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| <b>Doherty v A.C &amp; S., Inc.</b>  |
| 2012 NY Slip Op 30121(U)   |
| January 13, 2012   |
| Sup Ct, NY County  |
| Docket Number: 123065/01   |
| 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 \_\_\_\_\_

Index Number : 123065/2001

DOHERTY, JOHN

vs.

A.C. & S.

(TISHMAN)

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 123065/01  
11230/01

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

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the  
memorandum decision dated Jan 13, 2012

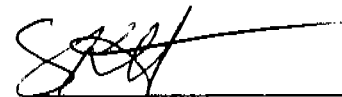
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

## FILED

JAN 18 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Jan 13, 2012



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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

----- X  
JOHN DOHERTY and KATHLEEN DOHERTY,

Plaintiffs,

-against-

A.C & S., Inc., et al.,

Defendants.  
----- X

**SHERRY KLEIN HEITLER, J.:**

Index No. 123065/01  
Motion Seq. 001

**DECISION AND ORDER**

**FILED**

**JAN 18 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

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 action was commenced by plaintiff John Doherty and his wife Kathleen Doherty to recover for personal injuries allegedly caused by Mr. Doherty's exposure to asbestos during his career as a carpenter and acoustical worker from approximately 1962 to 1996. Relevant to this motion is plaintiffs' claim that Mr. Doherty was exposed to a myriad of asbestos-containing products at the construction site for the World Trade Center ("WTC") in the 1960's and early 1970's. It is undisputed that defendant Tishman was employed by the Port of New York Authority ("Port Authority") to serve as the general contractor for the construction at the WTC site. According to the plaintiffs, Tishman supervised the construction of various buildings that made up the WTC complex and is therefore liable for their injuries pursuant to Labor Law § 200.

Mr. Doherty testified<sup>1</sup> that he worked at the WTC construction site for approximately 15 years beginning in the early 1960's. He testified that his job duties required him to cut and install asbestos-containing ceiling tiles and sheetrock, and scrape asbestos-containing fireproofing off of the structural beams in order to install tracks. Mr. Doherty also testified that he was exposed to asbestos from fireproofers, tapers, and pipe-coverers who used or otherwise caused asbestos to become friable in his presence.

Tishman argues that it was not responsible for the selection of the products used at the WTC construction site, and that plaintiffs cannot show that the work Mr. Doherty performed was supervised or controlled by Tishman as required for liability to attach to it under New York's Labor Law. Plaintiffs assert, among other things, that Tishman's responsibility or lack thereof for the selection of products and equipment used at the WTC construction site is irrelevant to the question of its liability. Plaintiffs submit that there are issues of fact with regard to Tishman's ability to control the use of asbestos-containing fireproofing spray at the WTC construction site and its knowledge that such products were hazardous to the health of the WTC workers.

### **DISCUSSION**

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). Liability under § 200 is "limited to parties who exercise supervision or control over the manner in which the activity alleged to have caused the injury was performed" (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]) or who

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<sup>1</sup> Mr. Doherty was deposed on October 29, 2010. A copy of his deposition transcript is submitted as plaintiff's exhibit 1.

create or have actual or constructive notice of an unsafe condition which causes the injury. *See Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 877 (1993).

Here, as Mr. Doherty allegedly was exposed in part from the work of other trades at the WTC construction site, plaintiffs must show 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 that Tishman 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, supra*. The key determination is whether Tishman was in a position to “avoid or correct [the] unsafe condition.” *Russin, supra*, 54 NY2d at 317.

This court addressed near-identical issues in several of its recent decisions. *See Walsh v A.O. Smith Water Products, et al.*, Index No. 190358/09, 2010 NY Slip Op 33523U (Sup. Ct. NY Cty. 2010); *Kersten v A.O. Smith Water Products, et al.*, Index No. 190129/10, 2011 NY Slip Op 30066U (Sup. Ct. NY Cty. 2010); *Robinson v A.O. Smith Water Products, et al.*, Index No. 190170/10, 2011 NY Slip Op 32037U (Sup. Ct. NY Cty. 2011). In each of these cases, the plaintiff alleged that he was exposed to asbestos at the WTC construction site from, among other things, asbestos containing fireproofing spray. The court reached the same conclusion in all three cases, to wit, that there were issues of fact concerning Tishman’s knowledge of the dangers associated with the use of such product at the WTC construction site sufficient to deny it summary judgment.

As in *Walsh, supra, Kersten, supra, and Robinson, supra*, plaintiffs’ submissions herein are sufficient to defeat Tishman’s motion. Defendant’s assertion that it had the authority only to offer recommendations to the Port Authority regarding safety initiatives is questionable at best.

To the contrary, it appears that Tishman may have directly supervised the subcontractor tasked with fireproofing the WTC towers (Mario & DiBono), and had the authority to alter its work methods to comply with governing safety protocols. To this end, Tishman wrote to Mario & DiBono on October 4, 1969, presumably to control the hazards created by its spraying operations (Plaintiffs' Exhibit 16):

You are hereby directed to stop spraying of the exterior columns on the 7th Floor, mechanical equipment room, until such a time as you comply with the procedure for protection agreed upon by your office and Tishman

Tishman wrote to Mario & DiBono again on October 6, 1969 after it had apparently failed to cease its operations (Plaintiffs' Exhibit 17) :

Our general superintendent, Mr. Fred Corrado, ordered you to stop spraying until canvasses were hung and gave your foreman this order in writing (see attached). Your foreman chose to ignore the order. As a result, large quantities of fireproofing material have blown onto the loading platforms . . . and onto adjacent areas both within and outside the building . . . . Again, we direct you to comply with the protective measures outlined in our letter of September 19, 1969. Unless you comply, the repercussions from air pollution control people and from the unions on the job may be such that your operation will be greatly restricted.

WTC subcontractor Sand-Courter also wrote to Tishman in light of such non-compliance three days later, further evidencing Tishman's perceived control over Mario & DiBono's fireproofing activities (Plaintiffs' Exhibit 18):

It is a matter of record that Mario & DiBono has proceeded to install spray-on fire proofing in the 7th Floor and SL-5 Mechanical Equipment Rooms without taking the necessary precautions to protect the work of the mechanical trades in these areas . . . . To avoid this type of problem in the future we strongly urge that Mario & DiBono be again instructed to take the necessary precautions to protect the work of the other trades.

These and several other letters submitted by plaintiffs (*see* Plaintiffs' Exhibits 6-9) suggest that Tishman knew or should have known that asbestos-containing fireproofing spray could pose

health hazards to the other workers if not used properly. In light of such correspondence, there are several material issues of fact outstanding such that plaintiffs' suit should proceed to a jury.

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: *January 13, 2012*



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SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

**JAN 18 2012**

NEW YORK  
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