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

PRESENT: Hon. DIANE A. LEBEDEFF *Justice* **PART** 8

Robert Croteau,

- v -

A. C. & S., Inc.,

INDEX NO. 118793/01

MOTION DATE 10/18/04

MOTION SEQ. NO. 019

MOTION CAL. NO. 28

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

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1–6
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~

Motion is decided in accordance with the accompanying memorandum decision.

It is noted that this court, prior to trial, addressed with counsel the issue of stock ownership on the record to the satisfaction of counsel.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: APR 01 2005

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

☐ Do Not Post ☐ Reference

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
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IN RE NEW YORK CITY ASBESTOS LITIGATION :

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THIS DOCUMENT RELATES TO:

ROBERT CROTEAU and VIRGINIA CROTEAU. Index No. 118793/01
Mot. Seq. No. 019

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DIANE A. LEBEDEFF, J.:

Defendant Consolidated Edison Company of New York, Inc. ("Con Ed"), moves for judgment over on its cross-claim for common law and contractual indemnification against defendant Treadwell Corporation ("Treadwell").

Background

On or about February 19, 1989, pursuant to the New York City Asbestos Litigation Case Management Order, Con Ed served and filed its Standard Verified Answer ("Answer"), which includes a cross-claim against all co-defendants for contractual or common law indemnification. On or about August 1, 1991, Con Ed served and filed its Verified Cross-Claim for Contractual Indemnification and Contribution ("Cross-Claim"). Plaintiffs Robert Croteau, now deceased ("Plaintiff") and Virginia Croteau commenced this action in October, 2001, against Con Ed and Treadwell, among other defendants, whereupon the Answer and the Cross-Claim were interposed as pleadings in this case.

Treadwell is a contractor that was hired to help erect equipment at certain powerhouses in the New York City area, including the Bowline Point Generating Station ("Bowline") and Astoria Powerhouse Unit Six ("Astoria 6"), both of which were owned by Con Ed at that time, and Northport Powerhouse, which was, and is, owned by the Long Island Lighting Company. Plaintiff Robert Croteau was employed by Treadwell to work on those projects at various times from 1967 to 1975. In May, 2001, he developed symptoms of, and was diagnosed with, mesothelioma, which, insofar as is relevant here, is a tumor arising from the cells on the inner surface of the membrane that covers the lungs. Plaintiff alleged that his illness resulted from his exposure to asbestos dust while working on the three projects.

On February 25, 2003, after participating in discovery, but prior to trial, Treadwell entered into a confidential settlement with plaintiffs. Thereafter, a trial was held, in February and March, 2003, as against Con Ed and the other remaining defendants. Treadwell did not participate in that trial, although it was on notice that, if Con Ed were found liable to plaintiffs, it would seek indemnification from Treadwell. On March 26, 2003, the jury rendered a verdict for plaintiffs in the sum of $47,100,000, of which 34% was allocated to Con Ed (17% for Bowline and 17% for Astoria 6). The jury found, among other things, that Con Ed had failed to provide Plaintiff with a safe place to work in violation of Labor Law § 200 and that Treadwell had contributed to Plaintiff's injury through its negligence.

On May 2, 2003, Con Ed moved to set aside the verdict against it, and on June 17, 2003, it appeared before this court for oral argument. At that time, this court ruled, among

other things, that the jury's finding that Con Ed had acted recklessly would be stricken as against the weight of the evidence.[1]

On October 21, 2003, Con Ed entered into a settlement agreement with Virginia Croteau. The settlement was evidenced by a release, dated October 30, 2003, and a stipulation of discontinuance with prejudice, as to Con Ed, dated November 13, 2003. On April 13, 2004, in anticipation of the instant motion, Con Ed and Treadwell executed a stipulation whereby Treadwell agreed not to contest the reasonableness of the settlement amount that Con Ed had paid to Virginia Croteau.

Discussion

1. *Common law Indemnity*

Common law, or implied, indemnity arises out of the equitable principle that liability should be shifted where "[a] person [has], in whole or in part, ... discharged a duty which is owed by him but which as between himself and another should have been discharged by the other" (*McDermott v. City of New York*, 50 N.Y.2d 211, 217 [1980]; citation and internal quotation marks omitted; *see also Salamone v. Wincaf Props.*, 9 A.D.3d 127 [1st Dept. 2004]). A party who is successful in seeking common law indemnification must prove "that it was not guilty of any negligence beyond [a] statutory

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[1] At that time, this court stated that a written order would follow, primarily because the settlement of the main claims obviated the need to issue that decision. That order will appear as part of the order and judgment in this matter.

liability" (*Correia v. Professional Data Mngmnt., Inc.*, 259 A.D.2d 60, 65 [1st Dept. 1999]).

In this instance, liability was imposed under Labor Law § 200, which is a codification of the common law duty of owners and contractors to provide a safe work place for construction site workers (*Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 [1993]). "An implicit precondition of this duty ... is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 [1981]). The jury charge given herein recognized these concepts as follows:

> "The legislature has determined that a site owner is liable under [Labor Law § 200] only if it exercises supervision and control over the operations which gave rise to the asbestos exposure.
>
> "An owner which retains only general supervisory power or inspection privileges, is not liable under this provision."
>
> * * *
>
> "If you decide that any of the defendants' workplace[s] had an unsafe condition [*i.e.*, that asbestos-containing products were in use there], that such owner exercised supervision and control over [the site], directly or through an agent, and that the unsafe condition resulted from the failure of the defendant owner or its agent to exercise reasonable care in making the workplace safe or keeping it safe [, y]ou will find for the plaintiff, as you will have determined [that] such defendant failed to provide a safe place to work ." (Carruthers affirm., exhibit A, at 1521-1523.)

The jury, in determining that Con Ed "fail[ed] to provide Robert Croteau with a safe place to work," at both Bowline and Astoria 6 (Verdict Sheet, McCann affirm., exhibit G, at 2), necessarily found that Con Ed, or its agents, had exercised actual supervision and control over the subject work places, and that it had failed to exercise reasonable care in making

those work places safe. That is, the jury found Con Ed liable for actions or omissions constituting common law negligence. Having failed to persuade the jury that it was not guilty of actual negligence, Con Ed is not entitled to common law indemnification (*Comes v. New York State Elec. & Gas Corp.*, *supra*, 82 N.Y.2d at 876).

Con Ed's reliance on *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680 (1990), and *Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553 (1973), is misplaced. In each of those cases, plaintiff was injured by a malfunctioning elevator, and the building owner was liable to plaintiff under the Multiple Dwelling Law § 78, which imposes a non-delegable duty on owners of multiple dwellings to maintain their premises in a reasonably safe condition. However, in each of those cases, the owner had divested itself of direct control of the elevator, by entering into an agreement with the Otis Elevator Company ("Otis"), whereby Otis took full responsibility for operating, maintaining, examining, and repairing the elevators. Accordingly, the owners were allowed to claim-over against Otis for common law indemnification. In contrast to the owners in those cases, Con Ed, here, retained actual control of the work sites, and was found to have committed common law negligence.

Based on the foregoing, common law indemnification does not lie.

2. *Contractual Indemnity*

Con Ed's claim to contractual indemnity is based on the following three contracts: the Astoria 6 Steam Generating Unit Contract ("Steam Contract"), the Astoria 6 Condenser Contract ("Condenser Contract"), and the Bowline Contract. Such right to indemnity as Con Ed may have under the Condenser contract or the Bowline Contract would be

cumulative to its right to indemnity under the Steam Contract. Accordingly, the court will address the issues raised in relation to the Steam Contract.

The Steam Contract provides that:

> "Contractor [Treadwell] shall indemnify and save harmless Purchaser [Foster-Wheeler] and Owner [Con Ed] from and against any and all liability for injury to person or property occasioned, prior to commercial operation of the Steam Generating Unit, wholly or in part, by any act or omission of Contractor ... including any and all expense, legal or otherwise, incurred by Purchaser and Owner in the defense of any claim or suit arising in connection with the erection of Steam Generating Unit and related services. After commercial operation of the Steam Generating Unit, any such liability shall be governed by the common law." (McCann affirm., exhibit K, General Conditions, at IH 006633.)

Treadwell argues that Con Ed has no right of action against Treadwell under the Steam Contract, because Con Ed sold its interest in the Astoria 6 powerhouse to the Power Authority of the State of New York ("PASNY") in December, 1974, and concomitantly agreed to transfer all of its rights under the Steam Contract to PASNY; and because PASNY subsequently entered into a de novo contract with Treadwell, which provides that Con Ed's rights under the Steam Contract would thenceforth lie with PASNY.

By letter, dated May 22, 1974, the Steam Contract was terminated, with certain exceptions, with Con Ed's consent. Among the contractual provisions excepted from termination was the "Indemnification and Insurance" provision, a portion of which is quoted above (see Carruthers affirm., exhibit D, at Q001320).

Con Ed sold Astoria 6 to PASNY by an agreement, dated December 13, 1974. Pursuant to that agreement, Con Ed conveyed certain real, personal, and intangible property to PASNY (see Carruthers affirm., exhibit E, appendix A). Con Ed also agreed to assign to

PASNY any further rights that it might have to collect damages and insurance proceeds for damages to the assets conveyed by the agreement (see Carruthers affirm., exhibit E, at 32-33). Nowhere in the agreement, however, is there any indication that Con Ed was transferring to PASNY the rights that Con Ed had retained to indemnification from Treadwell.

The de novo contract between PASNY and Treadwell, dated January 31, 1975, recites in relevant part, that:

> "On January 31, 1975 Con Edison with the consent of Treadwell transferred to [PASNY] Con Edison's rights in futuro in a contract ... entered into between Con Edison and Treadwell on May 22, 1974 together with Con Edison's rights in the following antecedent agreements ..."
>
> * * *
>
> "2. A letter dated May 22, 1974 from Treadwell to Foster Wheeler and subscribed by Foster Wheeler, Con Edison and Treadwell, wherein [the Steam contract] ... was terminated with the consent of Con Edison ...." (Carruthers affirm., exhibit F, at C1ASTORIA0000012.)

