

Falsetta v ABB, Inc.
2019 NY Slip Op 33587(U)
December 5, 2019
Supreme Court, New York County
Docket Number: 190260/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

**JOHANNA L. FALSETTA, as Executor for the Estate
Of HENRY R. BETTKE, and LOLA BETTKE, Individually,
Plaintiffs,**

- against -

**ABB, INC., as successor in interest to ITE CIRCUIT
BREAKERS, INC., et al.,**

Defendants.

INDEX NO. 190260/2015

MOTION DATE 12-04-2019

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to dismiss by BURNHAM LLC, pursuant to CPLR 3211(a)(7):

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Burnham, LLC's (hereinafter "Burnham") motion pursuant to CPLR §3211(a)(7) to dismiss plaintiffs' complaint against it is granted solely to the extent of dismissing the causes of action against Burnham for breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants liability (sixth cause of action). The motion to dismiss the causes of action for failure to warn (first and third causes of action), loss of consortium (seventh cause of action) and punitive damages is denied.

Plaintiffs bring this action to recover for injuries sustained by Mr. Henry Bettke from his alleged exposure to asbestos from various defendants' products. It is alleged that Mr. Bettke was exposed to asbestos while removing and installing Burnham boilers from approximately 1956 to 1959.

Plaintiffs commenced this action on August 20, 2015 (Exhibit E). Burnham acknowledged service and answered on September 21, 2015 (Exhibit H). Plaintiffs filed supplemental complaints, which incorporated plaintiffs' attorneys - Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7, on November 10, 2015 and January 25, 2016.

Burnham, pursuant to CPLR §3211(a) (7), seeks to dismiss plaintiffs' complaint including the punitive damages claim asserted against it. Plaintiffs do not oppose dismissal of the causes of action for breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants' liability (sixth cause of action). Those causes of action are dismissed with prejudice, without opposition.

Plaintiff opposes dismissal of the causes of action for failure to warn (first and third causes of action), the cause of action for loss of consortium (seventh cause of action) and punitive damages.

Burnham argues that plaintiffs' claims for punitive damages are based on failure to warn in the face of a general awareness of potential human health risks, rendering it insufficient to meet the standard to sustain the claims. Burnham also argues that because it did not mine, mill or manufacture asbestos, the claim cannot be sustained. Burnham argues that plaintiff's failure to warn claims must be dismissed because the allegations are insufficient as a matter of law, since its boilers did not contain asbestos and at the time of Mr. Bettke's exposure Burnham, a manufacturer, had no duty to warn end users about the hazards arising from the use of a third-party's product in conjunction with its product. Finally, it argues that since the failure to warn claim should be dismissed, the loss of consortium claim should also be dismissed because it is derivative of the failure to warn claim.

Plaintiffs argue that their causes of action for failure to warn are properly pled, and factually and legally sufficient. they argue that although Burnham did not manufacture asbestos, it promoted for decades, specified and knew of the use of asbestos-containing materials for insulating its product. Mr. Bettke testified that he was exposed to asbestos when he removed and replaced Burnham jacketed boilers as service manager for Sentinental Oil from 1956 to 1959. During the removal process the Burnham boilers were broken up with sledge hammers, after the sheet metal covering was stripped off, releasing dust that Mr. Bettke breathed in. (see Exhibit 9). Plaintiffs further points to Burnham specifications requiring the spaces in sectional boilers be "filled between beads with asbestos cement as each section is set..." and providing "...sufficient asbestos cement with each boiler ..." Burnham further admitted in its interrogatories that its boilers were asbestos-containing and that it sold such boilers at least through 1986 (see Exhibit 3,4,5,6,7,8,9,10,11 and 12). Plaintiffs argue that since the failure to warn claim survives, so too should its cause of action for loss of consortium.

Plaintiffs seek punitive damages under multiple causes of action and assert that Burnham is liable for punitive damages because it placed corporate profits above the health and safety of Mr. Bettke, and that Burnham continually insisted that there was no asbestos exposure from its product.

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action does not have to be skillfully prepared, but it does have to present facts so that it can be identified and establish a potentially meritorious claim. The facts alleged are given the benefit of every favorable inference (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

Plaintiffs' failure to warn and loss of consortium claims can be identified and are properly pled. Plaintiffs have alleged sufficient facts and produced sufficient evidence in support of their allegations that Burnham sold asbestos containing boilers, and specified, knew of the use of and sold asbestos-containing materials for insulating its boilers (see Exhibits 3,4,5,6,7,8,9,10,11 and 12). Mr. Bettke stated that he was exposed while removing and replacing Burnham boilers. He stated that the boilers had to be stripped of their metal covering and broken up using a sledgehammer, that this created dust which he breathed in (see Exhibit 9). These allegations and exhibits support plaintiffs' failure to warn and loss of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

consortium claims (see *In re New York City Asbestos Litigation (Dummitt)*, 27 N.Y.3d 765, 59 N.E.3d 458, 37 N.Y.S.3d 723 [2016]; *In re New York City Asbestos Litigation (Sweberg)*, 143 A.D.3d 483, 39 N.Y.S.3d 411[1st. Dept. 2016]; *In re New York City Asbestos Litigation (Hackshaw)*, 143 A.D.3d 485, 39 N.Y.S.3d 130[1st. Dept. 2016]; *Peraica v. A.O. Smith Water Products, Co.*, 143 A.D.3d 448, 39 N.Y.S.3d 392 [1st. Dept. 2016]; *In re New York City Asbestos Litigation (Murphy-Clagett)*, 173 A.D.3d 529, 104 N.Y.S.3d 99 [1st. Dept. 2019]).

Burnham argues that the plaintiffs' punitive damages claims are procedurally improper and fail to state a viable cause of action. Burnham argues that the punitive damages claims stated as prayers for relief in the *Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7*, are not particularized as to Burnham or pled with specificity as to the individual defendants. Burnham cites to the Case Management Order (CMO) Sections VII-C (Pleadings Punitive Damages), IX-M (Discovery), as protocols requiring that plaintiff inform defendants that it intends to seek punitive damages and permitting defendants to conduct discovery on any claims asserted for punitive damages. Burnham argues that plaintiffs' failure to notify Burnham of their intent to pursue punitive damages violated its due process rights, warranting dismissal.

CMO VII.C titled "Pleading Punitive Damages," only permits punitive damages claims on Active or Accelerated Docket cases where there is a good faith basis for doing so against a named defendant. It states in relevant part:

"In cases on the Active or Accelerated Dockets, where the complaint already contains a prayer for punitive damages at the time that this Case Management Order becomes effective, plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it will not proceed with a punitive damages claim against a given defendant plaintiff shall sign a stipulation dismissing the prayer for punitive damages...Where an existing complaint does not contain a prayer for punitive damages, plaintiff may amend the complaint to include punitive damages, if he or she has a good faith reason for doing so, without leave up to ten days prior to the date of plaintiffs application to be included in an Accelerated or Active Cluster....After that time, but prior to the Trial Court setting a trial date, plaintiff may move before the Coordinating Judge to amend the complaint to include punitive damages."

Both parties, plaintiffs and Burnham, incorporated their Standard pleadings into their short form pleadings. CMO VII.C states that the Accelerated or Active Docket cases, such as this case, are required to contain a "prayer" for punitive damages.

Black's Law Dictionary (11th Edition, 2019) defines "Prayer for Relief" as:

"A request addressed to the court and appearing at the end of a pleading: esp., a request for specific relief or damages - Often shortened to *prayer*"

CMO VII.C does not require any specificity as to a named plaintiff or a named defendant. Plaintiffs included a prayer for punitive damages for approximately six causes of action in the *Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7*, and complied with the requirements of CMO VII.C. To the extent Burnham is arguing that CMO VII.C

does not strictly comport with the CPLR, the Appellate Division First Department in affirming the CMO stated that the lack of strict conformity is acceptable “so long as they do not deprive a party of its right to due process” (In re New York City Asbestos Litigation, 159 AD 3d 576, 74 NYS 3d 180 [1st Dept. 2018]).

Burnham argues that the CMO deprives it of due process and equal protection rights under the New York and Federal Constitution. Burnham’s argument was previously made to the Appellate Division, First Department which stated:

“Section XXIV and the other provisions (of the CMO) create rules for discovery and notice in connection with punitive damages claims so as to protect the defendants due process rights. We find these procedural protocols in the new CMO, as well as the other provisions challenged by defendants that were either present in preceding CMOs or appear for the first time in the new CMO, do not deprive defendants of their due process or other constitutional rights, even where they do not strictly conform to the CPLR...” (In re New York City Asbestos Litigation, 159 AD 3d 576, supra pgs. 577-578).

The resolution of an issue by the appellate court on a prior appeal is “law of the case” and is binding on the Supreme Court as well as the appellate court. No further examination of the issues can be made without a showing of subsequent evidence or a change in the law (Board of Managers of the 25 Charles Street Condominium v. Seligson, 106 AD 3d 130, 961 NYS 2d 152 [1st Dept. 2013] citing to J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey, 45 AD 3d 809, 847 NYS 2d 130 [2nd Dept. 2007]).

Plaintiffs argue that defendants were aware of the prayer for punitive damages asserted in the Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7, but failed to seek discovery on the issue until after the case was placed on the trial calendar.

CMO XI.M titled “Discovery Concerning Punitive Damages,” states:

“Where plaintiff asserts a punitive damage claim against a defendant, plaintiff shall answer defendants’ standard interrogatories and document requests seeking information related to punitive damages per the CPLR, and defendant shall answer plaintiffs’ standard interrogatories and document requests seeking information related to punitive damages per the CPLR. The parties shall confer about the possibility of a stipulation dismissing the prayer for punitive damages...before responding to standard interrogatories and document requests seeking information concerning punitive damages.”

CMO XXIV titled “Punitive Damages,” under subsection B titled “Discovery on a Defendant’s Financial Condition,” permits plaintiffs to seek financial disclosure from the defendant on a claim for punitive damages “no later than immediately prior to the commencement of jury selection, defendant shall provide plaintiff with reliable financial disclosure.”

Burnham should have sought discovery on punitive damages earlier in this case. The Weitz & Luxenberg, P.C. - Standard Asbestos Complaint for Personal Injury No. 7, incorporated into the Complaint and Amended Complaints asserted the prayer for punitive damages. Burnham provides no proof of its own attempts

to confer with plaintiffs' counsel to obtain a stipulation withdrawing the punitive damages claims or summary judgment. Burnham attempts to place the onus of its failure to seek discovery on the plaintiffs for failure to confer.

Plaintiffs' inclusion of six prayers for punitive damages in its standard complaint for personal injury No. 7 sufficiently state a claim for punitive damages. Dismissal at this stage is unwarranted and a motion may be made to the trial judge after submission of all evidence.

Plaintiffs have sufficiently pled their causes of action for failure to warn, loss of consortium and punitive damages.

ACCORDINGLY, it is ORDERED that defendant Burnham, LLC's motion to dismiss plaintiffs' complaint pursuant to CPLR §3211(a)(7) is granted to the extent of dismissing the causes of action against Burnham for breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants liability (sixth cause of action), and it is further

ORDERED that the breach of express and implied warranties (second cause of action), market share liability (fourth cause of action), common law negligence and labor law violations (fifth cause of action) and dust mask defendants' liability (sixth cause of action) in plaintiffs' complaint are severed and dismissed with prejudice, and it is further

ORDERED that the motion to dismiss the causes of action for failure to warn (first and third causes of action), loss of consortium (seventh cause of action) and punitive damages is denied, and it is further

ORDERED that the moving party serve a copy of this order with notice of entry by e-filing protocol on plaintiffs' attorney, all remaining parties, the General Clerk's Office (Room 119) and the New York County Clerk (Room 141B), and it is further

ORDERED that the clerk enter judgment accordingly.

Dated: December 5, 2019

ENTER:


MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE