

## *Moxam v ABB Inc*

Supreme Court of New York, New York County

January 12, 2022, Decided

Index No. 190372/2018

### Reporter

2022 N.Y. Misc. LEXIS 184 \*; 2022 NY Slip Op 30105(U) \*\*

[\*\*1] JOAN MOXAM, as Administrator of the Estate of NELSON MOXAM, Deceased, Plaintiff, - v - ABB INC.,AERCO INTERNATIONAL, INC.,BMCE INC.,IN ITSELF AND AS SUCCESSOR TO UNITED CENTRIFUGAL PUMP CO., CBS CORPORATION, A DELAWARE CORPORATION, F/K/A VIACOM 1 INC.,SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTTEED CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK INC.,COOPER INDUSTRIES LLC,CRANE CO., EATON CORPORATION AS SUCCESSOR-IN-INTEREST TO EATON ELECTRICAL INC. AND CUTLER-HAMMER 1 INC.,FOSTER WHEELER ENERGY CORPORATION, GENERAL ELECTRIC COMPANY, GOULD ELECTRONICS, INC.,GRAYBAR ELECTRIC COMPANY INC.,INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM COMPANY, INGERSOLL-RAND COMPANY, JOHN CRANE INC.,JOHN E. POTENTE & SONS, INC.,METROPOLITAN LIFE INSURANCE COMPANY, PNEUMO ABEX LLC,SUCCESSOR-IN-INTEREST TO ABEX CORPORATION, F/K/A PNEUMO ABEX CORPORATION, ROCKWELL AUTOMATION INC.,INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ALLEN BRADLEY COMPANY,

SCHNEIDER ELECTRIC USA, INC.F/K/A SQUARE D COMPANY, SIEMENS CORPORATION, SIEMENS INDUSTRY, INC.,INDIVIDUALLY AND AS SUCCESSOR TO SIEMENS ENERGY & AUTOMATION INC.,UNION CARBIDE CORPORATION, JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS) Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### Core Terms

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punitive damages, *asbestos*, partial summary judgment, summary judgment, exposure, deposition transcript, issue of fact, encountered, argues, cement, truck, pipe, claim for punitive damages, entitlement to judgment, insufficient to support, moral culpability, entire career, matter of law, cause injury, documents, proffer, Notice, gaps

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

**Opinion by:** ADAM SILVERA

### Opinion

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**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND)

**[\*\*2]** Upon the foregoing documents, it is ordered that defendant Graybar Electric Company Inc.'s (hereinafter referred to as "defendant Graybar") motion for partial summary judgment to dismiss plaintiffs punitive damages claims is hereby granted for the reasons set forth below.

Here, defendant Graybar moves for partial summary judgment arguing that punitive damages are not warranted herein. In support, defendant Graybar proffers, *inter alia*, the deposition transcript of Nelson Moxam. According to defendant Graybar, punitive damages are inappropriate here where plaintiff only encountered its product once during his entire career.

In opposition, plaintiff argues that issues of fact exist to preclude summary judgment in that plaintiff was exposed to asbestos containing cement pipe which was **[\*2]** sold and distributed by defendant Graybar and which lead to plaintiffs diagnosis with mesothelioma and eventual death. Plaintiff argues that plaintiff worked with and installed asbestos containing cement pipe many times during his employment. According to plaintiff, the instant motion must be denied as defendant failed to meet its burden in establishing entitlement to judgment as a matter of law. Plaintiff contends that defendant Graybar merely points to gaps in plaintiffs proof in an attempt to meet its burden. Plaintiff further argues that the issue of punitive damages is an issue to be

determined by a jury. Defendant Graybar replies.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

"The 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 eliminate any material issues of fact from the case".

*Winegrad v New York University Medical Center*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985). Once such entitlement has been demonstrated

by the moving party, the burden shifts to the party opposing the motion to **[\*\*3]** "demonstrate by admissible evidence the existence of a factual issue **[\*3]** requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]".

*Zuckerman v City of New York*, 49 NY2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

As to punitive damages, the Appellate Division, First Department, has held that it is "singularly rare cases where punitive damages are warranted by extreme aggravating factors such as improper state of mind or malice." *Maltese v Westinghouse Elec. Corp.*, 225 AD2d 414, 415, 640 N.Y.S.2d 488 (Pt Dep't 1996) affd, 89 NY2d 955, 678 N.E.2d 467, 655 N.Y.S.2d 855 (1997)(internal citations and quotations omitted). The Appellate Division in *Maltese* set aside a jury award for punitive damages. The Court of Appeals affirmed the Appellate Division in *Maltese* holding that evidence of a defendants "general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury" was insufficient to support a finding of punitive damages. *See Maltese v Westinghouse Elec. Corp.*, 89 NY2d 955, 957, 678 N.E.2d 467, 655 N.Y.S.2d 855 (1997).

While plaintiff's opposition papers highlight the long company history of defendant Graybar in an attempt to establish that moving defendant knew of the dangers of asbestos, a review of plaintiff's deposition transcript reveals that plaintiff testified that he first encountered a Graybar truck during his employment with Steinmetz Electric with whom plaintiff was employed for six months in 1977. Plaintiff testified that he unloaded Korduct, a cement pipe, from the Graybar [\*4] truck with two of his co-workers. Plaintiff further testified that in his entire career, he only encountered a Graybar truck once. *See* Notice of Motion, Exh. F., Nelson Moxam Depo. Tr., pp. 250-275. Punitive damages must be considered on a case by case basis. Here, based upon plaintiff's limited contact with, and exposure to, defendant Graybar's product, defendant Graybar has established that its conduct towards plaintiff did not rise to the high threshold of moral culpability required for an award of punitive damages. Even if defendant Graybar had a general [\*\*4] knowledge that prolonged exposure to asbestos could cause an injury, this is insufficient to support a finding of punitive damages. Although defendant Graybar used plaintiff's deposition transcript in support of its motion, moving defendant was not merely pointing to gaps in plaintiff's proof. Rather, moving defendant established, through plaintiff's deposition testimony that its conduct, as it relates to plaintiff herein, did not rise to the level necessary to establish punitive damages. Plaintiff's opposition failed to proffer any evidence showing that defendant Graybar's conduct rises to a level of "high degree of moral culpability" [\*5] necessary for a finding of punitive damages. *See Maltese, 225 AD2d at 415*. General awareness of the potential human risks associated with exposures to certain levels of asbestos do not give rise to punitive damages. *See id.* As such, defendant Graybar's motion for partial summary judgment, pursuant to *CPLR 3212*, dismissing plaintiffs' punitive damages claim against it is granted.

Accordingly, it is

ORDERED that defendant Graybar's motion for partial summary judgment to dismiss plaintiff's claim for punitive damages is granted; and it is further

ORDERED that within 30 days of entry, defendant Graybar shall serve a copy of this Decision/Order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

1/12/2022

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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