

Cisler v A.O. Smith Water Prods. Co.

2013 NY Slip Op 30589(U)

March 22, 2013

Supreme Court, New York County

Docket Number: 190044/12

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

Cisler, John E.

INDEX NO. 190044/12

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

A.O. Smith Water - v -
LIPA/KEYSPAN

The following papers, numbered 1 to _____ were read on this motion to/for SUM. Judgment

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 3.22.13

FILED

MAR 27 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-22-13

[Signature]
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.

FOR THE FOLLOWING REASON(S):

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

----- X
JOHN E. CISLER and CAROL CISLER,

Plaintiffs,

Index No. 190044/12
Motion Seq. 002

DECISION & ORDER

- against -

A.O. SMITH WATER PRODUCTS CO., et al.

Defendants.

FILED

MAR 27 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

In this asbestos personal injury action, plaintiffs allege, among other things, that defendant National Grid Generation, LLC, sued herein as "Keyspan Generation LLC, f/k/a Long Island Power Authority" ("LILCO"), violated New York State Labor Law §§ 200¹ and 241(6)² and the common law by failing to provide plaintiff John Cisler with a safe work environment. LILCO now 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 in part and denied in part.

Plaintiffs contend that Mr. Cisler was exposed to asbestos over the course of a long career as an

¹ Labor Law § 200 provides in relevant part that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

² Labor Law § 241(6) provides that "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

electrician. Among other places, he worked at the Island Park powerhouse in Island Park, New York where he installed lighting systems from 1970-1974. Mr. Cisler testified³ that he sustained bystander exposure to asbestos during this time period from other trades who worked on boilers in his presence (Deposition pp. 280, 282):

- Q. On the times that you were inside the old powerhouse, do you feel you were exposed to any asbestos?
- A. Yes, I do.
- Q. And what would be the source of that?
- A. It was coming off the boiler or off a pipe, it was like it was snowing.
- Q. Would you be able to say where it was coming from?
- A. Like I say, it was coming from up above near the boiler, so maybe it was coming off the boiler. Probably was coming off the boiler.
- Q. It was up above you?
- A. Oh, yes.
- Q. What did you see that was coming off, what were you observing?
- A. I would consider it to be asbestos.
- Q. Can you describe it for me?
- A. It was grayish-white powdery stuff.

* * * *

- Q. And on the different occasions that you went over there, was there anything different going on?
- A. One time we went over there, there was a boiler that was being taken apart and it was quite amazing to see that being new in a powerhouse for me.
- Q. Was it one of the large boilers?
- A. Yeah, yeah. The front was off of it, guys working on the side up high.
- Q. Do you know that the trade of any of the workers that were working on the boilers?
- A. I don't personally know what trade that would be. I would assume it'd be a boilermaker or a LILCO employee.

LILCO moves for summary judgment on the ground that there is no evidence to show that it is responsible for Mr. Cisler's injuries. To obtain summary judgment, the movant must establish its

³ Mr. Cisler was deposed on February 9, 2012, March 2, 2012, March 8, 2012, March 9, 2012, and March 12, 2012. Copies of his deposition transcripts are submitted as defendant's exhibit D .

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). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

With respect to plaintiffs' Labor Law § 200 claims, LILCO contends that there is no evidence to show that it supervised and controlled the activities which are purported to have caused Mr. Cisler's injuries. Labor Law § 200 codifies the common law duty imposed on an owner or general contractor to provide construction workers with a safe work site. To pursue a Labor Law § 200 claim, plaintiffs must show that LILCO 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 LILCO 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 N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993).

In this regard, and in addition to Mr. Cisler's deposition testimony, plaintiffs rely on the affidavit of former LILCO employee Lawrence Collins who regularly worked at the Island Park powerhouse as a utility man and mechanic.⁴ Significantly, Mr. Collins avers that during the relevant time period (1970-1974) he removed and replaced asbestos containing insulation on boilers, valves,

⁴ Mr. Collins affidavit was sworn to on December 17th, 2012 and is submitted as plaintiffs exhibit 3.

and pumps which caused asbestos-laden dust to be released into the air. He further avers that LILCO controlled every aspect of his work, and even instructed him how to handle asbestos containing products. According to Mr. Collins, LILCO's oversight also extended to its subcontractors, whose work LILCO regularly supervised and inspected. In light of such evidence, plaintiffs common law and Labor Law § 200 claims should proceed to a jury.

Plaintiffs do not oppose LILCO's motion to dismiss their Labor Law 241(6) claims, nor is there any evidence upon which to sustain same. *See Comes, supra*, at 878 (Labor Law 241(6) requires plaintiffs to show that a premises owner or contractor violated an Industrial Code regulation that sets forth a specific standard of care). Accordingly, that branch of LILCO's motion is granted.

Accordingly, it is hereby

ORDERED that LILCO's motion for summary judgement is granted in part only with respect to plaintiffs' Labor Law § 241(6) claim against it, and otherwise denied; and it is further

ORDERED that plaintiffs Labor Law § 241(6) claim is hereby dismissed as against LILCO; and it is further

ORDERED that the Clerk of the Court is directed to enter judgement accordingly.

This constitutes the decision and order of the court.

FILED
MAR 27 2013
NEW YORK
COUNTY CLERKS OFFICE
ENTER:

DATED: 3.22.13



SHERRY KLEIN HEITLER
J.S.C.