

Nostrom v Chesterton
2008 NY Slip Op 33616(U)
February 4, 2008
Sup Ct, NY County
Docket Number: 102120/07
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN
Justice

PART 39

DONALD NOSTROM and JUDITH NOSTROM,

INDEX NO. 102120/07

Plaintiffs,

MOTION DATE _____

-v-

MOTION SEQ. NO. 004

A.W. CHESTERTON, et al.

Defendant.

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____


Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Sequoia Ventures, Inc. f/k/a Bechtel Corp., ("SVI") is decided in accordance with accompanying memorandum decision.

Dated: February 4, 2008


Helen E. Freedman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

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

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

-----X
DONALD NOSTROM and JUDITH NOSTROM,

Plaintiffs,

-against-

A.W. CHESTERTON, et al.,

Defendants.
-----X

Helen E. Freedman, J.S.C.

Index No. 102120/07

FILED

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Upon the foregoing papers, it is ordered that this motion for summary judgment of defendant Sequoia Ventures, Inc. f/k/a Bechtel Corporation, ("SVI") is granted.

Plaintiff's decedent was a boilermaker who died of mesothelioma after many years of working for various contractors in power houses (electric generating plants). Although he never identified Bechtel, he testified that he was exposed to asbestos while working at the Bowline and Indian Point Powerhouses. Orange and Rockland and Con-Edison had hired Bechtel Corporation to serve as general contractor during the time that Nostrom was there.

Plaintiff's claim is based on Labor Law 241(6) and rests on testimony that there was a lot of dust in the air and asbestos containing products were being cut or used by various carpenters and insulators.

Plaintiff contends that sections 12 NYCRR 12-1.4-1.6 of the Industrial Code that regulate air contaminants renders SVI liable for not providing a safe place to work. She cites *Osorio v. Kenart Realty, Inc.*, 35 AD3d 561 (2 Dept. 2006) involving glue vapors and *Piazza v. Frank L. Ciminelli Constr., Inc.*, 2 AD3d 1345 (4th Dept. 2003) involving an acetylene gas leak in which the Second and Fourth Departments specifically found that Labor Law 241(6) applied to


violations of 12 NYCRR 12-1.4-1.9. In one case the Court dismissed the claims under 12 NYCRR 23-1.7(g) but found that 12 NYCRR 12 applied, and in the other that both applied. Both cases involved injuries from explosions caused by fumes and occurring in narrow unventilated spaces.

This Department specifically rejected an asbestos claim based on 12 NYCRR 23-1.7(g) where there was, as here, no evidence that plaintiff had worked in a "confined" unventilated or tested area. *See Mazzocchi v. International Business Machines*, 294 AD2d 151 (1st Dept. 2002). Unlike the Second and Fourth Departments, this Department has never found sections 12 of the Industrial Code to be a basis for liability pursuant to Labor Law 241(6) inasmuch as these are general regulations. Moreover, even if these sections applied, asbestos fibers are not the type of air contaminates envisioned by those regulations because the fibers result from the work that various contractors are doing rather than from an existing condition and, thus, are subject to the control of the particular contractors doing the work and not the premises owners or general contractors.

For the foregoing reasons the claims against SVI are dismissed and the Clerk is directed to enter judgment accordingly.

Dated: February 4, 2008

ENTER:


Helen E. Freedman, J.S.C.

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