

**Maseto v A.O. Smith Corp.**

2022 NY Slip Op 33444(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 190209/2019

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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INDEX NO. 190209/2019

ERNEST MASETO,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005

- v -

A.O. SMITH CORPORATION, AERCO INTERNATIONAL, INC., AII ACQUISITION LLC F/K/A AII ACQUISITION CORP. F/K/A ATHLONE INDUSTRIES, INC. F/K/A HOLLAND FURNACE CO., AIR & LIQUID SYSTEMS CORPORATION, BUFFALO PUMPS DIVISION, BLACKMER PUMP COMPANY, BMCE INC., IN ITSELF AND AS SUCCESSOR TO UNITED CENTRIFUGAL PUMP CO., BORGWARNER MORSE TEC LLC, AS SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION, BRYAN STEAM LLC, BURNHAM LLC, BW/IP, INC., CARRIER CORPORATION INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO BRYANT HEATING & COOLING SYSTEMS, CBS CORPORATION, A DELAWARE CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAIN-TEED CORPORATION, CRANE CO., CROWN CORK & SEAL COMPANY INC., CUMMINS, INC., EATON CORPORATION, ECR INTERNATIONAL, INC., FMC CORPORATION, FMC CORPORATION, ON BEHALF OF ITS FORMER NORTHERN PUMP COMPANY, FOSTER WHEELER ENERGY CORPORATION, GENERAL ELECTRIC COMPANY, GREENE TWEED & CO. INC., HENNESSY INDUSTRIES, LLC, INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM COMPANY, INGERSOLL-RAND COMPANY, JOHN CRANE, INC., LENNOX INDUSTRIES, INC., RHEEM MANUFACTURING COMPANY, THE GOODYEAR TIRE & RUBBER COMPANY, TRANE U.S. INC. F/K/A AMERICAN STANDARD INC., UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN INC., A DIVISION OF THE MARLEY-WYLAIN COMPANY, WEIR VALVES & CONTROLS USA, INC., D/B/A ATWOOD & MORRILL, YORK INTERNATIONAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO YORK CORPORATION, PNEUNO ABEX LLC, SUCCESSOR-IN-INTEREST TO ABEX CORPORATION, F/K/A PNEUNO ABEX CORPORATION, SID HARVEY INDUSTRIES, INC., JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS)

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 179, 180, 181, 182, 183, 184, 185, 186, 187, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that Defendant ECR International Inc.'s (hereinafter referred to as "ECR") motion for partial summary judgment is denied for the reasons set forth below.

The instant action is premised upon Ernest Maseto's (hereinafter referred to as "Plaintiff") alleged exposure to asbestos as a result of his work with boilers manufactured by Utica Companies (hereinafter referred to as "Utica"), the predecessor by merger to ECR. Namely, Plaintiff worked as a mechanic serviceman in which he serviced and maintained boilers. Plaintiff's deposition testimony reflects that he removed and serviced Utica boilers between 1955 and 1985. Plaintiff's work included the removal and installation of insulation which created visible dust which Plaintiff claimed to breathe in. When asked what Plaintiff would have done differently if he saw warnings regarding asbestos and its cancer-causing effects, he testified that he would have worn proper clothing or find other means. *See* Plaintiff's Memorandum Of Law In Opposition to Defendant ECR International, Inc.'s Motion For Partial Summary Judgment On The Issue Of Punitive Damages, Exh. 1, Maseto De Bene Esse Depo. Tr., dated November 5, 2019, p. 121, ln. 7 – 11. Plaintiff argues that "Utica's failure to warn individuals such as Mr. Maseto that its boilers were equipped with harmful asbestos-containing components is significant, given that the work which Mr. Maseto performed on Utica's boilers exposed him to dangerous levels of respirable asbestos." *Id.* at p. 3. As such, Plaintiff seeks an award for punitive damages. ECR moves for partial summary judgment claiming punitive damages are not

warranted, as “no evidence exists that would warrant a finding that ECR acted with the requisite level of malice and near criminal reckless disregard under New York law to impose such damages.” Memorandum Of Law In Support Of ECR International, Inc.’s Motion For Partial Summary Judgment On The Issue Of Punitive Damages, p. 1. Plaintiff opposes, and no reply papers were filed.

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

*Corp.*, 89 NY2d 955, 956-57 (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”. *Matter of 91st St. Crane Collapse Litig.*, 154 AD3d 139, 156 (1st Dept 2017) (internal parenthesis omitted).

Preliminarily, ECR contends that Plaintiff’s claim for punitive damages is procedurally defective as it violates the terms of the Case Management Order (hereinafter referred to as the “CMO”). Pursuant to Section VII.C of the CMO, “punitive damages are no longer deferred in NYCAL and may be sought, where there is a good faith basis for doing so, against named defendant(s).” ECR argues that Plaintiff’s intentions to seek punitive damages does not provide any explanation of the good faith basis nor any evidence to be submitted in support of its claims. *See Memorandum Of Law In Support, supra*, at p. 8. Conversely, Plaintiff argues that absent from the CMO is any requirement that Plaintiff provide an explanation regarding their good faith basis to seek punitive damages. *See Memorandum Of Law In Opposition, supra*, at p. 20. “The New York City Asbestos Litigation (NYCAL) Coordinating Justice has the authority under the Uniform Rules For Trial Courts (22 NYCRR) § 202.69 to issue a Case Management Order (CMO). . . that sets forth procedural protocols for the NYCAL that do not strictly conform with the CPLR so long as those protocols do not deprive a party of its right to due process”. *Hettinger v Amchem Products, Inc.*, 193 AD3d 544 (1st Dept 2021). In the case at bar, Plaintiff complied with the CMO’s due process requirement, as “[p]laintiff had informed [ECR] of its intention to seek punitive damages by letter dated October 10, 2018.” *Memorandum Of Law In Opposition, supra*, at p. 21 (internal emphasis omitted). Since ECR’s due process rights were not violated, lack of a specific good faith explanation does not infringe upon the CMO particularly in light of

the fact that such explanation is not required by the CMO. As such, Plaintiff's claim for punitive damages is not procedurally defective.

Here, ECR argues that they did not recklessly disregard the health and safety of their employees. More specifically, "any exposure to asbestos resulting from Mr. Maseto's removal or servicing of Utica's boilers would have been below the applicable OSHA limits in place at the time." Memorandum Of Law In Support, *supra*, at p. 7. Conversely, Plaintiff argues that the Occupational Safety and Health Administration (hereinafter referred to as "OSHA") permissible exposure limit (hereinafter referred to as "PEL") is not applicable in the instant matter. Plaintiff further contends that even assuming *arguendo* that OSHA PEL is applicable, OSHA has made clear that there is no known safe level of exposure to asbestos. *See* Memorandum Of Law In Opposition, *supra*, at p. 6. OSHA set its PEL at its initial eight-hour time weighted average at 12 f/cc in 1971. *See* Notice Of Motion, Exh. F, Robert D. Strode, M.S., CIH, FAIHA Report, dated December 16, 2020, p. 12. Throughout the years, OSHA has lowered the PEL, with the current OSHA PEL established at 0.1 f/cc in 1994. *See Id.* Although Plaintiff argues that OSHA PEL is inapplicable, it is undisputed that employers were required to comply with OSHA asbestos regulations regarding the monitoring of asbestos exposure. *See Id.* at p. 13. The Appellate Division, First Department, has previously held "that. . . compliance with a statute may constitute some evidence of due care". *Lugo v LJM Toys, Ltd.*, 146 AD2d 168, 170 (1<sup>st</sup> Dept 1989). Thus, evidence of compliance with OSHA may be used to support the argument that punitive damages should not be imposed. However, as the Appellate Division, First Department found in *Lugo*, "compliance with a statute. . . does not preclude a finding of negligence." *Id.*

Plaintiff contends that ECR cannot dispute that "Utica failed to comply with OSHA's labeling requirement." Memorandum Of Law In Opposition, *supra*, at p. 9. Plaintiff refers to

OSHA’s regulations which “provide that warning labels must be affixed to all asbestos products and to all containers of asbestos products, including waste containers, that may be in the workplace.” *Id.* Plaintiff further contends that “ECR did not present any evidence that Utica’s boilers were tested, nor is there any dispute that Utica’s boilers were unaccompanied by a warning, thereby placing it out of compliance with OSHA.” *Id.*

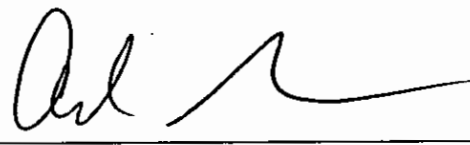
The Court notes that the Court of Appeals has held that “[a] products liability action founded on a failure to warn involves conduct of the defendant having attributes of negligence which the jury may find sufficiently wanton or reckless to sustain an award of punitive damages”. *Home Ins. Co. v. Am. Home Products Corp.*, 75 NY2d 196, 204 (1990) (internal citations omitted). Furthermore, plaintiff has provided evidentiary facts tending to show that ECR’s warnings were deficient such that the adequacy of such warnings are a factual 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 ECR’s motion is denied.

Accordingly, it is

ORDERED that Defendant ECR International Inc.’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 entry

This constitutes the decision/order of the Court.



ADAM SILVERA, J.S.C.

10/4/2022  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
 REFERENCE