

Krauss v 3M Co.
2013 NY Slip Op 31258(U)
June 12, 2013
Supreme Court, New York County
Docket Number: 190020/12
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

- Index Number : 190020/2012
KRAUSS, WILLIAM E.
vs.
3M COMPANY
SEQUENCE NUMBER : 012
SUMMARY JUDGMENT

Justice

INDEX NO. 190020/12

MOTION DATE _____

MOTION SEQ. NO. 012

(TISHMAN LIQ.)

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 6.12.13,

FILED

JUN 14 2013

NEW YORK
CLERK OF COURT'S OFFICE

Dated: 6.12.13



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

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
WILLIAM E. KRAUSS and JEANNE KRAUSS,

Index No.: 190020/12
Motion Seq. 012

Plaintiffs,

DECISION & ORDER

-against-

3M COMPANY, et al.,

Defendants.

SHERRY KLEIN HEITLER, J:

Defendant Tishman Liquidating Corporation, Inc. (Tishman) moves pursuant to CPLR 3212

for an order dismissing plaintiffs' complaint and all cross-claims against it on the ground that plaintiffs have failed to show that plaintiff William E. Krauss was exposed to asbestos by any product manufactured, distributed, or installed by Tishman or that Tishman supervised or controlled any of the work which gave rise to such plaintiff's alleged asbestos exposure. Plaintiffs contend that Tishman is responsible under Labor Law § 200 and the common law as it was the general contractor at various job sites at which Mr. Krauss worked. Plaintiffs argue that there is a genuine issue of fact whether Tishman supervised some of Krauss's job sites and contractors thereon sufficient to preclude summary judgment. As more fully set forth below, the motion is granted.

Krauss was diagnosed with lung cancer in June of 2011. On January 17, 2012, Krauss and his wife Jeanne Krauss commenced this action to recover for injuries allegedly caused by his exposure to asbestos. Krauss was deposed over eight non-consecutive days between February 28, 2012 and March 16, 2012.¹ His video deposition was taken on April 10, 2012.

¹ Krauss's deposition transcripts are submitted as exhibits A-H to Tishman's moving papers ("Deposition").

From 1951 to the early 1970's and from 1978 to 1986, Krauss worked as a union sheet metal worker installing HVAC systems throughout New York City. He testified that he was exposed to asbestos from various products that were installed by other trades, including pipe-covering, insulation, fire-proofing, floor tiles, and joint compound.

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]). 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 was responsible for monitoring safety at Krauss’s work sites. The only evidence submitted by plaintiffs in support of their position is Krauss’s own testimony that Tishman was one of several general contractors that oversaw these locations. (Deposition pp. 1365-1370):

Q. We’ve talked about your employers and the different trades at the various job sites you were at?

A. Yes, sir.

Q. And the general contractors?

A. Yes, sir.

Q. Do you recall which general contractors you worked with through your career?

A. Well, on the new construction, it was -- can I refer to my list?

Q. If you need your list to refresh your recollection, that’s ok.

A. It was, Bechtel did some of the jobs. It was mostly Cushman, Fuller, Tishman, and a lot of occasions Wolf and Munier, and Turner; Turner was a big contractor. . . .

- Q. When you were working with these general contractors that you mentioned, can you describe your interaction with them, please?
- A. Well, if I was just working with the tools, I didn't really have that much of a problem, unless I was doing something that was unsafe, and they were in the area, they would let me know about it. But if I was running a job, they had periodic jobs to just bring everything up to speed, as far as how fast it was moving. . . .
- Q. . . . You mentioned that there were some instances where you would have interaction with the general contractors regarding safety?
- A. Yeah. Just, it was always brought up at all of the meetings, as far as just being reminded of that: don't remove any of the barriers or things; if you have to do it, make sure that you replace it, and things like that. That's about all the interaction we had as far as safety is concerned. . . .
- Q. And you mentioned meetings. Can you explain what those meeting were about, sir?
- A. It was mostly the progress of the way the job was going. And if one particular area had to be finished before another, they would -- they would just give you a list of what their priorities were, and they would occasionally come around to check to see what the progress was.
- Q. Would they check on anything else?
- A. If there was a barrier moved and not replaced, they would do, you know, push it back into place; but, other than that, they didn't do anything.
- Q. Did there come a time when the general contractor would tell you that a job, that your work was done incorrectly?
- A. Very, very seldom. We knew what the building codes required, and we stuck to them very close.
- Q. Who did the contractors oversee at a job site?
- A. We, basically, it was the whole job. They were the ones that would bring in the contractors that were there. Everything was done on bids. So, whoever they were satisfied with, their bid, they would have them come in and do the work that they were supposed to do.
- Q. And there were multiple trades at these job sites?
- A. Oh yes, sir.
- Q. Did the general contractors oversee these multiple trades?
- A. All of them; yes, sir.

While "perhaps indicative of [Tishman's] general right of inspection," this testimony does not denote the level of supervisory control necessary to maintain plaintiffs' claims against it. *Philbin v A.C.&S.*, 25 AD3d 374, 374 (1st Dept 2006); see also *Mazzocchi v IBM*, 294 AD2d 151, 151 (1st Dept

2002) (“It does not avail plaintiff that defendant maintained a shack on the work site for employees who had a right to inspect the progress of the work or other general right of supervision.”); *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003) (“There is no evidence that defendant general contractor gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200.”) The mere fact that Tishman may have raised general safety precautions unrelated to asbestos at meetings is insufficient to raise a triable issue of fact. *See Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 478 (1st Dept 2011) (“the fact that Con Edison had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether it exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence.”); *see also Hughes, supra*. In this context, plaintiffs have provided no evidence concerning Krauss’s exposure by reason of any products distributed or installed by Tishman or directed by Tishman to be distributed or installed.

Accordingly, it is hereby

ORDERED that Tishman Liquidating’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:

JUN 14 2013

NEW YORK

DATED: 6.12

COUNTY CLERKS OFFICE

SHERRY KLEIN HEITLER

J.S.C.