

<b>Houston v Beazer E., Inc.</b>
2014 NY Slip Op 31467(U)
June 2, 2014
Supreme Court, New York County
Docket Number: 190119/12
Judge: Sherry Klein Heitler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X  
 THOMAS HOUSTON and ELLEN HOUSTON,

Plaintiffs,

-against-

BEAZER EAST, Inc., individually and as successor-in  
 interest to THIEM CORP. and UNIVERSAL  
 REFRACTORIES, et. al.,

Defendants.

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

In this asbestos personal injury action, defendant Tishman Liquidating Corporation, Inc. (“Tishman”) moves pursuant to CPLR 3212 for an order dismissing plaintiffs’ complaint and all cross-claims asserted against it. In opposition plaintiffs contend that Tishman is liable for their injuries pursuant to New York’s Labor Law and the common law inasmuch as it negligently caused asbestos-laden dust to be released into plaintiff Thomas Houston’s vicinity. Tishman’s motion is granted as set forth below.

Thomas Houston has been diagnosed with mesothelioma. Plaintiffs allege that the proximate cause of his disease is his career-long occupational exposure to asbestos-containing products and equipment. Mr. Houston was deposed in this regard for six days in 2012 and 2013.<sup>1</sup> Relevant to this motion, he recalled working at one or two office buildings where “Tishman” was the general contractor during the late 1960’s. Mr. Houston testified that he was exposed to

---

<sup>1</sup> Complete copies of Mr. Houston’s deposition transcripts are submitted as plaintiffs’ exhibit B (“Deposition”).

Index No. 190119/12  
 Motion Seq. 008

**DECISION & ORDER**

asbestos at these locations from fireproofing and pipe-insulation debris which Tishman laborers cleaned up in his presence (Deposition pp. 333, 335-37).

Labor Law § 200<sup>2</sup> codifies the common law duty imposed on a general contractor to provide a safe workplace. To pursue a Labor Law § 200 against Tishman, plaintiffs must show that it 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 it had actual or constructive notice of the defective condition which caused Mr. Houston’s injuries. See *Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993); see also *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 (1st Dept 2006).

Labor Law § 200's notice prong demands that plaintiffs establish that Tishman either knew or should have known of the hazards associated with asbestos. In *Maiorana v U.S. Mineral Prods. Co.*, 52 F3d 1124 (2d Cir. 1995), for example, the evidence of Tishman’s constructive notice of such hazards included warnings on the injury-causing products in question, New York State regulatory measures, OSHA standards in place at the time of the alleged exposure, Tishman’s presence at safety meetings in which the dangers of asbestos were discussed, and news reports on the hazards posed by asbestos. *Id.* at 1137-38.

Here, conversely, the record merely contains photographs of asbestos-containing materials in use during the relevant time period.<sup>3</sup> While such products warn against dust

---

<sup>2</sup> 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.”

<sup>3</sup> See Plaintiffs’ exhibits D & E.

inhalation, plaintiffs concede that “the exact materials used [in this case] are unknown”.<sup>4</sup> As such it would be speculative to assume that the materials depicted in the photographs were present at the Tishman sites at issue and that they were used in Mr. Houston’s presence.

There is also no evidence that Tishman exercised the kind of pervasive control required by the Labor Law. In this regard, Mr. Houston clearly indicated that his foreman, not Tishman employees, directed him in his job. And while representatives from Mr. Houston’s employer attended meetings with Tishman the court could only guess what topics they discussed.<sup>5</sup> At most it appears Tishman may have exercised general supervisory authority over its subcontractors which as a matter of law is insufficient to maintain a Labor Law § 200 cause of action against it. *See Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007).

Plaintiffs have also failed to demonstrate that Tishman is responsible for Mr. Houston’s injuries under a common law negligence theory for creating and/or exacerbating an unsafe condition. Again, there is no evidence that Tishman purchased the alleged asbestos-containing products at issue, or that it was aware the debris its laborers swept up contained asbestos, or that it knew or should have known that such debris was hazardous. *See Lopez v Dagan*, 98 AD3d 436, 438 (2012), *lv. app. den.* 21 NY3d 855 (2013); *Wynne v B. Anihony Constr. Corp.*, 53 AD3d 654 (2d Dept 2008); *LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470, 471 (2d Dept 2006); *Dombrower v Maharia Realty Corp.*, 296 AD2d 353, 353 (1st Dept 2002).

Accordingly, it is hereby

---

<sup>4</sup> Plaintiffs’ memorandum of law, p. 15.

<sup>5</sup> Deposition pp. 397-98.

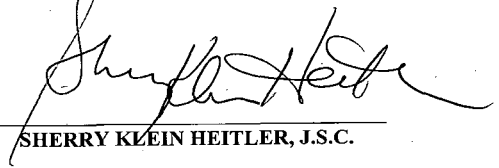
ORDERED that Tishman Liquidating Corporation, Inc.'s motion for summary judgment is granted, and that this action and any cross-claims against this defendant are severed and dismissed in their entirety, and it is further

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.

ENTER:



SHERRY KLEIN HEITLER, J.S.C.

DATED: 6-2-14