Defonce v A.O. Smith Water Prods. Co.
2020 NY Slip Op 30961(U)
April 13, 2020
Supreme Court, New York County
Docket Number: 190232/2015
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

BELINDA DEFONCE, as Administratrix for the Estate of PATRICK J. DEFONCE JR., and BELINDA DEFONCE, Individually,

Plaintiffs,

-against-

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

Defendants.

INDEX NO. 190232/2015
MOTION DATE 04/08/2020
MOTION SEQ. NO. 002
MOTION CAL. NO. ____

The following papers, numbered 1 to 5 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 ...	1- 2
Answering Affidavits ☪ Exhibits	3-4
Replying Affidavits	5

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 cause of action), loss of consortium (seventh cause of action), and punitive damages is denied.

Plaintiffs bring this action to recover for injuries sustained by Patrick J. Defonce Jr. from his alleged exposure to asbestos from various defendants' products. It is alleged that Mr. Defonce was exposed to asbestos when he worked on Burnham boilers when he worked alongside his brother, Anthony. Mr. Defonce further testified that he worked on Burnham boilers with asbestos-containing insulation and was exposed to asbestos when he removed the boilers, which created asbestos dust, from 1959 through approximately 1965.

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

Plaintiffs commenced this action on July 30, 2015. (Exhibit E). Burnham acknowledged service on September 2, 2015. (Exhibit I).

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 with prejudice, without opposition.

Plaintiffs oppose 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. As per *Maltese*, Burnham argues that the claim for punitive damages should be dismissed because this case is not "singularly rare where extreme aggravating factors are present" and their conduct was not "egregious and willful." (Matter of New York City Asbestos Litig. (Maltese), 89 N.Y.2d 955, 678 N.E.2d 467, 655 N.Y.S.2d 855 [1997]). Burnham continues to argue that the award of punitive damages violates their substantive due process rights. (Racich v. Celotex Corp., 887 F.2d 393 [2nd Cir. 1989]).

Burnham then argues that because it did not mine, mill, or manufacture asbestos, the claim cannot be sustained. Burnham argues that plaintiffs' 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. Defonce'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. Burnham also argues that since the failure to warn claim should be dismissed, the loss of consortium claim should also be dismissed because it is a derivative of the failure to warn claim.

Plaintiffs argue that their causes of action for failure to warn are properly pled, and factually and legally sufficient. They argue that although Burnham did not manufacture asbestos, it manufactured asbestos cement, promoted for decades, specified, and knew of the use of asbestos-containing materials for insulating its product. Mr. Defonce testified that he was exposed to asbestos when he worked on Burnham boilers with asbestos-containing insulation and was exposed to asbestos when he had to remove the boilers, which created asbestos dust, from 1959 through approximately 1965. Mr. Defonce further stated that he was never warned regarding the dangers of asbestos. (Exhibit 9). Plaintiffs further point to Burnham specifications requiring insulation of boilers to be covered with

"plastic asbestos at least 1-1/2 inches thick" then "with a finishing coat." Further Burnham specifications required 17 feet asbestos wicking and five pounds of asbestos cement" and that spaces in sectional boilers be "filled between beads with asbestos cement as each section is set..." and providing "... sufficient asbestos cement with each boiler..." (Exhibit 10 and 11). Burnham further admitted in its interrogatories that its boilers were asbestos-containing and that it sold such boilers at least through 1986, that it manufactured asbestos cement commonly used by insulation workers and pipe coverers to apply to joints or spread over exposed surfaces of the boiler (Exhibits 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 13). Plaintiffs argue that since the failure to warn claim survives, so should their cause of action for loss of consortium.

Plaintiffs seek punitive damages under multiple causes of action and assert that Burnham is liable for punitive damages because it placed corporate profits above Mr. Defonce's health and safety, 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. (Exhibits 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 13). Mr. Defonce testified that he knew he was exposed to asbestos when he worked on Burnham boilers and had to remove them. (Exhibit 9). These allegations and exhibits support plaintiff's failure to warn and loss of consortium claims. (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[1st. Dept. 2016]; In re New York City Asbestos Litigation (Hackshaw), 143 A.D.3d 485, 39 N.Y.S.3d 130[1st. Dept. 2016]; Peraica v. A.O. Smith Water Products, Co., 143 A.D.3d 448, 39 N.Y.S.3d 392 [1st. Dept. 2016]; In re New York City Asbestos Litigation (Murphy-Clagett), 173 A.D.3d 529, 104 N.Y.S.3d 99 [1st. 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 (11th 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. Plaintiff includes 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 the CMO VII.C. To the extent that 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 [1st 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 [1st Dept. 2013] citing to J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey, 45 AD 3d 809, 847 NYS 2d 130 [2nd 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 IX.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 plaintiff 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. Plaintiff's inclusion of six prayers for punitive damages in its standard complaint for personal injury No. 7 sufficiently state a claim for punitive damages.

