

Layton v. Amchem Prods.

Supreme Court of New York, New York County

December 6, 2021, Decided

INDEX NO. 190063/2019

Reporter

2021 N.Y. Misc. LEXIS 6251 *; 2021 NY Slip Op 32586(U) **

[1]** JANICE LAYTON, Plaintiff, - v-AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC, BIRD INCORPORATED, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, DAP, INC., DOMCO PRODUCTS TEXAS, INC, GENERAL ELECTRIC COMPANY, KARNAK CORPORATION, MANNINGTON MILLS, INC, PFIZER, INC. (PFIZER), THE B.F. GOODRICH COMPANY, (GOODRICH CORPORATION), U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, punitive damages, prior decision, *asbestos*, reargue, issue of fact, reargument, visible, dust, misapprehended, overlooked, warnings, argues

Judges: **[*1]** PRESENT: HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 227, 228, 229, 235, 237 were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 230, 231, 232, 233, 234, 236, 238 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is ordered that defendant American Biltrite Inc.'s (hereinafter referred to as "defendant American Biltrite") motion to reargue (mot. seq. no. 004) this Court's prior Decision dated January 12, 2021 (hereinafter referred to as the "Prior Decision") and defendant Mannington Mills, Inc.'s (hereinafter referred to as "defendant **[**2]** Mannington Mills") motion to reargue (mot. seq. no. 005) the Prior Decision, are both decided below.

Plaintiff commenced this action against defendants, by summons and complaint seeking monetary damages for personal injuries resulting from plaintiff's exposure to *asbestos* allegedly from defendants' products. By prior motions (mot. seq. no. 002 and 003), defendants Mannington Mills and American Biltrite both moved for summary judgment [*2] to dismiss this action. Such motions were denied by the Prior Order.

Here, both moving defendants move to reargue the Prior Order and seeks, upon reargument, the dismissal of plaintiff's summons and complaint as against them. Defendants argue that the Court overlooked and misapprehended the facts. [CPLR 2221\(d\)\(2\)](#) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law or facts in rendering its initial decision. "A motion for leave to reargue pursuant to [CPLR 2221](#) is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." [William P. Pahl Equip. Corp. v Kassis](#), 182 AD2d 22, 27, 588 N.Y.S.2d 8 (1st Dep't 1992), appeal denied in part, dismissed in part 80 NY2d 1005, 607 N.E.2d 812, 592 N.Y.S.2d 665 (1992) (internal quotations omitted).

Preliminarily, the Court notes that defendants failed to establish that the Court, in the Prior Order, misapprehended or overlooked the facts or law in determining that issues of fact existed to preclude summary judgment. Defendants argue that the Court mistakenly relied upon the report of Dr. Mark Ginsburg. According to both moving defendants, Dr. Ginsburg's report did not quantify decedent's *asbestos* exposure [*3] and, thus, plaintiff failed to establish that decedent was exposed to a sufficient level of *asbestos* to cause lung cancer. In addition to these arguments, [**3] defendant American Biltrite further moves on the grounds that the Prior Decision did not address the

portion of their original motion seeking to dismiss the cause of action for punitive damages.

Preliminarily, the Court finds that the report of Dr. Ginsburg was sufficient in establishing an issue of fact such that it was appropriate to deny the prior motions for summary judgment. The law on summary judgment is well settled. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See [Alvarez v Prospect Hosp.](#), 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." [Garcia v J.C. Duggan, Inc.](#), 180 AD2d 579, 580, 580 N.Y.S.2d 294 (1st Dep't 1992), citing [Dauman Displays, Inc. v Masturzo](#), 168 AD2d 204, 562 N.Y.S.2d 89 (1st Dep't 1990). The court's role is "issue-finding, rather than issue-determination". [Sillman v Twentieth Century-Fox Film Corp.](#), 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. See [Ugarriza v Schmieder](#), 46 NY2d 471, 475-476, 386 N.E.2d 1324, 414 N.Y.S.2d 304 (1979).

Here, as held in the Prior Decision, [*4] there is an issue of fact, as well as a clear conflict in the evidence, precluding summary judgment. In arguing that the Court erred in the Prior Decision, defendants ignore all the studies cited to by Dr. Ginsburg in his report dated September 20, 2020. Specifically, Dr. Ginsburg's report speaks to visible dust particles and the *asbestos* fiber concentrations contained in visible dust, which plaintiff testified that he saw and breathed in visible dust particles as he was performing the duties of his job which occurred approximately 1,000 times. Dr. Ginsburg's report makes clear that the amount of

asbestos fiber concentrations in visible dust significantly exceeded OSHA standards. The conflicting medical reports, one of **[**4]** which finds that visible dust holds amounts of asbestos fiber concentrations which exceed OSHA standards and one which finds that the visible dust inhaled by decedent held amounts of asbestos fiber concentrations which did not exceed OSHA standards, raises a genuine triable issue of fact. Thus, defendants failed to establish that the Court misapprehended or overlooked the facts in determining that issues of fact existed to preclude summary judgment such that both motions **[*5]** to reargue are denied as to summary judgment to dismiss the complaint.

As to the portion of defendant American Biltrite's motion seeking to reargue the Prior Decision with regards to punitive damages, defendant American Biltrite correctly argues that the Court overlooked the issue as the Prior Decision is silent as to punitive damages. As such, defendant American Biltrite's motion to reargue is granted solely on the issue of punitive damages and the issue, as raised in the prior motion (mot. seq. no. 003), is fully considered and decided below.

Defendant American Biltrite argues that it complied with all federal and state regulations and hired experts to ensure compliance such that its conduct cannot be considered wanton and reckless or malicious. Accordingly, defendant American Biltrite argues that punitive damages are inappropriate herein. In opposition, plaintiff argues that compliance with governmental regulations alone does not foreclose on a plaintiff's ability to allege punitive damages. According to plaintiff, a violation of a common law duty can still give rise to a cause of action for punitive damages, particularly if such violation was a result of a defendant's reckless or **[*6]** wanton misconduct. Plaintiff argues that defendant American Biltrite knew of the dangers of asbestos as early as 1970 but did not stop selling its

asbestos containing product until 1985 and failed to warn of its products' hazards. Such product, which was in the chain of commerce was permitted to be sold until 1996. According to plaintiff, moving defendants' motion must be denied as **[**5]** issues of fact exist as to whether such defendant's conduct constitutes wanton and reckless behavior.

The Appellate Division, First Department, has held that "it is black letter law that compliance with statutory or regulatory enactments does not preclude a finding that the defendant violated a common-law duty". [Kelly v Metropolitan Ins., 82 AD3d 16, 23, 918 N.Y.S.2d 50 \(1st Dep't 2011\)](#). Plaintiff proffers, inter alia, moving defendant's response to interrogatories and the deposition transcript of Roger S. Marcus to establish that defendant American Biltrite knew of the dangers of asbestos but failed to provide a warning and continued sales of its asbestos containing products. Thus, plaintiff has raised an issue of fact as to the adequacy of defendant American Biltrite's warnings on how to use its products. Plaintiff has demonstrated that defendant American Biltrite was aware of **[*7]** the danger of their product and the method in which it should be handled but failed to put warning labels or stickers. The Court 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, 507 N.Y.S.2d 386 \(1986\)](#). Thus, defendant American Biltrite has failed to demonstrate that plaintiff cannot establish that its conduct was wanton or reckless to justify an award of punitive damages such that issues of fact exist precluding summary judgment. As such, defendant American Biltrite's motion is denied as to punitive damages.

Accordingly, it is

ORDERED that defendant American Biltrite Inc.'s motion to reargue (mot. seq. no. 004) this Court's Prior Decision is denied in part as to the portion seeking reargument of its motion for summary judgment to dismiss the complaint; and it is further

[6]** ORDERED that defendant American Biltrite Inc.'s motion to reargue this Court's Prior Decision is granted in part as to the portion seeking reargument of its motion for summary judgment to dismiss the claim for punitive damages, and, upon reargument, the Court denies defendant **[*8]** American Biltrite's prior motion (mot. seq. no. 003) for summary judgment on the issue of punitive damages; and it is further

ORDERED that defendant Mannington Mills, Inc.'s motion to reargue (mot. seq. no. 005) the Prior Decision is denied in its entirety; and it is further

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

This constitutes the Decision and Order of the Court.

12/6/2021

DATE

/s/ ADAM SILVERA

ADAM SILVERA, J.S.C.

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