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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Index Number : 190134/2010
KONSTANTIN, DAVID
vs
630 THIRD AVENUE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 190134/10
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 in accordance with the memorandum decision dated 2-28-11

FILED

MAR 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2.28.11

HON. SHERRY KLEIN HEITLER 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: PART 30

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DAVID KONSTANTIN and RUBY KONSTANTIN,

Plaintiffs,

-against-

630 THIRD AVENUE ASSOCIATES, et al.,

Defendants.

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Index No. 190134/10
Motion Seq. 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Tishman Liquidating Corporation ("Tishman" or "Tishman Liquidating"), moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced by David Konstantin and Ruby Konstantin to recover for personal injuries allegedly caused by Mr. Konstantin's exposure to asbestos while working as a laborer and carpenter at various locations throughout Manhattan. Mr. Konstantin was deposed on April 21, 2010, April 22, 2010, and July 21, 2010, and his deposition transcript is submitted as defendant's exhibit A ("Deposition"). Mr. Konstantin claims that he was exposed to asbestos as a Tishman-employed laborer from 1973 to 1974 at a construction site located at 622 Third Avenue in Manhattan. He testified that when he left Tishman's employ he continued to be exposed to asbestos from the work of Tishman-supervised subcontractors at the same construction site. Mr. Konstantin also claims he was exposed to asbestos from Tishman workers

and other Tishman-supervised workers at the Olympic Tower located on Fifth Avenue at 51st street in Manhattan during the mid 1970's.

With regard to the construction at 622 Third Avenue, Mr. Konstantin's duties as a Tishman employee included cleaning up for tapers, who allegedly caused dust to be released into the air when they sanded dry joint compound. Later, as a carpenter employed by a Tishman subcontractor, Mr. Konstantin hung sheetrock and installed drop ceilings, again in the vicinity of tapers who created dust. Mr. Konstantin testified that he performed the same carpenter duties at the Olympic Tower. Mr. Konstantin identified three brands of joint compound used at both construction sites to which he was exposed: USG, Georgia-Pacific, and Kaiser-Gypsum. According to plaintiffs, corporate documents and interrogatory responses submitted as plaintiffs' exhibits A-G confirm that all three brands of joint compound contained asbestos during the relevant time period.

Defendant argues that plaintiffs' claims are barred by New York's Workers' Compensation Law ("WCL") because Mr. Konstantin's alleged asbestos exposure occurred while in the defendant's employ. Defendant also argues that it is not liable for Mr. Konstantin's alleged injuries resulting from his exposure at the Olympic Tower because it was not present in any capacity at that construction site. While plaintiffs concede that those incidents of exposure which occurred while Mr. Konstantin worked for Tishman are covered by the WCL, they submit that the WCL does not bar those claims against Tishman which arose out of Mr. Konstantin's alleged exposure after he left Tishman's employ.

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. *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].

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 defendant's product. *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 v Georgia Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]. Mere boilerplate and conclusory allegations will not suffice. *Cawein*, *supra*, 203 AD2d at 105.

A. Workers' Compensation

Workers' Compensation is the sole exclusive remedy available against an employer when an employee is injured during the course of employment. WCL § 11. Employees are entitled to "compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury." WCL § 10(1). Injury is defined as "only accidental injuries arising out of and in the course of employment and such disease or

infection as may naturally and unavoidably result therefrom." WCL § 2(7). The universe of injuries covered by the WCL is extremely broad and includes not only physical injuries, but also diseases, including asbestos-related diseases. *Acevedo v Consolidated Edison of New York Inc.*, 189 AD2d 497, 500 [1st Dept 1995]; *see also Blair v Bendix Corp.*, 85 NY2d 834 [1995].

Defendant contends that this action is barred by the WCL not only for those alleged incidents of exposure which occurred during the course of Mr. Konstantin's employment with Tishman, but also for any exposure that may have resulted from its employees' actions after Mr. Konstantin left the company. In support, defendant relies primarily on *Conway v AC&S*, Index No. 0534/98 [Sup. Ct. Onondaga Co. July 2, 1999] and *Root v AES Corp*, Index No. 6752/02 [Sup. Ct. Onondaga Co. Sept. 29, 2003], which held that the exclusivity principle of the WCL applies where a plaintiff alleges he was exposed, even in part, during the course of his employment with a defendant. Both decisions hold that the unique situation in asbestos cases where a plaintiff is unable to distinguish which, if any, incidents of exposure caused his injury, is "clearly contemplated" by WCL § 44. *Root, supra,* at 4; *see also Conway, supra,* at 5.[1] WCL § 44 provides, in pertinent part:

> The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such diseases, except silicosis or other dust disease and compressed air illness or its sequelae, was contracted while such employee was in the employment of a prior employer, the employer who is made liable for the total compensation as provided by this section, may appeal to the board for an apportionment of such compensation among the several employers who since the contraction of such disease shall have employed such employee in the employment to the nature of which the disease was due. Such apportionment shall be proportioned to the time such employees was employed in

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[1] While both courts cite to the provisions of WCL § 44, they do not provide any further support (other than the words of the statute) for their positions.

the service of such employers . . . .

I do not find that the factual circumstances described in this case are contemplated by WCL § 44. A plain reading of WCL § 44 reveals that it was "designed to fix a simple and practical means of assuring prompt compensation to the disabled employee, while relegating the often difficult question of basic causality to litigation by the employers who may be concerned." *Bahry v Nu-Glamore Beauty Salon, Inc.*, 4 AD2d 351, 354 [3rd Dept 1957], *app den.* 3 NY2d 707 [1957]. As plaintiffs point out, WCL § 44 underscores that workers' compensation benefits are recoverable in full from the claimant's last employer. The sole purpose of this provision is to ensure that a claimant is provided with fast and total compensation while preserving a mechanism by which the last employer may to seek apportionment from the claimant's prior employers as to the injury at issue. *See* Minkowitz, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 44, at 417-18.

As an example, consider the case of the welder in *In re Polifroni v Delhi Steel Corp,* 46 AD3d 970 [3rd Dept 2007] who worked for several employers over the course of his career and began to complain of wrist pain. This complaint led to the eventual establishment of a workers' compensation claim for the occupational disease of carpal tunnel syndrome. Had the Workers' Compensation Board determined that the welder's claims were valid, he would have been able to collect the full amount of benefits from the last of his employers "who employed the employee in the employment to the nature of which the disease was due." WCL § 44. The last employer would then have been able to seek reapportionment from the other employers who contributed to the welder's occupational disease. Similarly, and in the context of asbestos-related diseases, if the Workers' Compensation Board found that an employer was the last employer of five who

performed the kind of work that caused a deceased worker's mesothelioma, the last employer would then be able to seek reapportionment from the worker's four previous employers. Minkowitz, *Practice Commentaries*, *supra*; WCL § 44.

Defendant also incorrectly relies on the exclusivity provision of the WCL, which provides that "the liability of an employer prescribed by [§ 10] shall be exclusive and in place of any other liability whatsoever, to such employee . . . on account of such injury or death or liability arising therefrom." WCL § 11. Defendant fails to account for the plain meaning of § 2(7) of the statute, which defines injury as "only" those injuries "arising out of and in the course of employment," and § 10 of the statute, which states that Workers' Compensation bars only those claims "arising out of and in the course of employment." Construing this language in its "most natural and obvious sense," and construing the sections of the statute "as a whole" to "determine the legislative intent," it stands to reason that incidents of exposure which did not "arise out of and in the course of employment" are not barred by the exclusivity provisions in § 11.[2] McKinney's Cons Laws of NY, Book 1, Statutes §§ 94, 97.

Plaintiffs contend that each separate incident of exposure by the plaintiff herein constitutes a separately compensable injury. In support, plaintiffs rely on *Consorti v Owens-Corning Fiberglass Corp.*, 86 NY2d 449 [1995], in which the Court of Appeals found that a widow could not recover for loss of consortium due to her husband's death from mesothelioma

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[2] Plaintiff relies on this court's decision in *Horn v Treadwell*, Index No. 190281/09 [New York Co. Sup. Ct. Oct. 27, 2010] in error. In *Horn*, the plaintiff was first allegedly exposed to asbestos as a bystander from defendant's workers and then later on went to work for that same defendant. In opposition to that defendant's motion for summary judgment, the *Horn* plaintiff alleged that he was exposed solely by reason of the defendant's actions prior to his employment with defendant. The plaintiff never testified he was exposed while he was employed by the defendant. Accordingly, the WCL did not apply to that case.

because she was not married to him at the time of exposure. The court held that "the injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust" before they were married. *Id.* at 452. However, the analysis in *Consorti* is academic in light of CPLR § 214-c, which provides that the date of accrual of an asbestos-related claim is measured "from the date of discovery of the injury by the plaintiff."[3] By adopting CPLR § 214-c, the legislature adopted "a rule of accrual keyed to 'the discovery of the manifestations or symptoms of the latent disease that the harmful substance produced.'" *Giordano v Market America, Inc.*, 2010 NY Slip Op 8382, *20 [November 18, 2010] [quoting *Wetherill v Eli Lily & Co.*, 89 NY2d 506, 514 [1997]. Therefore, plaintiffs' reliance on *Consorti* is misplaced.

Despite both parties' contentions, the question of what constitutes an "injury" in asbestos-related claims remains unclear. *See Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD3d 128, 145 [1st Dept 2008], *leave to app. den.* 13 NY3d 710 [2009]. As the Sixth Circuit explained: "There is usually little dispute as to when an injury occurs when dealing with a common disease or accident. [In the case of asbestos-related diseases] there is considerable dispute as to when an injury . . . should be deemed to occur." *Insurance Co. Of N. Am. v Forty-Eight Insulations Inc.*, 633 F.2d 1212, 1222 [6th Cir. 1980], *cert den.* 454 US 1109 [1981]. It is clear to this court that what constitutes an injury in asbestos-related cases is yet a question of fact.

Notwithstanding, whether and to what extent each alleged incident of exposure caused Mr. Konstantin's injuries should be left to a jury because triable issues of fact exist regarding same. If, as an example, a jury determined that Mr. Konstantin was exposed only during the

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[3] While *Consorti* was decided after the enactment of CPLR § 214-c, the New York Court of Appeals subsequently rejected *Consorti's* injury-upon-exposure rule. *See Wetherill v Eli Lily & Co.*, 89 NY2d 506, 514 [1997].

course of his employment, the WCL would cover all of Tishman's liabilities. But if a jury determined that Mr. Konstantin was never exposed as a Tishman employee but was exposed and injured as a bystander to the actions of Tishman employees, the WCL would not cover any of Tishman's liabilities. These crucial determinations cannot be made at this stage of the litigation.

The only certainty here is that Mr. Konstantin maintained two completely different roles with respect to Tishman over the course of his career. The WCL undoubtedly covers those claims which arose out of Mr. Konstantin's employment as a laborer for Tishman. But the WCL simply does not apply to those incidents of exposure which arose from Mr. Konstantin's role as a carpenter for a different employer, who happened to be a bystander to the actions of Tishman employees. Therefore, Mr. Konstantin's claims, to the extent they arise from his alleged exposure after he left Tishman's employ, are not barred by statute.

B. Liability

Defendant argues that Tishman's presence at any site where Mr. Konstantin was employed does not render it liable because it exercised no control over those construction sites, and in particular, Mr. Konstantin. *See Matthews v A.C. & S.*, Index No. 118368/01 [Sup. Ct. NY Co. Dec. 6, 2002] [the "mere presence of a representative of a general contractor who has no supervisory role or control [over the plaintiff] does not render the contractor liable" where the defendant contractor was not "present at the exact time plaintiff was present."]

However, Mr. Konstantin's deposition testimony presents triable issues of fact regarding Tishman's control over both the 622 Third Avenue and Olympic Tower construction sites. Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction workers with a safe work environment. *See Nevins v Essex Owners Corp.*, 276

AD2d 315 [1st Dept 2000]. Where an injury arises from a dangerous work condition of the workplace, as 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]. To establish liability, the plaintiff need only establish that the defendant at 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 constitutes 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, Mr. Konstantin testified that his father worked for Tishman for many years and was the general superintendent at 622 Third Avenue. He testified that his father had authority over the entire building, including all Tishman subcontractors, and oversaw the implementation of safety protocols. Specifically, Mr. Konstantin testified that Tishman required the subcontractors to wear hard hats at all times and to utilize lifelines when working within ten feet of the edge of the building. Mr. Konstantin further testified that Tishman was still the general contractor when Mr. Konstantin left Tishman's employ and became a carpenter's apprentice. As a carpenter, Mr.

