

Cuevas v A.O. Smith Water Prods. Co.

2023 NY Slip Op 32821(U)

August 14, 2023

Supreme Court, New York County

Docket Number: Index No. 190009/2014

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

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JUANA CUEVAS,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., BELL & GOSSETT COMPANY, BIRD INCORPORATED, BURNHAM, LLC, CARRIER CORPORATION, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, CROWN BOILER CO., DANA COMPANIES, LLC, DAP, INC., FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GEORGIA PACIFIC LLC, GOODYEAR CANADA, INC, HARRIS CORPORATION, HEIDELBERG USA, INC., HONEYWELL INTERNATIONAL, INC., ITT INDUSTRIES, INC., ITT INDUSTRIES, INC., JENKINS BROS., KAISER GYPSUM COMPANY, INC, KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO., MARIO & DIBONO PLASTERING CO., INC, OWENS-ILLINOIS, INC., PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), SLANT/FIN CORPORATION, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN REALTY & CONSTRUCTION CO., INC, U.S. PLYWOOD CORPORATION, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, WEYERHAEUSER COMPANY, AERCO INTERNATIONAL, INC, BORG-WARNER CORPORATION, BY ITS SUCCESSOR-IN-INTEREST, BORG-WARNER MORSE TEC, INC, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, INTERNATIONAL PAPER COMPANY A/K/A HAMMERMILL PAPER CO, ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 109, 110, 111, 112, 113, 114, 115, 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

were read on this motion to/for

DISMISSAL

**DECISION + ORDER ON
MOTION**

Upon the foregoing documents, it is ordered that the instant motion for dismissal is partially granted with respect to plaintiff's breach of implied and express warranties, market share liability, Labor Law premises liability, and dust mask-related liability claims as there is no opposition as to the dismissal of such claims against defendant Burnham LLC ("Burnham"). Dismissal of plaintiff's failure to warn, loss of consortium, and punitive damages claims is denied in accordance with the decision below.

On a motion to dismiss pursuant to CPLR §3211(a)(7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v Martinez*, 84 NY2D 83, 87-88 (1994). A motion to dismiss the complaint for failure to state a cause of action "will generally depend upon whether or not there was substantial compliance with CPLR 3013." *Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep't 1972). If the allegations are not "sufficiently particular to give the court and parties notice of the transactions intended to be proved and the material element of each cause of action", the cause of action will be dismissed. *Id.* at 715. CPLR §3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions and occurrences, intended to be proved and the material elements of each cause of action or defense."

Here, defendant Burnham moves to dismiss plaintiff's "failure to warn" claims on the basis that plaintiff has not met the standard for "an injury arising from the foreseeable use of a defendant's non-asbestos equipment in conjunction with a third party's asbestos components...that was 'necessary' for the defendant's product to function as intended" under *Dummitt*. *See* Memorandum of Law in Support of Defendant Burnham LLC's Motion to Dismiss, p. 10 (citing *Matter of New York City Asbestos Litig. (Dummitt)*, 27 N.Y.3D 765

(2016)). Plaintiff notes that the *Dummitt* standard focuses on “foreseeability and ‘practical necessity’ of using the carcinogenic asbestos component part”. Affirmation in Opposition to Burnham’s [*sic*] Motion to Dismiss Certain Claims, p. 3. Here, there is ample evidence that Burnham was aware of the asbestos-containing components used in their boilers and knew of their “practical necessity” to the boilers. *See id.* at p. 11-12. Certain components, such as asbestos cement, were clearly necessary to, and expected to, be used in Burnham boilers. This is sufficient basis for the failure to warn claims, and accordingly, the loss of consortium claim.

Defendant Burnham also moves to dismiss plaintiff’s claims for punitive damages on the basis that they are not pled sufficiently and implicate procedural due process under the 2017 Case Management Order. Defendant’s procedural claim is insufficient due to the incorporation of punitive damages in plaintiff’s standard complaint. A review of the standard complaint reveals that the claims for failure to warn, loss of consortium, and punitive damages are all sufficiently pled so as to put defendant on notice of such claims. As such, defendant Burnham’s instant motion is denied as to such claims.

Accordingly, it is

ORDERED that defendant Burnham’s motion for dismissal is granted in part with respect to the breach of implied and express warranties, market share liability, Labor Law premises liability, and dust mask-related liability claims; and it is further

ORDERED that defendant Burnham’s motion for dismissal is denied with respect to the failure to warn, loss of consortium, and punitive damages claims; and it is further

ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

08/14/2023

DATE

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: