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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Index Number : 190170/2010

ROBINSON, GEORGE

vs

A.O.SMITH WATER PRODUCTS INC.

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. 190170/10

MOTION DATE

MOTION SEQ. NO. 006

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 7-19-11

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

Dated: 7-19-11

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

----------X

GEORGE ROBINSON,

Plaintiff,

-against-

A.O. SMITH WATER PRODUCTS, INC .,

Defendant.

----------X

Index No. 1901070/10
Motion Seq. 006

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos-related personal injury action, defendant Tishman Realty and 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 George Robinson to recover for personal injuries allegedly caused by defendant Tishman during the construction of the World Trade Center ("WTC") between 1969 and 1971. Tishman was employed by the Port Authority of New York ("Port Authority") to act as the general contractor for the construction of the WTC towers. Mr. Robinson testified[1] that, between the summer of 1969 and 1971, he was employed as an ironworker by several different Tishman subcontractors, during which time he was continually

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[1] Mr. Robinson was deposed over the course of three days, on June 14, 15, and 16, 2010. (Defendant's exhibit C). His *de bene esse* video deposition testimony was given on July 22, 2010.

exposed to asbestos which permeated his work areas due to the spraying of asbestos-containing fireproofing conducted by Tishman subcontractor Mario & DiBono.

On this motion, Tishman asserts that Mr. Robinson cannot show that he was exposed to asbestos-containing fireproofing spray during the relevant time period because a ban on asbestos-containing spray was introduced at the WTC site in April of 1970, purportedly before the plaintiff performed much of his work at the site. Tishman also argues that plaintiff cannot show that Tishman was responsible for the selection of the products used at the construction site, and that plaintiff cannot show that the work he performed was supervised or controlled by Tishman, as required to for liability to attach under Labor Law § 200.

In opposition, plaintiff asserts that he was continuously exposed to asbestos during his employment at the WTC site, insofar as he worked there well before any ban was placed on the use of asbestos-containing fireproofing spray. Plaintiff asserts that, in any event, he was continuously exposed to asbestos-containing fireproofing materials being applied in his presence or in his vicinity beginning with the start of his employment in the summer of 1969. (Defendant's exhibit C at 60-64). Plaintiff asserts that Tishman's argument that it was not responsible for the selection of products used at the work site is irrelevant to the question of contractor liability under Labor Law § 200. In that regard, plaintiff argues that Tishman had the authority to supervise, control, and correct the injury-causing activity at the site so as to render it liable under Labor Law § 200.

DISCUSSION

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. *Tronlone v Lac d'Aminate du Quebec, Ltee*, 297

AD2d 528, 528-29 (1st Dept 2002); *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 (1st Dept 1995). 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 issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR § 3212(b). 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).

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or asbestos-containing material, 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 v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994).

A. Exposure

Tishman's argument that Mr. Robinson was not exposed to asbestos-containing products throughout his employment at the WTC site between the summer of 1969 and 1971 because it banned the use of these materials in April of 1970 is without merit. Plaintiff clearly alleges that he was exposed beginning in 1969. Moreover, there is no dispute that Tishman had authorized the use of asbestos-containing Cafco Blaze-Shield Type D ("Cafco Type D") fireproofing spray at the WTC site until it was banned in April 20, 1970 and replaced by a purportedly non-

asbestos-containing product called Cafco Blaze-Shield Type D-CF. Cafco Type D was specified on all of Tishman's insulating contracts prior to the ban. (Defendant's exhibit E). Tishman also continued to authorize the use of an asbestos-containing overspray known as Cafco Mark II Hardcoat ("Mark II") at the WTC site between 1969 and 1972. (Plaintiff's exhibits E and F). Thus, during Mr. Robinson's employment at the WTC prior to the summer of 1970, both Cafco D and Mark II asbestos-containing products were used in his presence.

B. Labor Law § 200

Tishman claims that it cannot be held vicariously liable for the actions of subcontractor Mario & DiBono under Labor Law § 200 because it did not exercise supervisory control over Mr. Robinson's work. Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction workers with a safe work site. *Nevins v Essex Owners Corp.*, 276 AD2d 315 (1st Dept 2000), *app. den.* 96 NY2d 705 (2001). Under Labor Law § 200, the issue is whether the defendant supervised or controlled the dangerous activity, not whether it supplied or selected the materials used. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505-06 (1993). Where a claim arises out of alleged dangers arising from a subcontractor's methods or materials, recovery against the general contractor generally "cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross*, *supra*, 81 NY2d at 505. In this regard, when an injury arises from a dangerous condition of the workplace, as 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) (quoting *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]). Rather, only the supervision of the injury-causing activity is required. *See id.*

Here, Mario & DiBono's fireproofing activities are at issue, not Mr. Robinson's own work. As such, the plaintiff must establish that Tishman had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," *Russin v Picciano & Son*, 54 NY2d 311, 317 (1981), or had actual or constructive notice of the defective condition that caused the injury. *See LaRose v Resinick Eighth Ave. Assoc., LLC,* 26 AD3d 470 (2nd Dept 2006); *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993) (an essential prerequisite to liability under Labor Law § 200 is a showing that the party charged with that responsibility had the authority to control the activity which brought about the injury). However, "neither retention of inspection privileges nor a general power to supervise alone constitutes control sufficient to impose liability." *Pacheco v South Bronx Mental Health Council, Inc.*, 179 AD2d 550 (1st Dept 1992). The key determination is whether the defendant was in a position to "avoid or correct [the] unsafe condition." *Russin, supra*, 54 NY2d at 317.

In this case, there are questions of fact regarding whether, and to what extent, Tishman controlled the fireproofing spray activity. Though contractual duties alone may not be sufficient to infer the requisite control to impose liability under Labor Law § 200, they may be a factor in the court's determination. *Reilly v Newreen Associates*, 303 AD2d 214, 221 (1st Dept 2003), *app den.* 100 NY2d 508 (2003). The evidence shows that Tishman bid on and was awarded a contract to "assist the [Port] Authority in providing all labor, materials, equipment and services . . . for the construction [of the World Trade Center]" and to "perform the other services provided for in [the] agreement, such as coordination and supervision with respect to the foregoing construction." (Defendant's exhibit B at 3-4). The Port Authority's Final Product Identification Statement provides that Tishman was responsible for the "installation" of the Cafco Type D and

Mark II spray on fireproofing products. (Plaintiff's exhibit E at 5). Tishman's contract with the Port Authority lists its duties, which included the responsibility to "arrange with the [Port] Authority to remedy safety deficiencies permitted to exist by [subcontractors]." (Defendant's exhibit B at 7).

Tishman asserts that it had no actual control over the fireproofing spray work at the WTC site. In support, it submits a letter dated September 12, 1969 from Tishman to the Port Authority, recommending that Mario & DiBono not be permitted to proceed with interior fireproofing without additional exterior protection. (Defendant's exhibit F at 108-109) ("As you know, our recommendation is to definitely not permit this work to be performed without making a conscientious effort to contain the fireproofing material . . . and I urge that you reconsider the direction to the contrary that you have issued to us."). Tishman argues that because the Port Authority declined to follow its recommendation and proceeded without the suggested protection, Tishman did not have authority to control the activity. Plaintiff, in opposition, submits a letter also dated in September of 1969 from Tishman to the Port Authority, which sets forth that, "[Tishman has] today met with the spray-on fireproofing contractor and developed the details of the protection program he shall be required to follow." (Plaintiff's exhibit K at 3).

Plaintiff submits the testimony in an unrelated action of James Endler, Tishman's Project Executive for the WTC construction site. Plaintiff alleges that Mr. Endler's testimony demonstrates that Tishman was aware in 1969 of Dr. Irving Selikoff's published scientific study on the effects of asbestos exposure on construction workers in which he concluded that there are health hazards associated with such exposure. (Plaintiff's exhibit H at 198-200). Plaintiff also submits a memorandum drafted by Mr. Endler on September 12, 1969, that expresses his concern

regarding the dangers of asbestos, (Plaintiff's exhibit H at 199), as well as a September 15, 1969 letter from Mr. Endler to the Port Authority addressing the hazards of using spray-on fireproofing at the site. (Plaintiff's exhibit K). The September 15th letter highlights New York City's concern about "environmental pollution of 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." (Plaintiff's exhibit K at 1).

Overall, the documentary evidence concerning Tishman's responsibility for safety initiatives at the WTC certainly is sufficient to raise issues of fact as to whether Tishman exercised a sufficient degree of control over the fireproof spraying activity and whether it had knowledge of the dangers associated with the use of asbestos-containing products.

Accordingly, it is hereby

ORDERED that Tishman Realty and Construction Co., Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: July 19, 2011

SHERRY KLEIN HEITLER
J.S.C.