

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

Supreme Court of New York, New York County

November 13, 2024, Decided

INDEX NO. 190380/2018

Reporter

2024 N.Y. Misc. LEXIS 22466 *; 2024 NY Slip Op 34112(U) **

[**1] JANE E. WIXTED, AS EXECUTRIX FOR THE ESTATE OF THOMAS N. WIXTED, AND JANE E. WIXTED, INDIVIDUALLY, Plaintiff, - v. - A.O. SMITH WATER PRODUCTS CO., AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC., ARMSTRONG PUMPS, INC., ATWOOD & MORRILL COMPANY, BLACKMER, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, 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, ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, 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 INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., JENKINS BROS., MILTON ROY COMPANY, RHEEM MANUFACTURING COMPANY, RILEY POWER INC, SUPERIOR BOILER WORKS, INC., TACO, INC., THE NASH ENGINEERING COMPANY, WARREN PUMPS, LLC, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

valves, summary judgment, **asbestos**, movant, summary judgment motion, manufactured, gaskets, **asbestos** product, memoranda of law, initial burden, matter of law, duty to warn, exposed, entitlement to judgment, issue of material fact, sufficient evidence, toxic tort, Affirmation, insulation, mechanical, documents, proffered, products, flange, papers, Reply, facie, toxin, gaps, warn

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) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131, 135 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth below, the Court denies the motion for summary judgment by defendant Crosby Valve, LLC ("Defendant"), pursuant to [CPLR § 3212](#).

A court must grant summary judgment if the movant establishes its claim "as a matter of law" and no "issue of fact" warranting trial remains. [CPLR § 3212\(b\)](#). The movant has the initial burden to show "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 Univ. Med. Ctr., 64 NY2d 851, 853 \(1985\)](#). The movant's failure to meet its

initial burden requires denial of the motion without probing the sufficiency of the opponent's papers. See *id.* Furthermore, even if the movant makes a prima facie showing of entitlement to judgment as a matter of law, the court must deny a summary judgment motion if the opponent's papers present admissible evidence establishing that a "material issue[] of [*2] fact" remains. [Alvarez v Prospect Hosp.](#), 68 NY2d 320, 324 (1986).

[**2] "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), quoting [Dauman Displays, Inc. v Masturzo](#), 168 AD2d 204, 205 (1st Dep't 1990). The court's role centers on "issue-finding, [not] issue-determination." [Siliman v Twentieth Century-Fox Film Corp.](#), 3 NY2d 395, 404 (1957), quoting [Esteve v Abad](#), 271 AD 725, 727 (1st Dep't 1947) (internal quotation marks omitted). As a result, and because it is a "drastic remedy," [Vega v Restani Constr. Corp.](#), 18 NY3d 499, 503 (2012), summary judgment is rarely granted in negligence actions unless no conflict exists in the evidence. See [Ugarriza v Schmieder](#), 46 NY2d 471, 475-476 (1979).

[**3] In toxic tort cases about a defendant's alleged failures to warn of a toxin's dangers, as here, the court must first decide whether the defendant has a legal duty to warn the plaintiff. [Matter of New York City Asbestos Litig. \(Dummitt\)](#), 27 NY3d 765, 787 (2016). "[T]he manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." *Id.* at 793. The concept of necessity is a functional one that extends beyond "purely ... mechanical necessity." *Id.* at 796; see also [Peraica v A.O. Smith Water Prods. Co.](#), 143 AD3d 448, 450 (1st Dep't 2016) (considering the "practical[] necess[ity]" of using **asbestos** products with the defendant's [*3] valves). If a duty to warn exists, a plaintiff must then show, among other things, that he was exposed to a toxin by the defendant.¹ See [Dyer v Amchem Prods. Inc.](#), 207 AD3d 408, 410 (1st Dep't 2022), citing [Parker](#)

[v Mobil Oil Corp.](#), 7 NY3d 434, 448 (2006).

When a defendant in a toxic tort case moves for summary judgment, "the burdens of proof are virtually reversed." [Lopez v Gem Gravure Co., Inc.](#), 50 AD3d 1102, 1108 (2d Dep't 2008, Lifson, J.P., dissenting). Thus, for the moving defendant to meet its initial burden on summary judgment, it must do more than "point[] to gaps in [the] opponent's evidence"; it must "affirmatively demonstrate the merit" of its position. [Koulermos v A.O. Smith Water Prods.](#), 137 AD3d 575, 576 (1st Dep't 2016), quoting [Dalton v Educ. Testing Serv.](#), 294 AD2d 462, 463 (2d Dep't 2002); see also [Dyer](#), 207 AD3d at 409 (noting that a summary judgment movant does "not meet its prima facie burden by merely pointing to gaps or deficits in [the] plaintiff's case"); [Reid v Georgia-Pac. Corp.](#), 212 AD2d 462, 463 (1st Dep't 1995) (denying summary judgment [**4] when the defendant "fail[ed] to unequivocally establish that its product could not have contributed to the ... plaintiff's injury").

Here, Defendant moves to dismiss this action on the grounds that the plaintiff, Jane E. Wixted ("Plaintiff"), as executrix for the estate of the decedent, Thomas N. Wixted ("Decedent"), has not established (i) that Decedent was exposed to any **asbestos** products manufactured by Defendant or (ii) that Defendant had a duty to warn Decedent of **asbestos** products that, although not manufactured by Defendant, [*4] were used jointly with Defendant's products. See Memorandum of Law in Support of Crosby Valve, LLC's Motion for Summary Judgment ("Motion") at 4-10. In opposition, Plaintiff points to the testimony of Decedent's former co-worker that Decedent was exposed to **asbestos** from work involving Defendant's valves. See Affirmation in Opposition to Defendant Crosby Valve, LLC's Motion for Summary Judgment ("Opposition") ¶¶ 9-24. Plaintiff also challenges the affidavit of Defendant's corporate representative and, based on the prior testimony of this representative and on Defendant's interrogatory responses, claims that Defendant recommended use of **asbestos** gaskets with its valves. See *id.* 111130-51. Defendant's reply, in addition to reaffirming the arguments in its Motion, argues that Plaintiff's Opposition should be stricken from the record because it is a memorandum of law cloaked as an affirmation, in violation of court rules. See Reply Memorandum of Law in Support of Crosby Valve, LLC's Motion for Summary Judgment at 2-8.

Plaintiff has proffered sufficient evidence, including (i) of Defendant's awareness of the use of **asbestos** flange gaskets or insulation along with its valves and (ii) of

¹ Although the duty and exposure analyses are described here as two separate steps, the analyses are often collapsed into one.

Decedent's [*5] work with Defendant's valves, to raise issues of fact about the extent of Defendant's involvement with **asbestos** flange gaskets and insulation. For example, Plaintiff has proffered evidence that Defendant at times shipped **asbestos** gaskets with its valves. See Opposition, Exh. 8, Depo. Tr. of [**5] Robert Martin, dated September 12, 2006, at 83-85. As such, factual questions exist as to Defendant's "substantial[] participat[ion]" in the integration of its valves with products containing **asbestos**. [Dummitt, 27 NY3d at 799](#), quoting *Restatement [Third] of Torts: Products Liability* § 5(b)(1). Thus, summary judgment must be denied.

Accordingly, it is

ORDERED that Defendant'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.

11/13/2024

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.