

Sweetman v A.O. Smith Water Prods. Co
2022 NY Slip Op 33664(U)
October 24, 2022
Supreme Court, New York County
Docket Number: Index No. 190186/2018
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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INDEX NO. 190186/2018

GEORGE A SWEETMAN,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC, BORGWARNER MORSE TEC LLC, BRYANT HEATING & COOLING SYSTEMS, BURNHAM, LLC, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., CERTAINTEED CORPORATION, COOPER INDUSTRIES, INC, CROWN BOILER CO., DANA COMPANIES, LLC, EATON CORPORATION, AS SUCCESSOR -IN-INTEREST TO, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GOULD ELECTRONICS INC, H.B. FULLER COMPANY, HONEYWELL INTERNATIONAL, INC., LENNOX INDUSTRIES, INC, LEVITON MANUFACTURING CO., INC, MANNINGTON MILLS, INC, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS, SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST TO, SLANT/FIN CORPORATION, STANDARD MOTOR PRODUCTS, INC, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, J-M MANUFACTURING COMPANY, INC, AMERICAN HONDA MOTOR CO., INC. (AHM), BRIGGS & STRATTON CORP., BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, DAP, INC., DOMCO PRODUCTS TEXAS, INC., FRIGIDAIRE, GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON - KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON - KELLEY, ITT INDUSTRIES INC. INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT ADN AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., MERCEDES - BENZ USA, LLC, F/K/A MERCEDES - BENZ USA, INC. AND MERCEDES - BENZ OF NORTH AMERICA, INC., NISSAN NORTH AMERICA, INC., PENNCO INC., RHEEM MANUFACTURING COMPANY, TARKETT ALABAMA, INC., TARKETT INC., VOLKSWAGEN GROUP OF AMERICA, INC., YORK INTERNATIONAL CORPORATION, BIRD INCORPORATED, KARNAK CORPORATION, R.W.

DECISION + ORDER ON MOTION

BECKETT CORPORATION, YAMAHA MOTOR CORPORATION USA,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 258, 259, 260, 261, 262, 263, 264, 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

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 on the issue of punitive damages is denied for the reasons set forth below.

The instant matter is premised upon Plaintiff George Sweetman's alleged exposure to asbestos as a result of his repair work with Burnham's boilers. Plaintiff was deposed on November 11 – 15, and 21, 2019, in which he testified that he was exposed to asbestos when he performed maintenance on a Burnham boiler from approximately 1968 to 1974 within his residence in Queens, New York. Plaintiff further testified that from approximately 1979 – 1984, Plaintiff worked for Cook & Krupa, a construction company. During the late 1970s to the 1980s, he performed maintenance work and removed Burnham boilers on five different occasions within residences located in Queens, New York while working with his friend, Mr. Max Gross. Thereafter, Plaintiff owned Gemco Sweetman, Inc., whereupon he removed old Burnham boilers and installed new ones. Plaintiff further testified that he knew that Burnham was the manufacturer of the boilers since the name was on the boilers itself. 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 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 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. 9-10. 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’s attempted reliance on the one isolated study by a microscopist, coupled with its misuse and misrepresentations. . . demonstrate the [lack of merit in the] present motion.” Affirmation In Opposition To Burnham’s Motion For Partial Summary Judgment, p. 5, ¶ 17.

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).

In the case at bar, the single study conducted by Dr. Longo does not support a finding for partial summary judgment on the issue of punitive damages. In his deposition testimony, Dr. Longo concedes that he never conducted any studies on a Burnham boiler. *See* Affirmation In Opposition, *supra*, Exh. 4, Depo. Tr. of William E. Longo, PH.D., dated December 16, 2015, p. 36, ln. 10 – 12. Further, Dr. Longo does not rely upon any information regarding Burnham boilers, as Dr. Longo testified that he relies on the mixing and removal of materials which cause significant exposure. *See Id.* at p. 37, ln. 14 – 17. “A court’s function on a motion for summary judgment involves issue finding rather than issue determination”. *Farias v Simon*, 122 AD3d 466, 468 (1st Dept 2014). Here, the Court need only determine whether a genuine issue of

material fact exists as to whether Burnham's conduct rises to the level of wanton disregard for punitive damages to be imposed. Dr. Longo's study cannot unambiguously establish that Plaintiff's asbestos exposure was below OSHA's PEL. As such, Dr. Longo's study which infers Plaintiff's exposure was below OSHA's PEL does not refute that Burnham may have acted with wanton disregard by failing to warn Plaintiff of the ultra-carcinogenic hazards of asbestos.

It is important to note that Burnham's reliance on *Maltese, supra*, is misplaced. Namely, Burnham contends that according to *Maltese*, a general awareness of significant exposure to asbestos is insufficient to support a finding of punitive damages. See Memorandum Of Law In Support, *supra*, at p. 9. However, 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 Burnham'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 Burnham's motion is denied.

Accordingly, it is

ORDERED that Defendant Burnham LLC'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



10/24/2022

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: