

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

2022 NY Slip Op 34059(U)

November 28, 2022

Supreme Court, New York County

Docket Number: Index No. 190261/2019

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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INDEX NO. 190261/2019

GLORIA A. MARYN,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 004

- v -

A.O. SMITH WATER PRODUCTS CO, AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BARNES & JONES, INC, BLACKMAN PLUMBING SUPPLY COMPANY, INC, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, 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, CERTAINTIED CORPORATION, CLEAVER BROOKS COMPANY, INC, CLYDE UNION, INC, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CONBRACO INDUSTRIES, INC, CRANE CO, ELECTROLUX HOME PRODUCTS, INC. INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC. INDIVIDUALLY AND 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, FOSTER WHEELER, L.L.C, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS, KAMCO SUPPLY CORP, KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LOCHNIVAR CORPORATION, NEW YORKER BOILER COMPANY, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PULSAFEEDER, R.W. BECKETT

DECISION + ORDER ON MOTION

CORPORATION, RED WHITE VALVE CORP, RHEEM MANUFACTURING COMPANY, RILEY POWER INC, ROCKWELL AUTOMATION, INC., AS SUCCESSOR IN INTEREST TO ALLEN- BRADLEY COMPANY, LLC, ROPER PUMP COMPANY, SLANT/FIN CORPORATION, SPENCE ENGINEERING COMPANY, INC. INDIVIDUALLY AND AS A DIVISION OF CIRCOR INTERNATIONAL INC, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, SUPERIOR BOILER WORKS, INC, TACO, INC, THE J.R. CLARKSON COMPANY LLC SUCCESSOR BY MERGER TO IMI CASH VALVE, INC. (FORMERLY KNOWN AS AW CASH VALVE MANUFACTURING CORPORATION), U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC, WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, ZY-TECH GLOBAL INDUSTRIES, INC, AMERICAN INTERNATIONAL INDUSTRIES INC., BIRD INCORPORATED, J-M MANUFACTURING COMPANY, INC., KARNAK CORPORATION, LENNOX INDUSTRIES, INC., NESLEMUR, AS SUCCESSOR IN INTEREST TO CLUBMAN AND JERIS TALC, NESLEMUR, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CLUBMAN, ARMSTRONG PUMPS, INC., INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, LEVITON MANUFACTURING CO., INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 348, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 496, 497, 498, 499, 500, 501

were read on this motion to/for \_\_\_\_\_ DISMISSAL \_\_\_\_\_.

Upon the foregoing documents, it is 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 Gloria Maryn's alleged exposure to asbestos through the clothes of her son, Victor Arana, who worked with Burnham boilers. Mr. Arana was deposed on February 6, 7, 10, and 11 of 2020, in which he testified that in approximately 1999, Mr. Arana began working as a plumber's helper at New York Plumbing & Sewer and held this position for 15 years. His duties included the removal and repairs of asbestos insulated boilers at both residential and commercial locations within New York. When removing boilers, Mr. Arana was required to break the boilers apart for removal. Mr. Arana testified that he was exposed to asbestos through the insulation encased in the boilers, the jacket, and rope gaskets that surrounded the boilers. Mr. Arana identified Burnham as the manufacturer of the boilers since there were name plates on the boilers itself. Mr. Arana further testified that Plaintiff would launder his clothes, shake out the clothes, and clean the dust off of the floor, causing her exposure. 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 Summary Judgment, p. 13. 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 "under no circumstances is the TLV, OSHA PEL, or any other regulatory standard relevant to determining liability under a defendant manufacturer's nondelegable duty to warn." Plaintiff's Memorandum Of Law In Opposition To Defendant Burnham LLC's Motion For Summary Judgment, p. 30.

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 Support Of Defendant Burnham LLC’s Motion For Partial Summary Judgment, Exh. U, 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). Burnham’s reliance on Dr. Longo’s study is misplaced, as such study assumes that Plaintiff’s exposure was below permissible standards. 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. Further, 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.* 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.

In addition, Burnham argues that according to the decision in *Maltese, supra*, punitive damages are not appropriate when the claim rests upon an alleged failure to warn. However, 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, supra*, Exh. 20, 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

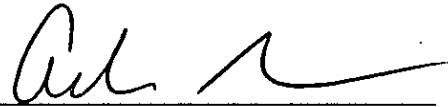
ORDERED that Defendant Burnham LLC’s motion for partial summary judgment is hereby denied in its entirety; and it is further

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

11/28/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE