

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

2023 NY Slip Op 30686(U)

March 6, 2023

Supreme Court, New York County

Docket Number: Index No. 190263/2020

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA**

**PART**

**13**

*Justice*

FRANK PASSANISI,

Plaintiff,

INDEX NO. 190263/2020  
MOTION DATE 01/17/2023  
MOTION SEQ. NO. 005

- v -

A.O. SMITH WATER PRODUCTS CO, AMERICAN  
BILTRITE INC, AMERICAN HONDA MOTOR CO., INC.  
(AHM), BURNHAM, LLC, INDIVIDUALLY, AND AS  
SUCCESSOR TO BURNHAM CORPORATION,  
DOMCO PRODUCTS TEXAS, INC, FORD MOTOR  
COMPANY, GRINNELL LLC, HONEYWELL  
INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. /  
BENDIX, NAVISTAR, INC., A/K/A INTERNATIONAL  
TRUCK & ENGINE CORP. F/K/A INTERNATIONAL  
HARVESTER, INC, NISSAN NORTH AMERICA, INC, PB  
HEAT LLC, INDIVIDUALLY AND AS SUCCESSOR IN  
INTEREST TO PEERLESS INDUSTRIES, STANDARD  
MOTOR PRODUCTS, INC, THE B.F. GOODRICH  
COMPANY, (GOODRICH CORPORATION), TOYOTA  
MOTOR SALES U.S.A., INC, UNION CARBIDE  
CORPORATION, WEIL-MCLAIN, A DIVISION OF THE  
MARLEY-WYLAIN COMPANY, A WHOLLY OWNED  
SUBSIDIARY OF THE MARLEY COMPANY, LLC,

Defendant.

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 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, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that defendant Burnham LLC's motion for partial summary judgment to dismiss plaintiff's complaint is hereby denied for the reasons set forth below.

Here, defendant Burnham moves for summary judgment arguing that plaintiff has failed to establish that moving defendants' conduct rises to the level of egregious and morally culpable

conduct necessary for an award of punitive damages. According to defendant Burnham, any exposure to asbestos by plaintiff through Burnham boilers were below the regulated threshold limits and permissible exposure limits (hereinafter referred to as “PEL”). In support of its motion, defendant Burnham relies upon a study conducted by William E. Longo, Ph.D in 2007 (hereinafter referred to as the “Longo study”), arguing that plaintiff’s exposure to asbestos was below the Occupational Safety and Health Act’s PEL. As such, defendant Burnham contends that its failure to warn does not rise to reckless and wanton disregard to support a claim for punitive damages. Plaintiff opposes the instant motion arguing, *inter alia*, that the Longo study is insufficient to meet defendant Burnham’s initial burden on summary judgment. Moving defendant replies.

During his deposition, and through answers to interrogatories, plaintiff testified that he worked as a painter from 1966 to 1986. Plaintiff further testified that he was exposed to asbestos through Burnham boilers at his own residence while a plumber worked on his Burnham boiler, during his employment as a painter while he cleaned the asbestos from the Burnham boilers in order to paint, and during his employment while plumbers removed the Burnham boilers in his presence. Plaintiff alleges that such work released asbestos dust from the boilers.

The standards of summary judgment are well settled. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). “The 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 eliminate any material issues of fact from the case”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires

denial of the motion. *Id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1<sup>st</sup> Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1<sup>st</sup> Dep’t 1990). The court’s role is “issue-finding, rather than issue-determination”. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

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 91<sup>st</sup> St. Crane Collapse Litig.*, 154 AD3d 139, 156 (1<sup>st</sup> Dep’t 2017)(internal parentheses omitted).

Plaintiff correctly argues that the single study conducted by Dr. Longo is insufficient to support partial summary judgment on the issue of punitive damages herein. In his deposition, Dr.

Longo concedes that he never conducted any studies on a Burnham boiler. *See* Affirmation in Opposition to Burnham's Motion for Partial Summary Judgment, Exh. 6, Depo. Tr. of William E. Longo, Ph.D., dated December 16, 2015, p. 36, ln. 10-12. In *Dryer v Amchem Products Inc.*, 207 AD3d 408, 411 (1<sup>st</sup> Dep't 2022) the Appellate Division, First Department held that to succeed on a motion for summary judgment, the moving party must support the motion with a fact specific study. Here, the Longo study provides no relevant information regarding the specific products at issue herein, and the specific circumstances in which the instant plaintiff was exposed to asbestos through defendant Burnham's boilers. Thus, defendant Burnham has failed to proffer sufficient evidence to establish entitlement to summary judgment.

Moreover, the Court notes that where a plaintiff provides evidentiary facts tending to show that defendant's warnings were in any way 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). The New York Court of Appeals has also 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). Here, plaintiff has proffered evidence that demonstrates defendant Burnham failed to warn plaintiff of the hazards of asbestos. During direct testimony of the corporate representative of defendant Burnham, Mr. Sweigart, was asked whether it was correct that "Burnham, never...put a warning regarding hazards of asbestos on any of its boilers". Affirmation in Opposition, *supra*, Exh. 7, excerpts from the Tr. of Mr. Sweigart from the *Assenzio* trial group, dated June 19, 2013, p. 2778, ln. 14-16. Mr. Sweigart answered "[t]hat's correct." *Id.* at ln. 20. As such, defendant

Burnham has failed to demonstrate their prima facie burden that punitive damages are not warranted herein. Thus, defendant Burnham's motion is denied.


Accordingly, it is

ORDERED that defendant Burnham's motion for partial summary judgment to dismiss plaintiff's claim for punitive damages 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 defendants with notice of entry.

This constitutes the Decision/Order of the Court.

3/6/2023  
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"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE