

Houston v A.O. Smith Corp.

2014 NY Slip Op 30978(U)

April 9, 2014

Sup Ct, New York County

Docket Number: 190119/2012

Judge: Sherry Klein Heitler

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

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THOMAS HOUSTON and ELLEN HOUSTON,

Plaintiffs,

-against-

A.O. SMITH CORPORATION, *et al.*,

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190119/2012
Motion Seq. 006

DECISION & ORDER

In this asbestos personal injury action, defendant Morse Diesel, Inc. (“Morse Diesel”) moves pursuant to CPLR 3212 for summary judgment dismissing plaintiffs’ Labor Law § 200¹ and all other claims asserted against it on the ground that plaintiffs have failed to demonstrate that Morse Diesel contributed to any of plaintiff Thomas Houston’s injuries. In opposition, plaintiffs assert that Morse Diesel laborers swept up asbestos debris in Mr. Houston’s presence without taking protective measures, thereby creating an unsafe condition which contributed to Mr. Houston’s asbestos exposure. For the reasons set forth below, the defendant’s motion is granted.

Thomas Houston and his wife Ellen Houston filed this action on March 7, 2012.² Their April 29, 2013 Third Amended Complaint included Morse Diesel as a defendant (“Complaint”). The Complaint alleges that Mr. Houston was exposed to asbestos-containing products and

¹ Labor Law § 200 provides in relevant part that “[a]ll 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 On April 29, 2013 plaintiffs filed their Third Verified Amended Complaint, which named Morse Diesel as a defendant for the first time (plaintiff’s exhibit D).

equipment throughout his career which caused him to develop mesothelioma. Mr. Houston was deposed for six days in 2012 and 2013.³ He testified that he worked as a mason throughout New York City and Long Island from 1953 to 1997. He identified Morse Diesel as the general contractor at two of these sites but was only able to provide specific testimony about his work at the North Shore Hospital during the late 1960's. In this regard Mr. Houston testified that Morse Diesel laborers swept up asbestos-containing debris in his presence at that location (Deposition pp. 338-341, Video Deposition pp. 35-39, objection omitted):

- Q. Do you remember the first time you worked on a Morse-Diesel job site?
- A. In the sixties sometime.
- Q. Can you recall the last time you worked on a Morse-Diesel job site?
- A. I think the last time I worked was North Shore Hospital.
- Q. Approximately what time period would that have been?
- A. Late sixties. . . .
- Q. Were there any other job sites aside from the North Shore Hospital that you worked on that were Morse-Diesel sites?
- A. It may have been another office building in New York. They did quite a bit of general contracting.
- Q. But you only recall the office building and the hospital at this time?
- A. Yeah. . . .
- Q. Were you present when the boiler was installed?
- A. They installed the boilers before we started doing the walls so we they [sic] could get them in.
- Q. Were you present when the boiler was insulated?
- A. Yes.
- Q. Do you remember if it was a subcontractor doing the insulating?
- A. It was, but I don't know who they were. . . .

³ June 19-20, 2012, June 27, 2012, May 30-31, 2013, and July 18, 2013. Portions thereof are submitted as defendant's exhibit C. Complete copies were e-filed at the request of the court ("Deposition" and "Video Deposition").

- Q. Was there piping associated with that boiler?
- A. I guess there had to be, yes.
- Q. Do you recall seeing that, seeing any pipe insulation being applied to those pipes?
- A. I recall seeing the whole exterior of the boiler being covered with asbestos. The outside of the boilers were covered with asbestos, cut pieces in place and stuff like that.
- Q. Was there any fireproofing being applied to the boiler room?
- A. Not that I recall, no.
- Q. Were there any, did you ever see any Morse-Diesel representatives on location in the boiler room?
- A. Yes, they had assistant supers that were around.
- Q. Were there any other people employed by Morse-Diesel that were present working in the boiler room?
- A. Yeah, they had laborers.
- Q. And would these laborers be doing the same thing as you previously described?
- A. Yes, they were cleaning up, yeah.
- Q. The men with the brooms?
- A. It was really a safety factor too, keeping the floors clean, you know, for all the other trades.

* * * *

- Q. Can you recall the first time you worked on a Morris [sic] Diesel job site? . . .
- THE WITNESS: Yeah. North Shore Hospital.
- Q. What was the purpose of that addition?
- A. It was a hospital, just expanding. . . .
- Q. What other trades can you recall on Morris Diesel job sites?
- A. One in particular was the pipe covers, insulators.
- Q. And what would the pipe covers be doing on Morris Diesel jobs?
- A. Well, on the particular job -- we built a huge boiler room on that job. And they were insulating the boiler with sheets of asbestos.
- Q. Was there piping coming out of this boiler?
- A. Yeah. Piping.
- Q. Did that piping have to be insulated as well?
- A. Yeah. Sure.

Q. Did those insulators clean up after themselves?

A. No. Most of the time they didn't. They -- they -- see, a lot of those contractors had made up that they didn't do their own cleanup. And it's usually GC's that did their own cleanup. . . .

Q. Were you present in the boiler room when they were installing those sheets of asbestos on the boilers?

A. Yes. . . .

Q. Was that a messy process?

A. Yeah. It made some dust. That's for sure.

Q. And do you recall seeing that dust?

A. Oh sure.

Q. And the laborers cleaned up after them?

A. Yes.

Q. Were you present when the laborers swept up?

A. I don't know exactly. At times.

Labor Law § 200 codifies the common law duty imposed on a general contractor to provide a safe workplace. To pursue a Labor Law § 200 against the defendant, plaintiffs must show that Morse Diesel 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 Morse Diesel had actual or constructive notice of the defective condition that caused Mr. Houston's injuries. *See Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993).

Here, there is no evidence that Morse Diesel directed the pipefitters at the North Shore Hospital to insulate the boilers and pipes with asbestos and/or controlled the manner in which they performed their work. At most it appears Morse Diesel exercised general supervisory authority over its subcontractors which as a matter of law is insufficient to maintain plaintiffs' Labor Law § 200 cause of action against it. *See Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007).

Plaintiffs argue notwithstanding that Morse Diesel is responsible for Mr. Houston's injuries

on the ground that its laborers created and/or exacerbated the unsafe condition which allegedly contributed to his injuries. However, there is no evidence that Morse Diesel purchased the asbestos insulation for the North Shore Hospital site, knew that the debris its laborers swept up contained asbestos, or knew that such debris was hazardous. *See Lopez v Dagan*, 98 AD3d 436 (2012), *lv. app. den.* 21 NY3d 855 (2013); *Wynne v B. Anthony Constr. Corp.*, 53 AD3d 654 (2d Dept 2008); *LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470 (2d Dept 2006); *Dombrower v Maharia Realty Corp.*, 296 AD2d 353, 353 (1st Dept 2002)

Accordingly, it is hereby

ORDERED that Morse Diesel's motion for summary judgment is granted, and this action and any cross-claims against Morse Diesel are severed and dismissed in their entirety; and it further

ORDERED that this action shall continue as against all remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 4.9.14



SHERRY KLEIN HEITLER, J.S.C.