

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

2019 NY Slip Op 33669(U)

December 16, 2019

Supreme Court, New York County

Docket Number: 190175/2017

Judge: Manuel J. Mendez

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

**PRESENT: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

**IN RE: NEW YORK CITY ASBESTOS LITIGATION**

**CHERI SUDANO, as Executrix for the  
Estate of JOSEPH BUCKLEY,**

**INDEX NO. 190175/2017**  
**MOTION DATE 12/11/2019**  
**MOTION SEQ. NO. 001**  
**MOTION CAL. NO. \_\_\_\_\_**

**Plaintiff,**

**-against-**

**A.O. SMITH WATER PRODUCTS CO., et al.,**

**Defendants.**

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

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

**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 plaintiff's 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 cause of action), loss of consortium (seventh cause of action), and punitive damages is denied.**

**Plaintiff brings this action to recover injuries sustained by Mr. Joseph Buckley from his alleged exposure to asbestos from various Defendants' products. It is alleged that Mr. Buckley was exposed to asbestos while renovating and repairing asbestos-containing Burnham boilers and heating systems from 1968 through approximately 1978.**

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

Plaintiff commenced this action on June 6, 2017 (Exhibit E). Burnham acknowledged service and answered on September 25, 2017 (Exhibit H).

Burnham, pursuant to CPLR § 3211(a)(7), seeks to dismiss plaintiff's complaint including the punitive damages claim asserted against it. Plaintiff does 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 Plaintiff's 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. As per *Maltese*, Burnham argues that the claim for punitive damages should be dismissed because this case is not "singularly rare where extreme aggravating factors are present" and their conduct was not "egregious and willful." (Matter of New York City Asbestos Litig., 678 N.E.2d 467, 655 N.Y.S.2d 855 (Court of Appeals, 1997)). Burnham also argues that because it did not mine, mill, or manufacture asbestos, the claim cannot be sustained.

Burnham argues that Plaintiffs' 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. Buckley'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. Burnham also argues that since the failure to warn claim should be dismissed, the loss of consortium claim should also be dismissed because it is a 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 manufactured asbestos cement, promoted for decades, specified, and knew of the use of asbestos-containing materials for insulating its product. Ms. Cheri Sudano testified that Mr. Buckley was exposed to asbestos when he renovated and repaired asbestos-containing products on Burnham boilers when he worked for Commander Oil from 1968 through approximately 1978. Ms. Sudano stated that she believes Mr. Buckley renovated and repaired asbestos-containing products that covered Burnham boilers. Mr. Steven Grey stated that he believes Burnham never warned Mr. Buckley regarding the dangers of asbestos. (Exhibit 9). Plaintiffs further point to Burnham specifications requiring insulation of boilers to be covered with "plastic asbestos

at least 1-1/2 inches thick,” then “with a finishing coat.” Further Burnham specifications required 17 feet asbestos wicking and five pounds of asbestos cement,” and that spaces in sectional boilers be “filled between beads with asbestos cement as each section is set...” and providing “... sufficient asbestos cement with each boiler...” (Exhibit 10). Burnham further admitted in its interrogatories that its boilers were asbestos-containing and that it sold such boilers at least through 1986, that it manufactured asbestos cement commonly used by insulation workers and pipe coverers to apply to joints or spread over exposed surfaces of the boiler (Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13). Plaintiffs argue that since the failure to warn claim survives, so should their 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 health and safety of Mr. Buckley, 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. (Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13). Ms. Sudano and Mr. Grey state that Mr. Buckley was exposed while renovating and repairing asbestos-containing Burnham boilers. They stated that the old asbestos-containing insulation had to be removed and that Mr. Buckley reapplied asbestos-containing insulation to the Burnham boiler and pipes, and that this crated visible dust that he breathed in. (Exhibit 9). These allegations and exhibits support Plaintiffs’ failure to warn and loss of consortium claims. (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[1<sup>st</sup>. Dept. 2016]; In re New York City Asbestos Litigation (Hackshaw), 143 A.D.3d 485, 39 N.Y.S.3d 130[1<sup>st</sup>. Dept. 2016]; *Peraica v. A.O. Smith Water Products, Co.*, 143 A.D.3d 448, 39 N.Y.S.3d 392 [1<sup>st</sup>. Dept. 2016]; In re New York City Asbestos Litigation (Murphy-Clagett), 173 A.D.3d 529, 104 N.Y.S.3d 99 [1<sup>st</sup>. 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 plaintiff's 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, Plaintiff 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* (11<sup>th</sup> 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. Plaintiff includes 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 the CMO VII.C. To the extent that 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 2013] citing to J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey, 45 AD 3d 809, 847 NYS 2d 130 [2<sup>nd</sup> 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 IX.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 plaintiff 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.

Burnham argues that punitive damages should be dismissed because "their failure to warn in the face of a general awareness of potential human health risks" is insufficient to meet the standard to sustain the claims under *Maltese*, because this case is not "singularly rare where extreme aggravating factors are present," and their conduct was not "egregious and willful." However, Burnham boilers containing asbestos and asbestos-containing insulation were in production and sold at least through 1986 and they manufactured and produced asbestos cement within the years of Mr. Buckley's exposure. (Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13). *Maltese*, as suggested by Burnham it be applied, does not support Burnham's argument. In *Maltese*, the Court of Appeals denied a claim for punitive damages although the corporation in question which manufactured asbestos-containing turbines had "a general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury," because the decedents were not "at risk at any time it could have warned them." (Matter of New York City Asbestos Litig., 678 N.E.2d 467, 655 N.Y.S.2d 855 (Court of Appeals, 1997)). Burnham was aware that their boilers contained asbestos and they manufactured and produced asbestos cement throughout the years in which Mr. Buckley was exposed. Burnham knew their boilers contained asbestos and knew of the potential human health risks associated with asbestos exposure during this time. Mr. Buckley was at risk during the time Burnham could have warned him. Thus, dismissal at this stage is unwarranted. 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 Plaintiff's 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 Plaintiff's 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.

**ENTER:**

**MANUEL J. MENDEZ**  
J.S.C.



\_\_\_\_\_  
**MANUEL J. MENDEZ**  
J.S.C.

**Dated:** December 16, 2019

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