

**Reilly v A.O. Smith Water Prods. Co.**

2019 NY Slip Op 33428(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 190037/2019

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**

**WILLIAM J. REILLY and EILEEN REILLY,**

**Plaintiffs,**

**- against -**

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

**Defendants.**

INDEX NO. 190037/2019

MOTION DATE 11-06-2019

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to dismiss by BURNHAM LLC, pursuant to CPLR 3211(a)(7): **PAPERS NUMBERED**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	

**Cross-Motion:      Yes    X No**

Upon a reading of the foregoing cited papers, it is Ordered that defendant Burnham, LLC's (hereinafter "Burnham") motion pursuant to CPLR §3211(a)(7) to dismiss plaintiffs' complaint against it is granted solely to the extent of dismissing the causes of action against Burnham for breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants liability (sixth cause of action). The motion to dismiss the causes of action for failure to warn (first and third causes of action), loss of consortium (seventh cause of action) and punitive damages is denied.

Plaintiffs William and Eileen Reilly bring this action to recover for injuries sustained by Mr. Reilly for his alleged exposure to asbestos from various defendants' products. It is alleged that Mr. Reilly was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from asbestos on Burnham boilers while he installed, removed and performed maintenance and cleaning work on the boilers from approximately 1970 to 1990.

Plaintiffs commenced this action on February 6, 2019 (NYSCEF Doc. #1). Plaintiffs filed a supplemental complaint on May 22, 2019, which incorporated plaintiffs' attorneys - Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7 (Mot. Exhibit. A). On March 13, 2019 Burnham served an Acknowledgment of Receipt of service (Mot. Exhibit. G). Burnham, pursuant to CPLR §3211(a) (7), seeks to dismiss plaintiffs' complaint including the punitive damages claim asserted against it. Plaintiffs do not oppose dismissal of the causes of action for breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants' liability (sixth cause of action). Those causes of action are dismissed without opposition.

Plaintiff opposes dismissal of the causes of action for failure to warn (first and third causes of action), the cause of action for loss of consortium (seventh cause of action) and punitive damages.

Burnham argues that plaintiffs' claims for punitive damages are based on failure to warn in the face of a general awareness of potential human health risks, rendering it insufficient to meet the standard to sustain the claims. Burnham also argues that because it did not mine mill or manufacture asbestos the claim cannot be sustained. Burnham argues that plaintiff's failure to warn claims must be dismissed because the allegations are insufficient as a matter of law, since its boilers did not contain asbestos and at the time of Mr. Reilly's exposure Burnham, a manufacturer, had no duty to warn end users about the hazards arising from the use of a third-party's product in conjunction with its product. Finally, it argues that since the failure to warn claim should be dismissed, the loss of consortium claim should also be dismissed because it is derivative of the failure to warn claim.

Plaintiff argues that its causes of action for failure to warn are properly pled, and factually and legally sufficient. It argues that although Burnham did not manufacture asbestos, it promoted for decades, specified and knew of the use of asbestos-containing materials for insulating its product. Mr. Reilly testified that he worked installing, removing and repairing Burnham boilers and that he removed asbestos insulation from both the outside and inside of the Burnham Boilers and that this created dust that he inhaled (see Exhibit 9). Plaintiff further points to Burnham specifications requiring "17 feet asbestos wicking and 5 pounds asbestos cement" for one of its boilers (see Exhibit 10, 11, 12). It argues that since the failure to warn claim survives, so too should its cause of action for loss of consortium.

Plaintiffs seek punitive damages under multiple causes of action and asserts that Burnham is liable for punitive damages because it placed corporate profits above the health and safety of Mr. Reilly, and that Burnham continually insisted that there was no asbestos exposure from its product.

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action does not have to be skillfully prepared, but it does have to present facts so that it can be identified and establish a potentially meritorious claim. The facts alleged are given the benefit of every favorable inference (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

Plaintiffs' failure to warn and loss of consortium claims can be identified and are properly pled. Plaintiffs have alleged sufficient facts and produced sufficient evidence in support of their allegations that Burnham sold asbestos containing boilers, and specified, knew of the use of and sold asbestos-containing materials for insulating its boilers (see Exhibits 10, 11, 12). Mr. Reilly stated that he worked on Burnham boilers and removed asbestos-containing insulation from inside and the outside of Burnham boilers, which created dust that he breathed in (see Exhibit 9). These allegations and exhibits support plaintiffs' failure to warn and loss of consortium claims (see In re New York City Asbestos Litigation (Dummitt), 27 N.Y.3d 765, 59 N.E.3d 458, 37 N.Y.S.3d 723 [2016]; In re New York City Asbestos Litigation (Sweberg), 143 A.D.3d 483, 39 N.Y.S.3d 411[1<sup>st</sup>. Dept. 2016]; In re New York City Asbestos Litigation (Hackshaw), 143 A.D.3d 485, 39 N.Y.S.3d 130[1<sup>st</sup>. Dept. 2016]; Peraica v. A.O. Smith Water Products, Co., 143

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

A.D.3d 448, 39 N.Y.S.3d 392 [1<sup>st</sup>. Dept. 2016]; In re New York City Asbestos Litigation (Murphy-Clagett), 173 A.D.3d 529, 104 N.Y.S.3d 99 [1<sup>st</sup>. Dept. 2019]).

Burnham argues that the plaintiffs' punitive damages claims are procedurally improper and fail to state a viable cause of action. Burnham argues that the punitive damages claims stated as prayers for relief in the Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7, are not particularized as to Burnham or pled with specificity as to the individual defendants. Burnham cites to the Case Management Order (CMO) Sections VII-C (Pleadings Punitive Damages), IX-M (Discovery), as protocols requiring that plaintiff inform defendants that it intends to seek punitive damages and permitting defendants to conduct discovery on any claims asserted for punitive damages. Burnham argues that plaintiffs' failure to notify Burnham of their intent to pursue punitive damages violated its due process rights, warranting dismissal.

CMO VII.C titled "Pleading Punitive Damages," only permits punitive damages claims on Active or Accelerated Docket cases where there is a good faith basis for doing so against a named defendant. It states in relevant part:

"In cases on the Active or Accelerated Dockets, where the complaint already contains a prayer for punitive damages at the time that this Case Management Order becomes effective, plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it will not proceed with a punitive damages claim against a given defendant plaintiff shall sign a stipulation dismissing the prayer for punitive damages...Where an existing complaint does not contain a prayer for punitive damages, plaintiff may amend the complaint to include punitive damages, if he or she has a good faith reason for doing so, without leave up to ten days prior to the date of plaintiffs application to be included in an Accelerated or Active Cluster....After that time, but prior to the Trial Court setting a trial date, plaintiff may move before the Coordinating Judge to amend the complaint to include punitive damages."

Both parties, plaintiffs and Burnham, incorporated their Standard pleadings into their short form pleadings. CMO VII.C states that the Accelerated or Active Docket cases, such as this case, are required to contain a "prayer" for punitive damages.

*Black's Law Dictionary* (11<sup>th</sup> Edition, 2019) defines "Prayer for Relief" as:

"A request addressed to the court and appearing at the end of a pleading: esp., a request for specific relief or damages - Often shortened to *prayer*"

CMO VII.C does not require any specificity as to a named plaintiff or a named defendant. Plaintiffs included a prayer for punitive damages for approximately six causes of action in the Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7, and complied with the requirements of CMO VII.C. To the extent Burnham is arguing that CMO VII.C does not strictly comport with the CPLR, the Appellate Division First Department in affirming the CMO stated that the lack of strict conformity is acceptable "so long as they do not deprive a party of its right to due process" (In re New York City Asbestos Litigation, 159 AD 3d 576, 74 NYS 3d 180 [1<sup>st</sup> Dept. 2018]).

Burnham argues that the CMO deprives it of due process and equal protection rights under the New York and Federal Constitution. Burnham's argument was previously made to the Appellate Division, First Department which stated:

**"Section XXIV and the other provisions (of the CMO) create rules for discovery and notice in connection with punitive damages claims so as to protect the defendants due process rights. We find these procedural protocols in the new CMO, as well as the other provisions challenged by defendants that were either present in preceding CMOs or appear for the first time in the new CMO, do not deprive defendants of their due process or other constitutional rights, even where they do not strictly conform to the CPLR..." (In re New York City Asbestos Litigation, 159 AD 3d 576, supra pgs. 577-578).**

The resolution of an issue by the appellate court on a prior appeal is "law of the case" and is binding on the Supreme Court as well as the appellate court. No further examination of the issues can be made without a showing of subsequent evidence or a change in the law (Board of Managers of the 25 Charles Street Condominium v. Seligson, 106 AD 3d 130, 961 NYS 2d 152 [1<sup>st</sup> Dept. 2013] citing to J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey, 45 AD 3d 809, 847 NYS 2d 130 [2<sup>nd</sup> Dept. 2007]).

Plaintiffs argue that defendants were aware of the prayer for punitive damages asserted in the Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7, but failed to seek discovery on the issue until after the case was placed on the trial calendar.

CMO XI.M titled "Discovery Concerning Punitive Damages," states:

**"Where plaintiff asserts a punitive damage claim against a defendant, plaintiff shall answer defendants' standard interrogatories and document requests seeking information related to punitive damages per the CPLR, and defendant shall answer plaintiffs' standard interrogatories and document requests seeking information related to punitive damages per the CPLR. The parties shall confer about the possibility of a stipulation dismissing the prayer for punitive damages...before responding to standard interrogatories and document requests seeking information concerning punitive damages."**

CMO XXIV titled "Punitive Damages," under subsection B titled "Discovery on a Defendant's Financial Condition," permits plaintiffs to seek financial disclosure from the defendant on a claim for punitive damages "no later than immediately prior to the commencement of jury selection, defendant shall provide plaintiff with reliable financial disclosure."

Burnham should have sought discovery on punitive damages earlier in this case. The Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7, incorporated into the Complaint and Amended Complaints asserted the prayer for punitive damages. Burnham provides no proof of its own attempts to confer with plaintiffs' counsel to obtain a stipulation withdrawing the punitive damages claims or summary judgment. Burnham attempts to place the onus of its failure to seek discovery on the plaintiffs for failure to confer.

Plaintiffs' inclusion of six prayers for punitive damages in its standard complaint for personal injury No. 7 sufficiently state a claim for punitive damages. Dismissal at this stage is unwarranted and a motion may be made to the trial judge after submission of all evidence.

Plaintiffs have sufficiently pled their causes of action for failure to warn, loss of consortium and punitive damages.

ACCORDINGLY, it is ORDERED that defendant Burnham, LLC's motion to dismiss plaintiffs' complaint pursuant to CPLR §3211(a)(7) is granted to the extent of dismissing the causes of action against Burnham for breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants liability (sixth cause of action), and it is further


ORDERED that the breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants' liability (sixth cause of action) in plaintiffs' complaint are severed and dismissed, and it is further

ORDERED that the motion to dismiss the causes of action for failure to warn (first and third causes of action), loss of consortium (seventh cause of action) and punitive damages is denied, and it is further

ORDERED that the moving party serve a copy of this order with notice of entry by e-filing protocol on all remaining parties, the General Clerk's Office (Room 119) and the New York County Clerk (Room 141B), and it is further

ORDERED that the clerk enter judgment accordingly.

Dated: November 19, 2019

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE