Tippin v. 3M Co.

Supreme Court of New York, New York County

December 6, 2024, Decided

INDEX NO. 190062/2021

Reporter
2024 N.Y. Misc. LEXIS 25061 *; 2024 NY Slip Op 34351(U) **

[1]** COREY G. TIPPIN, Plaintiff, - v - 3M COMPANY, ALCAT, INCORPORATED, AMERICAN INTERNATIONAL INDUSTRIES, AVON PRODUCTS, INC., BOURJOIS, LTD, BRENNTAG NORTH AMERICA, INC, BRENNTAG SPECIALTIES, LLC, BRISTOL-MYERS SQUIBB COMPANY, CHANEL, INC., CHATTEM, INC., COLGATE-PALMOLIVE COMPANY, COTY INC., GLAMOUR INDUSTRIES CO., JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER INC. KERR CORPORATION, KRYOLAN CORPORATION, L'OREAL USA, INC., MAX FACTOR CO., INC., MAYBELLINE, INC., PFIZER INC., R.T. VANDERBILT HOLDING COMPANY, INC., REVLON, INC., THE NESLEMUR COMPANY, UNION CARBIDE CORPORATION, VANDERBILT MINERALS, LLC, WHITTAKER CLARK & DANIELS, INC., YVES SAINT LAURENT AMERICA, INC., BLOCK DRUG COMPANY, INC. IND. AND AS SUCCESSOR-IN-INTEREST TO THE GOLD BOND STERILIZING POWDER COMPANY, A/K/A THE GOLD BOND COMPANY, BLOCK DRUG CORPORATION IND. AND AS SUCCESSOR-IN-INTEREST TO THE GOLD BOND STERILIZING POWDER COMPANY, A/K/A THE GOLD BOND COMPANY, JANSSEN PHARMACEUTICALS, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO JOHNSON & JOHNSON SUBSIDIARIES NAMED JOHNSON & JOHNSON CONSUMER INC., JOHNSON & JOHNSON HOLDCO (NA) INC., F/K/A JOHNSON & JOHNSON CONSUMER INC., KENVUE INC., INDIVIDUALLY AND AS SUCCESSOR-ININTEREST TO JOHNSON & JOHNSON CONSUMER INC., LTL MANAGEMENT LLC, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: *Tippin v. 3M Co., 2021 N.Y. Misc. LEXIS 47200 (N.Y. Sup. Ct., July 21, 2021)*

Core Terms

talc, punitive damages, summary judgment, asbestos, issue of fact, partial summary judgment, argues, initial burden, causation, movant

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 013) 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 569, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628,

629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, **[**2]** 663, 664, 665, 666, 667, 668, 669, 670, 1016, 1017, 1026, 1027, 1031, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1053, 1054 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons set forth below, the Court grants the portion of defendant American International Industries's ("Defendant") motion seeking partial summary judgment, pursuant to *CPLR § 3212*, on punitive damages and denies the remainder of the motion.

A court must grant summary judgment if the movant **[*2]** 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, 476 N.E.2d 642, 487 N.Y.S.2d 316 (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 fact" remains. *Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986)*.

"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)*, quoting *Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205, 562 N.Y.S.2d 89 (1st Dep't 1990)*. The court's role centers on "issue-finding, [not] 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)*, quoting *Esteve v Abad, 271 AD 725, 727, 68 N.Y.S.2d 322 (1st Dep't 1947)* (internal quotation marks omitted). As a result, and because it is a "drastic remedy," *Vega v Restani Constr. Corp., **[**3]** 18 NY3d 499, 503, 965 N.E.2d 240, 942 N.Y.S.2d 13 (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, 386 N.E.2d 1324, 414 N.Y.S.2d 304 (1979)*.

In toxic tort cases, as here, a plaintiff must **[*3]** show that he was exposed to a toxin by the defendant, "that the toxin is capable of causing a particular illness (general causation) and that [he] was exposed to sufficient levels of the toxin to cause the illness (specific causation)." *Dyer v Amchem Prods. Inc., 207 AD3d 408, 410, 171 N.Y.S.3d 498 (1st Dep't 2022)*, quoting *Parker v Mobil Oil Corp., 7 NY3d 434, 448, 857 N.E.2d 1114, 824 N.Y.S.2d 584 (2006)*. To win punitive damages in these cases, a plaintiff must show that the defendant "intentionally" and "unreasonabl[y] disregard[ed] ... a known or obvious risk that was so great as to make it highly probably that harm would follow' and [did] so with conscious indifference to the outcome." *Matter of New York City Asbestos Litig. v Westinghouse Elec. Corp. (Maltese), 89 NY2d 955, 956-957, 678 N.E.2d 467, 655 N.Y.S.2d 855 (1997)*, quoting *Saarinen v Kerr, 84 NY2d 494, 501, 644 N.E.2d 988, 620 N.Y.S.2d 297 (1994)* (internal quotation marks omitted).

When a defendant moves for summary judgment in toxic tort cases, "the burdens of proof are virtually reversed." *Lopez v Gem Gravure Co., Inc., 50 AD3d 1102, 1108, 858 N.Y.S.2d 226 (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, 27 N.Y.S.3d 157 (1st Dep't 2016)*, quoting *Dalton v Educ. Testing Serv., 294 AD2d 462, 463, 742 N.Y.S.2d 364 (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, 622 N.Y.S.2d 946 (1st Dep't 1995)* (denying summary judgment when the defendant "fail[ed] . . . to unequivocally establish that its product could not have **[**4]** **[*4]** contributed to the ... plaintiff's injury"). As detailed, the Court first decides that there are issues for trial on causation and then decides that there are no issues for trial on punitive damages.

I. Causation

Here, Defendant argues that the plaintiff, Corey Tippin ("Plaintiff"), cannot establish that Defendant's product, Clubman Talc, exposed him to asbestos or that any alleged exposure caused his mesothelioma. *See* Memorandum of Law in Support of Defendant American International Industries' Motion Pursuant to *CPLR §3212* for Summary Judgment, or, Alternatively, Partial Summary Judgment ("Motion") at 4, 12-14. Citing to the testimony of its corporate representative, Mr. Charles Loveless, Defendant claims that its products have never used asbestos. *See id.* at 4, citing Affirmation in Support of Defendant American International Industries' Motion for Summary Judgment or, Alternatively, Partial Summary Judgment ("Defendant's Affirmation"), Exh. C, Affidavit of Charles Loveless, dated December 9, 2022, ¶¶ 17, 20. Moreover, relying on studies that did not find an increased risk of mesothelioma in workers exposed to cosmetic talc at work, Defendant argues that less frequent exposure to a better-quality, **[*5]** pharmaceutical-grade talc, as here, must pose less risk and that Plaintiff's exposure, even under worst-case assumptions, was insufficient to cause his cancer. *See id. at 5*, citing Defendant's Affirmation, Exh. D, Expert Report of Kenneth A. Mundt, dated October 14, 2021 *id.* at 7-8. 12-16. Then, assuming it has met its initial burden and poking holes in Plaintiff's expert testimony, Defendant claims that Plaintiff fails to establish that a material issue of fact remains. *See id.* at 8, 14-18.

In opposition, Plaintiff argues that Defendant did not meet its initial summary judgment burden because it did not submit expert evidence that its talc was asbestos-free and instead only relied on Mr. Loveless's testimony. *See* Memorandum of Law in Opposition to Defendant **[**5]** American International Industries Motion for Summary Judgment ("Opposition") at 39. Plaintiff also challenges the assumptions in Defendant's worst-case scenario analysis. *See id.* at 29. And even if Defendant has met its initial summary judgment burden, Plaintiff argues that it has established that issues of fact remain as to the extent of Defendant's responsibility for Plaintiffs cancer. *See id.* at 24-31, 44-45.

In this case, the **[*6]** parties' "competing causation evidence" is the "classic 'battle of the experts,'" sufficient to raise a question of fact and, thus, to preclude summary judgment. *Sason v Dykes Lbr. Co., Inc., 221 A.D.3d 491, 492, 199 N.Y.S.3d 56 (1st Dep't 2023)*, quoting *Shillingford v New York City Tr. Auth., 147 AD3d 465, 465, 46 N.Y.S.3d 110 (1st Dep't 2017)*. It is the jury's job, not the Court's, to "pass on issues of credibility." *Garcia, 180 AD2d at 580*, quoting *Dauman, 168 AD2d at 204*. Defendant has failed "to unequivocally establish that its product could not have contributed to the ... [P]laintiff's injury." *Reid, 212 AD2d at 463*. As Defendant has failed to meet its initial burden, and issues of fact exist, summary judgment must be denied.

H. Punitive Damages

Here, Defendant argues that it did not possess the heightened state of mind required for punitive damages, as it had no reason to believe that its talc was contaminated with asbestos until litigation commenced against it in the 2000s. *See* Motion at 19-21. In fact, Defendant had reason to believe the very opposite, as its talc suppliers certified that the talc that Defendant purchased was asbestos-free. *See id.* at 20.

In opposition, Plaintiff argues that Defendant knew or should have known of the risks associated with asbestos and of the possibility that its talc contained asbestos for several reasons: First, the suppliers' certifications suggest that Defendant was aware of **[*7]** the possibility that Clubman Talc was contaminated with asbestos—otherwise, why require the certifications at all? **[**6]** *See* Opposition at 34. Second, Defendant had a safety department, responsible for overseeing the safe handling of asbestos by its workers, and a regulatory department, responsible for complying with federal regulations, but did not have a consumer safety department. *See id.* at 31-33, 35. Third, Defendant conducted due diligence when it purchased Clubman Talc from its predecessor, which should have alerted it to the possibility that Clubman Talc contained asbestos because its predecessor conducted general, preemptive research on asbestos in talc. *See id.* at 33-34. And fourth, Defendant was generally aware of relevant laws and regulations in the 1980s and 1990s, which should have put it on notice of ongoing research as to the possible presence of asbestos in talc. *See id.* at 35-37.

Plaintiff's arguments do not pass muster and do not reflect the law. Defendant should not be punished with punitive damages for having robust internal controls to try to minimize risk and for following the law. Defendant sought to promote worker safety through its safety program and to promote **[*8]** consumer safety by adhering to relevant laws and regulations and by purchasing talc certified to be free of asbestos. These facts, especially the suppliers'

certifications that the talc was asbestos-free, are sufficient to shift the burden onto Plaintiff to establish a material issue of fact as to punitive damages, which it has not done. Plaintiff has not shown that Defendant "intentionally" and "unreasonabl[y] disregard[ed] ... a known or obvious risk that was so great as to make it highly probably that harm would follow' and [did] so with conscious indifference to the outcome." *Maltese, 89 NY2d at 956-957*, quoting *Saarinen, 84 NY2d at 501* (internal quotation marks omitted). Defendant's "general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury" and that there was some possibility that talc generally—and some remote possibility that Defendant's talc specifically—contained asbestos is insufficient to create an issue of fact.

[7]** By Plaintiff's logic, Defendant would have been better off by not having any internal controls, by not conducting due diligence, by flouting federal law, and by not requiring its suppliers to preemptively test talc for asbestos. Plaintiff's logic would incentivize **[*9]** defendants to turn a blind eye to safety and to the law. Such logic, of course, would present defendants with the ultimate catch-22, rendering them damned-if-they-do, damned-if-they-don't: don't be diligent, and get hit with punitive damages; be diligent, and get hit with punitive damages nonetheless. In other words, Plaintiff suggests that defendants who are conscientious of employee and public safety, and who have taken steps to ensure such safety, are equally deserving of punitive damages as are defendants who have done nothing to ensure, or who have intentionally ignored, public safety. Because that is not the law—nor should it be—Plaintiff's arguments fail.

The law is well settled that "[t]he purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for wanton and reckless, malicious acts and thereby to discourage the defendant and other people [and] companies from acting in a similar way in the future." *Matter of 91st St. Crane Collapse Litig., 154 AD3d 139, 156, 62 N.Y.S.3d 11 (1st Dep't 2017)*, quoting *PJI 2:278* (cleaned up). Here, Defendant's acts do not rise to the level of maliciousness sufficient to warrant punitive damages, and Plaintiff has failed to raise issues of fact regarding punitive damages. As such, the portion of Defendant's motion **[*10]** for partial summary judgment on punitive damages must be granted.

Accordingly, it is

ORDERED that the portion of Defendant's motion for partial summary judgment on punitive damages is granted and Plaintiffs claim for punitive damages is hereby dismissed as to Defendant; and it is further

[8]** ORDERED that the remainder of Defendant's motion for summary judgment is denied; 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.

12/6/2024

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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