

**Matter of Proctor v A.O. Smith Water Prods. Co.**

2019 NY Slip Op 32630(U)

September 5, 2019

Supreme Court, New York County

Docket Number: 190109/2018

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ Justice PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION GEORGE C. PROCTOR and NANCY PROCTOR INDEX NO. 190109/2018

Plaintiff(s),

MOTION DATE 8/21/2019

- against -

MOTION SEQ. NO. 005

A.O. SMITH WATER PRODUCTS CO., et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 6 were read on Burnham LLC's motion for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, Replying Affidavits, and Cross-Motion.

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Burnham LLC's, (hereinafter, "Burnham") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiffs commenced this action by filing a Supplemental Summons and Second Amended Verified Complaint on April 18, 2018 (Aff in Supp, Exh. A). Mr. George C. Proctor suffered from asbestos related Mesothelioma. He was diagnosed with Mesothelioma on February 20th, 2018 and passed away March 23rd, 2019 (see Aff in Opp., Exh. 1). Mr. Proctor began working with Vanderlin Electrical Contractors in 1963 and was first exposed to Burnham boilers during that year (see Aff in Opp., Exh. 2). He was deposed beginning on May 2, 2018 and ending on June 6, 2018 (see generally Aff in Opp., Exh. 3). In his deposition, he alleged that he was exposed to asbestos from coming into contact with insulation used on Burnham boilers during the course of performing electrical work (id. at 274). He identified these boilers as being Burnham products because they were branded with the Burnham name (see id. at 1643).

Mr. Proctor described the Burnham boilers he worked on at Weslyn College for Vanderlin in 1963 as unjacketed on arrival, "about 5 foot tall by about 6 foot long, and about 3 and a half feet wide" and arriving on site as pieces of "cast iron that you have to assemble" (id. at 1640- 1641). Further, Mr. Proctor testified that the Burnham boilers were "galvanized-type sectional," boilers fueled by gas, and had "asbestos jacket [s] around the exterior" which was applied (id. at 1640-1641). He recalled insulation workers applying an asbestos cement mix with water to the "exterior" of the boiler creating the jacket; he knew the cement mix contained asbestos because it said asbestos on the packaging (id. at 1645). He recalled that this process generated visible dust that became airborne (id. at 1644). Mr. Proctor further remembered personally removing insulation from

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Burnham boilers with a knife to access the area where the valves were attached (*id.* at 277). He alleges that he breathed in asbestos dust on each occasion that asbestos was applied to or removed from Burnham boilers (see *id.* at 2088-2089).

Notably, Burnham acknowledges that it recommended the use of asbestos-containing insulation in the field installation of Burnham boilers at some time prior to 1972 (Aff. in Opp., Exh. 4 at 15.0). Burnham also acknowledges that it manufactured asbestos cement at some unspecified time for use by insulation workers who worked on boilers (Aff in Opp., Exh. 5 at 18-B.38).

Defendant now moves for summary judgment, essentially arguing that plaintiffs have failed to establish that Burnham had a duty to warn about the dangers of using asbestos insulation on jacketed Burnham boilers which came with non-asbestos insulation. Plaintiffs oppose the motion, contending that Burnham has not met its prima facie burden for summary judgment.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; see also *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept 2016]). Regarding asbestos, a defendant must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.-Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]). The defendant must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520, 997 NYS2d 381 [1st Dept 2014]).

In support of its motion, Burnham argues that the evidence is insufficient to prove plaintiffs' case against Burnham. Namely, there is insufficient evidence to show that Burnham had a duty to warn about the dangers of using asbestos

insulation on Burnham boilers that were manufactured, sold, and distributed with non-asbestos insulation already underneath the boiler jacket.

Plaintiffs oppose the motion, contending that Burnham's motion should be denied because it has failed to meet its prima facie burden. To this effect, plaintiffs argue that defendant's motion for summary judgment is not supported, as required, by an affidavit or other testimony of someone with personal knowledge of the relevant facts. Plaintiffs further argue that even if Burnham's claim that it stopped manufacturing boilers that required asbestos products in 1962 is true, the defendant has failed to eliminate the possibility that its products were residually used in the marketplace. Lastly, plaintiffs argue that any argument regarding the strength of the plaintiff's recollection of Burnham's boiler products goes to the weight of the evidence rather than its admissibility.


The testimony of Roger Pepper does not definitively establish anything about the details of Burnham's boiler manufacturing operation at any given point in time (i.e., whether asbestos insulation was included with or recommended for installation with any Burnham boilers); it is just bare testimony, unsupported by external documentation (see generally Aff in Supp, Exh. D). Moreover, there is conflicting testimony on the record. For instance, as previously mentioned, Mr. Proctor testified to being exposed to asbestos from coming into contact with insulation used on Burnham boilers. What now remains is for the jury to decide which evidence on the record is most credible.

It is not the function of the court deciding a summary judgment motion to determine credibility issues or make findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). Conflicting testimonial evidence raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v New York City Transit Authority*, 84 AD 3d 439, 922 NYS 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 AD 3d 439, 29 NYS 3d 178 [1st Dept 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]).

Burnham has failed to meet its burden of presenting evidence which "unequivocally establish[es] that its products could not have contributed to the causation of plaintiff's injury" (see *Matter of N.Y.C. Asbestos Litig.*, *supra*) and its motion for summary judgment is denied.

Accordingly, it is ORDERED that defendant Burnham LLC's motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

Dated: September 5, 2019

ENTER: **MANUEL J. MENDEZ**  
**J.S.C.**  
  
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**MANUEL J. MENDEZ**  
**J.S.C.**

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