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HON. SHERRY KLEIN HEITLER

YORK — NEW YORK COUNTY

PART 30

Index Number : 190358/2009

WALSH, EUGENE F.

vs.

A.O. SMITH WATER PRODUCTS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 190358/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 denied as per the memo decision dtd 12.21.10

FILED

DEC 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12.21.10

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------X

EUGENE F. WALSH and JOYCE WALSH

Index No. 190358/09
Motion Seq. 001

Plaintiff(s),

DECISION AND ORDER

-against-

A.O. SMITH WATER PRODUCTS et al.,

Defendants.

----------X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Tishman Realty & Construction Co., Inc. ("Tishman") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced by Eugene Walsh and Joyce Walsh to recover for personal injuries allegedly caused by defendant Tishman at the World Trade Center ("WTC") in the early 1970's. Tishman was employed by the Port of New York Authority ("Port Authority") to act as the general contractor for the construction of the WTC. Mr. Walsh was deposed in this action on November 5, 2009 and his deposition transcript is submitted as plaintiffs' exhibit A ("Deposition"). Mr. Walsh testified that he worked as a steamfitter at the WTC for a total of nine years and alleges that he was exposed to asbestos while working for Sands & Courter, a Tishman subcontractor, from April 1971 through December 1976. He testified that he worked on all floors of both WTC towers throughout the course of his employment.

Specifically, Mr. Walsh alleged that his exposure to asbestos derived from the spraying of asbestos-containing materials on the beams in the towers by employees of subcontractor Mario & DiBono. Mr. Walsh testified that he was exposed by "chipping the beams to get the hangers on" throughout the towers. (Deposition, p. 136). He also alleged that he was in the vicinity while Mario & DiBono employees fireproofed the building. Mr. Walsh further testified that he was exposed to asbestos from pipecovers, valves, and pumps, but was unable to name any specific products or manufacturers associated with these products.

Tishman alleges, among other things, that Mr. Walsh could not have been exposed to asbestos-containing products because it ceased using asbestos-containing fireproofing spray in April, 1970, months before Mr. Walsh began working at the WTC, and Tishman cannot be held liable for Mr. Walsh's injuries because it did not control or supervise the WTC construction site. In opposition, plaintiffs assert, among other things, that Tishman had authorized the use of asbestos-containing fireproofing spray during the relevant time period, Tishman did exercise control over construction at the WTC, and that Tishman was aware of the hazards associated with asbestos at that time.

DISCUSSION

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See, e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the

burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]. Where the facts are undisputed but susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. *Ace Wire & Cable Co., v Aetna Casualty & Surety Co.*, 60 NY2d 390, 401 [1983]. If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

A. Exposure

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, the plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from a particular defendant's product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. The plaintiff is required "to show facts and conditions from which defendants' liability may reasonably be inferred." *Reid, supra*, 212 AD2d at 462. Mere boilerplate and conclusory allegations will not suffice. *Cawein*, *supra*, 203 AD2d at 105.

Here, Tishman alleges that Mr. Walsh could not have been exposed to asbestos-containing fireproofing spray because it banned the use of these materials at the WTC construction site before Mr. Walsh came to work there. Tishman had authorized the use of an asbestos-containing fireproofing spray called Cafco Blaze-Shield Type D until April 20, 1970, which was then banned and replaced by a purported non-asbestos-containing product called

Cafco Blaze-Shield Type D-CF. Tishman asserts that Mr. Walsh's social security records show that he did not begin working for Sands & Courier until the second quarter of 1971, after Cafco Blaze Shield Type D was banned.

Tishman admittedly used an asbestos-containing sealant known as Cafco Mark II at the WTC construction site during the relevant time period. Tishman alleges that Mark II Hardcoat was used to support steel beams and decking above floors 6, 74, 75, and 107, on support columns and beams within the high-speed elevator shafts, and on top of spray-on sound insulation on floors with mechanical equipment rooms. However, Tishman contends that the use of Cafco Mark II at the WTC is not sufficient to prove causation because Mr. Walsh never alleged that he worked in any of the areas where that product was utilized. To the contrary, Mr. Walsh did in fact testify that he worked in areas where, according to Tishman, Cafco Mark II hardcoat was utilized. While Mr. Walsh's recollection of the floors on which he worked does not entirely comport with Tishman's allegations, *see Dollas v Grace*, 225 AD2d 319 [1st Dept 1996], Mr. Walsh did testify that he worked in mechanical equipment rooms, where, as Tishman admits, Mark II Hardcoat was used on top of spray-on sound insulation.

The documentary evidence also suggests that the alleged non-asbestos-containing spray, Cafco Blaze-Shield Type D-CF, did in fact contain asbestos. Submitted as plaintiffs's exhibit S is a handwritten memorandum, dated June 25, 1971, from the manufacturers of Cafco Blaze-Shield Type D-CF. In it, the author states "the fact that asbestos fibers are reported in our D C/F bothers me." Submitted as plaintiffs' exhibit T is a letter from a doctor at Mount Sinai School of Medicine, dated April 29, 1970, wherein the doctor informs the Port Authority that electron microscopes revealed the presence of "chrysotile asbestos" in samples of its allegedly

non-asbestos-containing Cafco Blaze-Shield Type D-CF spray.

B. Labor Law § 200

Tishman claims it cannot be held vicariously liable for the actions of Mario & DiBono under Labor Law § 200 or under common law negligence standards because it did not exercise supervisory control over Mr. Walsh. Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction workers with a safe work site. *See Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000], *app. den.* 96 NY2d 705 [2001]. Where an injury arises from the dangerous condition of the workplace, as it is alleged here, it is "not necessary to prove [the general contractor's] supervision and control over the plaintiff." *Urban v No. 5 Times Square Development, LLC*, 62 AD3d 553, 556 [1st Dept 2009]. In order to establish liability, the plaintiff need only establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," *see Russin v Picciano & Son*, 54 NY2d 311, 317 [1981], or had actual or constructive notice of the defective condition that caused the accident, *see LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470 [2nd Dept 2006].

Control over the premises is sufficient to give rise to a duty even when the general contractor has no direct control over the activity that brought about the injury where the contractor is present and extensively involved with the work performed by its subcontractors. *Pacheco v South Bronx Mental Health Council, Inc.*, 179 AD2d 550 [1st Dept 1992], *app. den.* 80 NY2d 754 [1992]. While "neither retention of inspection privileges nor a general power to supervise alone constitute control sufficient to impose liability," the central issue is whether the defendant was in a position to "avoid and correct an unsafe condition." *Pacheco, supra,* 179

AD2d at 551.

In this case, there are questions of fact as to whether and to what extent Tishman controlled the WTC construction site. Tishman's contractual agreement with the Port Authority, submitted as plaintiffs' exhibit F, specifies that it "shall supervise, direct and coordinate progress of various contractors performing the construction work." The contract also significantly provides that Tishman shall "employ all means within [its] authority to enforce observation by contractors for the construction work of safety requirements for the World Trade Center and shall, if necessary, arrange with the Authority to remedy safety deficiencies." Exhibit F, p. 7.

In addition to the contract itself, plaintiffs submit a number of other documents which suggest Tishman's control of all safety protocols and standards at the WTC construction site. One is a letter to Tishman from the Port Authority, dated June 10, 1970, which purports to outline Tishman's responsibilities (plaintiffs' exhibit H):

> The contract between the Port Authority and Tishman Realty and Construction Company, Inc. specifically calls for Tishman to coordinate contractor activities for most contractors at the World Trade Center. Since safety is considered an integral part of construction activities and is a specific contract requirement for all contractors at the World Trade site, and Tishman is responsible to see that these contractors perform their required work according to contract specifications, it would seem that Tishman also has the direct responsibility for obtaining contractor conformance to all applicable safety ordinances and safety needs.

The letter also significantly provides that "Tishman's personnel not ours are responsible for contractor activities at the site." *Id.* A second letter, submitted as plaintiffs' exhibit I, was written with reference to Tishman assigning laborers to remove Cafco fireproofing spray from exterior columns in the WTC towers. Finally, in a memorandum submitted as plaintiffs' exhibit V, Tishman directed Mario & DiBono to cease fireproofing altogether. Taken together, these documents at the very least raise issues of fact concerning the extent of Tishman's control over

construction and safety matters at the WTC construction site. *See Urban, supra,* 62 AD3d at 553 (denying summary judgment where defendant had the "responsibility to coordinate the work of the various subcontractors at the site, was in charge of site safety and had a site safety director at the construction cite.").

Tishman contends that it was unaware of the dangers associated with asbestos. In opposition, plaintiffs submitted a letter by Tishman's vice president, dated September 17, 1969, which summarized a meeting between representatives from Tishman and Mount Sinai Hospital (plaintiff's exhibit M):

> On September 11, 1969, our Mr. Joseph Newman and the writer met with Dr. I. J. Selkoff, Director of the Environmental Science Laboratory . . . regarding the hazards which exist in the application of spray-on fireproofing at the World Trade Center. The City is very much concerned about environmental pollution by asbestos fibers, particularly in view of the fact that asbestos fiber has been proven to be injurious to the health of those people exposed to same over prolonged periods of time.

This, coupled with the documentary evidence of Tishman's responsibility for coordinating the subcontractors and workplace safety initiatives, is sufficient to raise an issue of fact as to whether it had knowledge of the dangers associated with the use of asbestos at the WTC. *See Urban, supra*, 663 AD3d at 556.

Accordingly, defendant's motion for summary judgment is denied.

This constitutes the Decision and Order of the court.

DATED: December 21, 2010

FILED
DEC 29 2010

SHERRY KLEIN HEITLER
J.S.C.

FILED
DEC 29 2010
COUNTY CLERK

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DEC 29 2010
COUNTY CLERK