

As to causation, DAP provides a case-specific expert affidavit and report from Robert C. Adams, CIH, CSP, FAIHA, in which he concludes that "it is highly unlikely that Ms. Buczynski had any **asbestos** exposures from Mr. Buczynski's use of DAP caulk or glazing products, or from her handling of Mr. Buczynski's dirty work clothing that would have been greater than the ambient background concentrations of **asbestos** that would be present in the atmosphere." See Memorandum of Law in Support, *supra*, Exh. K, Affidavit and Report of Robert C. Adams, MS, CIH, CSP, FAIHA, p. 11, dated February 26, 2024 and December 20, 2023, respectively. Contrarily, plaintiff's expert, Dr. Mark Ginsburg, specifically reviewed plaintiff's exposure to provide causation analysis and concludes that "[Mr. Buczynski's] described exposure to DAP caulking, when he applied, chiseled, removed, and sanded **asbestos** containing DAP caulking; individually and cumulatively caused Ms. Buczynski's malignant mesothelioma". See Plaintiff's Affirmation in Opposition, *supra*, Exh. **[*6]** 11, Report of Dr. Mark Ellis Ginsburg, MD, dated April 19, 2024, p. 27.

As defendant DAP has failed to "establish that its products could not have contributed to the causation of plaintiff's injury" as stated in [Reid v Georgia-Pacific Corp.](#), *supra.*, and a **[**5]** reasonable juror could

determine that **asbestos** exposure from DAP products was a contributing cause of plaintiff's 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.

10/02/2024

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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