Kersten v A.O. Smith Water Prods.
2011 NY Slip Op 30066(U)
January 12, 2011
Supreme Court, New York County
Docket Number: 190129/10
Judge: Sherry Klein Heitler
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SCANNED ON 1/12/2011

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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Index Number : 190129/2010

KERSTEN, GEORGE W.

VS

A.O. SMITH WATER PRODUCTS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 190129/10

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 decided as per the memo decision 1-7-11.

FILED

JAN 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1.7.11

HON. SHERRY KLEIN HEITLER J.S.C.

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

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

GEORGE W. KERSTEN, SR.

Index No. 190129/10
Motion Seq. 001

Plaintiff,

DECISION AND ORDER

-against-

A.O. SMITH WATER PRODUCTS et al.,

Defendants.

----------X

FILED
JAN 12 2011
COUNTY CLERK'S OFFICE
NEW YORK

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 is an action commenced by George W. Kersten Sr. 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 Authority of New York ("Port Authority") to act as the general contractor for the construction of the WTC. Mr. Kersten was deposed in this action on April 26, 2010 through April 29, 2010, and the relevant portions of his deposition transcript is submitted as plaintiffs exhibit A ("Deposition"). Mr. Kersten was a Local 638 steamfitter from approximately 1959 until his retirement in 1993. He worked at a number of sites throughout New York City, most notably the WTC construction site from May 1971 through August 1974. Mr. Kersten testified that he was exposed to asbestos while working for Courter & Co, a Tishman subcontractor, while working on the 8th, 42nd, 75th, and 108th floors of the south

tower.

Mr. Kersten testified to working with asbestos-containing gaskets and that he was exposed to asbestos-containing fireproofing spray which was utilized in both the mechanical rooms and the elevator shafts by Tishman subcontractor W.R. Grace. Mr. Kersten admitted that he was not permitted in the machine rooms or elevator shafts while the spray was being applied, but testified that asbestos particles were often present in the air when he was able to resume his duties.

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

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 defendant's liability may be reasonably 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. Kersten could not have been exposed to asbestos-containing fireproofing spray because the use of these materials was banned at the WTC construction site before Mr. Kersten 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. It was then banned and replaced by a purported non-asbestos-containing product called Cafco Blaze-Shield Type D-CF. Mr. Kersten admits that he did not begin working at the WTC

construction site until approximately May of 1971, more than a year after Cafco Blaze Shield Type D was banned.

However, an asbestos-containing sealant known as Cafco Mark II was used during the construction of the WTC during the relevant time period. Tishman admits 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. Mr. Kersten testified regarding his alleged exposure (Deposition pp. 345-347):

Q: During your time working in the machine rooms on the 8th, 42nd, 75th, and 108th floor, did you observe a contractor spraying asbestos in all of those machine rooms?

A: I didn't observe all of them. But I knew it was there. I saw them spraying the upper ones.

Q: Which ones did you see them spraying in?

A: 75 and 108.

Q: And - -

A: They stopped using asbestos in the machine rooms when some doctor complained that the stuff was blowing all over downtown. So the only thing they could do after that was to spray the elevator shafts because you couldn't use anything but asbestos in the elevator shafts.

* * * *

Q: And when you came in after they were sprayed with asbestos, what did the air look like?

A: Well, you could see stuff in the air like, as I said before, almost like little moon dust things flying around.

Q: Did you breathe the dust from that moon dust?

A: I'm sure I did.

* * * *

Q: Were you ever in the elevator shafts after they sprayed it with asbestos?

A: Yes.

Q: What did their spray do to the air in the elevator shafts?

A: When the elevator goes up you get woosh, when you go down you get woosh. The stuff blows around.

Q: Was that the same moon dust you saw in the machine room?

A: Yes.

Tishman contends that the use of Cafco Mark II at the WTC construction site could not have caused Mr. Kersten's exposure because the product was a hardcoat material which did not release asbestos fibers into the air once it hardened. Tishman argues that the product described by Mr. Kersten as his alleged source of exposure must therefore have been Cafco Blaze-Shield Type D, the non-asbestos-containing spray. Attached as plaintiffs exhibit E is a 1986 letter to the New York State Attorney General which referenced the use of Cafco Mark II at the WTC construction site:

> During the early stages of construction of One World Trade Center, the use of asbestos fireproofing materials was [banned] and [asbestos] free materials were substituted. In specific areas such as elevator shafts, because of the velocity of the elevator cars, it was necessary to continue with the use of asbestos materials since there was no available substitute at that time. In this situation the asbestos containing material was an overspray, Cafco Mark II . . . The hard coat was self-encapsulating and thereby prevented the escape of asbestos fibers into the air.

Notwithstanding, Mr. Kersten's testimony regarding his work in the machine rooms and elevators shafts coupled with Tishman's admission regarding the use of Cafco Mark II in same is sufficient to raise triable issues of fact as to Mr. Kersten's exposure. While Cafco Mark II may have been designed to prevent the escape of asbestos fibers into the air once it hardened, Tishman has not shown that asbestos fibers could not be released into the air while the spray was being applied and/or remained in the vicinity thereafter.

B. Labor Law § 200

Tishman claims it cannot be held vicariously liable for the actions of its subcontractors under Labor Law § 200 or under the common law for negligence because it did not exercise supervisory control over Mr. Kersten. Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site. *See Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000]. Where an injury arises from a 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 causing 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 contractor has no direct control over the activity bringing 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]. However, "neither retention of inspection privileges nor a general power to supervise alone constitute control sufficient to impose liability." *Id.* The central issue is whether the defendant was in a position to "avoid or correct an unsafe condition." *Id.*

Here there are issues of fact as to whether and to what extent Tishman controlled the

WTC construction site. *See Urban, supra*, 62 AD3d at 556. Tishman's contractual agreement with the Port Authority, submitted as plaintiffs exhibit G, specifies that Tishman "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." *Id.* at 7.

Plaintiff submits a number of other documents which suggest Tishman's control over all safety protocols and standards at the WTC construction site. One is a letter to Tishman from the Port Authority, dated May 16, 1969, which purports to explain Tishman's contractual obligations (plaintiffs exhibit H):

> An inherent part of your contract for supervising construction of the World Trade Center is the responsibility for providing a safe work environment and seeing to the safety indoctrination of the construction workers employed by your subcontractors . . . It is essential that all of your employees be aware of the need for safety in construction activities. This awareness must be communicated to the subcontractors who are directly engaged in construction at the site.

Another letter to Tishman from the Port Authority, dated June 10, 1970, also purports to outline Tishman's responsibilities (plaintiffs exhibit I):

> 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." Tishman's control over the WTC construction site is also seen in its interactions with subcontractor Mario & DiBono. In a letter to Mario & DiBono, dated September 19, 1969, Tishman ordered all workers to follow specific safety protocols, to wit, that the entire floor be covered in canvass before spraying and that all employees in the area wear protective masks during cleanup.

Finally, Tishman argues that it was unaware that Cafco Mark II was an asbestos-containing spray. However, the evidence is sufficient to raise triable issues of fact as to Tishman's knowledge thereof. For example, Port Authority communications state that a sample of "Mark II asbestos cement overspray" was being examined for use in the elevator shafts. *See* plaintiffs exhibit D. In 1969, Tishman briefed the Port Authority on available options that would minimize public relations problems given "the fact that asbestos fiber has been proven to be injurious to the health of those people exposed." *See* Def. Reply Exhibit F. In addition, a portion of the contract between Mario & DiBono and the Port Authority, dated March 17, 1969, explicitly lists Cafco Mark II as an asbestos containing spray. This evidence, coupled with the documentary evidence of Tishman's responsibility for coordinating its subcontractors and workplace safety initiatives, is sufficient to raise an issue of fact as to whether Tishman had knowledge of the dangers associated with Cafco Mark II and asbestos exposure in general.

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

This constitutes the Decision and Order of the court.

DATED: January 7, 2011

FILED
JAN 12 2011
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER
J.S.C.