

Duffy v City of New York
2007 NY Slip Op 33735(U)
November 19, 2007
Supreme Court, Richmond County
Docket Number: 0080294/2007
Judge: Thomas P. Aliotta
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DUFFY AND ZANELLI v CITY

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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FRANCIS J. DUFFY and PAUL A. ZANELLI,

PART C-2

Petitioners,

Present:
HON. THOMAS P. ALIOTTA

-against-

DECISION & ORDER

CITY OF NEW YORK,

Index No. 080294/07
Motion Nos. 2742 - 001
2856 - 002

Respondent.

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The following papers numbered 1 to 4 were used on these motions this 28th day of September, 2007:

	Papers Numbered
Petitioners' Order to Show Cause dated September 6, 2007 with Supporting Papers and Verified Petition.....	1
Respondent's Notice of Cross Motion to Dismiss with Affirmation in Support and in Opposition to Order to Show Cause.....	2
Petitioners' Affirmation in Reply and in Opposition to Cross Motion to Dismiss.....	3
Affidavit of Paul J. Mucha (dated September 27, 2007).....	4

Upon the foregoing papers, petitioners' application (No. 2742) for injunctive relief is denied, and respondent's cross motion (No. 2856) to dismiss the petition for failure to state a cause of action is granted.

Petitioners Francis J. Duffy and Paul A. Zanelli (hereinafter "petitioners") allege in the underlying petition and notice of claim against the City of New York (hereinafter the "City") that they were exposed to asbestos for a period commencing on or about October, 2006 through on or about July 23, 2007 at the City-owned premises on Staten Island known as Borough Hall, located at 2-10 Richmond Terrace, Staten Island, New York, 10301. At the time in question, petitioners were employed as Correction Officers at the Arthur Kill Correctional Facility, and were in the process of supervising six inmates who were assigned to Borough Hall to perform work on its ground floor. According to petitioners, the scope of the work being supervised included removing carpeting, floor tiles and ceiling tiles, as

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well as painting and moving furniture. The specific location at issue is described as the “two offices located on the first floor in the back of the TOPO [Topographical] room.” Petitioners state that they were first informed of the presence of asbestos in their work area on July 23, 2007 by Borough Hall’s Environmental Engineer. Thereafter, all operations ceased. It is undisputed that a sample of the rug/floor tile material taken from the work site was tested by the Safety Environmental Company of New York, Inc. on August 17, 2007 with positive results for asbestos containing material (ACM).

In their application, petitioners seek a preliminary and permanent injunction (1) barring any further work at Borough Hall, (2) appointing an independent asbestos investigator to conduct an inspection of the premises to determine the extent of asbestos exposure, (3) directing that an investigation be conducted as to why the existence of asbestos at the subject premises was not disclosed, (4) mandating that the investigation include the manner and method of removing and disposing of the asbestos to date, and (5) monitoring the removal of the remaining asbestos at the subject premises. In support, petitioners submit a copy of the unsworn report dated August 17, 2007 of Dr. Francis Owoh, Director of the aforementioned Safety Environmental Company of New York, as well as the affidavit of Paul J. Mucha, director of the America Science Team of New York, Inc., concerning his August 18, 2007 report. Both Owoh and Mucha confirm that the samples of rug and floor tile collected by petitioners tested positive for ACM , containing 4.3% chrysotile asbestos. Petitioners also submit (1) a copy of their letter dated July 30, 2007 to Superintendent of Corrections Dennis Breslin advising him of the existence of asbestos in the work area, and (2) a photograph which allegedly depicts the improper disposal of ACM at the work site.

In opposition to the application for injunctive relief, and in support of its cross motion to dismiss the petition, the City maintains that petitioners have no standing to obtain the relief sought since they are not alleged to have suffered “any particularized injury-in-fact.” In any event, it is argued that their claims are moot, and that an order directing the City to cease all work at Borough Hall would be ineffectual because the renovation work was completed in early July of 2007.

Similarly, it is alleged that the appointment of an independent asbestos monitor is unnecessary because an independent asbestos contractor tested for the presence of asbestos in Borough Hall during the course of the work performed by DCAS (the Department of Citywide Administrative Services), and the results obtained either failed to show the

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presence of airborne asbestos or were consistently below the regulatory threshold. In any event, it is claimed that there is nothing to monitor since the work is now complete.

By way of background, it is conceded that in or about December 20, 2004 through July 6, 2007, certain renovation work was performed by DCAS in Staten Island's Borough Hall on the ground, first and fourth floors. Nevertheless, the City states that the work in which petitioners were engaged was *not* part of the DCAS renovation project. In addition, the City maintains that DCAS tested for asbestos prior to commencing the renovations, and that its licensed asbestos abatement contractor properly removed asbestos-containing material from every location where it was determined to exist. It is also claimed that all regulatory requirements were complied with.

According to the City, the last abatement work that DCAS performed at Borough Hall occurred in the TOPO room on the ground floor in April of 2007, and that prior thereto, floor tiles were removed as a precautionary measure when several loose ACM tiles were discovered. The removal of these tiles was also said to be done by an abatement contractor following the mandated protocols for asbestos remediation. As a result, it is alleged that the asbestos sampling and testing that was performed after the abatement was completed yielded either negative results or results that were well below the regulatory threshold. In view of the forgoing, the City contends that there is no asbestos contamination in Borough Hall, and no risk to the public health.

In addressing petitioners' specific claim, the City states that the offices adjacent to the TOPO room were not part of the DCAS renovation plan. Accordingly, any renovations performed in those offices was not performed by or under the supervision of DCAS. As such, the City concedes that the floor tiles in those offices *may* have contained asbestos and *may* have been removed contrary to DCAS procedures. In any event, the area in question has since been tested for the presence of asbestos by two independent licensed contractors, and no contamination has been found. In support, the City has submitted the affidavit of Pramod Shah, a certified asbestos investigator employed by DCAS, who attests that (1) his unit tested for the presence of asbestos dust in the area in question, i.e., the room which serves as the office of the Borough's Environmental Engineer; (2) on September 19, 2007, two licensed contractors, i.e., Environmental Probe, Inc. and KAM Consultants, separately tested for asbestos in that area by conducting air monitoring and collecting bulk samples; and (3) the resulting samples were analyzed utilizing two different methodologies approved by the State of New York, one of which detects very fine particles and is extremely sensitive to the presence of asbestos-containing material. According to Mr. Shah, the test

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results (a copy of which is annexed to his affidavit) indicate that no asbestos was detected in any of the samples taken from the area in question. As a consequence, Mr. Shah opines that there is no asbestos contamination and no threat to the public health in the location where petitioners claim to have worked.

It is well settled that in order to be entitled to preliminary injunctive relief, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; W.T. Grant Co. v Srogi, 52 NY2d 496, 517; Hightower v Reid, 5 AD3d 440). Moreover, since such relief constitutes "a drastic remedy", it "will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant" (Abinanti v Pascale, 41 AD3d 395, 396, quoting Peterson v Corbin, 275 AD2d 35, 37 [citations and internal quotation marks omitted]).

Consonant with the foregoing principles, it is the opinion of this Court that whether viewed as a motion for a preliminary injunction, a proceeding for a permanent injunction or a writ of mandamus to compel, petitioners have wholly failed to demonstrate that they are entitled to the relief which they seek. In any event, it is clear that the basis for the injunctive or mandatory relief sought in the petition no longer exists. Here, it is undisputed that the work in which petitioners were engaged ceased as of July 23, 2007, and that the most recent sampling and testing reveals no asbestos contamination at the location in question. Thus, there is no longer any factual basis for the relief (*see* Stutz v 15 W. 72nd St. Assoc., 75 AD2d 773). As a result, both this application and the underlying proceeding have been rendered moot (*see* Matter of Morrison v New York State Div. of Hous. & Community Renewal, 93 NY2d 834, 838). Finally, the well known exception to the mootness doctrine does not appear to be applicable herein, since the controversy in question is fact specific, and not likely to recur (*see* Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715).

On this basis, no further issues need to be considered.

Accordingly, it is

ORDERED, that the application is denied and the proceeding dismissed; and it is further

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ORDERED, that the Clerk enter judgment accordingly.

The foregoing constitutes the Decision and Order of the Court.

Dated: Nov. 19, 2007

/s/ _____
HON. THOMAS P. ALIOTTA, J.S.C.