

**Maseto v A.O. Smith Corp.**

2022 NY Slip Op 33443(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 190209/2019

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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ERNEST MASETO,

Plaintiff,

- v -

INDEX NO. 190209/2019
MOTION DATE
MOTION SEQ. NO. 006

A.O. SMITH CORPORATION, AERCO INTERNATIONAL, INC., AII ACQUISITION LLC F/K/A AII ACQUISITION CORP. F/K/A ATHLONE INDUSTRIES, INC. F/K/A HOLLAND FURNACE CO., AIR & LIQUID SYSTEMS CORPORATION, BUFFALO PUMPS DIVISION, BLACKMER PUMP COMPANY, BMCE INC., IN ITSELF AND AS SUCCESSOR TO UNITED CENTRIFUGAL PUMP CO., BORGWARNER MORSE TEC LLC, AS SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION, BRYAN STEAM LLC, BURNHAM LLC, BW/IP, INC., CARRIER CORPORATION INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO BRYANT HEATING & COOLING SYSTEMS, CBS CORPORATION, A DELAWARE CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAIN-TEED CORPORATION, CRANE CO., CROWN CORK & SEAL COMPANY INC., CUMMINS, INC., EATON CORPORATION, ECR INTERNATIONAL, INC., FMC CORPORATION, FMC CORPORATION, ON BEHALF OF ITS FORMER NORTHERN PUMP COMPANY, FOSTER WHEELER ENERGY CORPORATION, GENERAL ELECTRIC COMPANY, GREENE TWEED & CO. INC., HENNESSY INDUSTRIES, LLC, INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM COMPANY, INGERSOLL-RAND COMPANY, JOHN CRANE, INC., LENNOX INDUSTRIES, INC., RHEEM MANUFACTURING COMPANY, THE GOODYEAR TIRE & RUBBER COMPANY, TRANE U.S. INC. F/K/A AMERICAN STANDARD INC., UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN INC., A DIVISION OF THE MARLEY-WYLAIN COMPANY, WEIR VALVES & CONTROLS USA, INC., D/B/A ATWOOD & MORRILL, YORK INTERNATIONAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO YORK CORPORATION, PNEUNO ABEX LLC, SUCCESSOR-IN-INTEREST TO ABEX CORPORATION, F/K/A PNEUMO ABEX CORPORATION, SID HARVEY INDUSTRIES, INC., JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS)

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 231, 232, 233, 234, 235, 236, 237, 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, 295, 296, 297, 298, 299, 300, 301

were read on this motion to/for

DISMISSAL

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

The instant matter is premised upon Plaintiff Ernest Maseto's alleged exposure to asbestos resulting from his work with boilers that were manufactured and sold by Burnham. Plaintiff was an HVAC mechanic serviceman in Connecticut and New York, in which he maintained, removed, and installed boilers. At his deposition, Plaintiff testified that Burnham's manual specified asbestos gaskets, asbestos insulation, and asbestos cement. *See* Plaintiff's Memorandum Of Law In Opposition To Defendant Burnham LLC's Motion For Partial Summary Judgment On The Issue Of Punitive Damages, Exh. 1, De Bene Esse Depo. Tr. Of Ernest Maseto, dated November 5, 2019, p. 114, ln. 11 – p. 115, ln. 1. Plaintiff further testified that there were no warnings about the dangers of asbestos on the Burnham boilers or manuals, and if there were any warnings regarding the potential cancer-causing effects of asbestos, Plaintiff would have sought protective clothing or find other means. *See Id.* at p. 115, ln. 2 – 14. Plaintiff further acknowledged that he would have no way of knowing the manufacturer of the gasket material nor if this gasket material was original to the boiler. *See* Notice Of Motion, Exh. E, Depo. Tr. Of Ernest Maseto Dated October 15, 2019, p. 762, ln. 8 – 15. Plaintiff seeks an award of punitive damages for Burnham's failure to warn Plaintiff of the dangers of asbestos.

Burnham files the instant motion for partial summary judgment dismissing the punitive damages claim, arguing *inter alia*, that the Plaintiff has not demonstrated through clear and convincing evidence Burnham recklessly disregarded, with wanton malice, his health and safety. 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).

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).

First, Plaintiff contends that Burnham’s failure to warn rises to the level of wanton and malicious conduct which requires the imposition of punitive damages. Plaintiff states “that Burnham had actual knowledge of the health dangers of asbestos, including the asbestos incorporated into the boilers that Mr. Maseto regularly worked on, well before Mr. Maseto began his career in 1955.” Plaintiff’s Memorandum Of Law In Opposition, *supra*, at p. 5. Conversely, Burnham argues that “in situations such as the one in this case where a plaintiff’s claim for punitive damages rests entirely upon an alleged failure to warn, punitive damages are not appropriate or warranted under New York law.” Memorandum Of Law In Support Of Defendant Burnham LLC’s Motion For Partial Summary Judgment Dismissing Punitive Damages, p. 12.

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 in any way 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). Although Burnham argues that Punitive Damages are not appropriate, Burnham has failed to demonstrate that punitive damages are not warranted under the instant matter. A failure to warn

may rise to the level of wanton and reckless conduct for a jury to find that punitive damages are to be imposed.

Further, Burnham contends that the alleged exposure Plaintiff sustained from his work on Burnham boilers would have been within the threshold limit value (hereinafter referred to as “TLV”) and permissible exposure limit (hereinafter referred to as “PEL”) adopted by the Occupational Health and Safety Act (hereinafter referred to as “OSHA”). Burnham refers to the study conducted by Dr. William E. Longo which involves exposure of asbestos and cast-iron boilers. More specifically, “when measuring exposure levels to asbestos from removing external asbestos-containing insulation from a residential cast-iron boiler the exposure level was significantly less than the TLV before 1970.” Memorandum Of Law In Support, *supra*, at p. 13. Burnham argues that this study demonstrates that the asbestos exposure was still far below the PEL set by OSHA even when permissible exposure levels were lowered after OSHA’s inception. *See Id.* Conversely, Plaintiff argues that Burnham’s reliance on Dr. Longo’s study is misplaced, as OSHA’s PEL is inapplicable to the case at bar and therefore cannot be used by Burnham to argue that it cannot be held liable for an award of punitive damages. *See Plaintiff’s* Memorandum Of Law In Opposition, *supra*, at p. 14. Plaintiff further argues that “[e]ven assuming, arguendo, that the OSHA PEL is applicable to this case (which it is not), OSHA itself has made clear, as has the rest of the mainstream scientific and medical community, that there is no known safe level of asbestos exposure. *Id.* at p. 15. (internal italics omitted). Moreover, the Appellate Division, First Department, has held that “compliance with a statute. . . does not preclude a finding of negligence.” *Lugo v L/JN Toys, Ltd.*, 146 AD2d 168, 170 (1st Dept 1989).

In the instant matter, Plaintiff proffered a report from Mr. Steven Paskal, CIH in which he concludes that Plaintiff “would have incurred asbestos exposures that ranged

from hundreds to millions of times greater than (and in addition to) ambient pollution levels in even the most polluted areas.” See Plaintiff’s Memorandum Of Law In Opposition, Exh. 2, Report of Steven Paskal, dated March 16, 2020, p. 5, ¶ 9. Therefore, the Court need not find that punitive damages should be imposed, rather that a jury may find that Burnham acted with reckless disregard and wanton malice regarding Plaintiff’s safety. As issues of facts exist, Burnham’s motion for partial summary judgment on the issue of punitive damages is denied.

Accordingly, it is

ORDERED that Defendant Burnham LLC’s motion for partial summary judgment to dismiss plaintiff’s claim for punitive damages is denied in its entirety; 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.

10/04/2022

DATE

ADAM SILVERA, J.S.C.

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