

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

2023 NY Slip Op 33174(U)

September 11, 2023

Supreme Court, New York County

Docket Number: Index No. 190242/2019

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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JO-ANN SILVIANO AS EXECUTRIX FOR THE ESTATE OF
KENNETH LAST,

Plaintiff,

INDEX NO. 190242/2019

MOTION DATE 10/28/2020

MOTION SEQ. NO. 001

- v -

A.O. SMITH WATER PRODUCTS CO., AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPS SCIENCE INC., AMERICAN BILTRITE INC., ARCONIC, INC, AURORA PUMP COMPANY, BIRD INCORPORATED, BLACKMER, BORGWARNER MORSE TEC LLC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, 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, CERTAINT EED CORPORATION, COMPU DYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., CRANE CO, CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., DAP, INC., DOMCO PRODUCTS TEXAS, INC., 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, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC., FOSTER WHEELER, L.L.C., GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, IMO INDUSTRIES, INC., INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, 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., J-M MANUFACTURING COMPANY, INC,

**DECISION + ORDER ON
MOTION**

KAISER GYPSUM COMPANY, INC., KOHLER CO.,
 LEVITON MANUFACTURING CO., INC, MANNINGTON
 MILLS, INC., MARIO & DIBONO PLASTERING CO., INC,
 MORSE DIESEL, INC, NORTHROP GRUMMAN CORP. AS
 SUCCESSOR TO GEORGE A. FULLER COMPANY,
 PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER),
 PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO
 ABEX CORPORATION (ABEX), PORT AUTHORITY OF
 NEW YORK AND NEW JERSEY, RHEEM
 MANUFACTURING COMPANY, SLANT/FIN
 CORPORATION, SPIRAX SARCO, INC. INDIVIDUALLY
 AND AS SUCCESSOR TO SARCO COMPANY, TISHMAN
 LIQUIDATING CORP, TISHMAN REALTY &
 CONSTRUCTION CO., INC, TURNER CONSTRUCTION
 COMPANY, U.S. RUBBER COMPANY (UNIROYAL),
 UNION CARBIDE CORPORATION, UTICA BOILERS, INC.,
 INDIVIDUALLY AND AS SUCCESSOR TO UTICA
 RADIATOR CORPORATION, VELAN VALVE
 CORPORATION, VIKING PUMP, INC, WARREN PUMPS,
 LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-
 WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY
 OF THE MARLEY COMPANY, LLC, WEYERHAEUSER
 COMPANY, IPA SYSTEMS, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for

DISMISS

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 Arconic, Inc. f/k/a Alcoa, Inc. ("ALCOA") moves to dismiss on the basis that asbestos-containing fire-proofing material was not in use at the World Trade Center during plaintiff's employment and that ALCOA, as a general contractor, did not supervise or control plaintiff's work as a sub-contractor employee. *See* Memorandum of Law, dated October 20, 2020, p. 2-3. Plaintiff decedent, Kenneth Last ("Mr. Last") opposes, noting that a general contractor can be held liable for injury when it has actual or constructive notice of an unsafe

work condition or created such working conditions. *See* Affirmation in Opposition to ALCOA, Inc., n/k/a ARCONIC, Inc.'s Motion for Summary Judgment, p. 8. Defendant replies, re-emphasizing that fire-proofing spray was asbestos-free after 1970.

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

Defendant ALCOA fails to meet its burden at summary judgment. Defendant's motion relies primarily on one memo from 1970 from the construction manager of the World Trade Center discussing contracts and use of asbestos fire-proofing spray. *See* Affirmation in Support, Exh. G, Memo dated 05-15-1970. This memo indicates that an agreement was reached between the construction manager and contractors regarding the costs necessary to switch over to asbestos-free fire-proofing spray. Such memo does not indicate a firm date by which the switch must take place nor any confirmation that use of asbestos-containing spray was not resumed for a time period after this 1970 internal evaluation and discussion with contractors. Defendant ALCOA further relies on Mr. Last's social security records indicating his employment at the World Trade Center beginning in 1972. This is not dispositive of whether Mr. Last was exposed to asbestos during his employment.

Plaintiffs have offered sufficient documentary evidence to raise a question of fact as to the extent of asbestos-containing material in use at the World Trade Center post-1970, its proximity to plaintiff's work, and whether defendant ALCOA had notice of, or created, the dangerous condition. *See* Affirmation in Opposition, *supra*, at p. 9-10. It is also clear via the many 1970 memos in both parties' Exhibits that defendant ALCOA was well-aware of risks surrounding the use of asbestos-products. *See id.* at p. 11. Finally, there is apparent evidence that defendant ALCOA was involved in selecting the materials used by its sub-contractors. *Id.*

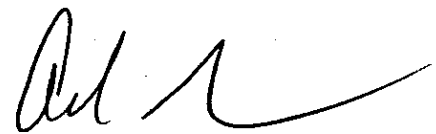
As a reasonable juror could decide that Mr. Last was exposed to asbestos during his work at the World Trade Center and that defendant ALCOA had supervision and control over such work to render it liable for Mr. Last's injuries, issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant ALCOA'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.



09/11/2023

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: