

Brady v 4th Ave. Burner & Heating Supplies, Inc.

Supreme Court of New York, New York County

August 2, 2023, Decided

INDEX NO. 190023/2019

Reporter

2023 N.Y. Misc. LEXIS 3933 *; 2023 NY Slip Op 32670(U) **

[1]** ROSALIE BRADY, Plaintiff, - v - 4TH AVE. BURNER & HEATING SUPPLIES, INC., A. F. SUPPLY CORP., A.O. SMITH WATER PRODUCTS COMPANY, ALL ACQUISITIONS, LLC, F/K/A HOLLAND FURNACE COMPANY, AVCO CORPORATION, BURNHAM, LLC, CARLIN COMBUSTION TECHNOLOGY, INC., CLAYTON INDUSTRIES, CLEAVER-BROOKS, INC., COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUTDYNE, LLC, CRANE CO., ECR INTERNATIONAL, INC, F/K/A DUNKIRK RADIATOR CORP. AND AS SUCCESSOR BY MERGER TO THE UTICA COMPANIES, INC., FEDERATED DEVELOPMENT COMPANY, FORT KENT HOLDINGS, INC., F/K/A DUNHAM-BUSH, INC., FULTON BOILER WORKS, GENERAL ELECTRIC, GREENE, TWEED & CO., H&L HEATING SUPPLY, INC., H. & L. OIL BURNER HEATING SUPPLY CORP, H.B SMITH, ITT LLC, AS SUCCESSOR-IN-INTEREST TO BELL & GOSSETT AND MCDONNELL & MILLER, JOHN CRANE; INC., LAARS HEATING SYSTEMS COMPANY, INC., LENNOX INDUSTRIES, INC., PECORA CORPORATION, PEERLESS INDUSTRIES, R.W. BECKETT CORPORATION, RHEEM MANUFACTURING COMPANY, ROCKWELL AUTOMATION, INC. AS SUCCESSOR IN INTEREST TO TIMKEN-DETROIT AXLE COMPANY, SEAMAN FUEL OIL CORPORATION, SID HARVEY INDUSTRIES, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO BURNS HEATING & COOLING SUPPLY CO., INC. TACO, INC, TRANE U.S., INC., F/K/A AMERICAN STANDARD INC., UNION CARBIDE CORPORATION, WAYNE/SCOTT FETZER COMPANY, DOING BUSINESS AS WAYNE COMBUSTION SYSTEMS, WEIL MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

summary judgment, punitive damages, boilers, **asbestos**, 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 004) 153, 154, 155, 156, 157, 158. 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, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 224, 225, 226

were read on this motion to/for DISMISS.

[2]** 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.

Here, defendant Burnham moves for summary judgment arguing that plaintiff has failed to establish that moving defendants' conduct rises to the level of egregious and morally culpable conduct necessary for an award of punitive damages. According to defendant Bumham, any exposure to **asbestos** by plaintiff through Bumham boilers were below the regulated threshold limits and permissible exposure limits (hereinafter referred to as "PEL"). In support of its motion, defendant Bumham relies upon a study conducted by William E. Longo, **[*2]** 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, and through answers to interrogatories, plaintiff testified that he worked as a steamfitter's helper from 1961 to 1966. Thereafter, plaintiff worked as a burner serviceman from 1966-1999. Plaintiff further testified that he was exposed to **asbestos** through Burnham boilers while working on the boilers as well as working in close proximity to them. Plaintiff alleges that he would often replace blast tubes in the boilers. Plaintiff alleges that such work released **asbestos** dust from the boilers.

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 **[**3]** warranted **[*3]** 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 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).

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 **[*4]** 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, **[**4]** 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 Dep't 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. Longo concedes that he never conducted any studies on a Burnham boiler. See Affirmation in Support of Defendant Burnham LLC's Motion for Partial Summary Judgment, Exh. U, Depo. Tr. of William E. Longo, Ph.D., dated December 16, 2015, p. 36, in. 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 **[*5]** 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 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 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 Bumham failed to warn plaintiff of the hazards of **asbestos**. During direct testimony of the corporate representative of defendant **[**5]** Burnham, Mr. Roger Pepper was asked whether "[u]ntil 1982, did Burnham ever place a warning regarding the dangers of **asbestos** on any of its boilers". Affirmation in Opposition, *supra*. Exh. 7, excerpts from the Tr. of Mr. Roger Pepper, **[*6]** dated March 20, 2018, p. 2168, ln. 15-17. Mr. Pepper answered "[t]hey have not, no." *Id.* at ln. 18. As such, defendant Burnham has failed to demonstrate their prima facie burden on summary judgment that punitive damages are not warranted herein. Thus, defendant Burnham's motion is denied.

Accordingly, it is

ORDERED that defendant Bumham'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.

8/2/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.