

Tryon v A.O. Smith Water Prods. Co

2021 NY Slip Op 32242(U)

November 5, 2021

Supreme Court, New York County

Docket Number: Index No. 190368/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART 13

Justice

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BARBARA TRYON, AS EXECUTRIX FOR THE ESTATE
OF FERRIS O. TRYON, AND BARBARA TRYON,
INDIVIDUALLY,

Plaintiff,

INDEX NO. 190368/2017

MOTION DATE 09/03/2020

MOTION SEQ. NO. 003

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM
PRODUCTS, INC., AURORA PUMP COMPANY,
BURNHAM, LLC, CBS CORPORATION, F/K/A VIACOM
INC., CENTRAL HUDSON GAS & ELECTRIC,
CERTAINTED CORPORATION, CLEAVER BROOKS
COMPANY, INC, CONSOLIDATED EDISON COMPANY,
COURTER & COMPANY INCORPORATED, CRANE CO,
CROSBY VALVE LLC, FMC CORPORATION, FOSTER
WHEELER, L.L.C., GARDNER DENVER, INC, GENERAL
ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL
LLC, HESS CORPORATION, ITT LLC., JENKINS BROS,
KEELER-DORR-OLIVER BOILER COMPANY,
MILWAUKEE VALVE COMPANY, NIAGRA MOHAWK
POWER CORP, NIBCO INC., O'CONNOR
CONSTRUCTORS, INC., ORANGE & ROCKLAND
UTILITIES, INC, OWENS-ILLINOIS, INC, PEERLESS
INDUSTRIES, INC, PFIZER, INC. (PFIZER), RILEY
POWER INC, SUPERIOR BOILER WORKS, INC, TACO,
INC, THE FAIRBANKS COMPANY, TREADWELL
CORPORATION, TWC THE VALVE COMPANY, LLC, U.S.
RUBBER COMPANY (UNIROYAL), UNION CARBIDE
CORPORATION, WARREN PUMPS, LLC, WATTS WATER
TECHNOLOGIES, INC. F/K/A, WEIL-MCLAIN, A DIVISION
OF THE MARLEY-WYLAIN COMPANY, EASTERN
REFRACTORIES COMPANY, INC.,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 173, 174, 175, 176,
177, 178, 179, 180, 181, 182, 183, 184, 197, 201, 202, 205

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants' motion for summary
judgment to dismiss plaintiff's complaint is denied. Plaintiffs Ferris O. Tryon and Barbara Tryon

allege that Mr. Tryon was injured as a result of his exposure to asbestos from Foster Wheeler's products.

Here, defendant Foster Wheeler moves for summary judgment arguing that New Jersey law should be applied in this action. According to defendant Foster Wheeler, the New Jersey Statute of Repose bars any alleged exposure attributable to Foster Wheeler products as a matter of law such that this action must be dismissed.

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). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]". *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). Defendant refers to *Neumeier v Kuehner*, 31 NY2d 121, 128 (1972), in which the Court of Appeals addressed cases involving conflicts of choice of law between New York and foreign states and delineated the three following principles:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of

decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants. (Cf. Restatement, 2d, Conflict of Laws, P.O.D., pt. II, §§ 146, 159 [later adopted and promulgated May 23, 1969].)

While not involving a motor vehicle accident, moving defendant argues that the first principle is applicable herein. Defendant notes that the vast majority of locations where plaintiff worked were in New Jersey, that plaintiff is domiciled in New Jersey, that plaintiff's treating doctors were located in New Jersey and that Foster Wheeler has its principal place of business and operational headquarters in Hampton, New Jersey. Plaintiffs and defendant are both domiciled in New Jersey and defendant argues that the vast majority of events which form the basis of plaintiffs' claims in this case occurred in New Jersey. In the state of New Jersey, the Statute of Repose bars "all claims after ten years from the time of the furnishing of services, or the performance of construction, irrespective of the date of injury". *Brown v. Jersey Central Power and Light Co.*, 163 N.J. Super. 179, 193 (App. Div. 1978).

In opposition, plaintiff argues that much of the work in question was conducted in New York which directly contradicts moving defendants' claims that such work occurred mainly in New Jersey. Moreover, there is a question of fact as to where plaintiff was exposed to asbestos. Here, plaintiff's exposure site has yet to be determined for the purposes of this case. As such, the Court finds that plaintiff has provided evidence that an issue of fact exists sufficient to preclude summary judgment. Thus, defendant's motion is denied.

Accordingly, it is

ORDERED that defendant Foster Wheeler's motion for summary judgment to dismiss plaintiff's complaint is denied.

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendant with notice of entry.

This constitutes the Decision/Order of the Court.



11/5/2021
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED				GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE