

[Desiena v. Algoma Hardwoods, Inc](#)

Supreme Court of New York, New York County

March 7, 2023, Decided

INDEX NO. 190032/2020

Reporter

2023 N.Y. Misc. LEXIS 989 *; 2023 NY Slip Op 30685(U) **

[1]** STEPHEN P DESIENA, Plaintiff, - v - ALGOMA HARDWOODS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC, AMERICAN HONDA MOTOR CO., INC. (AHM), BEAZER EAST, INC., F/K/A KOPPERS COMPANY INC, BIRD INCORPORATED, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO, DAP, INC, DOMCO PRODUCTS TEXAS, INC, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, KARNAK CORPORATION, MANNINGTON MILLS, INC, MORSE TEC LLC, NISSAN NORTH AMERICA, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO ABEX CORPORATION (ABEX), SLANT/FIN CORPORATION, TACO, INC, TOYOTA MOTOR SALES U.S.A., INC, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, WEYERHAEUSER COMPANY, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL

NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

punitive damages, boilers, summary judgment, **asbestos**, partial summary judgment, warn

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 003) 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, **[**2]** 156, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that defendant Burnham LLC's motion for partial summary judgment to dismiss plaintiff's complaint is hereby denied for the reasons set forth below. Preliminarily, the Court notes that the Notice of Motion seeks summary judgment dismissing all claims against defendant Burnham. However, the moving papers, as well as defendant Burnham's reply papers, seek only partial summary judgment on the issue of punitive damages. As such, the Court is treating the instant motion as a motion for partial summary judgment as to punitive damages.

Here, defendant Burnham moves for summary judgment arguing that plaintiff has failed to establish [*2] that moving defendants' conduct rises to the level of egregious and morally culpable conduct necessary for an award of punitive damages. According to defendant Burnham, any exposure to **asbestos** by plaintiff through Burnham boilers were below the regulated threshold limits and permissible exposure limits (hereinafter referred to as "PEL"). In support of its motion, defendant Burnham relies upon a study conducted by William E. Longo, Ph.D in 2007 (hereinafter referred to as the "Longo study"), arguing that plaintiff's exposure to **asbestos** was below the Occupational Safety and Health Act's PEL. As such, defendant Burnham contends that its failure to warn does not rise to reckless and wanton disregard to support a claim for punitive damages. Plaintiff opposes the instant motion arguing, *inter alia*, that the Longo study is insufficient to meet defendant Burnham's initial burden on summary judgment. Moving defendant replies.

During his deposition, plaintiff testified that he worked as a mechanic helper and carpenter throughout his career from 1978 to 1989. Plaintiff further testified that he was exposed [**3] to **asbestos** through Burnham boilers on 22 to 55 occasions while in the presence of workers [*3] on site performing work on the Burnham boilers. Plaintiff alleges that he worked within 5-15 feet of the workers who demolished and installed the Burnham boilers, and that such work released **asbestos** dust from the boilers. Plaintiff specifically testified that he was able to identify Burnham boilers as it was labeled on the boiler itself.

The standards of summary judgment are 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). 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). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See [Zuckerman v City of New York](#), 49 NY2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595

(1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and [*4] 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 [Daman Displays, Inc. v Masturzo](#), 168 AD2d 204 (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).

[**4] 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, 678 N.E.2d 467, 655 N.Y.S.2d 855 (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, 62 N.Y.S.3d 11 (1st Dept 2017)(internal parentheses omitted). Plaintiff correctly argues that the single study conducted by Dr. Longo is insufficient to support partial summary judgment on the issue of punitive damages herein. In his deposition, Dr. [*5] Longo concedes that he never conducted any studies on a Burnham boiler. See Affirmation in Opposition to Burnham's Motion for Partial Summary Judgment, Exh. 5, Depo. Tr. of William E. Longo, Ph.D., dated December 16, 2015, p. 36, ln. 10-12. In [Dryer v Amchem Products Inc.](#), 207 AD3d 408, 411, 171 N.Y.S.3d 498 (1st Dep't 2022) the Appellate Division, First Department held that to succeed on a motion for summary judgment, the moving party must support the motion with a fact specific study. Here, the Longo study provides no relevant information regarding the specific products at issue herein, and the specific circumstances in which the instant plaintiff was exposed to **asbestos** through defendant Burnham's boilers. Thus, defendant Burnham has failed to proffer sufficient evidence to establish entitlement to summary judgment.

Moreover, 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 **[**5]** factual question that should be resolved by a jury. See [Eiser v Feldman, 123 AD2d 583, 584, 507 N.Y.S.2d 386 \(1986\)](#). The New York Court of Appeals has also 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 **[*6]** wanton or reckless to sustain an award of punitive damages." [Home Ins. Co. v Am. Home Products Corp., 75 NY2d 196, 204, 550 N.E.2d 930, 551 N.Y.S.2d 481 \(1990\)](#)(internal citations omitted). Here, plaintiff has proffered evidence that demonstrates defendant Burnham failed to warn plaintiff of the hazards of **asbestos**. During direct testimony of the corporate representative of defendant Burnham, Mr. Sweigart, was asked whether it was correct that "Burnham, never...put a warning regarding hazards of **asbestos** on any of its boilers". Affirmation in Opposition, *supra*, Exh. 6, excerpts from the Tr. of Mr. Sweigart from the *Assenzio* trial group, dated June 19, 2013, p. 2778, ln. 14-16. Mr. Sweigart answered "[t]hat's correct." *Id*, at ln. 20. As such, defendant Burnham has failed to demonstrate their prima facie burden that punitive damages are not warranted herein. Thus, defendant Burnham's motion is denied.

Accordingly, it is

ORDERED that defendant Burnham'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.

3/7/2023

DATE

/s/ Adam Silvera

ADAM **[*7] SILVERA, J.S.C.**

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