Konstantin testified that he would receive instructions from Tishman and observed his father, as Tishman's general superintendent, directing the other subcontractors.

Mr. Konstantin testified that Tishman supervised and controlled the Olympic Tower construction site as well (Deposition, p. 404):

> A. All of the subcontractors would have a foreman, and they would directly supervise their men. The foreman would answer to some Tishman employee; in most cases, my dad. In rare cases, my dad would directly speak to one of the man if he felt it was an urgent situation to stop the person from whatever they were doing.

Mr. Konstantin's father also appeared to be a liaison between Tishman and the subcontractors (Deposition, p. 458-59):

> Q. Okay. So for example, if your father, the Tishman superintendent, wanted a subcontractor to perform work in a different manner, did he ever speak to the foreman of that subcontractor about that?
>
> A. Yes
>
> * * * *
>
> Q. Do you remember that happening?
>
> A. Yes.
>
> Q. And if he saw work that he thought was bring performed in a -- in an unsafe way, would he speak to the foreman of the subcontractor at times about that?
>
> MS. ALMAZAN: Same objection
>
> THE WITNESS: Yes.
>
> Q: Do you remember that happening?
>
> A: Absolutely.
>
> Q: And if he intervened with one of the subcontractors, would they follow what he told them?
>
> MS. ALMAZAN: Same objection.
>
> THE WITNESS: Yes.

Mr. Konstantin also testified regarding his asbestos exposure. Mr. Konstantin alleged

that as a laborer he cleaned up the dust created from the sanding of joint compound both during and after the tapers performed their work. He testified that as a carpenter he continued to work next to the drywall tapers. Mr. Konstantin identified three brands of joint compound to which he was exposed: USG, Georgia-Pacific, and Kaiser Gypsum. Documents and interrogatory responses submitted by plaintiffs as exhibits A-G confirm that all three brands of joint compound did in fact contain asbestos. As such, issues of fact exist as to Tishman's liability for Mr. Konstantin's exposure under both the common law and Labor Law § 200.

Finally, defendant's argument that this action is being maintained against the wrong Tishman entity is without merit. The verified complaint, dated March 22, 2010, names five Tishman entities as defendants: Tishman 919 Lease Corp., Tishman Construction Corp., Tishman Liquidating Corp.,[4] Tishman Realty & Construction Co., Inc., and Tishman Speyer Properties, Inc. Regarding his employment at the Olympic Towers, Mr. Konstantin testified as follows (Deposition, p. 117):

> Q: Do you know who the general contractor was on that site?
> A: Yes. Tishman Construction. And maybe I can clarify something, also. Tishman, I believe has three divisions. One is construction, one is construction management, and one is real estate management.
>
> * * * *
>
> A. I'm sorry. I'm positive it was Tishman, because my dad was in charge of the building, and he worked for Tishman. I just didn't know which division.

Based on this testimony, defendant contends it was one of Tishman's construction entities and

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[4] Defendant claims Tishman Liquidating was "established for the purpose of liquidating the assets of Tishman Realty and Construction for certain insurance policies. However, Tishman Liquidating only existed on paper and never employed any workers nor did it perform work at any construction sites." Reply Affirmation in Further Support of Motion For Summary Judgment, dated December 13, 2010, p. 1, n. 1.

not Tishman Liquidating which was present at the Olympic Towers. However, Mr. Konstantin's social security records indicate that he was an employee of Tishman Liquidating when he worked as a laborer at 622 Third Avenue. At most, Mr. Konstantin's deposition testimony and social security records raise further issues of fact regarding the role of Tishman Liquidating at 622 Third Avenue and the Olympic Tower and do not warrant summary judgment.

Accordingly, it is hereby

ORDERED that Tishman's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: February 28, 2011

SHERRY KLEIN HEITLER
J.S.C.