

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

2022 NY Slip Op 33663(U)

October 24, 2022

Supreme Court, New York County

Docket Number: Index No. 190131/2019

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART 13

Justice

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JOHN SCHLACHTER,

Plaintiff,

INDEX NO. 190131/2019

MOTION DATE

MOTION SEQ. NO. 002

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPS SCIENCE INC., AURORA PUMP COMPANY, BLACKMER, BORGWARNER MORSE TEC LLC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO., CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC, DOMCO PRODUCTS TEXAS, INC, ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC, GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, IMO INDUSTRIES, INC, ITT INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., KAISER GYPSUM COMPANY, INC., KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LEVITON MANUFACTURING CO., INC, PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, SLANT/FIN CORPORATION, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO

DECISION + ORDER ON MOTION

COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, CLEAVER BROOKS COMPANY, INC., DAP, INC., FOSTER WHEELER, L.L.C., FULTON BOILER WORKS, INC., TACO, INC., ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, J-M MANUFACTURING COMPANY, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 311, 312, 313, 314, 315, 316

were read on this motion to/for

DISMISSAL

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

The instant matter is premised upon Plaintiff John Schlachter's alleged exposure to asbestos as a result of his removal, repairs, and installation of Burnham boilers. Plaintiff was deposed on August 27 – 28, and September 3 – 4, 2019, in which he testified that he worked with Burnham boilers from 1963 through 1993 throughout numerous locations within New York City. Plaintiff argues, *inter alia*, that Burnham failed to place a warning on their boilers even after obtaining the knowledge of the harmful and dangerous effects when exposed to asbestos warranting the imposition of punitive damages. Conversely, Burnham argues that any asbestos exposure from Plaintiff's work on Burnham boilers was significantly below threshold limit values and exposure limits set by the standards and regulations of the Occupational Safety and

Health Act (hereinafter referred to as “OSHA”). Burnham moves for partial summary judgment on the issue of punitive damages. Plaintiff opposes, and Burnham replies.

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 support of their motion, Burnham contends that Plaintiff cannot identify evidence to justify the imposition of punitive damages and that such damages are not warranted under New York Law. See Memorandum Of Law In Support Of Defendant Burnham LLC’s Motion For Partial Summary Judgment, p. 9. Burnham relies upon a study conducted by Dr. William E. Longo, a microscopist, arguing that Plaintiff’s exposure to asbestos was below OSHA’s permissible exposure limit (hereinafter referred to as “PEL”). As such, Burnham contends that Burnham’s failure to warn does not rise to reckless and wanton disregard to support a claim for punitive damages. Conversely, Plaintiff argues that “Burnham fundamentally misunderstands. . .

OSHA[’s] PEL, which [is] plainly inapplicable, irrelevant to the case at bar, and cannot serve as a defense shield for Burnham to argue that it cannot be held liable for an award of punitive damages.” Plaintiffs’ Memorandum Of Law In Opposition To Defendant Burnham LLC’s Motion For Partial Summary Judgment On The Issue Of Punitive Damages, p. 15, ¶ 27.

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, 956-957 (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 parentheses omitted).

Although Plaintiff argues that OSHA is inapplicable in the instant matter, 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 (1st Dept 1989). Thus, evidence of compliance with the OSHA PEL 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.*

Moreover, it is well established “that on motions for summary judgment issue-finding rather than issue-determination, is the key to the procedure”. *Harlib v Chandris Lines, Inc.*, 374

NYS2d 6, 6 (1st Dept 1975) (internal quotations omitted). At issue herein is not whether Burnham complied with OSHA's PEL, rather, on the instant motion for summary judgment, the Court must determine whether an issue of fact exists and whether a reasonable trier of fact may conclude that Burnham acted with wanton and reckless disregard for failing to warn Plaintiff of the hazards of asbestos exposure.

In addition, Burnham argues that according to the Appellate Division, First Department's decision in *Maltese, supra*, punitive damages are not appropriate when the claim rests upon an alleged failure to warn. See Memorandum Of Law In Support, *supra*, at p. 8. However, Plaintiff contends that Burnham's reliance on *Maltese* is misplaced, as "punitive damages are undoubtedly permitted in failure to warn cases." Plaintiff's Memorandum Of Law In Opposition, *supra*, at p. 22, ¶ 39. The New York 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). This Court further notes that where a Plaintiff provides evidentiary facts tending to show that defendant's warnings were deficient, 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). Plaintiff has proffered evidence that demonstrates Burnham failed to warn Plaintiff of the hazards of asbestos. The corporate representative of Burnham, Mr. Roger Pepper, testified that up until 1982 Burnham never placed a warning regarding the dangers of asbestos on any of its boilers. See Plaintiff's Memorandum Of Law In Opposition, Exh. 21, Excerpts of Depo. Tr. of Roger Pepper dated March 20, 2018, p. 2168, ln. 15 – 18. As such, Burnham has failed to demonstrate their prima facie burden that punitive damages are not warranted herein.

Accordingly, it is

ORDERED that defendant Burnham LLC's motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision / order of the Court.

ADAM SILVERA, J.S.C.

10/24/2022  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: