



Moutal v A.O. Smith Water Prods. Co

2022 NY Slip Op 33662(U) (2022) | Cited 0 times | New York Supreme Court | October 24, 2022

FILED: NEW YORK COUNTY CLERK 10/25/2022 03:08 PM INDEX NO. 190086/2019 NYSCEF
DOC. NO. 433 RECEIVED NYSCEF: 10/25/2022

1 of 10 SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY PRESENT:
HON. ADAM SILVERA Justice -----X PAUL MOUTAL, Plaintiff, - V - A.O. SMITH
WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., NIKIA RHONE POULENC AG
COMPANY, N/K/A BAYER CROPSCIENCE INC., AMERICAN BIL TRITE INC, BURNHAM, LLC,
INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS
WHOLLY OWNED SUBSIDIARIES, CERTAINTED CORPORATION, CLYDE UNION, INC,
COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY,
INC, CRANE CO., CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., DAVID
FABRICATORS INC A/KIA DAVID ASBESTOS CORP, 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, G.S. BLODGETT
CORPORATION, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS
PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL,
INC./ BENDIX, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS
SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS,
MANNINGTON MILLS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), QCP,
INC., INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC,
RHEEM MANUFACTURING COMPANY, SLANT/FIN CORPORATION, THE GOODYEAR TIRE
AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE
CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA
RADIATOR CORPORATION, VIKING PUMP, INC, WEIL-MCLAIN, A DIVISION OF THE
MARLEY WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY
COMPANY, LLC, AERCO INTERNATIONAL, INC., BMCE INC., F/K/A UNITED CENTRIFUGAL
PUMP, BORGWARNER MORSE TEC LLC, BIRD INCORPORATED,

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INDEX NO. MOTION DATE 190086/2019



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MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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3 of 10 Defendant. -----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 224 225 226 227 228,229,230,231,232,233,234,235,236,237,238,239,240,241,242,243,244, 249,259,337,341,342,343,344,345,346,347,348,349,350,351,352,353,354,355,356,357,358, 359,360,361,362,363,364,365,366,367,368,369,370,371,372,373,374,375,376,377,378 were read on this motion to/for DISMISSAL Upon the foregoing documents, it is hereby ordered that Defendant Burnham LLC

(hereinafter referred to as "Burnham") motion for partial summary judgment denied for the reasons set forth below.

The instant matter is premised upon Plaintiffs alleged exposure to asbestos resulting from the removal of Burnham boilers. During his deposition on July 30 through August 1 of 2019, Plaintiff testified that he removed Burnham boilers within residential locations in New York City and Burlington, Vermont from approximately 1971 to 1999. Plaintiff recognized Burnham as the manufacturer of the boilers he removed by the name on the boiler itself. Plaintiff also testified that his asbestos exposure was from gaskets and insulation as Plaintiff dismantled and removed Burnham boilers. Plaintiff argues that the imposition of punitive damages are warranted, as Burnham failed to place a warning on their boilers even after obtaining knowledge of the harmful and dangerous effects when exposed to asbestos. Conversely, Burnham argues that any asbestos exposure from Plaintiffs work on Burnham boilers was significantly below



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threshold limit values and exposure limits set by the standards and regulations of the Occupational Safety and Health Act (hereinafter referred to as "OSHA"). Burnham moves for partial summary judgment on the issue of punitive damages. Plaintiff opposes, and Burnham replies.

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[* 2] heavy · FILED: NEW YORK COUNTY CLERK 10/25/2022 03:08 PM INDEX NO. 190086/2019 NYSCEF DOC. NO. 433 RECEIVED NYSCEF: 10/25/2022

5 of 10 Pursuant to CPLR 3212(b), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he 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 demonstrate the absence of any material issues of fact. This burden is a one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers'". *Vega v Restani Constr. Corp.*, 18 NY3d 499,503 (2012) (internal emphasis omitted).

In support of their motion. Burnham contends that Plaintiff cannot identify evidence to



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justify the imposition of punitive damages and that such damages are not warranted under New York Law. See Memorandum Of Law In Support Of Defendant Burnham LLC's Motion For Partial Summary Judgment, p. 9. Burnham relies upon a study conducted by Dr. William E. Longo, a microscopist, arguing that Plaintiff's exposure to asbestos was below OSHA's permissible exposure limit (hereinafter referred to as "PEL"). As such, Burnham contends that Bumham's failure to warn does not rise to reckless and wanton disregard to support a claim for punitive damages. In opposition, Plaintiff argues, inter alia, that "Bumham's attempted reliance on the one isolated study by a microscopist, coupled with its misuse and misrepresentations ...

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7 of 10 demonstrate the [lack of merit in the] present motion." Affirmation In Opposition To Burnham's

Motion For Partial Summary Judgment, p. 5, -i 14.

In toxic tort cases, the New York Court of Appeals has adopted a gross negligence standard for the purposes of punitive damages, holding that punitive damages are warranted when "the actor has intentionally done an act of an unreasonable character in disregard of a



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known or obvious risk that was so great as to make it highly probable that harm would follow and has done so conscious indifference to the outcome." *Maltese v Westinghouse Elec.*

Corp., 89 NY2d 955, 956-957 (1997) (internal quotations omitted). "The 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, companies from acting in a similar way in the future". *of91st St. Crane Collapse Litig.*, 154 AD3d 139, 156 (1st (internal parenthesis omitted).

In the case at bar, the single study conducted by Dr. Longo does not support a finding for partial summary judgment on the issue of punitive damages. In his deposition testimony, Dr. Longo concedes that he never conducted any studies on a Burnham boiler. See Affirmation In Opposition, *supra*, Exh. 4, Depo. Tr. of E. Longo, PH.D., dated December 16, 2015, p. 36, ln. 10 - 12. Further, Dr. Longo does not rely upon any information regarding Burnham boilers, as Dr. Longo testified that he relies on the mixing and removal of materials which cause significant exposure. See *Id.* at p. 37, ln. 14 - 17. court's function on a motion for summary judgment involves issue finding rather than issue determination". *Farias v Simon*, 122 AD3d 466, 468 (1st Dept 2014). Here, the Court need only determine whether a genuine issue of material fact exists as to whether Burnham's conduct rises to the level of wanton disregard for punitive damages to be imposed. Dr. study cannot unambiguously establish that

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[* 4] does a

finding



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9 of 10 Plaintiff's asbestos exposure was below OSHA's PEL. As such, Dr. Longo's study which infers

Plaintiff's exposure was below OSHA's PEL not refute that Burnham may have acted with

wanton disregard by failing to warn Plaintiff of the ultra-carcinogenic hazards of asbestos.

It is important to note that Burnham's reliance on *Maltese, supra*, is misplaced. Namely,

Burnham contends that according to *Maltese*, general awareness of significant exposure to

asbestos is insufficient to support a of punitive damages. See Memorandum Of Law In

Support, *supra*, at p. 8. However, the Court of Appeals has held that "[a] products liability action

founded on a to warn involves conduct of the defendant having attributes_ of negligence

which the jury may sufficiently wanton or reckless to sustain an award of punitive

damages". *Home Ins. Co. Am. Home Products Corp.*, 75 NY2d 196, 204 (1990) (internal

citations Plaintiff has provided evidentiary facts tending to show that

· Burnham' s warnings were deficient such that the adequacy of such warnings are a factual



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question that should be resolved by a jury. See *Eiser v Feldman*, 123 AD2d 583, 584 (1986). As such, issues of fact exist to preclude summary judgment, and Burnham's motion is denied.

Accordingly, it is

ORDERED that Defendant Burnham LLC's motion for partial summary judgment is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of

This constitutes the decision/order of the Court.

10/24/2022 DATE CHECK ONE:

APPLICATION: CHECK IF APPROPRIATE: CASE DISPOSED GRANTED DENIED SETTLE
ORDER INCLUDES TRANSFER/REASSIGN

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SILVERA, J.S.C. NON-FINAL DISPOSITION GRANTED IN PART SUBMIT ORDER FIDUCIARY
APPOINTMENT OTHER

REFERENCE

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