

Coffman v A.O. Smith Water Prods. Co
2022 NY Slip Op 33441(U)
October 3, 2022
Supreme Court, New York County
Docket Number: Index No. 190137/2016
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

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PATRICIA LEE COFFMAN, AS EXECUTOR FOR THE ESTATE OF ROBERT G. COFFMAN,

Plaintiff,

INDEX NO. 190137/2016

MOTION DATE

MOTION SEQ. NO. 004

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC, AZROCK INDUSTRIES, BIRD INCORPORATED, BORGWARNER MORSE TEC LLC., BURNHAM, LLC, CERTAINTTEED CORPORATION, CUMMINS, INC, DAP, INC., EATON CORPORATION, AS SUCCESSOR -IN-INTEREST TO, G.S. BLODGETT CORPORATION, GENERAL ELECTRIC COMPANY, GEORGIA PACIFIC LLC, GOULDS PUMPS, INC., HONEYWELL INTERNATIONAL, INC., KAISER GYPSUM COMPANY, INC, LIPE-AUTOMATION CORPORATION, MANNINGTON MILLS, INC, MAREMONT CORP., MCCORD CORPORATION, OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO, STANDARD MOTOR PRODUCTS, INC., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 216, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is hereby ordered that Defendant Burnham LLC's (hereinafter referred to as "Burnham") motion for summary judgment is denied for the reasons set forth below.

Patricia Lee Coffman (hereinafter referred to as "Plaintiff") as Executor of the estate of Robert G. Coffman (hereinafter referred to as "decedent"), files suit claiming personal injuries

and wrongful death due to alleged exposure to asbestos by Burnham's boilers. According to the testimony of Plaintiff, "she personally saw [decedent] perform maintenance work on a Burnham Boiler at Cheese & Wine Cellar in Bethesda, Maryland from approximately 1973 through 1980." Affirmation In Opposition To Burnham's Motion For Partial Summary Judgment, p. 4, ¶ 11. Plaintiff further testified that "her father was exposed to asbestos when he would scrape the exterior and interior insulation surrounding the outside and inside of the boiler, which she described as a white hard cement-like outer crust, which created a very dusty environment". *Id.* at ¶ 12. Conversely, Burnham argues that Plaintiff "was the only fact witness deposed. . . She testified that her father performed some type of maintenance on it. . . but she did not know what type of maintenance work he did." Memorandum Of Law In Support Of Defendant Burnham LLC's Motion For Summary Judgment, p. 3 (internal quotations omitted). Burnham further contends that it "has never manufactured asbestos-containing components; instead, any such components would have been purchased primarily from suppliers of such products." *Id.* Also, "[a]t all relevant times, Burnham never received any workers' compensation claims related to asbestos, nor has it ever had an OSHA [Occupational Safety and Health Administration] violation regarding related [*sic*] to asbestos." *Id.* Importantly, OSHA adopted the Permissible Exposure Limit (PEL) which is based on an exposure period of an eight-hour a day time average over a five-day week to limit the amount of exposure an individual is subject to. The measurement a worker is allowed to be exposed to at the workforce post 1970 is "12 f/cc or 2-million particles per cubic foot." *Id.* at p.5. Burnham moves for summary judgment arguing that Plaintiff was not exposed to asbestos from Burnham boilers and that Plaintiff is not entitled to 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).

Burnham first contends that Plaintiff has failed to proffer evidence “tending to show that [decedent] was exposed to asbestos from working on or around any product manufactured or sold by Burnham.” Memorandum Of Law In Support, *supra*, at p. 8. Namely, Burnham argues that Plaintiff has the burden to establish a reasonable inference that decedent “was exposed to asbestos-containing products manufactured or sold by Burnham, and that it was more likely than not that this exposure was a substantial factor in causing his injury.” *Id.* However, it is undisputed that, on a motion for summary judgment, the burden does not shift to Plaintiff until Burnham has first established a prima facie case that decedent was not exposed to any asbestos containing material manufactured, distributed, or installed by Burnham. “[P]ointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment”.

Koulermos v A.O. Smith Water Products, 137 AD3d 575, 576 (1st Dept 2016). Burnham may not establish its prima facie case by relying upon Plaintiff's alleged failure to reasonably infer decedent's exposure to asbestos by Burnham's product.

Further, Burnham asserts that Plaintiff has not provided unequivocal testimony that Burnham manufactured an asbestos containing product to which he was exposed. However, the Appellate Division, First Department, has held that on a motion for summary judgment, it is moving defendant's burden to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury". *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Here, Burnham has failed to meet its burden in establishing that its product did not contain asbestos and could not have contributed to plaintiff's injury. *See DiSalvo v A.O. Smith Water Products*, 123 AD3d 498, 499 (1st Dept 2014). Burnham has failed to proffer any evidence that its boilers did not contain asbestos or that it could not have caused plaintiff's illness. As Burnham failed to establish entitlement to summary judgment, the instant motion for summary judgment is denied, and we now move to the issue of punitive damages.

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, 956-57 (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 parenthesis omitted).

Burnham first contends that any alleged exposure to asbestos sustained by decedent from his work on Burnham boilers was significantly below OSHA’s PEL or threshold limit value (TLV). Burnham refers to the study of Dr. Longo, in which they argue that “any exposure [decedent] could have potentially had to asbestos from the Burnham boiler located at his business would have been far below the .16 f/cc reported in the Longo Study and, therefore, significantly below the standards in place when the boilers were offered for sale and installed decades before Plaintiff allegedly encountered them.” Memorandum Of Law In Support, *supra*, at p. 13. Conversely, Plaintiff argues that Burnham’s use of Dr. Longo’s study is misplaced, as “Longos [*sic*] experiments. . . are mostly designed to show the fact of fiber release, and under no circumstances could be considered relevant, or admissible, regarding the precise amount of fiber release to which a plaintiff, years earlier, may have been exposed.” Affirmation In Opposition, *supra*, at p. 6.

In *Dyer v Amchem Products Inc.*, 207 AD3d 408, 411 (1st Dept, 2022), the Appellate Division, First Department held that the defendant therein met its burden on summary judgment by proffering an industrial hygiene expert as a witness who tendered a study regarding decedent’s exposure to asbestos, which “involved a worker and a helper who cut, scored/snapped Amtico tiles in an isolation test chamber, simulating an eight-hour shift. . . Based upon the results of the 2007 EPI study and their review of other materials, publications and decedent’s deposition, [defendant]’s experts concluded that the decedent’s time weighted average exposure to chrysotile asbestos was below the OSHA eight-hour permissible exposure limit (PEL) of 0.1 f/cc, and also indistinguishable from 0.00000033 f/cc the lifetime cumulative exposure that the

general public is exposed to in the ambient air that we all breathe.” Unlike the case at bar, the study relied upon in *Dyer* established specific levels of respirable asbestos with regards to the specific moving defendant’s product in the specific work environment of the plaintiff at issue therein. Here, Dr. Longo’s testimony establishes that he has never conducted any studies on Burnham Boilers. *See* Affirmation In Opposition, Exh. 5, Depo. Tr. of William E. Longo, dated December 16, 2015, p. 36, ln. 10 – 12. Here, Dr. Longo’s study in relation to Plaintiff’s level of asbestos exposure is insufficient for Burnham to establish that punitive damages are not warranted pursuant to the Appellate Division, First Department holdings.

Burnham further alleges that punitive damages are not warranted in the instant matter, as punitive damages serve no corrective purpose. Plaintiff, however, argues that Burnham knew of the hazardous effects of asbestos fibers, and failed to warn Plaintiff of such dangers. The Court of Appeals 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). Further, 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). Thus, at issue herein is whether a genuine issue of material fact exists as to whether a jury may find that Burnham’s conduct in failing to warn was a result of wanton and reckless disregard to decedent’s safety. Thus, Burnham has failed to demonstrate that no issues of fact exist as to Burnham’s conduct and whether such conduct was wanton or reckless to justify an award of punitive damages such that issues of fact exist precluding summary judgment.

Accordingly, it is

ORDERED that Defendant Burnham LLC's motion for summary judgment to dismiss this action as against it is denied in its entirety; and it is further

ORDERED that the branch of Defendant Burnham LLC's motion for partial summary judgment to dismiss plaintiff's claim for punitive damages is denied; 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.

ADAM SILVERA, J.S.C.

10/03/2022

DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE