SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In Re Eighth Judicial District Asbestos Litigation

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

ROBERT BARKER

Plaintiff,

DECISION AND ORDER
Index No. 2012-3873

-v-

BEAZER EAST, INC.
f/k/a KOPPERS COMPANY, INC., et al.

Defendants.

BEFORE: HON. JEREMIAH J. MORIARTY III
Supreme Court Justice

APPEARANCES: For Plaintiffs:
Lipsitz & Ponterio, LLC
By: John N. Lipsitz, Esq.
Mathew M. Morton, Esq.

For: Defendant Honeywell, International, Inc., as successor to Allied Chemical Corporation, Wilputte Coke Oven Division
Phillips Lytle, LLP
By: James W. Whitcomb, Esq.

For: Defendant Beazer East, Inc., f/k/a Koppers Company, Inc.
Ward Greenberg Heller & Reidy, LLP
By: Meghan M. DiPasquale, Esq.

The following papers were read and considered, on defendant Beazer East, Inc., f/k/a Koppers Company, Inc.'s (Koppers) Motion for summary judgment and on Honeywell, International, Inc.'s (Honeywell) Motion for summary judgment: Notice of motion by defendant Koppers, dated October 1, 2013; Affirmation in support of Koppers' motion of Meghan M. DiPasquale, Esq., dated October 1, 2013, with annexed exhibits; Affidavit of William Edgar, P.E., sworn to January 29, 2013 (filed in *Charles Streif v A.O. Smith Water Products Co., et al.*, Erie County Index No.2011-1120); Affidavit of Mary D. Wright, Esq., sworn to January 27, 2013 (filed in *Streif*); Notice of motion by defendant Honeywell, dated October 1, 2013; Affidavit in support of James W. Whitcomb, Esq., sworn to October 1, 2013, with annexed exhibits; Affidavit in support of William Thomas Birmingham, sworn to October 1, 2013; Affidavit in support of Peter Schroth, sworn to September 28, 2013; Attorney affirmation in opposition of John Ned Lipsitz, Esq., dated November 8, 2013, with annexed exhibits; Reply affirmation of Meghan M. DiPasquale, Esq., dated December 2, 2013, with annexed exhibits; Reply affidavit of James W. Whitcomb, Esq., sworn to December 2, 2013, with annexed exhibits; Supplemental attorney affirmation of John Ned Lipsitz, Esq., dated December 2, 2013, with annexed exhibit; Affidavit in opposition of Meghan M. Dipasquale, Esq., sworn to December 23, 2013; Affidavit of Michael J. Berchou, Esq., sworn to December 20, 2013, with annexed exhibits.

Plaintiff's Claims and Occupational History

Plaintiff Robert Barker, living with cancers of the lung and larynx[1] claims that his injuries were caused by his exposure to coke oven emissions[2] while employed at the former Bethlehem Steel plant in Lackawanna, New York (Bethlehem).[3] Plaintiff's theory of recovery is strict products liability, that defendants are liable for the coke-oven related injuries sustained due to their failure to warn him of the "lung cancer hazard presented by normal and intended operation of their coke oven batteries".[4]

Plaintiff Barker's career at Bethlehem was wholly in the coke oven department. He began in 1973 and he worked through 1981, with some gaps in employment, primarily as

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[1] That cancer is described in plaintiff's answers to interrogatories as "squamous cell carcinoma of the right area epiglottic fold, the false right vocal cord the epiglottis and the larynx". (affirmation of defendant Koppers' counsel, 10/1/13, exhibit E, question 60 at 28-29)

[2] Plaintiff points out that coke oven emissions, including dusts, fumes and gases began to be regulated by the United States Occupational Health and Safety Administration (OSHA) in 1976. Coke oven emissions are produced during manufacture of coke, a "porous cellular residue from the destructive distillation or carbonization of coal" which is used as fuel in the steel-making process. "Coke oven emissions are a complex mixture of particulates, vapors and gases" (41 Fed Reg 46741 [1976]).

According to OSHA and plaintiff's expert industrial hygienist, Gregory L. Sliwinski, MS, CIH, these emissions are carcinogenic (*id*; affirmation of plaintiff's counsel, 11/8/13, exhibit 4). Further, OSHA found that "[C]oke ovens are a carcinogen-rich environment". (41 Fed Reg 46741 [1976])

[3] Plaintiff Barker has withdrawn his claims against Honeywell and Koppers for injury resulting from exposure to asbestos. (affirmation of plaintiff's counsel, 11/8/13 at ¶ 5)

[4] Plaintiff has also withdrawn his claim for relief based upon common-law negligence. (*id.*)

a lid man. He testified that he spent 80% of his time at Bethlehem as a lid man. Plaintiff was deposed on December 4 and December 11, 2012; his videotaped trial testimony was taken on December 12, 2012.[5]

Defendants' Motions

Defendants herein are Honeywell, whose predecessor was Wilputte Coke Oven (Willputte) and Koppers, Inc.[6], companies that designed and built coke oven batteries at Bethlehem.[7]

Defendants move for summary judgment on five grounds, contending that, under New York law and the facts of this case, they are not liable to plaintiff. First, Honeywell and Koppers assert that, as suppliers of unique design, engineering and general contracting services to Bethlehem for construction of coke oven batteries they are immune from strict

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[5] Plaintiffs' expert Sliwinski describes the duties of "lid men", as did Barker in his deposition and trial testimony. According to Sliwinski , lid men stood on top of the ovens, opened the ovens' lids to allow the ovens to be "charged" with coal, closing the lids and sealing them . He described the work as extremely difficult and harsh due to extreme heat and dense smoke conditions, " resulting in direct and significant" coke oven emissions exposures (affirmation of plaintiff's counsel 11/8/13 , exhibit 4 at 5-6)

[6] Now known as Beazer East, Inc.

[7] Coke oven batteries, according to former Koppers engineer William Edgar, P.E., were the largest structures within coke oven plants. The plants "were comprised of a number of freestanding buildings, structures and complex mechanical systems", the batteries "consisted of a number of adjacent tall and narrow brick oven chambers housed in structure made of steel, concrete and brick." While batteries varied in size and design, "[t] the average oven chamber was approximately 37 to 40 feet long, 9 to 11 feet high" and 16 to 20 inches wide. Coke oven chambers were heated to very high temperatures, charged with coal, the impurities burned off, what's left is coke. (id. at ¶ 14) Peter Schroth states that coke ovens have an operationg temperature of 2400-2600 degrees. (Schroth aff, ¶ 10)

products liability. Defendants were "purveyors of services" to Bethlehem, not manufacturers, they assert, and that no action for strict liability is permitted when performance of services rather than the sale of a product is at issue. Defendants suggest that, as designers and engineers, they could be liable, if it all, for professional negligence, which plaintiff has neither alleged nor proven. Second, defendants maintain that the batteries are not "products", and hence, do not fall within the parameters of strict products liability. Third, Koppers moves for dismissal of the punitive damages cause of action. Fourth, Koppers takes issue with the product identification supplied by plaintiff, maintaining that he has not shown that he was exposed to harmful substances in its coke ovens. Fifth, Honeywell argues that an indemnification agreement entered into on September 1, 1970, among Honeywell's predecessor Allied Chemical Corporation (Allied), Wellington Tube Holding Limited and Salem Corporation which sold Allied's coke oven division, absolves Honeywell for injuries related to the Bethlehem coke ovens. Alternatively, Honeywell maintains it had no duty to plaintiff because all of its services provided to Bethlehem were completed before Mr. Barker began working at the plant.

In support of its motions, Honeywell submits the affidavit of William Thomas Birmingham, a former Bethlehem engineer from 1970 to 2001. In this short affidavit, he states that Wilputte designed and built batteries 5, 6, 7, 8 and 9; that these batteries were constructed on site by Wilputte's employees or by subcontractors hired by Wilputte; and that in addition, Wilputte supervised Bethlehem employees in performing yearly repairs to batteries 5, 6, 7, 8 and 9, using material supplied by Bethlehem. Honeywell also relies on

an affidavit of Peter Schroth, Ph. D. a refractory engineer, trained in Germany. He states that he has reviewed the plans for Wilputte's coke ovens and that the materials used in constructing these ovens complied with "industry practice". Honeywell's moving papers do not disclose the year in which the coke ovens were built, except for Battery 9. However, plaintiff's counsel's affirmation in opposition attached a document produced by Honeywell in asbestos litigation, but in another case, stating that Battery 5 was constructed in 1941; Battery 6 in 1943; Battery 7 in 1952; Battery 8 in 1961 and Battery 9 in 1970 (affirmation of plaintiff's counsel, 11/13/13, exhibit 2 at ¶10)

Koppers supplies the affidavit of engineer William Edgar, who worked for Koppers from 1950-1984. He outlines the work done by Koppers for Bethlehem, describes Koppers' coke oven plants in general and at Bethlehem, stating that Koppers designed and built batteries 2 and 3 in 1923, each having 57 ovens and battery 4 in 1930, also having 57 ovens. He states that the batteries were rebuilt by Koppers in 1942 and repaired in 1952. Mr. Edgar notes that, with the exception of the 1952 repair[8], all labor and materials were supplied by Koppers. Koppers also furnishes an affidavit from Beazer East's assistant secretary, Mary D. Wright, filed in another case, enclosing the contracts between Bethlehem and Koppers.

Neither defendant claims to have issued any warnings concerning the hazards of coke oven emissions during the relevant period.

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[8] Bethlehem supplied the materials for the 1952 repair.

Summary Judgment-Generally

CPLR Rule 3212 (b) provides in pertinent part, that summary judgment "[S]hall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a material issue of fact (*Fisons Corp. v Sweeteners Plus, Inc.*, 258 AD2d 872 [4th Dept 1999]). It is established in New York that the Court must review the evidence in a light most favorable to the non-moving party when determining if an issue exists (*Brubaker v Houseknecht*, 83 AD3d 1539, 1540 [4th Dept 2011]; *Russo v YMCA of Greater Buffalo*, 12 AD3d 1089 [4th Dept 2004]). "As a general proposition, summary judgment should not be granted 'where there is any doubt as to the existence of factual issues . . . or where the issue is arguable'" (*Chilberg v Chilberg,* 13 AD3d 1089, 1090 [4th Dept 2004], *quoting Onondaga Soil Testing v Barton, Brown, Clyde & Loguidice*, 69 AD2d 984, 985 [1979]).

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986) discusses summary judgment:

> "As we have stated frequently, 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 demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center,* 64 N.Y.2d 851, 853; *Zuckerman v.*

> *City of New York,* 49 N.Y.2d 557, 562 ; *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 404). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Center, supra,* at p. 853). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York, supra,* at p. 562)."

Strict Liability/ Duty to Warn

Strict products liability in New York was summarized in *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107 (1992): "[A] plaintiff may assert that the product is defective because of a mistake in the manufacturing process (*Victorson v Bock Laundry Mach. Co., supra*) or because of an improper design (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376) or because the manufacturer failed to provide adequate warnings regarding the use of the product (*Torrogrossa v Towmotor Co.*, 44 NY2d 709). (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478-479.)" The duty imposed on a manufacturer by the third category is to "warn against latent dangers resulting from foreseeable uses of a its product of which it knew or should have known" (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]). This duty to warn of latent dangers extends to employees of those purchasers (*McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62 [1962]) and other persons exposed to a foreseeable and reasonable risk of harm occasioned by the failure to warn(*Oliver v Namco Controls*, 161 AD2d 1188, 1189 [4th Dept 1999]. The duty to warn can continue after the sale is made (*Liriano v Hobart Corp.*, 92

NY2d 232, 240 [1998]; *Cover v Cohen,* 61 NY2d 261, 274-275 (1984)

Service Provider Argument

Noting that the record shows that their coke oven batteries were massive buildings constructed on location for a limited number of clients in accordance with unique design specifications provided by those companies, defendants Honeywell and Koppers argue that as designer and general contractors they are not subject to strict liability because they provided services to Bethlehem. Plaintiff agrees that when a defendant engages in a transaction which consists primarily of the provision of a service rather than the manufacture, distribution of sale of a good, it may not be liable under principles of strict products liability, citing *Perlmutter v Beth David Hosp.*, 308 NY 100 (1954). Plaintiff contends that defendants' assertions that they were service providers, not product manufacturers, is unsupported by the applicable law.

Defendants analogize their role to that of the architects in *Barnett v City of Yonkers,* 731 F Supp 594 (S.D. NY., 1990),*Sears, Roebuck & Co. v Enco Assoc.*, 43 NY 2d 389 (1977), *Hotel Utica v Armstrong*, 62 AD2d 1147 (4th Dept 1978), and of a subcontractor in *Milau Assoc. v North Ave. Dev. Corp.*, 42 NY2d 482 (1977).

Barnett was an action against the city ,school district, product manufacturers and the architect who specified asbestos for use in a school building, brought on behalf of a former student who died of asbestos-related disease. In granting the architect's motion for summary judgment, the court stated: "New York law is crystal clear that in service-oriented contracts, such as agreements to render architectural services, no action in breach of

implied warranty or strict product liability will lie for the negligent performance of professional services" (*Barnett v City of Yonkers, supra* at 601). Defendants argue that *Barnett's* holding is applicable not only to architects but also to contractors, builders and engineers, absolving them of liability to plaintiff. Plaintiff correctly contrasts the instant case with *Barnett.* There, the architect supplied only plans and specifications calling for use of asbestos, but did not provide the asbestos. Here, moving defendants did a lot more than provide blueprint, but furnished all the materials and constructed the ovens. The comparison of their activities to the architect in *Burnett* fails.

Plaintiff points out that *Sears* is a case where plaintiff property-owner sought to recover for a deteriorating parking ramp against the architect-engineers who designed and built the ramp. That case was decided on statute of limitations grounds but the court did observe that no action lies in strict liability on behalf of an owner against the architect with whom he has his contract. As plaintiff states, this case only to the rights of an owner against an architect[9]. Similarly, in *Hart v Mornay Homes*, 158 AD2d 890 (3rd Dept 1990), the owner of a home could not recover against its builder in strict liability for a faulty fireplace. *Hotel Utica* states the principle gleaned from the "later cases" that "an owner who alleges that an architect has breached his contract may sue both in contract and in negligence, the latter often referred to as 'malpractice'" *(Hotel Utica* at 1147). *Milau Assoc. v North Ave. Dev. Corp.*, 42 NY2d 482 (1977), decided after trial, not summary judgment, is a breach of

[9] To the extent that Sears determined that a six year statute of limitations applied to contract claims, it has been superseded by statute (*see In re: R.M Kliment & Frances Halsband, Architects [McKinsey & Co., Inc],* 3 NY3d 538 [2004]).

warranty and negligent installation case concerning a commercial building's sprinkler system installed by a construction specialist. While there is a long discussion concerning strict products liability (pp. 488-489), and *Milau* is frequently cited for that discussion and its outline of public policy considerations favoring imposition of strict product liability, the case did not turn on it. In fact, such a cause of action had neither been pled nor argued, at any "time in the course of litigation". (Id. at 489)

In *Held v 7-Eleven Food Store*, 108 Misc. 2d 754 (Sup. Ct., Erie County 1981) ,plaintiff sought to recover for injuries sustained when he fell into an "allegedly defective" hole in the concrete in front of convenience store, the result of the owner's attempt to repair a cracked walkway. In rejecting plaintiff's strict products liability claim, the court observed that strict products liability to transactions in which service predominates have been "unequivocally rebuffed" and that the concrete in which plaintiff fell was not a product.

Plaintiff cites a relatively early case, *Inman v Binghamton Hous. Auth.,* 3 NY2d 137 (1957) where the principles of *MacPherson v Buick Motors*, (217 NY 382 [1916]) to a personal injury caused, it was claimed, by a hazardous condition on the rear stoop of an apartment building. The court found no reason to distinguish between the liability of "one who supplies a chattel and one who erects a structure" quoting Prosser on Torts (*Imam* at 144). Hence, the MacPherson rule "holding a manufacturer of an inherently dangerous chattel defectively made, liable for injuries to remote users" was found applicable to determine liability of architects and builders (*id.* at 144-145). While defendants urge that *Imam* is inapplicable here because it was a design defect case and deals with ordinary

negligence, not strict products liability, the court in *Serna v New York State Urban Dev. Corp.*, 185 AD2d 562, 563 (3rd Dept 1992) disagreed: In *Imam,* "[T]he Court of Appeals recognized the availability of strict products liability claims against builders and architects of a defective building" but declined to extend this to a building owner in a case of a defective elevator. While dealing with "simple negligence", the opinion in *Cubito v Kreisberg*, 69 AD2d 738 (2nd Dept 1979) *affd for reasons stated below*, 51 NY2d 900 (1980), makes clear that an architect can be responsible to a injured third party for the architect's wrongful conduct in rendering services to his client. (*Id.* at 742) Interestingly, the court went on to equate an architect's duty of care with an industrial manufacturer, finding that an architect is similarly obligated to "'exercise that degree of care in his plan or design as to avoid any unreasonable risk of harm to anyone who is exposed to the danger'" (*id* at 745, quoting *Micallef v Miehle Co.*, 39 NY2d 376, 385).

Defendants' reliance on *Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc.*, 192 AD2d 151 (1st Dept 1993), is similarly misplaced. Again, a building owner sought to recover from its construction manager for a defective facade, alleging property damage only. The trial court's dismissal of the strict products liability claim was affirmed because the "construction contract in this case was clearly for the performance of a service"(*id* at 155). However, the court contrasted this to another construction case, also brought by Columbia, which held that the owner would have a claim in strict products liability against the manufacturer of the defective product used in the construction (*Trustees of*

Columbia Univ. v Mirchell/Giurgola Assoc., 109 AD2d 449 [1st Dept 1985])[10]. Plaintiffs also point out that the complained of defect in *Gwathney* was in the manner of the construction of the facade, rather than in any specific product.