Burnham argues that punitive damages should be dismissed because "their failure to warn in the face of a general awareness of potential human health risks" is insufficient to meet the standard to sustain the claims under *Maltese*, because this case is not "singularly rare and there are no extreme aggravating factors present." Furthermore, their conduct was not "egregious and willful." However, Burnham boilers containing asbestos and asbestos-containing insulation were in production and sold at least through 1986, and they manufactured and produced asbestos cement during the years of Mr. Defonce's exposure (Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14).

Maltese, as Burnham suggests it be applied does not support Burnham's argument. In *Maltese*, the Court of Appeals affirmed denial of a claim for punitive damages because the evidence presented to the jury at trial showed only that the corporation in question (Westinghouse), which manufactured asbestos-containing turbines, had a "general awareness" that exposure to high concentrations of asbestos could cause injury. The Court found that a "general awareness," without more, was insufficient to sustain an award of punitive damages (In Re New York City Asbestos Litigation (*Maltese*) 89 N.Y.2d 955, 678 N.E.2d 467, 655 N.Y.S.2d 855 [1997]). Burnham argues that under *Maltese*, their general awareness does not give rise to wanton, reckless, and malicious conduct, and an award for punitive damages.

Although a general awareness alone may not give rise to the imposition of punitive damages, the complaint herein contains allegations that Burnham had more than a general awareness, and that their conduct was wanton, reckless, and malicious. (see Standard Complaint for Personal Injury No. 7 ¶ 174, 185, 186, 187, 188, 189, 190, 191, and 192). The complaint alleges that Burnham "since the early 1900's has possessed medical and scientific data which indicates that their asbestos-containing products are hazardous to human health; and prompted by pecuniary motives... has ignored and failed to act upon said medical and scientific data, and conspired to deprive the public and particularly the users, including the plaintiff, of said medical and scientific data and therefore deprived the public at large and the plaintiff in particular, of the opportunity of free choice as to whether or not to expose himself to [its] asbestos and asbestos-containing products; and further willfully, intentionally, and wantonly failed to warn plaintiff of the serious bodily harm which would result from the inhalation of asbestos fibers and the dust from their asbestos-containing products."

The Complaint alleges that Burnham knew and possessed medical and scientific data that asbestos in their product was hazardous. Burnham kept this information from the public and the plaintiff, prompted by a pecuniary motive. In doing so, Burnham willfully, intentionally, and wantonly failed to warn plaintiff and the public of the serious bodily harm that could result from inhalation of asbestos fibers and asbestos dust from their products, thereby depriving the public, and the plaintiff in particular, of the opportunity of free choice as to whether or not to expose himself to asbestos in Burnham's product.

The complaint alleges that Burnham had more than a general awareness. It describes conduct engaged in by Burnham evincing a high degree of moral culpability, manifesting a conscious disregard for the rights of others or so

reckless as to amount to such disregard (Greenberg v. Meyreles, 155 A.D.3d 1001, 66 N.Y.S.3d 297 [2nd Dept. 2017]).

"Accepting the facts as alleged in the complaint as true and according the plaintiff the benefit of every possible favorable inference, the complaint sufficiently states a demand for punitive damages against [Burnham]. At this stage of the litigation, it is premature to conclude that the allegations in the complaint are insufficient to support the allegations that [Burnham] acted so willfully, intentionally, or wantonly as to warrant an award of punitive damages" (Gipe v. DBT Express, LLC, 150 A.D.3d 1208, 52 N.Y.S.3d 904 [2nd Dept. 2017]).

Burnham argues, citing to Racich v. Celotex [*supra*], that an award of punitive damages violates substantive due process, in that multiple impositions of punitive damages against Burnham for the same course of conduct would result in fundamental unfairness. This argument is unpersuasive. The Court in *Racich*, citing to Browning-Ferris Inds. v. Kelco Disposal, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), which found that the imposition of punitive damages did not violate the excessive fines or cruel and unusual punishment clauses of the Eighth Amendment, declined to reach a decision on the substantive due process point on three grounds: (1) the issue was not preserved for appellate review, (2) even if it had been preserved, defendant did not make an adequate record to support it, and (3) this issue is best left to Congress or some higher judicial authority. Furthermore, the Court, citing to its precedent in Roginsky v. Richardson-Merrell Inc., 378 F.2d 832 [2nd Cir. 1967], reiterated that it does not accept the claim that "an award of punitive damages, unless restricted to fixed and measurable amounts violates due process," and continued to adhere to its policy that the best course to follow is to assess the sufficiency of the evidence [on punitive damages] submitted to the jury.

Thus, dismissal of the punitive damages claim at this stage is unwarranted. A motion to dismiss the punitive damage claim may be made to the Trial Judge after submission of all the evidence (*see Maltese* and *Racich, supra*).

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 plaintiff's 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 plaintiff's complaint are severed and dismissed with prejudice, 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 plaintiff's attorney, 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.

ENTER:

Dated: April 13, 2020

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