

<b>Andrucki v ALCOA, Inc.</b>
2011 NY Slip Op 32017(U)
July 14, 2011
Sup Ct, NY County
Docket Number: 190377/10
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HEITLER  
Justice

PART 30

ANDRUCKI, GEORGE

INDEX NO. 190377/10

- v -  
ALUMINUM COMPANY OF AMERICA, INC.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is denied*

*As per the memo discussion of 7.14.11.*

**FILED**

JUL 19 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7-14-11

*[Signature]*

HON. SHERRY KLEIN HEITLER <sup>J.S.C.</sup>

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  
GEORGE ANDRUCKI

Index No. 190377/10  
Motion Seq. 001

Plaintiff,

**DECISION AND ORDER**

-against-

**FILED**

ALCOA, INC., f/k/a ALUMINUM COMPANY  
OF AMERICA, et al.,

JUL 19 2011

Defendants.

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

NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos-related personal injury action, defendant ALCOA, Inc., f/k/a Aluminum Company of America ("Alcoa") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims asserted against it. For the reasons set forth below, Alcoa's motion is granted.

**BACKGROUND**

This action was commenced by George Andrucki, now deceased, to recover for personal injuries allegedly caused by his occupational exposure to a myriad of asbestos-containing products from 1952 through his retirement in 1998. Relevant to this motion is plaintiff's claim that he was exposed to asbestos as a sheet metal worker at the World Trade Center ("WTC") construction site in 1971 from, *inter alia*, fireproofing spray residue left in his work area.<sup>1</sup> Plaintiff contends that defendant Alcoa was the general contractor responsible for supervising and controlling the fireproofing activities which caused his injuries. Alcoa denies such

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<sup>1</sup> Plaintiff was deposed over the course of three days on November 9, 10, and 11, 2010. Copies of his deposition transcripts are submitted as defendant's exhibit B ("Deposition").

responsibility.

In this regard, Alcoa was hired by the Port of New York Authority ("Port Authority") to serve as the general contractor at the WTC for the installation of the curtain walls for both the north and south towers. Alcoa subcontracted with its wholly owned subsidiary, the H.H. Robertson Company, Cupples Products Division, to complete this work, which in turn subcontracted with the Mario & DiBono Plastering Co., Inc., ("Mario & DiBono") to furnish all fireproofing.

On this motion Alcoa argues that plaintiff could not have been exposed to asbestos-containing fireproofing spray at the WTC because, months before plaintiff began working there, such product was banned from use at the construction site and replaced with a non-asbestos containing product. In addition, Alcoa argues that it cannot be held vicariously liable for plaintiff's injuries under Labor Law § 200 because it did not supervise or control Mario & DiBono's fireproofing activities. It is undisputed that plaintiff was not employed at the WTC site prior to May, 1970. Plaintiff opposes primarily on the grounds that Alcoa did exercise supervisory control over the fireproofing activity at the WTC and that plaintiff's presence at the WTC construction site in the early 1970's where he observed fireproofing dust in his workplace raises triable issues of fact regarding his exposure sufficient to preclude summary judgment.

### **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, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *See*

*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212(b). Once the movant has made a *prima facie* showing, a plaintiff is then required to demonstrate that he was actually exposed to asbestos fibers released from the 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.

Alcoa submits, and plaintiff does not dispute, that asbestos-containing fireproofing spray was banned at the WTC construction site in or about April of 1970. Fatal to plaintiff's position is his admission that he worked at the WTC construction site for seven months exclusively during the 1971 calendar year (Deposition pp. 266-67, 269-70):

Q: When did you arrive on the site of the World Trade Center?

MR. JACOBS: If you're not sure don't guess.

A: Early in 1971.

Q: As a sheet metal mechanic working for Circle Ceiling, what were your responsibilities and duties working at the site.

A: Installing sheet metal ceilings.

\* \* \* \*

Q: How long were you on that site working for Circle Ceilings, Inc.?

A: I was there, I was there about seven months.

Q: Was that seven months entirely in 1971 or did it go over --

A: Yes.

Q: You have to let me finish the question. Was it entirely in '71 or did it go over into '72.

A: No, it was in 1971.

In addition, plaintiff has shown no evidence that Alcoa's WTC responsibility extended to the remote areas of the construction site where plaintiff allegedly sustained his injuries as to

render Alcoa liable under Labor Law § 200. 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 [1981] (quoting *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

In this case, Alcoa’s contract with the Port Authority, dated April 1, 1967 (defendant’s exhibit C), shows that Alcoa was responsible only for the erection of the curtain walls for the north and south WTC towers. Plaintiff’s testimony shows that he worked exclusively in the fully enclosed, underground PATH station of the WTC, which bears no apparent relationship to the curtain wall project overseen by Alcoa (Deposition pp. 267, 477, 479):

Q: Do you know which tower you were working in while doing this work?

A: I was working in the Path areas.

\* \* \* \*

Q: Was the area that you worked, the two areas that you worked in, were they both enclosed?

A: Yes.

Q: So there were roofs and -- there was a roof and a wall --

A: Yes.

\* \* \* \*

Q: What were they spraying?

A: They were spraying the steel joists on the floors, they were fireproofing them and they were -- the structural steel.

Q: They were -- I’m sorry?

A: And they were spraying before Alcoa put the curtain wall on, they were spraying some of that, some of the red iron panels?

Q: Were they spraying the towers or were they spraying the area that you were working in?

A: No. They were spraying up above us, up in the towers, yeah.

Plaintiff also testified that it was Tishman, not Alcoa, who was the general contractor responsible for the construction of the PATH station (Deposition p. 473):

Q: While you worked at the World Trade Center, who gave you your instructions?

A: Our foreman. Circle had several supers and Tishman had personnel down at that area too.

Q: And who is Tishman, sir?

A: Who's Tishman?

Q: Yes.

A: The general contractor.

In light of the foregoing, plaintiff has failed to raise triable issues of fact as to Alcoa's liability in this action. *See Reid, supra*, 212 AD2d at 463.

Accordingly, it is hereby

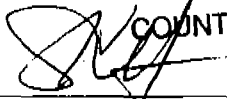
ORDERED that ALCOA, Inc., f/k/a Aluminum Company of America's motion for summary judgment is granted, and that this action and any cross-claims against Alcoa are severed and dismissed in their entirety; and it is further

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: July 14, 2011

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

JUL 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE