

Gartner v A.O. Smith Water Prods. Co.
2022 NY Slip Op 34060(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 190270/2019
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. 190270/2019

ROBERTA GARTNER,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- 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, AMERICAN BILTRITE INC, ARMSTRONG INTERNATIONAL, INC, ARMSTRONG PUMPS, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BRYANT HEATING & COOLING SYSTEMS, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, 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, CRANE CO, DAP, INC, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC, 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, FULTON BOILER WORKS, INC, GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULD ELECTRONICS INC, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, 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, JENKINS BROS, J-M MANUFACTURING COMPANY, INC, KAISER GYPSUM COMPANY, INC, KAMCO SUPPLY CORP, KOHLER CO, LENNOX INDUSTRIES, INC, MILWAUKEE VALVE COMPANY, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN

DECISION + ORDER ON MOTION

INTEREST TO ABEX CORPORATION (ABEX), RHEEM MANUFACTURING COMPANY, ROCKWELL AUTOMATION, INC., AS SUCCESSOR IN INTEREST TO ALLEN- BRADLEY COMPANY, LLC, SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SLANT/FIN CORPORATION, SPIRAX SARCO, INC. INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, SUPERIOR BOILER WORKS, INC, TACO, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, THE NASH ENGINEERING COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC, WATTS WATER TECHNOLOGIES, INC. F/K/A WATTS INDUSTRIES, INC INDIVIDUALLY AND AS SUCCESSOR TO MUELLER STEAM SPECIALTY COMPANY, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, YORK INTERNATIONAL CORPORATION, ANCHOR DARLING VALVE COMPANY, BIRD INCORPORATED, CLEAVER BROOKS COMPANY, INC., COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., IMO INDUSTRIES, INC., NIBCO INC., WARREN PUMPS, LLC, ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, FORT KENT HOLDINGS, INC., F/K/A DUNHAM-BUSH, INC., AS SUCCESSOR BY MERGER TO SILENT AUTOMATIC, A DIVISION OF SPACE CONDITIONING, INC., FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC., MUELLER STEAM SPECIALTY COMPANY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 308, 325, 326, 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

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 summary judgment is denied for the reasons set forth below.

Both individually and as administratrix for the estate of decedent Mr. James Scheriff, plaintiff Roberta Gartner seeks compensation against Burnham, premised upon decedent's alleged exposure to asbestos as a result of his work on Burnham's boilers. Decedent was diagnosed with Mesothelioma on October 8, 2019, and subsequently passed away from his illness on June 22, 2020. Prior to his death, decedent testified at his deposition that he worked as a plumber and helper for James Simpson Plumbing & Heating in the 1970s, and as a HVAC worker for the Metropolitan Transit Agency in the 1980s. Decedent testified that he installed, removed, and maintained Burnham boilers throughout his career as a plumber. Decedent further testified that visible dust would come from the jacket of Burnham boilers in which he was exposed. 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'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. 8, ¶ 14.

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.

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.* In the case at bar, 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.

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. 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. During the direct testimony of the corporate representative of Burnham, Mr. Sweigart, was asked whether it was correct that "Burnham never. . . put a warning regarding the hazards of asbestos on any of its boilers". Affirmation In Opposition, *supra*, Exh. 5, excerpts from the Tr. oof Mr. Sweigart from the *Assezgio* trial group, dated June 19, 2013, p. 2778, ln. 14 – 16. Mr. Sweigart answered "[t]hat's correct." *Id.* at ln. 20. 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:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE