Perez v Port Auth. of N.Y. & N.J.
2012 NY Slip Op 31741(U)
June 28, 2012
Sup Ct, NY County
Docket Number: 190460/11
Judge: Sherry Klein Heitler
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SCANNED ON 7/3/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER, Justice

PART 30

Index Number : 190460/2011
PEREZ, ANTONIO
vs.
PORT AUTHORITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 190460/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 6.28.12

FILED

JUL 03 2012

Dated: 6.28.12

HON. SHERRY KLEIN HEITLER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------X

ANTONIO PEREZ and ALICIA PEREZ,

Plaintiffs,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY., et al.,

Defendants.

----------X

Index No. 190460/11
Motion Seq. Nos. 001, 002

DECISION & ORDER

FILED

JUL 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

Motion sequence numbers 001 and 002 are consolidated herein for disposition.

The Port Authority of New York and New Jersey ("Port Authority") moves pursuant to CPLR 3211(a)(7) to dismiss the plaintiffs' complaint for failure to state a cause of action (Seq. # 001). Plaintiffs Antonio Perez and Alicia Perez oppose the Port Authority's motion and cross-move pursuant to CPLR 602(a) to consolidate this action in this court with *Antonio Perez and Alicia Perez v Aluminum Company of America, et al.*, which bears Index No. 190328/11 (Seq. # 002). Plaintiffs' cross-motion is unopposed.

A. Sequence 001 - Motion to Dismiss

On August 30, 2011, plaintiffs filed a summons and complaint bearing Index No. 190328/11 against several named defendants other than the Port Authority, which alleges that each such named defendant was the cause of plaintiff Antonio Perez's asbestos-related personal injuries ("Action No. 1"). On that same day, pursuant to New York's Unconsolidated Laws

§ 7107, plaintiffs served a notice of claim upon the Port Authority as owner of the World Trade Center which recites that Mr. Perez contracted mesothelioma due to his work at the World Trade Center in the early 1970's. On November 1, 2011, plaintiffs duly commenced the within action against the Port Authority bearing Index No. 190460/2011, (*see* Unconsolidated Laws §§ 7107, 7108), which alleges that it too caused Mr. Perez's asbestos-related injuries ("Action No. 2 ").

Mr. Perez was deposed on October 12, 2011 in Action No. 1.[1] Mr. Perez testified that he was employed by contractor Mario & DiBono for approximately two years at the World Trade Center site beginning in the fall of 1970. He testified that he was exposed to asbestos during this time period from loose fireproofing material that would fall to the floor after it was sprayed on the ceilings, walls, and metal beams of the building. Mr. Perez testified that he occasionally sprayed the walls and beams himself, and that such work also caused him to be exposed.

The Port Authority claims that Mr. Perez could not have been exposed to asbestos-containing spray insulation during his tenure at the World Trade Center construction site in as much as it stopped using asbestos-containing spray insulation in or about April of 1970, several months prior to Mr. Perez's arrival. It also claims that even if Mr. Perez was exposed to asbestos it is not responsible because it did not supervise or control his work. The Port Authority submits that plaintiffs' allegations are directly contradicted by Mr. Perez's own testimony and by the documentary evidence, which purportedly shows that the fireproofing operation was controlled by the general contractor Tishman Realty & Construction Co. ("Tishman") and its fireproofing

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[1] The Port Authority is not a party to Action No. 1. At that time, Action No. 2 had not yet been commenced. In this respect the Port Authority did not attend such deposition. However, plaintiffs served the Port Authority with Mr. Perez's deposition notice and invited it to participate.

subcontractor Mario & DiBono. Plaintiffs contend that Mr. Perez worked in mechanical rooms where asbestos-containing spray products were continued to be used even after the Port Authority had generally discontinued the use of asbestos-containing spray insulation at the World Trade Center site. Plaintiffs further argue that the Port Authority reserved to itself and exercised its right to control the fireproofing operations at the World Trade Center site so as to give rise to its liability herein by, among other things, bypassing Tishman with regard to its proposals to implement certain safety precautions.

On a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, accepting the facts as alleged in the complaint as true, and accord plaintiffs the benefit of every favorable inference. *Leon v Martinez*, 84 NY2d 83, 88 (1994); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Weksler v Weksler*, 81 AD3d 401 (1st Dept 2011). There is no dispute on this motion that on their face, the pleadings herein, including plaintiffs' Labor Law § 200 claim, do indeed state a viable cause of action. *See Leon, supra*; *Rovello, supra.*

However, should a court consider evidentiary material in determining a CPLR 3211(a)(7) motion, but does not convert the motion into one for summary judgment, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not

eventuate." *Guggenheimer, supra* at 275; *see also Bodden v Kean*, 86 AD3d 524, 526 (2d Dept 2011); CPLR 3212(c) This entails an inquiry into whether or not the material facts claimed by the pleader are facts at all and whether there are significant disputes among the parties regarding such allegations. *See Id*; *Siegel*, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C:3211:25, at 43. "This entire procedure is analogous to the investigation the court conducts on an ordinary summary judgment motion, which seeks not to resolve factual dispute, but only to determine whether any real dispute exists." *Seigel, supra*, CPLR C:3211:25, at 43.

New York's Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site. *See Nevins v Essex Owners Corp.*, 276 AD2d 315 (1st Dept 2000). Liability under Labor Law § 200 is "limited to parties who exercise supervision or control over the manner in which the activity alleged to have caused the injury was performed", *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, (1st Dept 2007), or who create or have actual or constructive notice of an unsafe condition which causes the injury. *See Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 877 (1993).

The Port Authority's motion hinges on two grounds: That the Port Authority does not owe Mr. Perez a duty of care under the Labor Law, and that Mr. Perez began working at the World Trade Center several months after the Port Authority banned the use of asbestos-containing fireproofing spray there.

If plaintiffs show that the Port Authority had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317, [1981]), or that the Port Authority had actual or constructive notice of the defective condition that caused the injury, (*see LaRose v Resinick Eighth Ave. Assoc., LLC*, 26

AD3d 470, (2nd Dept 2006); *see also Comes, supra*), then the Port Authority will not prevail on this motion. The key determination is whether the Port Authority was in a position to "avoid or correct [the] unsafe condition." *Russin, supra*, 54 NY2d at 317; *see also Pacheco v South Bronx Mental Health Council, Inc.*, 179 AD2d 550 (1st Dept 1992).

With respect to Port Authority's alleged duty to Mr. Perez, it appears that the Port Authority may have stationed several inspectors at the World Trade Center construction site, and that such inspectors provided instructions to fireproofing subcontractor Mario & DiBono. The record suggests that the Port Authority entered into direct negotiations with Mario & DiBono over the manner in which the spray-on fireproofing was to be applied. In so doing, the Port Authority may have bypassed Tishman with regard to proposed safety initiatives concerning Mario & DiBono's entire fireproofing operation. Further, it was the Port Authority that inevitably decided in April of 1970 to halt the majority of Mario & DiBono's fireproofing operations. This is sufficient evidence to sustain plaintiffs Labor Law § 200 claims. *See Comes, supra*; *Russin, supra*.

Similarly, the Port Authority has not effectively overcome Mr. Perez's alleged exposure to asbestos at the World Trade Center. In this regard, and despite banning the fireproofing spray that had been widely used on both towers in or about April of 1970, it is undisputed that the Port Authority specifically authorized the use of a known asbestos-containing hardcoat product in the mechanical rooms and elevator shafts through at least 1972. Insofar as Mr. Perez's deposition testimony suggests that he worked in those areas and was exposed to dust therefrom, there remains a bona fide dispute with respect to his asbestos exposure. *See Guggenheimer, supra* at 275. In light of the foregoing, the Port Authority's motion to dismiss must be denied.

B. Sequence 002 - Motion to Consolidate

Plaintiffs' motion to consolidate is granted without opposition and for good cause shown. *See* CPLR 602 (trial court may consolidate actions "involving a common question of law or fact"); *see also Brooks v Lefrak*, 188 AD2d 360 (1st Dept 1992); *American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622 (2d Dept 2012) (decision to consolidate lies in the sound discretion of the court). Both Action No. 1 and Action No. 2 allege injury from Mr. Perez's exposure to asbestos and involve similar if not identical questions of law. Moreover, the court believes that the prosecution of Mr. Perez's claims as a single action will conserve judicial resources and avoid the danger of inconsistent verdicts. *See Williams v Property Services, LLC*, 6 AD3d 255, 256 (1st Dept 2004).

Accordingly, it is hereby

ORDERED that the Port Authority of New York and New Jersey's motion to dismiss this action as against it is denied in its entirety; and it is further

ORDERED that plaintiffs' counsel shall arrange for the Port Authority to take the deposition of Mr. Perez on or before 15 days from the date of this decision and order, on notice to all other parties; and it is further

ORDERED that this action and the action captioned *Antonio Perez and Alicia Perez v Aluminum Company of America, et al.* in this court under Index No. 190328/11 are hereby consolidated for all purposes, and it is further

ORDERED that the caption of the consolidated action in this court shall be *Antonio Perez and Alicia Perez v Aluminum Company of America, et al.*, Index No. 190328/11; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the

pleadings in the consolidated action; and it is further

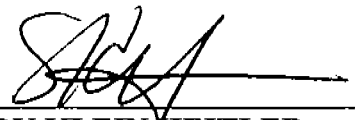
ORDERED that Plaintiff shall serve a copy of this order with notice of entry on all parties to the consolidated action, and the Clerk of the Court, and the Clerk of the Trial Support Office of this court, within ten days of entry of this order, and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation and the amendment of the caption; and it is further

ORDERED that upon service on the Clerk of the Trial Support Office of this court of a copy of this order with notice of entry, the Clerk shall mark the court's records to reflect such consolidation.

This constitutes the decision and order of the court.

DATED: 6.28.12



SHERRY KLEIN HEITLER
J.S.C.