

[DeRoy v Aerco Intl., Inc.](#)

Supreme Court of New York, New York County

October 4, 2023, Decided

INDEX NO. 190329/2019

Reporter

2023 N.Y. Misc. LEXIS 7418 *; 2023 NY Slip Op 33443(U) **

[1]** JOSEPH M DEROY, Plaintiff, - v - AERCO INTERNATIONAL, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, ARMOR KONE ELEVATOR INC, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BURLINGTON ELEVATOR CO, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTTEED CORPORATION, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CUTLER-HAMMER, INC, ELEVATOR CONTROLS CORP, ELEVATOR SYSTEMS, INC, FUJITEC AMERICA, INC., INDIVIDUALLY AND AS SUCCESSOR TO SERGE ELEVATORS, G.A.L. MANUFACTURING CORPORATION LLC, GENERAL ELECTRIC COMPANY, HARSCO CORPORATION, AS SUCCESSOR TO PATTERSON-KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A PATTERSON-KELLEY, HOLLISTER-WHITNEY ELEVATOR CORPORATION, MOTION CONTROL ENGINEER, INDIVIDUALLY AND AS SUCCESSOR TO O. THOMPSON ELEVATORS, NATIONAL ELEVATOR CAB & DOOR CORP, OTIS ELEVATOR COMPANY, PARKLINE ELEVATOR CAB INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), SCHINDLER ELEVATOR CORP, SEABERG ELEVATOR CO, THE PEELLE COMPANY, THYSSENKRUPP ELEVATOR CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO DOVER ELEVATOR COMPANY, TITAN MACHINE CORPORATION, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VANTAGE ELEVATOR SOLUTIONS, WESTINGHOUSE AIR BRAKES COMPANY, F/K/A UNION SWITCH & SIGNAL CO, GUARDSMAN ELEVATOR CO., INC., HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. /

BENDIX, A.O. SMITH WATER PRODUCTS CO., ARMSTRONG INTERNATIONAL, INC., ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CARRIER CORPORATION, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., CRANE CO., CROSBY VALVE LLC, CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., ECR INTERNATIONAL, CORP., F/K/A DUNKIRK BOILERS AND UTICA BOILER COMPANY, FLOWSERVE US, INC. INDIVIDUALLY AND SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC., GOULDS PUMPS LLC, IMO INDUSTRIES, INC., ITT INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO HOFFMAN SPECIALTY, KOHLER CO., LENNOX INDUSTRIES, INC., RILEY POWER INC, ROPER PUMP COMPANY, SLANT/FIN CORPORATION, STOCKHOLM VALVES & FITTINGS INC., SUPERIOR BOILER WORKS, INC., UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC., WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, ZURN INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO ERIE CITY IRON WORKS A/K/A ERIE CITY BOILERS, Defendant.

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

Core Terms

boilers, summary judgment, partial summary judgment, summary judgment motion, punitive damages, sufficient evidence, **asbestos** exposure, issue of fact, matter of law, moving party, **asbestos**-containing, unequivocal, Deposition, documents, **asbestos**

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) 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 305, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 381, 382, 383, 384, 385, 386 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the instant motion for partial summary judgment on the issue of punitive damages is denied in accordance with the decision below.

Here, defendant Burnham LLC ("Burnham") moves to dismiss plaintiff's punitive damages claim on the basis that **asbestos** exposure from Burnham boilers would fall below TLV or PEL/OSHA limits and per Burnham's lack of workers' compensation claims for **asbestos**-related disease. See Memorandum of Law in Support of Defendant Burnham LLC's Motion for Partial Summary Judgment, p. 9-11.

[**2] The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established [*2] 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. See [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). Furthermore, the Appellate Division, First Department has held that on a motion for summary judgment, it is moving defendant's burden "to unequivocally establish that its product could not have contributed to the causation [*3] of plaintiff's injury". [Reid v Georgia-Pacific Corp.](#), 212 AD2d 462, 463, 622 N.Y.S.2d 946 (1st Dep't 1995).

Defendant Burnham has plainly not met their burden at summary judgment. The TLV/OSHA standards have little bearing on plaintiff's unequivocal and consistent testimony regarding his work with Burnham boilers and his specific **asbestos** exposure therein. See [**3] Affirmation in Opposition to Burnham's Motion for Partial Summary Judgment [*sic*], p. 4-7. Similarly, the lack of compensation claims from Burnham's employees are wholly irrelevant to moving defendant's conduct as manufacturers of **asbestos**-containing boilers. Plaintiff correctly argues that the single study conducted by William E. Longo, PhD in 2007 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 Opposition, *supra*, Exh. 5, Deposition Transcript of William E. Longo, PhD, dated December 16, 2015, p. 36, ln. 10-12. In [Dyer 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 [*4] 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.

Furthermore, plaintiff has provided evidence sufficient to raise questions of fact as to defendant Burnham's prior knowledge of and participation in the use of **asbestos**-containing boiler parts. See Affirmation in Opposition, *supra*, at p. 11-15.

As a reasonable juror could find that defendant Burnham's knowledge and use of **asbestos** in their boilers constituted a prioritization of their corporate benefits over plaintiff's safety, issues of fact exist to preclude summary judgment on punitive damages.

Accordingly, it is

ORDERED that defendant Burnham's motion for partial summary judgment is denied in its entirety; and it is further

[4]** ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

10/04/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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