

Servedio v A.O. Smith Water Prods. Co
2022 NY Slip Op 34111(U)
December 5, 2022
Supreme Court, New York County
Docket Number: Index No. 190144/2018
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

INDEX NO. 190144/2018
MOTION DATE 01/24/2022
MOTION SEQ. NO. 001

CHARLES SERVEDIO,
Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM
PRODUCTS, INC., BORGWARNER MORSE TEC LLC.,
BURNHAM, LLC, CARRIER CORPORATION,
CERTAINTEED CORPORATION, CRANE CO,
CYCLOTHERM OF WATERTOWN, INC, DANA
COMPANIES, LLC, ECR INTERNATIONAL, CORP., H.B.
FULLER COMPANY, HONEYWELL INTERNATIONAL,
INC., ITT LLC., J.H. FRANCE REFRACTORIES COMPANY,
KOHLER CO, OWENS-ILLINOIS, INC, PEERLESS
INDUSTRIES, INC, PFIZER, INC. (PFIZER), REYNOLDS
METALS COMPANY, RHEEM MANUFACTURING
COMPANY, SCHNEIDER ELECTRIC USA, INC.
FORMERLY KNOWN AS, SLANT/FIN CORPORATION,
U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE
CORPORATION, WEIL-MCLAIN, A DIVISION OF THE
MARLEY-WYLAIN COMPANY, A WHOLLY OWNED
SUBSIDIARY OF, LEVITON MANUFACTURING CO., INC.,

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 116, 117, 118, 119,
120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140,
141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161,
162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179

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 Charles Servedio's alleged exposure to
asbestos as a result of his work with Burnham-boilers. Plaintiff worked for Gifford's Oil as a
boiler mechanic from approximately 1955 to 1967. His duties included the removal and

installation of boilers at residential and commercial settings in Nassau County, Kings County, and Queens County. Plaintiff alleges exposure to asbestos from mixing and applying asbestos containing powdered cement and applying it to the boilers, and by breaking apart boilers with a sledgehammer and chisel. According to Plaintiff, the manufacturer of the boiler was Burnham, as he identified Burnham on the name of the boiler's door. Plaintiff never wore protective gear or a respirator. 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 OSHA, claiming that exposure below the regulatory limit does not rise to reckless and wanton disregard to support a claim for punitive damages. In opposition, Plaintiff argues that OSHA is not applicable in the case at bar, as OSHA levels “in no way whatsoever contradicts, refutes, or settles the matter of Burnham’s wanton disregard of the known ultracarcinogenic hazards posed by its products by virtue of its grossly reckless refusal to warn product users.” Affirmation In Opposition To Burnham’s Motion For Partial Summary Judgment [*sic*], p. 10, ¶ 23.

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). 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 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 “[t]he First Department determinations in asbestos cases have established what sort of proof provides an ample predicate to sustain the conclusion that defendant’s failure to warn may be deemed to have been wanton or reckless.” Affirmation In Opposition, *supra*, at p. 19, ¶ 60. 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). Plaintiff has proffered

evidence that demonstrates Burnham failed to warn Plaintiff of the ultra-carcinogenic hazards of asbestos. When asked whether it was correct that “Burnham never. . . put a warning regarding the hazards of asbestos on any of its boilers”, corporate representative Mr. Sweigart testified “that’s correct.” Affirmation In Opposition, *supra*, Exh. 5, Excerpts From Tr. Of Mr. Sweigart From The *Assenzio* Trial Group, June 19, 2013, p. 2778, ln. 14 – 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 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.

12/5/2022
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- OTHER

APPLICATION:

- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- REFERENCE

CHECK IF APPROPRIATE: