

Landino v American Standard, Inc.

2011 NY Slip Op 31328(U)

May 17, 2011

Supreme Court, New York County

Docket Number: 119461/03

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

Franklin Landino

INDEX NO.

119461/03

MOTION DATE

9

MOTION SEQ. NO.

MOTION CAL. NO.

A.O. Smith Water Products Co. v. E.A. (TREADWELL)

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

5-17-11

FILED

MAY 19 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5-17-11

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.

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

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

----- X
LAURA LANDINO, as Executrix of the Estate of
FRANK LANDINO a/k/a FRANKLIN DELANO
LANDINO a/k/a FRANK DELANO LANDINO,
Deceased,

Index No. 119461/03
Motion Seq. 009

Plaintiff,
-against-

DECISION AND ORDER

FILED

AMERICAN STANDARD, INC., et al.,

MAY 19 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

----- X
SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury and wrongful death action, defendant Treadwell Corporation ("Treadwell") 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 granted.

BACKGROUND

This action was commenced by Frank Landino, now deceased, to recover for personal injuries allegedly caused by his exposure to asbestos-containing products. Mr. Landino was deposed over the course of four days in May of 2005 and his deposition transcripts are submitted as defendant's exhibit B ("Deposition"). Among other things, Mr. Landino worked as an insulator during the construction of the Consolidated Edison ("Con Edison") Ravenswood Powerhouse in Long Island City, New York ("Ravenswood") for several months in the 1950's or early 1960's. He testified that he then was exposed to asbestos from his insulating work on turbines, boilers, and ancillary equipment. Plaintiff alleges that Treadwell was the general

contractor at this work site during the time that Mr. Landino worked there.

Treadwell filed this motion for summary judgment on the grounds that Mr. Landino did not identify Treadwell as a contractor at any site where he worked or establish that he was exposed to asbestos by reason of the work of Treadwell employees. Treadwell also contends that Mr. Landino worked at Ravenswood several years before Treadwell had a contract with Con Edison to install turbines at that site. In opposition, plaintiff argues that documentary evidence establishes that Mr. Landino worked at Ravenswood during the time period relevant to Treadwell's contract with Con Edison, and that Treadwell supervised and controlled Mr. Landino's work so as to render it liable under Labor Law § 200.

DISCUSSION

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must tender 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].

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, to defeat summary judgment 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]. It is sufficient for plaintiff "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995].

Mr. Landino testified that he worked at Ravenswood for several months "probably around" 1955 or 1960 (Deposition p. 439), and that he was exposed to asbestos there from the

work he performed on turbines manufactured by General Electric ("GE"). Plaintiff asserts that Treadwell was the general contractor retained to install those turbines. In support, plaintiff submits a list compiled by Con Edison which identifies boiler and equipment history for its powerhouses and contains information which includes the years of installation, the years of commencement of service, and the general contractor on each project. Based on this list, it appears that GE turbines were installed at Ravenswood between 1962 and 1964 and that Treadwell was the general contractor and the "installation contractor" for this project. Plaintiff also submits evidence that Treadwell bid on this project in August of 1961 (Plaintiff's exhibit C) and was awarded the contract shortly thereafter (Plaintiff's exhibit D).

Defendant contends that Mr. Landino was not present at Ravenswood at the same time as Treadwell, and points to his testimony that he worked at Ravenswood "sometime around 1955 or 1960," which, according to Treadwell, is more than one year before it submitted its bid to Con Edison and more than two years before construction on the GE turbines began. (Deposition pp. 438-39). Nevertheless, Mr. Landino's social security records¹ indicate that he was employed for at least two months by Treadwell's subcontracting insulator, the Robert A. Keasbey Company ("Keasbey"), from 1962 to 1964, which includes the exact time frame when Treadwell subcontracted with Keasbey to insulate turbines at Ravenswood (plaintiff's exhibit E).

However, the fact that Treadwell and Mr. Landino may have been present at Ravenswood during the same time period does not, by itself, require a denial of summary judgment. Plaintiff must also provide evidence that Treadwell exercised supervision or control over Mr. Landino's

¹ Plaintiff submitted Mr. Landino's social security records in sur-reply with the permission of this court.

work. Labor Law § 200; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]. Section 200 of the Labor Law is a codification of the common-law duty imposed upon owners or general contractors to provide construction site workers with a safe place to work. *Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000]. “An implicit precondition to this duty ‘is that the party to be charged with that responsibility have the authority to control the activity bringing about the injury.’” *Russin v Picciano & Son.*, 54 NY2d 311, 317 (*quoting Comes, supra*, 82 NY2d at 877). Where a claim arises out of alleged defects or dangers arising from a contractor’s methods or materials, recovery against the general contractor “cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation.” *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]. In this regard, “[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed.” *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007].

Here, Mr. Landino was unable to identify any of the contractors at Ravenswood (Deposition p. 457):

- Q: Let me repeat the question. Do you know during the period of time that you were at Ravenswood if there were any other outside contractors on site that you specifically recall without guessing?
- A: Yes. There was some outside contractors.
- Q: Do you specifically recall the names of any of the outside contractors?
- A: Offhand, no, I can’t recall.

Moreover, he testified that the only persons who directed him in his work were members of his union (Deposition p. 547):

Q: Did anyone other than the Local 12 foreman or crew chief tell you what to do when you worked at Ravenswood?

A: Not that I know of.

While Treadwell bid on and was awarded a contract to “furnish supervision, labor, material, tools and construction equipment” required for the erection of the GE turbines at Ravenswood, (Plaintiff’s exhibit C, p. 1), it cannot be inferred solely from these contractual duties or from Treadwell’s presence at Ravenswood that it possessed the requisite degree of supervision and control over Mr. Landino’s work to render it liable under Labor Law § 200. *See Reilly v Newireen Associates*, 303 AD2d 214, 221 [1st Dept 2003], *app den.* 100 NY2d 508 [2003] [contractual duties not sufficient to infer requisite supervision and control]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 465 [2d Dept 2000] [conduct did not rise to the level of supervision or control necessary for liability for plaintiff’s injuries although defendant coordinated the contractors at the site, told contractors where to work on a given day, and had the authority to review safety on the site]; *Soshinsky v Cornell Univ.*, 268 AD2d 947, 947 [3d Dept 2000] [“general contractor’s retention of general supervisory control, presence at the worksite or authority to enforce general safety standards is insufficient to establish the necessary control”].

Plaintiff’s reliance on several Appellate Division decisions for her proposition that Treadwell exercised supervision and control over all subcontractors at several Con Edison powerhouses is misplaced. *See Croteau Croteau v A.C.&S.*, 41 AD3d 299 [1st Dept 2007]; *Tortorella v A.C.&S, Inc.*, 25 AD3d 375 [1st Dept 2006]; *Philbin v A.C.&S, Inc.*, 25 AD3d 374 [1st Dept 2006]. In *Croteau, supra*, the First Department held that a jury’s determination that Con Edison was negligent did not preclude it from obtaining contractual indemnification from Treadwell, who was the plaintiff’s employer. While the court referred to Treadwell as plaintiff’s

“sole supervisor,” it was also undisputed that the plaintiff was employed by Treadwell, which directed his work in every respect. *Id.* at 302. Here, there is no evidence, other than Con Edison’s general contractual language, to suggest that Treadwell employed, supervised, directed, or controlled Mr. Landino or Mr. Landino’s work at Ravenswood in any way. In *Tortorella, supra* and *Philbin, supra*, the First Department held that Con Edison, which owned the powerhouses at issue, did not supervise or coordinate the work of several insulation contractors, and thus could not be liable to plaintiffs under Labor Law § 200. Neither *Tortorella* nor *Philbin* held or implied that Treadwell supervised or coordinated the plaintiffs at the work sites at issue therein.

The court is also unpersuaded by plaintiff’s reliance on *Gallo v Supermarkets Gen. Corp.*, 112 AD2d 345 [2d Dept 1985] for the proposition that Treadwell must have controlled Mr. Landino’s work simply because it contracted with his employer to be its insulating contractor. In *Gallo, supra*, the Appellate Division held that the defendant was properly found liable for the plaintiff’s injuries where it “retained a significant degree of control over the construction project at which the injuries occurred.” In addition to having the power to choose subcontractors, the *Gallo* court primarily relied on the fact that the defendant could “order changes in both the specifications and the methods used, inspected the project on a regular basis, and discussed both the progress and the details of the job with the general contractor’s representative.” *Id.* at 347. No such evidence is present here.

Accordingly, it is hereby

ORDERED that Treadwell Corporation’s motion for summary judgment is granted, and that this action and any cross-claims against Treadwell are hereby severed and dismissed; and it

is further

ORDERED that this action shall continue as against the remaining defendants; and it is

further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: May 17, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED

MAY 19 2011

NEW YORK
COUNTY CLERK'S OFFICE