Defendant Honeywell cites La Rossa v Scientific Design Co., Inc., 402 F2d 937 [3rd Cir 1968]), in support of his services argument. However, that case, while very close factually to ours, applies New Jersey law and unlike our case there was no defective product alleged.[11]

As argued by plaintiff, defendants did not solely perform services. Bethlehem contracted to purchase coke ovens, not defendants' expertise as architects and construction managers. On this record, it cannot be said that the sale of the coke ovens were merely incidental to the service-oriented contract. Bethlehem contracted to obtain coke ovens to produce coke for its industrial use. That was its clear intent. Defendants designed

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[10] In *Mitchell/Giurgola* , the strict products liability claim stood, against the manufacturer of defective wall panels and tiles installed on the building's facade. "That a wall rendered defective and in imminent danger of collapse by improperly fabricated materials constitutes the type of dangerous product for which the manufacturer owes a duty to the ultimate user under the doctrine of strict products liability"(at 455).

[11] A chemical plant employee's representative alleged that his wrongful death injury was caused by exposure to cancerous dust, discharged from pellets loaded into a reactor by the employee under the supervision of defendant Scientific. Scientific had also designed, engineered and constructed the factory. This was a post-trial motion addressed to the trial court's dismissal of the express and implied warranty causes of action. In applying New Jersey law, the court analyzed those causes of action as strict products liability. In sustaining the dismissal, the court recognized the provider of services exception and also found important that there was no mass production of goods, no distribution of goods to remote consumers customers.

the ovens, furnished all the materials and constructed the ovens on site. When these ovens functioned as intended, they released carcinogenic emissions about which defendants failed to warn anyone.

The majority of cases cited by plaintiff are restricted to owner-contractor liability, dealing with poperty damage claims only. *Imam, Serna* and *Cubito* recognize that architects and builders can be liable for personal in juries to third-parties and, as stated Imam and Serna hold that this includes strict products liability.

Contract

Defendants argue that their contracts with Bethlehem are the key to their duties and responsibilities, that the coke ovens were designed pursuant to a specially-negotiated service contract nothing in the contract required it to warn of the dangers presented by coke oven emissions. Defendants claim they owed no duty of care to plaintiff independent of its contractual obligations. Defendants argue that the failure to warn claims must fail, because they had no duty to warn plaintiff. Their entire arrangement was by contract, - contract did not require defendants to warn. They cite: *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002), *Church v Callanan Indus.*, 285 AD2d 16 (3rd Dept 2010) *affd* 99 NY 2d 104 (2002) and *Palka v Servicemaster Mgt.*, 83 NY2d 579 (1994). Turning again to the *Sears* case, defendants claim that plaintiff unfairly interprets its holding. Defendants claim that the case holds that no action for breach of implied warranty or of strict products liability because whether looked at as tort of professional malpractice or contractual action for non-performance, the entire relationship grew out of the contract.

Defendants read their responsibility too narrowly. In *Church*, the court made it clear that mere acceptance of a builder's or contractor's work by the owner does not absolve the contractor of liability to an injured third party. The "modern rule" further provides that a contractor is liable where it is reasonably foreseeable that a third person could be injured because of the contractor's negligent performance of the work (*Church* 285 AD2d at 18-19). *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002) holds that no duty by contracting party is owed to a third party unless special circumstances exist.

"Product" argument

Plaintiff describes defendants' theory that coke ovens are not products is "singular and unprecedented", contending that the coke ovens at issue here are "products" and that defendants are subject to strict liability for injuries resulting from their failure to warn of the hazards of their use. The main purpose of these ovens, plaintiffs argue, was to transform coal to the coke needed to "power the steel industry" and that it was "the basic design and function of the coke oven battery that led to the release of hazardous dusts, fumes and gases in the breathing zone of coke oven battery operators". Plaintiff describes defendants coke ovens as large, fixed machines, but that defendants' argument that a coke oven battery is not a product based on size alone had no basis in New York law. ??

Honeywell characterizes coke ovens as permanent improvements on land, as opposed to a consumer products. Koppers agrees that coke ovens are permanent and large scale designed to the individual specifications of the client. Both defendants maintain that these ovens are buildings, not products.

In addition, defendants claim that they do not participate in a "stream of commerce" subject to mass production, mass advertising, mass distribution and sale to the customer. These ovens are sold only to a select few companies in the steel, chemical and coke industries, who were sophisticated consumers not needing protection of strict products liability.

Plaintiff, describing coke ovens as "devices", takes issue with the defense theory that when a device is sufficiently large, it becomes real property. This theory, according to plaintiff is contrary to public policy.

Defendants rely on *Van Inderstine v Lane Pipe Corp.*, 89 AD2d 459 (4th Dept 1982) for their "not a product" argument. In *Van Inderstine*, an allegedly defective guardrail had been designed and installed by the County. After reciting the history of products liability[12], the court held that since the county had not "produced a product for sale and placed it is the stream of commerce", an action in strict liability did not lie. The Court also observed that the guardrail was "not the product of modern commercial marketing practices" because it had

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[12] The doctrine of strict products liability renders the manufacturer of a defective product liable to any person injured thereby, regardless of privity, foreseeability or due care, if the defect was a substantial factor in bringing about the injury and provided (1) that at the time of the occurrence the product was being used for the purpose and in the manner normally intended, (2) that if the person injured is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger and (3) that by the exercise of reasonable care the person injured would not otherwise have averted the injury (*Codling v Paglia*, 32 NY2d 330, 342 [1973]; *Rainbow v Elia Bldg. Co.*, 79 AD2d 287 (4th Dept 1981), *affd* 56 NY2d 550 [1982]; *Dudley Constr. v Drott Mfg. Co.*, 66 AD2d 368 (4th Dept 1979). The defect may result either from a mistake in manufacturing, from improper design or from the inadequacy or absence of warnings for the use of the product (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478-479 (1980); *Opera v Hyva, Inc.*, 86 AD2d 373, 376-377 [4th Dept 1982]).

no distant customers who relied on national advertising claims, and that there was no mass production or commercial distribution of the product. Defendants claim that they did not engage in national advertising and that the market for their coke ovens was extremely limited, highly specialized, and provided to only a select few.

Plaintiff maintains that the fabrication and installation of the guardrail in *Van Inderstein was* clearly not a commercial transaction whereas here, defendants clearly engaged in a commercial venture. In *Van Inderstine*, the court cited, *inter alia*, *Rainbow v Elia Building Co.*, 49 AD2d 250,252 (4th Dept 1975) and *Weiss v Foote*, 7 NY2d 579 (1960) as a reminder that the County was acting in its governmental capacity in designing and planning highways and that public policy prohibits application of product liability principles; that its actions may be challenged only "on proof that the plan either was evolved without adequate study or lacked a reasonable basis" (*Weiss*, 7 NY2d at 589). *Van Inderstine* is not applicable to the commercial transaction herein and the governmental aspect of this case is not present here. Defendants' reliance on this case is misplaced.

Plaintiff argues that these coke oven batteries are similar to turbines relying on *Astoria Gas Turbine Power, LLC v Tax Comm. of City of NY*, 7 NY3d 451 (2006) where turbines were classified as real property for tax purposes, but also as products about which defendants have a duty to warn. Plaintiff also cites *Appalachian Ins. Co. v General Elec. Co*, 8 NY3d 162 (2007) and *Matter of New York City Asbestos Litig.[Maltese],* 89 NY2d 955 (1997).

Defendants resist comparing of coke oven batteries to turbines, as suggested by

plaintiff, arguing that coke batteries were massive buildings, constructed on location for a limited number of clients and uniquely designed in accordance with specifications provided by their customers. By contrast, they claim, turbines and boilers are mass-produced, built in a factory, assembled on site and widely distributed. These machines are not unique unmoveable, permanent structures like coke oven batteries are. Defendants also point out that plaintiff's cases *Appalachian, Astoria & Maltese* never deal with the issue whether the turbines are "products".

REAL ESTATE

Defendants argue that coke oven batteries are improvements to real estate, not products citing *Matter of City of Lackawanna v State Bd. of Equalization and Assessment of State of New York*, 16 NY2d 222 (1965). Defendants remain coke oven designers and builders in the cited cases of *Herriott v Allied Signal*, 998 F 2d 487 (7th Cir 1993) and *Adair v The Koppers Co., Inc.* , 541 F Supp 1120, aff'd 741 F 2d 111 (6th Cir 1984).

Plaintiff minimizes the Lackawanna case- saying simultaneous categories are allowable.

Stream of Commerce

Plaintiff argues with respect to failure to warn, that defendants dominated and controlled the market for coke oven batteries, that these ovens were in the stream of commerce, were sold all over the country and around the world. Willputte, as of 1962, had sold at least 22 coke oven batteries in the US, 1 in Mexico and 1 in Australia. Koppers, as of 1944 had sold 103 coke oven batteries in the US, 5 in Canada and 1 in Brazil.

Mass Market idea

Koppers cites *Sukljian v Charles Ross & Son Co.*, Inc, 69 NY2d 89 (1986) and *Codling* that products must be mass-produced subject to mass advertising and mass distribution.

Defendants have not demonstrated that coke ovens are not products.

Product Identification Argument and Analysis.

In countering the claims made by defendants that plaintiff has failed to show that he was exposed to coke oven emissions, plaintiff submits his deposition and video-taped trial testimony and the expert report of his industrial hygienist, Gregory L. Slawinski, MS, CIH detailing Barker's exposure to and coke oven emissions as well as the specific hazards thereof.

As this court has noted numerous times, it is well established in asbestos litigation that to go forward with a motion for summary judgment dismissing a complaint, [based on product identification grounds] a defendant must present admissible evidence showing that the complaint has no merit (*see Diel v Flintkote Co.*, 204 AD2d 53 [1st Dept 1994]), or affirmatively establish the merit of its defense (*see Higgins v Pope*, 37 AD3d 1086 [4th Dept 2007]; *Refermat v A. C. AND S., Inc.*, 15 AD3d 928 [4th Dept 2005]; *Root v Eastern Refractories Co., Inc.*, 13 AD3d 1187 [4th Dept 2004]; *Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d 1002 [4th Dept 1998]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). A defendant must make a prima facie showing that its products could

not have contributed to the causation of decedent's illness (*see Refermat, Root, Takacs*). A party moving for summary judgment cannot meet its burden by merely noting gaps or weakness in its opponent's proof (*see Allen v General Elec. Co.*, 32 AD3d 1163, 1165 [4th Dept 2006], *citing Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]; *Edwards v Arlington Mall Assocs.*, 6 AD3d 1136 [4th Dept 2004]).

Koppers argues that plaintiff Barker has not shown that he was exposed to coke oven emissions from its ovens, that its ovens were no longer in service when Mr. Barker began his career at Bethlehem. Defendant points out that plaintiff's own testimony shows that: during his employment, batteries 1, 2 and 3 had been shut down and that battery 4 was in the process of deconstruction; plaintiff could not state when he worked on battery 4 and did not testify that he worked on battery 3. Plaintiff maintains that he has presented sufficient facts and circumstances from which Koppers' liability may be reasonably inferred, opposes this branch of the motion, asserting that defendant has relied on only part of plaintiff's testimony. Plaintiff points out that, in his deposition testimony, he stated that batteries 4 and 5 were running "according to production" and "running periodically" (affirmation of plaintiff's counsel, 11/13/13, exhibit 7 ,at 103-104) and that if batteries were operational, he worked on them (*id.* at 207).

Plaintiff also relies on a Bethlehem history entitled "From Fire to Rust" to demonstrate that battery number 4 was periodically operational during Mr. Barker's employment: "Coke oven operations fluctuated with the overall pace of plant activity during the early 1970's and then shrank in proportion to reductions in pig iron and steelmaking capacity. Batteries

numbered 3 and 6, dating from the 1920's were relegated initially to reserve status but saw some service during periods of peak demand (affirmation of plaintiff's counsel, 11/13/13, exhibit 9 at 121). Defendant asserts that this history is inadmissible hearsay and that it is not specific about the shutdown of batteries 3 and 4. In its reply, Koppers submits an affidavit, from former Bethlehem engineer Birmingham, stating that batteries 2, 3 and 4 were shut down, apparently for good, in the late spring of 1970, that battery 4 was not in operation during Mr. Barker's employment at the plant. In *X-Med, Inc. v Western New York Spine, Inc.*, 74 AD3d 1708, 1709 (4th Dept 2010) the Appellate division recognized that "'[H] hearsay evidence may be considered in opposition to a motion for summary judgment,' provided that it is not the only proof relied upon by the opposing party (*Raux v. City of Utica,* 59 AD3d 984, 985 [2009])".

The affidavit of Birmingham cannot be considered in determining whether defendant met its initial burden on the motion which was to show that its coke oven could not have caused plaintiff's illness. "We do not consider the affidavit of defendant's expert meteorologist in determining whether defendant met its initial burden because that affidavit was submitted in reply to the affidavit of plaintiff's expert meteorologist." *Korthas v U.S. Foodservice, Inc.*, 61 AD3d 1407, 1408 (4th Dept 2009) *citing Walter v United Parcel Serv., Inc.* 56 AD3d 1187, 1188 (4th Dept 2008).

The motion for summary judgment on product identification grounds is denied.

Patents

At oral argument, plaintiff pointed out that Honeywell's predecessor, Allied Chemical,

had two patents for associated with coke ovens, arguing that these patents bolstered the claim that these ovens were products, a service provider does not patent a product. Supplementation of the record was allowed over defendants' objection.

Defendants have the better argument here in their showing that patents are obtainable for all inventions, not just products. Michael J. Berchou's Esq.'s affidavit, not contradicted by plaintiff, and the cases cited by Honeywell establish that patents may include processes, engineering methods and design methods. In *Diamond v Chakrabarty*, 447 US 303 (1980) a man-made form of bacteria was allowed to be patented. The Court relied on the statutory language of 35 U.S.C. § 101, tilted "inventions patentable" which provides:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

The patent argument is rejected.

Indemnification Issue:

With respect to Honeywell's claims concerning the indemnification agreement, plaintiff contends that it has no support in New York law and that Honeywell has supplied no law to bolster its argument.

Honeywell's motion with respect to the indemnification agreement is denied.

> "Courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an unmistakable intent" to indemnify (*see Levine v Shell Oil Co.*, 28 NY2d 205, 212 [1971]). As we have explained: 'When a party is under no legal duty to indemnify, a contract

> assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances' (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989] [citations omitted]; *see also Rodrigues v N & S Bldg. Contrs., Inc.*, 5 N.Y.3d 427, 433 [2005])".
>
> *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 (2006)

As there is no information before the court concerning the sale of Allied's coke oven division, other than the agreement itself, no determination of indemnity can be made.

Punitive Damages

Defendant Koppers moves to dismiss the punitive damages cause of action on the grouind that when it constructed, rebuilt and repaired the coke oven batteries at Bethlehem, it had no knowledge of the dangers of coke oven emissions and hence, can not be proven to have been willfull or to have engaged in negligent or reckless conduct. Plaintiff maintains that both defendants had extraordinarily detailed and specific knowledge regarding the lung cancer risk of exposure to coke oven emissions on the part of lidmen and other topside workers.

Starting in 1953, Koppers and Wilputte began participating in a study conducted by by the Kettering Laboratory concerning coal tar. By 1960-61 Koppers and Allied know that coal tar and related products caused lung cancer, they had funded the research and directly informed of the results. They knew that workers exposed to COE were experiencing significantly increased risk of lung cancer, lid men were most exposed. Plaintiff also submits

extensive documentation concerning defendants' knowledge of the dangers of coke oven emissions, including participation by both Koppers and Honeywell's predecessor, Allied, in research programs concerning the carcinogenic effects of exposure to coke oven emissions on employees including "lid men".

Defendants take issue with the "scientific" evidence amassed by plaintiff, citing the 1972 Lloyd-Redmond study which noted "there had been conflicting information presented regarding the nature and extent of the lung cancer risk for coke oven workers".

In *Matter of Eighth Jud. Dist. Asbestos Litig. [Drabczyk]*, 92 AD3d 1259, 1260-1261 (4th Dept 2012) *lv denied,* 19 NY3d 803 (2012), the court reminded us that punitive damages are warranted only in "singularly rare cases" citing *New York City Asbestos Litig.,* 225 AD2d 414 at 415 (1st Dept 1996) and that plaintiff must "establish that defendant 'engaged in outrageous or oppressive intentional misconduct or [acted] with reckless or wanton disregard of [the] safety or rights' of decedent" citing *Ross v. Louise Wise Servs., Inc.,* 8 N.Y.3d 478, 489 (2007).

Defendants motions for dismissal of the punitive damages claims against it is denied.

The Court will, however, adhere to its usual practice of deferring punitive damages until a verdict is reached and then try the punitive damages claim, if necessary, before the same jury.

As stated, plaintiff's first, third and sixth causes of action are dismissed.

Defendants' motions are in all other respects, otherwise denied.

SO ORDERED:

Dated: Buffalo, New York
July 17, 2014

Jeremiah J. Moriarty III
Supreme Court Justice

GRANTED

AUG 04 2014

BY: MARGARET P. MCMAHON
COURT CLERK