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| Sheridan v A.O. Smith Water Prods. Co |
| 2022 NY Slip Op 33442(U) |
| October 3, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 190182/2019 |
| 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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INDEX NO. 190182/2019

ALISON SHERIDAN,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

A.O. SMITH WATER PRODUCTS CO, AERCO INTERNATIONAL, INC, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BLACKMER, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, IMO INDUSTRIES, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., JENKINS BROS, MASONEILAN INTERNATIONAL, INC., F/K/A MASON-NEILAN REGULATOR COMPANY, TACO, INC., THE NASH ENGINEERING COMPANY, UNION CARBIDE CORPORATION, WARREN PUMPS, LLC, ECR INTERNATIONAL, CORP., F/K/A DUNKIRK BOILERS AND UTICA BOILER COMPANY, FOSTER WHEELER, L.L.C, PEERLESS INDUSTRIES, INC., WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, CRANE CO., EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CUTLER-HAMMER, INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 128, 129, 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, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

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

Mr. Raymond Sheridan (hereinafter referred to as "Plaintiff") was diagnosed with lung cancer on April 25, 2019. The instant matter was subsequently commenced by Plaintiff, against Burnham, alleging exposure to asbestos while removing Burnham boilers. Plaintiff was deposed on November 6th, 7th, and 15th, of 2019. During his deposition, Plaintiff testified that he worked as a mechanic and plumber apprentice for Ambrosio Plumbing and Heating from approximately 1986 to 1989, in which his duties included the removal and replacement of boilers. Plaintiff identified the boilers he was exposed to as Burnham boilers during his work at Ambrosio.

Plaintiff argues, *inter alia*, that Burnham failed to place a warning on their boilers even after obtaining the knowledge of the harmful and dangerous effects when exposed to asbestos warranting the imposition of punitive damages. Conversely, Burnham argues that any asbestos exposure from Plaintiff's work on Burnham boilers was significantly below threshold limit values and exposure limits set by the standards and regulations of the Occupational Safety and Health Act (hereinafter referred to as "OSHA"). Burnham moves for partial summary judgment on the issue of punitive damages. Plaintiff opposes, and no reply papers were filed.

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).

In support of their motion, Burnham contends that Plaintiff cannot identify evidence to justify the imposition of punitive damages and that such damages are not warranted under New York Law. *See Memorandum Of Law In Support Of Defendant Burnham LLC’s Motion For Partial Summary Judgment*, p. 9. Burnham relies upon OSHA’s permissible exposure limit (PEL) and Plaintiff’s exposure to asbestos, claiming that exposure below the regulatory limit does not rise to reckless and wanton disregard to support a claim for punitive damages. In opposition, Plaintiff argues that OSHA is not applicable in the case at bar, as the “[a]sbestos standards set by OSHA. . . were never intended to be a safety guideline.” Plaintiff’s *Memorandum Of Law In Opposition To Defendant Burnham LLC’s Motion For Partial Summary Judgment On The Issue Of Punitive Damages*, p. 17.

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 91st St. Crane Collapse Litig.*, 154 AD3d 139, 156 (1st Dept 2017) (internal parentheses omitted).

Although Plaintiff argues that OSHA is inapplicable in the instant matter, the Appellate Division, First Department, has previously held "that. . . compliance with a statute may constitute some evidence of due care". *Lugo v LJM Toys, Ltd.*, 146 AD2d 168, 170 (1st Dept 1989). Thus, evidence of compliance with the OSHA PEL may be used to support the argument that punitive damages should not be imposed. However, as the Appellate Division, First Department, found in *Lugo*, "compliance with a statute. . . does not preclude a finding of negligence." *Id.*

Moreover, 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). At issue herein is not whether Burnham complied with OSHA's PEL, rather, on the instant motion for summary judgment the Court must determine whether an issue of fact exists and whether a reasonable trier of fact may conclude that Burnham acted with wanton and reckless disregard for failing to warn Plaintiff of the hazards of asbestos exposure.

In addition, Burnham argues that according to the Appellate Division, First Department's decision in *Maltese v Westinghouse Elec. Corp.*, 225 AD2d 414 (1st Dept 1996), punitive damages are not appropriate when the claim rests upon an alleged failure to warn. *See* Memorandum Of Law In Support, *supra*, at p. 8. However, Plaintiff contends that Burnham's reliance on *Maltese* is misplaced, as "punitive damages are undoubtedly permitted in failure to warn cases." Plaintiff's Memorandum Of Law In Opposition, *supra*, at p. 21. The New York

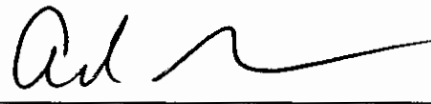
Court of Appeals has held that “[a] products liability action founded on a failure to warn involves conduct of the defendant having attributes of negligence which the jury may find sufficiently wanton or reckless to sustain an award of punitive damages”. *Home Ins. Co. v Am. Home Products Corp.*, 75 NY2d 196, 204 (1990) (internal citations omitted). This Court further notes that where a Plaintiff provides evidentiary facts tending to show that defendant’s warnings were 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). Plaintiff proffered evidence that reveals Burnham specified the use of asbestos in their boilers. For instance, the interrogatory responses of Burnham demonstrate that Burnham boilers came equipped with asbestos containing parts. *See* Plaintiff’s Memorandum Of Law In Opposition, Exh. 2, Defendant, Burnham’s Responses to Plaintiff’s Request For Admissions, dated March 27, 2014, question 2. Plaintiff has also proffered evidence that demonstrates Burnham failed to warn Plaintiff of the hazards of asbestos. The corporate representative of Burnham, Mr. Roger Pepper, testified that up until 1982 Burnham never placed a warning regarding the dangers of asbestos on any of its boilers. *See* Plaintiff’s Memorandum Of Law In Opposition, Exh. 20, Deposition Transcript of Roger Pepper, dated March 20, 2018, p. 2168, ln15 – 18. As such, Burnham has failed to demonstrate their prima facie burden that punitive damages are not warranted herein.

Accordingly, it is

ORDERED that the defendant Burnham LLC’s motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry, Plaintiffs shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision / order of the Court.



10/03/2022

DATE

ADAM SILVERA, J.S.C.

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: