

Croteau v A.C. & S. Consolldated Edison, Treadwell
2006 NY Slip Op 30453(U)
March 6, 2006
Supreme Court, New York County
Docket Number: 118793/01
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

Index Number : 118793/2001

CROTEAU, ROBERT

vs.

A.C. AND S.

SEQUENCE NUMBER : 023

REARGUMENT/RECONSIDERATION

PART 39

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered _____ in 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 accompanying
memorandum of law.

FILED

MAR 08 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 6, 2006 _____ *H2* J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----X

ROBERT CROTEAU and VIRGINIA CROTEAU,
Plaintiffs,

-against-

Index No. 118793/2001

A.C. & S.. CONSOLIDATED EDISON, TREADWELL
CORP., et al.

Defendants.

-----X

HELEN E. FREEDMAN, J:

In this action, defendant Treadwell Corp. (“Treadwell”), moves, pursuant to CPLR § 2221, to reargue and reconsider a decision rendered by Hon. Diane Lebedeff on April 1, 2005 following a personal injury-wrongful death asbestos trial. In that case, defendant Consolidated Edison (“Con Edison” or “Con Ed”) was found 34 % negligent and Treadwell was found to be 4% negligent. Treadwell had settled with the plaintiff before trial for an undisclosed amount, and Con Edison settled for \$350,000 after trial even though Justice Lebedeff set the verdict aside as to Con Edison. Con Ed then moved for full indemnification pursuant to contract(s) with Treadwell and pursuant to common law. While Justice Lebedeff rejected the common law indemnification claim, she granted the motion for contractual indemnification. After Justice Lebedeff was assigned to a different court, I entered judgment based on her decision. Treadwell now seeks to reargue that determination claiming that Treadwell did not agree to indemnify Con Edison for Con Ed’s own negligence inasmuch as two of the contracts between Treadwell and Con Ed that related to Treadwell’s employment at sites where plaintiff worked did not specifically provide for indemnification for Con Edison’s negligence. Plaintiffs, who have apparently reached an indemnification agreement with Treadwell if this court adheres

to Justice Lebedeff's decision, join in Treadwell's motion to reconsider.

The motion to reargue and reconsider is granted and upon reconsideration, the Court adheres to the April 1, 2005 decision of Hon. Lebedeff.

Robert Croteau was employed as a boiler maker by Treadwell at two Con Edison power plants, Astoria Unit 6 and Bowline from December 1972 through late 1975. He also worked as a boiler maker at Northport Powerhouse, owned by LILCO, as a Treadwell employee during 1967 and 1968 and briefly in 1971, and June to December of 1972. Croteau was diagnosed with mesothelioma on May 31, 2001.

There are three contracts between Con Edison and Treadwell. The first contract, dated May 31, 1972 was entered into by Con Edison, Ebasco Services, Inc. ("Ebasco"), and Treadwell, known as the "Astoria Condenser Contract" and provided that Treadwell would erect a condenser in Astoria 6. The second contract, dated September 9, 1971, is a subcontract between Treadwell and Foster Wheeler Corporation for construction of a boiler at Astoria Unit 6 and is known as the Astoria 6 Steam Generating Unit Contract ("Steam Contract" or "Boiler Contract"). That contract was terminated on May 22, 1974 by letter, but the "Indemnification and Insurance" provisions were excepted from termination..

At the conclusion of the trial, the Court charged the jury that Con Edison would be liable to plaintiff if it violated Labor Law §200 by not using reasonable care to provide plaintiff with a safe place to work. The court further charged that in order for Con Edison to be liable it would have had to exercise supervision and control over the workplace. The 34% allocation to Con Edison indicates that the jury found in favor of Croteau against Con Edison. Unfortunately, the verdict sheet did not specify whether Treadwell's liability derived from the work at either or

both Con Edison plants or the LILCO plant or from all three. In addition, Treadwell claims that there was no evidence concerning the extent or scope of Treadwell's work at Bowline during the time Croteau was allegedly present. Moreover, testimony disclosed that plaintiff was exposed to asbestos at LILCO's Northport facility between October 1967 and June 1968 when he worked on boilers and precipitators as well as at the Astoria and Bowline plants.

Treadwell's motion is predicated on the fact that it is unclear where Treadwell was negligent and that the contractual indemnification provisions have been interpreted too broadly. In her decision, Justice Lebedeff relied only on the Astoria Steam Generating Contract (the Boiler or Steam Contract), which 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 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 common law."

There were two other contracts between Con Edison and Treadwell, the Condenser Contract at Astoria 6 and the Bowline Contract. The Condenser Contract states:

"Except in cases of injuries or damages to persons or property as may be caused by the negligence of Owner [Con Edison] or the Engineer [Ebasco], the Contractor [Treadwell] shall save harmless the Owner and the Engineer from all claims and actions of any kind arising from or incidental to the performance of this contract and expenses incidental to such claims and actions, and shall assume without expense to Owner [Con Edison] or the

Engineer [Ebasco} the defense of any such claims or actions.”

The Bowline Contract provides as follows:

Subcontractor [Treadwell] shall indemnify, defend and save harmless Owner and Contractor [Bechtel] and their representatives, respectively from and against any and all suits, actions, legal or administrative proceedings, claims demands, damages, liabilities, interest, attorney's fees costs and expenses of whatsoever kind or nature arising before or after completion of the work and in any manner directly or indirectly caused, occasioned or contributed to, in whole or in part, or claimed to be caused, occasioned or contributed to, in whole or in part, by reason of any act omission, fault or negligence, whether active or passive, of Subcontractor [Treadwell], or of anyone acting under its direction or control, or on its behalf in connection with or incident to the works;...Subcontractor's indemnity and hold harmless shall not be applicable to any liability caused by the sole active negligence of the Contractor or Owner.”

All of the contracts provide for indemnification if negligence or fault could be attributed in whole or part to Treadwell. The Bowline Contract, while broad, excepts any liability caused by the sole active negligence of Contractor or Owner, the Condenser Contract specifically excepts injuries caused by the Owner or Ebasco but otherwise applies to all acts of Treadwell, and the Boiler or Steam Contract, most broadly, requires indemnification without making exceptions for any act of negligence occasioned in whole or part by the Owner (Con Ed) or the Purchaser (Foster-Wheeler).

Treadwell opines that since it was only held to be 4% liable for its actions at the two Con Ed sites and the LILCO site, and no inquiry was made as to Treadwell's liability at any particular site (While the Court asked the jury whether Con Ed was liable at particular sites, it failed to make the same inquiry as to the various contractors), it should not be required to indemnify Con Ed for its full 34% liability. Treadwell also argues that Con Edison was found to be actively negligent at its two sites, and public policy, currently codified as G.O.L §5- 322.1,

precludes indemnification for active negligence. However, the G.O.L. provision applies to contracts entered into after 1981 and by its terms is not retroactive.

As to plaintiff's first argument, it is unfortunate that the parties did not request the Court to ask the jury to distinguish among the sites at which Treadwell employees worked. Plaintiff, knowing that it had a private indemnity agreement with Treadwell, did not seek such an allocation. As to the second argument, that Treadwell may not be held responsible for Con Edison's active negligence, prior to the enactment of G.O.L. §5- 322.1, broad indemnity clauses, even those providing for indemnification in favor of active tortfeasors, have been upheld.. In *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980) and *Carollo v. Consolidated Edison Co. Of New York*, 57 A.D.2d 853 (2d Dept.1977), broad indemnity clauses such as those in the contracts at issue, were held to be enforceable even where the indemnitee as well as the indemnitor was found to be actively negligent. Treadwell cites a number of cases where indemnification provisions where the indemnitee has been found actively negligent have been unenforceable. However, those cases either post date enactment of G.O.L. §5- 322.1, or the indemnifying contractor was not found to have been negligent at all. (See *Lopez v. Consolidated Edison Co.*, 40 N.Y.2d 605 (1976)). As was the case in *Carollo v. Consolidated Edison Co. Of New York*, supra), Treadwell was allocated a percentage of negligence, albeit a small one, by the jury.¹

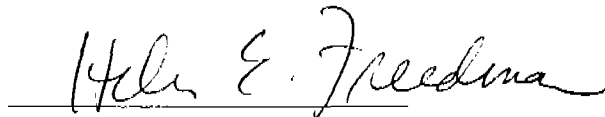
¹This Court notes the reluctance of the First Department to find that Con Edison actually exercised supervision and control during construction of facilities. Although the trial court submitted that issue to the jury and it found Con Edison did supervise and control the work, under recent case law, summary judgment might well have been granted. See *Philbin v. A.C.&S. Consolidated Edison* and *Tortorella v. A.C.& S., Consolidated Edison*, N.Y.L.J. page 29, 1/12/06.

[*7]
Based on the foregoing, the Court adheres to the April 1, 2005 decision of Hon. Diane Lebedeff. .

Although the contractual indemnification clauses include provisions for attorneys fees and other expenses, the history of this case makes any significant award problematic. However, in view of the contractual provisions, it will be necessary to hold a hearing concerning reasonable expenses. Parties are directed to call the court to establish a convenient time for a hearing.

Dated: March 6, 2006

Enter:



Helen E. Freedman, J.S.C.

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