This recital does not even suggest that Con Ed, which, in any event, was not a party to the de novo contract, had transferred its retained right of indemnification under the Steam Contract. Moreover, as discussed above, the May 22, 1974, agreement among Con Ed, Treadwell, and Foster Wheeler expressly did not terminate Con Ed's right to indemnification under that contract. Accordingly, Con Ed has standing to seek indemnification under the Steam Contract.

Treadwell also argues that it is not liable for indemnification under this contract, because the Steam Generating Unit was scheduled to begin commercial operation in the fourth quarter of 1976; Plaintiff was not diagnosed with mesothelioma until 25 years later;

and under New York law, liability for injuries resulting from exposure to toxic substances does not arise until the actual onset of the disease (*see Continental Casualty Co. v. Rapid American Corp.*, 80 N.Y.2d 640 [1993]).

Although Treadwell's statement of the law regarding liability for injury resulting from exposure to toxic substances is correct, the Steam Contract does not provide that Con Ed will be indemnified for liability for injuries occurring prior to the commercial operation of the unit. Rather, it provides that Con Ed will be indemnified for liability "for injury to persons or property *occasioned*, prior to commercial operation of the Steam Generating Unit" (emphasis added). As discussed above, Plaintiff testified that he had been exposed to asbestos, while working at Astoria 6, as early as 1972; the jury found that Plaintiff's illness resulted from his exposure to asbestos dust; and no party presented any evidence that Plaintiff's alleged exposure, in the years prior to 1976, was insufficient to cause mesothelioma. Indeed, Dr. Moline, Plaintiff's treating physician, testified that each significant exposure to asbestos is a substantial contributing cause to the development of a mesothelioma. Accordingly, while Plaintiff's illness did not become manifest until 1981, it was occasioned by his work at Astoria 6, commencing in 1972.

Treadwell also argues, albeit only in a footnote, that Con Ed is wholly barred from recovering under the Steam Contract by virtue of its own negligence. However, both the Court of Appeals and the Appellate Division, Second Department, have held that, under language identical to that in the Steam Contract, Con Ed is entitled to indemnification, despite any negligence of its own (*see Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 [1980]; *Carollo v. Consolidated Edison Co. of New York*, 57 A.D.2d 853 [2d Dept.

1977]). Accordingly, Con Ed is entitled to contractual indemnification, pursuant to the Steam Contract.[2]

Finally, citing *Lopez v. Consolidated Edison Co. of New York*, 40 N.Y.2d 605 (1976) and *Ruddy v. New York Central R.R. Co.*, 224 F.2d 96 (2d Cir. 1955), Treadwell contends that, even if it is liable to Con Ed under the Steam Contract, such liability is limited to those damages, if any, that Con Ed can prove that it incurred as the result of negligence that Treadwell committed in the course of its work under that contract. Treadwell cannot, it argues, be liable under the Steam Contract, either for such damages as Con Ed may have sustained as the result of the negligence of other contractors, or for such damage as Con Ed may have suffered as the result of any negligence on Treadwell's part, in performing work under other contracts. With regard to the first of these arguments, the *Lopez* Court held that Con Ed was not entitled to indemnification from the contractor, because there had been no negligence on the part of the contractor (*see Carollo v. Consolidated Edison Co. of New York, Inc.*, *supra*, 57 A.D.2d 853). Here, by contrast, the jury found that Treadwell had been negligent.

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[2] Had the Steam Contract been entered into after 1981, the indemnity provision that it contains would be entirely void and unenforceable (see General Obligations Law ["GOL"] § 5-322.1; *Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Corp.*, 89 N.Y.2d 786 [1997]; *Juliano v. Prudential Securities Inc.*, 287 A.D.2d 260 [1st Dept. 2001]). GOL § 5-322.1, however, does not apply retroactively to contracts entered into prior to the effective date of that statute (*Sapper v. St. Vincent's Hosp. and Medical Center of New York*, 190 A.D.2d 549 [1st Dept. 1993]).

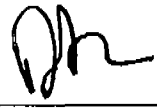
As to Treadwell's second argument, the jury found that Treadwell had negligently failed to provide Plaintiff with a safe work place, and that that negligence was a substantial factor in causing Plaintiff's illness (see verdict sheet, McCann affirm., exhibit G, at 3-4). Because the jury also found that Con Ed had failed to provide Plaintiff with a safe work place at Astoria 6, and because Plaintiff's testimony that he had been exposed to asbestos dust while working on the boiler was uncontradicted, Con Ed's liability to Plaintiff, and therefore, Treadwell's liability to Con Ed, arose from work that was within the scope of the Steam Contract. That the contract called for the use of mineral wool, which does not contain asbestos, is irrelevant, inasmuch as the jury found Treadwell liable to Plaintiff because of its use of other, asbestos-containing materials. Treadwell cannot, and does not dispute, that Plaintiff's claim arose "in connection with the erection of [the] Steam Generating Unit and related services" (McCann affirm., exhibit K, General Conditions, at IH 006633).

Liability having been found, the court need not examine the other two contracts.

* * *

Settle order and judgment on 10 day's notice.

Dated: April | , 2005



J.S.C.