Maffei v A.O. Smith Water Prods. Co
2021 NY Slip Op 31878(U)
June 1, 2021
Supreme Court, New York County
Docket Number: 190378/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 13**

Justice

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INDEX NO. 190378/2018

MOTION DATE 09/03/2020

MOTION SEQ. NO. 003

ROMEO MAFFEI,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC.,ARVINMERITOR, INC.,AURORA PUMP COMPANY, BIRD INCORPORATED, BORGWARNER MORSE TEC LLC,BRYANT HEATING & COOLING SYSTEMS, BURNHAM, LLC,BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CATERPILLAR, INC, CBS CORPORATION, F/K/A VIACOM INC.,CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, COMPUDYNE CORPORATION, CRANE CO, CROWN BOILER CO., DAIMLER TRUCKS NORTH AMERICA LLC,F/K/A, DANA COMPANIES, LLC,DAP, INC, DEERE & CO, ECR INTERNATIONAL, CORP., ELECTROLUX HOME PRODUCTS, INC.,FLOWSERVE US, INC.,FMC CORPORATION, FORT KENT HOLDINGS, INC.,GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, TRADING AS NAPA, GOODYEAR CANADA, INC, GOULD ELECTRONICS INC, GOULDS PUMPS LLC,GRINNELL LLC,H.O. PENN MACHINERY CO. INC, IMO INDUSTRIES, INC, ITT INDUSTRIES, INC.,ITT LLC., J-M MANUFACTURING COMPANY, INC, KAMCO SUPPLY CORP, KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LENNOX INDUSTRIES, INC, LIPE-AUTOMATION CORPORATION, MAREMONT CORP., MCCORD CORPORATION, NAVISTAR, INC.,A/K/A INTERNATIONAL, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PERKINS ENGINES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC,SUCCESSOR IN INTEREST, REYNOLDS METALS COMPANY, STANDARD MOTOR PRODUCTS, INC, SUPERIOR BOILER WORKS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS, LLC,WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, YORK INTERNATIONAL CORPORATION, CUMMINS, INC.,FEDERAL-MOGUL ASBESTOS PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO., FORD MOTOR COMPANY, HONEYWELL INTERNATIONAL, INC.,F/K/A ALLIED SIGNAL, INC./

DECISION + ORDER ON MOTION

BENDIX, MACK TRUCKS, INC.,ROCKWELL AUTOMATION, INC.,AS SUCCESSOR IN INTEREST TO ALLEN- BRADLEY COMPANY, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 319, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 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, 379, 384, 390, 394

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

After oral argument and upon the foregoing documents, it is ORDERED that defendant J-M Manufacturing company, Inc.'s ("J-MM") motion for summary judgment to dismiss plaintiff's Complaint and all cross-claims against J-MM and to dismiss plaintiff's claims for punitive damages is denied. Plaintiff opposes the motion.

J-MM's motion contends that plaintiff has failed to present evidence that links plaintiff's lung cancer diagnosis to any asbestos fibers released from any product manufactured, supplied, or distributed by J-MM. The case at issue stems from plaintiff Romeo Maffei's April 2017 diagnosis with lung cancer which allegedly arose from his exposure to asbestos-filled dust released from J-MM asbestos-containing pipe ("ACP") products, among others. Plaintiff testified that he was exposed to asbestos from J-MM pipes during his career working with his brothers in two Westchester-County-based, contracting businesses (Mot, Exh C at 106, 115). Plaintiff testified that he worked with pipes manufactured by "JM, Johns-Manville manufacturer" (*id.* at 122, ¶ 18). Plaintiff testified to removing pipe that was labeled "JM on it, Johns-Manville" at a prison in Bedford (*id.* at 813, ¶ 25).

Here, upon motion for summary judgment, J-MM alleges that in the case at bar, plaintiff cannot establish (A) that plaintiff ever worked with ACP distributed by J-MM; (B) that assuming plaintiff cut ACP with a power tool as he testified, he cannot recover on the theory that he was

provided adequate warnings on how to use the product; (C) that even if this Court finds that there is a reasonable inference that the ACP described by plaintiff was supplied by J-MM, New York's sophisticated intermediary and knowledgeable user doctrines provide a complete defense to J-MM; (D) that plaintiff violated OSHA and industry standards and thus an intervening causation defense is available to defendant; and (E) that plaintiff cannot establish that J-MM's conduct was wanton or malicious, bordering on criminal or reckless to justify an award of punitive damages.

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]). A defendant seeking summary judgment in a products liability case involving asbestos must make a prima facie case that its product could not have contributed to the causation of the plaintiff's injury (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]).

The Court finds an issue of fact as to defendant's first assertion that no issues of fact exist concerning whether plaintiff ever worked with ACP distributed by J-MM. Defendant alleges that plaintiff could not have worked with ACP distributed by J-MM because J-MM was expressly forbidden from using Johns-Manville name on any of its products pursuant to an Asset Purchase and Sale agreement between Johns-Manville and J-MM dated December 10, 1982 (Mot, Exh J at 3). In opposition, plaintiff notes that plaintiff testified to having seen the name "JM" and "Johns-Manville" on pipes at the Bedford work site (Mot, Exh 2 at 813). Further, plaintiff submits the Declaration of Lewis Armstrong who began working at Johns-Manville's Denison, Texas plant in 1960 and continued to work there until 1987 (Mot, Exh S). Mr. Armstrong testified that after 1983 when J-MM took over the plant that pipe depicting "Johns-Manville" and "J-M" were

manufactured at the plant (*id.* at 1). Further, Mr. Armstrong testified that after 1983, J-MM distributed tens of thousands of pieces of existing pipe that was manufactured by Johns-Manville. Thus, defendant's own motion contains issues of fact as to whether J-MM distributed John-Manville branded pipe.

In the case at bar, the Court does not agree with defendant's assertion that plaintiff cannot recover on the theory that he was provided adequate warnings on how to use J-MM products. It would be improper for the Court to determine upon motion for summary judgment that J-MM adequately warned plaintiff of the dangers of working with their asbestos containing products. J-MM avers to have adequately warned plaintiff of the dangers of cutting their pipe and breathing in dust which may result from cutting the pipe with a power saw. However, the Court notes that where a plaintiff provides evidentiary facts tending to show that defendant's warnings were in any way deficient, the adequacy of such warnings are a factual question that should be resolved by a jury (*Eiser v. Feldman*, 123 AD2d 583, 584 [1986]).

Here, plaintiff's opposition raises issues of fact as to whether defendant's warnings were deficient. Plaintiff submits evidence that defendant was aware that there was no safe level of exposure to asbestos and that J-MM recommended that its own employees use respirators during the cutting of asbestos cement pipe, but never warned other individuals to wear respirators (Aff in Op, Exh 5 at 40). Further, plaintiff submits the deposition of Richard Cronk who worked for both Johns Manville and J-MM and testified that J-MM's warning sticker was not applied to all asbestos cement pipe but rather was allegedly applied to "every fifth piece" of some of the pipe (Aff in Op, Exh 23, at 169-171). Thus, plaintiff has raised an issue of fact as to the adequacy of J-MM's warnings on how to use J-MM products.

Contrary to defendant's assertions, the Court finds that New York's sophisticated intermediary and knowledgeable user doctrines do not provide a complete defense to J-MM. Defendant argues that plaintiff's two decades worth of experience in the excavation and pipe industry make him a sophisticated intermediary. Pursuant to the sophisticated intermediary doctrine, a manufacturer discharges its duty to warn when adequate warnings are provided, or it sells to a sophisticated intermediary that knows or should be aware of the specific dangers (Restatement Second and Third of Torts; *Polimeni v. Minolta Corp.*, 227 A.D.2d 64, 66, 653 N.Y.S.2d 429, 431 [3d Dep't 1997]; *Martin v. Hacker*, 83 N.Y.2d 1, 8–9, 628 N.E.2d 1308, 1311–12 [1993]). However, the Court notes that in the case at bar, the extent or degree of plaintiff's sophistication is a question of fact that must be determined by the jury (*Public Admin. of Bronx County v 485 East 188th Street Realty Corp.*, 116 AD3d 1 [1st Dept 2014] ["Even if a user has some degree of knowledge of the potential hazards in the use of a product, summary judgment will not lie where reasonable minds might disagree as to the extent of the knowledge"]). Plaintiff has demonstrated that defendant was aware of the danger of their product and the method in which it should be handled in a way that plaintiff was not himself aware of at the time of the alleged exposure. Thus, plaintiff has raised an issue of fact as to New York's sophisticated intermediary and knowledgeable user doctrines.

Defendant has failed to demonstrate that plaintiff violated OSHA and industry standards and thus has failed to prove that an intervening causation defense is available to defendant. Under New York law, an intervening causation defense is available where the intervening act is extraordinary under the circumstances and unforeseeable in the course of events (*McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 72, 181 N.E.2d 430, 435 [1962]). Defendant argues that plaintiff's alleged use of an unventilated power tool is an egregious superseding act of

negligence. Defendant notes that the use of a power tool to cut ACP constitutes a superseding intervening cause of injury. In opposition, plaintiff cites *Billsborro v Dow Chemicals, USA*, 177 AD2d 7, 16 [2d Dept 1992] which states that, "[w]here an intervening act combines with the defendant's conduct to produce the plaintiff's injury, 'liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." Here, the Court agrees with plaintiff that the use of unventilated tools like a power saw to cut ACP is foreseeable. Thus, the Court finds that defendant has failed to prove that an intervening causation defense is available herein.

Finally, the Court shall address defendant's claim that plaintiff cannot establish that J-MM's conduct was wanton or malicious, bordering on criminal or reckless to justify an award of punitive damages. In support of its argument, defendant cites to the Honorable Manny Mendez July 26, 2019 decision on J-MM's motion for summary judgment to dismiss a plaintiff's claims for punitive damages against J-MM in *Marullo v. Amchem Prods., Inc.*, 2019 NY Slip Op 32243(U). Justice Mendez found that "[g]iven all these efforts J-MM made to warn about safe use of ACP, summary judgment is granted on the issue of punitive damages." Here, the Court notes that the facts presented by plaintiff are not identical to that of the plaintiff in *Marullo*. Plaintiff has demonstrated that contrary to the facts in *Marullo* where J-MM was found to have "placed a warning sticker on every piece of ACP it supplied," plaintiff has submitted evidence that J-MM's warning sticker was not placed on every piece of ACP it supplied (Aff in Op, Exh 23, at 169-171). Thus, defendant has failed to demonstrate that plaintiff cannot establish that J-MM's conduct was wanton or malicious, bordering on criminal or reckless to justify an award of punitive damages. Thus, defendant's motion is denied in its entirety.

Accordingly, it is

ORDERED that defendant J-MM's motion for summary judgment to dismiss plaintiff's Complaint and all cross-claims against J-MM is denied; and it is further

ORDERED that the branch of defendant J-MM's motion for summary judgment to dismiss plaintiff's claim for punitive damages is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This Constitutes the Decision/Order of the Court.

6/01/2021
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE