

Nostrom v Chesterton
2008 NY Slip Op 33617(U)
January 25, 2008
Sup Ct, NY County
Docket Number: 102120/07
Judge: Helen E. Freedman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: FREEDMAN
Justice

PART 39

NOSTROM, JUDITH,
ETAL.

INDEX NO.

102120/07

MOTION DATE

- v -

A. W. CHASTENOT CO.,
ETAL.

MOTION SEQ. NO.

06

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 Orange and Rockland Utilities, Inc. ("O&R") is decided in accordance with accompanying memorandum decision.

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

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK

Dated: January 25, 2008

Helen E. Freedman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DEFERENCE

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

-----X

JUDITH NOSTROM, AS PERSONAL REPRESENTATIVE
FOR THE ESTATE OF DONALD NOSTROM, and JUDITH
NOSTROM, INDIVIDUALLY,

Index No. 102120/07

Plaintiffs,

-against-

A.W. CHESTERTON, et al.,

Defendants.

-----X

Helen E. Freedman, J.S.C.

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Orange and Rockland Utilities, Inc. ("O&R") is granted.

Plaintiff's decedent was a boiler maker who died of mesothelioma after many years of working for various contractors in power houses (electric generating plants). He testified that he was exposed to asbestos while working at O&R's Bowline and Tompkins Cove Powerhouses at various times in the 1970's and 1980's.

Plaintiff's claim is based on Labor Law 241(6) and not Labor Law 200 as there is no evidence of supervision or control of the work by O&R. The claim rests on testimony that there was a lot of dust in the air and asbestos containing products were cut or used.

Plaintiff contends that sections 12 NYCRR 12-1.4-1.6 of the Industrial Code that regulate air contaminants renders O&R 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.

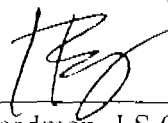
Both cases involved injuries from explosions caused by fumes and occurring in narrow unventilated spaces.

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 contaminants envisioned by those regulations because the fibers result from the work that various contractors, including those that plaintiff worked for, are doing rather than from an existing condition and, thus, are subject to the control of the contractors and not the premises owners.

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

Dated: January 25, 2008

ENTER:



Helen E. Freedman, J.S.C.

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE