

Nostrom v Chesterton
2008 NY Slip Op 33618(U)
January 25, 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: Freeman

PART 39

Index Number : 102120/2007

NOSTROM, DONALD

VS.

A.W.CHESTERTON

SEQUENCE NUMBER : 008

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

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 for summary judgement by defendant Central Hudson Gas + Electric Corporation is decided with accompany memorandum decision.

FOR THE FOLLOWING REASON(S):

FILED

JAN 29 2008

NEW YORK

COUNTY CLERKS OFFICE

Dated: January 25, 2008

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Central Hudson Gas & Electric Corporation ("Central Hudson") 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 Central Hudson's Roseton Powerhouse in 1973 and its Danskammer Powerhouse in 1986.

Plaintiff's claim is based on both Labor Law 241(6) and Labor Law 200. The Labor Law 241(6) claim rests on testimony that there was a lot of dust in the air and asbestos containing products were cut or used. The Labor Law 200 claim rests on Central Hudson's authority to shut down or delay work.

Plaintiff contends that sections 12 NYCRR 12-1.4-1.6 of the Industrial Code that regulate air contaminants renders Central Hudson 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.

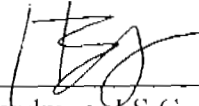
This Department specifically rejected an asbestos claim based on 12 NYCRR 23-1.7(g) where there was, as here, no evidence that plaintiff had worked in a “confined” unventilated or tested area. *See Mazzocchi v. International Business Machines*, 294 AD2d 151 (1st Dept. 2002). Unlike the Second and Fourth 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 are doing rather than from an existing condition and, thus, are subject to the control of the contractors and not the premises owners.

With respect to Labor Law 200, plaintiff alleges that Central Hudson controlled the work sites during various construction phases because it ordered work stoppages for unrelated reasons. However, a general authority to order a work stoppage is not sufficient to establish supervisory control over particular work. *See Hughes v. Tishman Constr. Corp.*, 40 AD3d 305 (1st Dept. 2007), holding that the supervision must be over the particular work at issue. Here, documents show that the contractors and not Central Hudson supervised the construction work.

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

Dated: January 25, 2008

ENTER:



Helen E. Freedman, J.S.C.

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JAN 29 2008
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