

<b>Zayas v A.C. &amp; S., Inc.</b>
2013 NY Slip Op 30356(U)
February 13, 2013
Supreme Court, New York County
Docket Number: 119115/02
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER  
Justice

PART 30

Index Number : 119115/2002  
ZAYAS, JEFFREY A.  
vs.  
A.C. & S.  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 119115/02  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

(TISHMAN)

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 2-13-13

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

**FILED**

FEB 20 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2-13-13

  
\_\_\_\_\_, 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

JEFFREY A. ZAYAS and SUSAN ZAYAS,

Index No. 119115/02  
Motion Seq. 001

Plaintiff,

**DECISION & ORDER**

- against -

A.C.&S., INC., *et al.*

**FILED**

FEB 20 2013

Defendants.

----- X

**SHERRY KLEIN HEITLER, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Tishman Liquidating Corporation, Inc. ("Tishman Liquidating" or "Tishman")<sup>1</sup> moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is granted.

**BACKGROUND**

Plaintiff Jeffrey A. Zayas was diagnosed with asbestosis on June 5, 2001. His case is included in the January 2012 FIFO trial group. During his deposition<sup>2</sup>, Mr. Zayas testified, *inter alia*, that he worked for the Otis Elevator Company at a post office construction site located on Third Avenue in Manhattan for approximately eight months in 1969. He testified that he was exposed to asbestos from his work as an elevator construction helper and from other trades that

<sup>1</sup> According to the defendant, Tishman Liquidating was established in 1978 for the purpose of liquidating some of the assets of Tishman Realty & Construction Co., Inc.

<sup>2</sup> Mr. Zayas was deposed on December 28, 2011 and March 12, 2012. His deposition transcripts are submitted as defendant's exhibits A and B ("Deposition").

worked in his vicinity. Mr. Zayas identified "Tishman" as the general contractor at the construction site.

The defendant moves for summary judgment on the ground that there is no evidence that it directed, supervised or controlled any of Mr. Zayas' work or that it supervised the other trades that are alleged to have caused Mr. Zayas' injuries. Plaintiffs argue that there is a genuine issue of fact regarding the defendant's supervision and control over the construction site sufficient to preclude summary judgment.

### DISCUSSION

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 issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In asbestos-related litigation, once the moving defendant has made a *prima facie* showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate facts and conditions from which the defendant's liability may reasonably be inferred. *Comeau v W.R. Grace & Co.*, 216 AD2d 79, 80 (1st Dept 1995).

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury. . . .'" *Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993) (citing *Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). In this regard, it is settled law that "[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, 306 (1st Dept 2007).

Plaintiffs contend that Tishman is liable under Labor Law § 200 and the common law because it monitored and prescribed directly to its subcontractors what they needed to do to effectuate safe practices. Plaintiffs’ opposition relies solely on the deposition testimony of Mr. Zayas, including (Deposition pp. 443-45, objections omitted):

Q. You had mentioned at the World Trade Center your foreman would go to safety, excuse me, foreman meetings run by the general contractor which was Tishman. Do you remember that?

A. Yes.

Q. Do you know if there was any type of meetings for foremen’s [sic] at the post office run by Tishman? . . .

A. . . .Yes.

Q. Who was the head of these meetings if you know?

A. I don’t know.

Q. Were these meetings organized by the individual contractors or by the general contractor?

A. I don’t know.

Q. Okay. When these meetings were finished, would your foreman, the Otis foreman, come back and direct you and other employees how work was going to be ongoing forward?

A. Yes.

Q. Did this include safety requirements?

A. Yes.

Q. Did you testify -- you testified just a few minutes ago that you personally didn’t have to deal with the general contractor. Did you ever observe Otis employees dealing directly with Tishman employees? . . .

A. Yes.

Q. And at any site where you recall Tishman being the general contractor, including the post office and the World Trade Center, who had the final say as to how work was going to be done -- . . . -- your foreman or the general contractor?

A. I don’t know.

Contrary to plaintiffs' assertions, such testimony merely shows that Tishman may have organized meetings with the subcontractors' foremen where he worked. Significantly, there is no testimony about the issues that were discussed at such meetings and by whom they were raised. Plaintiffs therefore cannot reasonably attribute the actions taken by Mr. Zayas' immediate foreman as a direct result of the defendant as opposed to the individual subcontractors on the job. Plaintiff has shown only that Tishman exercised general supervisory authority at the post office construction site, which as a matter of law is insufficient to maintain a cause of action under Labor Law § 200. *Hughes v Tishman Constr. Corp, supra.*

Plaintiffs' position that Tishman knew or should have known that asbestos-containing products were being used at the post office site is also unsupported by the record.

Accordingly, it is hereby

ORDERED that Tishman Liquidating Corporation, Inc.'s motion for summary judgment is granted, and that this action and any cross-claims related to this defendant are severed and dismissed in their entirety, and it is further

ORDERED that this case shall continue against the remaining defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

**FILED**

ENTER:

FEB 20 2013

NEW YORK  
COUNTY CLERK'S OFFICE

DATED: 2-13-13



SHERRY KLEIN HEITLER  
J.S.C.