

Proctor v Alcoa, Inc.
2014 NY Slip Op 31700(U)
June 26, 2014
Sup Ct, NY County
Docket Number: 190040/13
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
JAMES AUGUSTUS PROCTOR and
JOY C. PROCTOR,

Index No. 190040/13
Motion Seq. 005

Plaintiffs,

DECISION & ORDER

-against-

ALCOA, INC., *et al*,

Defendants.
-----X

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Andal Corporation (“Andal”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiff James Proctor has failed to identify Andal or any of its alleged predecessor companies as a source of his exposure. As more fully set forth below Andal’s motion is denied.¹

From 1964 through the early 1970s Mr. Proctor was a sheet metal worker who primarily installed HVAC duct work. Many years later, in January of 2013, Mr. Proctor was diagnosed with mesothelioma. On February 7, 2013 James and his wife Joy Proctor commenced this action to recover for his alleged occupational exposure to asbestos. Among other things Mr. Proctor testified² in respect of the four month period in 1970 during which he worked in the tower then under construction at the World Trade Center site (“WTC”). In particular he recalled that other

¹ The parties appeared for oral argument on February 25, 2014. The record at that time consisted of four briefs (Andal’s December 5, 2013 moving papers, plaintiffs’ January 14, 2014 opposition, Andal’s January 30, 2014 reply, and plaintiffs’ February 7, 2014 sur-reply) and a letter (Andal, February 18, 2014). Post argument, and without court approval, the parties submitted three more letters (plaintiffs, February 27, 2014; plaintiffs, April 2, 2014; Andal, April 4, 2014), which have not been considered by this court.

² Mr. Proctor was deposed for five days in March and April of 2013. Portions of his deposition transcripts are submitted as defendant’s exhibit D and plaintiffs’ exhibit’s 1 and 2 (“Deposition”).

trades mixed and sanded asbestos-containing joint compound and cut asbestos-containing floor tiles in his presence (Deposition pp. 273-74, 276, 477):

Q. Tile work. You mentioned tile people before.

A. Yes. . . .

Q. What were they doing?

A. Laying floor tile. . . .

Q. And do you also believe that that floor tile used on the eighth floor contained asbestos?

A. Yes.

Q. Did they have to cut the tile?

A. Yes.

Q. When they cut the tile, did that create dust?

A. Yes.

* * * * *

Q. Do you believe any of the work that the carpenters or sheetrock workers were performing on the eighth floor exposed you to asbestos?

A. Yes.

Q. How so?

A. They were mixing it. It was powder in bags that they mixed water with, Kaiser Gypsum, the same material on the seventh floor.

Q. What exact material are we talking about?

A. The joint compound.

* * * * *

Q. How -- what was the closest amount of feet you were next to these individuals mixing the product?

A. Within 2 feet.

Q. How long of a time would you be next to these guys doing that, when you were, like, about 2 -- 2 feet?

A. Hanging up, putting the hangers in, 25, 30 minutes.

Despite the defendant's arguments to the contrary, plaintiffs' exhibits show that the tapers and floor tile installers described by Mr. Proctor were there through the offices of Star Circle Wall Systems, Inc. ("Star Circle") and Circle Floor Co., Inc. ("Circle Floor"). With respect to taping

work, minutes of an April 29, 1970 Port Authority of New York WTC meeting led by Tishman Realty & Construction Co., Inc. reveal that Star Circle was the WTC's sheetrocking contractor.³ These minutes refer to former Star Circle supervisor and project manager Joseph Lucarelli, who testified in 1998 in an unrelated federal court action⁴ that Star Circle's contract included the construction of the WTC's walls, ceilings, and floors (plaintiffs' exhibit 10, 10-11):

- A. . . . what was your recollection of Star-Circle's work at the World Trade Center?
- Q. Well, Star-Circle's work at the World Trade Center was the installation of the sheet rock walls. I also got involved with the ceilings, chrysotile ceilings. We also got involved with the vinyl asbestos floors, and the drapery, and the painting, and part of the partition contract was the installation of styrofoam insulation at the mechanical room ceilings.
- Q. Was Star-Circle's work under the contract WTC-110?
- A. That is correct.
- Q. The work that you just described to me, was all that work encompassed within the MERs, and when I use the term MER, you understand that it is mechanical equipment room. Right?
- A. Yes.
- Q. Was all of your work encompassed within the MERs or did you also do work within the tenant spaces?
- A. No. We did the walls at the elevator shafts all the way up, we did walls at the mechanical rooms, and we also did walls at the tenant areas, yes.
- Q. Was your contract generally designated as the carpentry contract?
- A. The carpentry contract, yes.

Joseph Giordano was employed by Star Circle at the World Trade Center as a drywall taper from 1968 through 1972. In 1991 he testified in connection with his own asbestos personal injury action included in the Joint Eastern and Southern District of New York Asbestos Litigation in the United

³ *Minutes of Job Meeting, April 29, 1970*, at pp. 6-7, plaintiffs' exhibit 6.

⁴ See July 20, 1998 transcript from proceedings in *The Port Authority of New York and New Jersey, et al. v Allied Corporation*, 91-CV-0310, plaintiffs' exhibit 10.

States District Court's for the Eastern District of New York and Southern District of New York
(plaintiffs' exhibit 11, pp. 66-68):

- Q. You've indicated in your Interrogatories that you worked at the World Trade Center?
- A. Correct. . . .
- Q. Okay. Were you a drywall taper at that point?
- A. Yes, correct.
- Q. And your employer at that time?
- A. Star-Circle . . .
- Q. Did you personally use asbestos products --
- A. Yes.
- Q. -- at that job site?
- A. Yes.
- Q. Which type of products would they be?
- A. Taping compounds.

Paul Cavanaugh was employed by the Port Authority of New York and New Jersey as a construction management engineer. He too recalled Star Circle as a prominent WTC flooring and ceiling subcontractor (plaintiffs' exhibit 12, p. 76):

- Q. Do you recall Star Circle being a subcontractor in the construction of the World Trade Center?
- A. Yes, big time.
- Q. What did they do?
- A. They did all the walls. They had several divisions of Star Circle. They did all the walls, the carpentry, I think they did the floor tile under another contract 115, I think, and they also did the ceilings.

Plaintiffs' submissions also show that Andal is the successor to both Star Circle and Circle Floors as a result of a series of transactions and mergers. Pursuant to a September 21, 1971

agreement among Kinney Services, Inc., Circle Floors, and National Kinney Corporation⁵, all of Circle Floors' wholly-owned subsidiaries (including several "Star Circle" entities) were sold to National Kinney Construction Corporation ("NKCC")⁶ "subject to all liabilities of each such Division of any kind and nature."⁷ In or about December 13, 1974, Circle Industries Corp., Star Circle, Circle Acoustics Corp., and National Interior, Inc. merged into NKCC, and NKCC changed its name to Circle Industries Corp.⁸ In 1983 Circle Industries Corp. changed its name to Old Salem Corporation.⁹ On or about November 1, 1984, Old Salem Corporation merged with and into Andal.¹⁰

Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *see also Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). In deciding a summary judgment motion the court's role is to determine if any triable issues exist, not the merits of any such issues. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). In doing so, the court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013). Should the defendant establish its *prima facie* entitlement to summary

⁵ Plaintiffs' exhibit 7.

⁶ In all, NKCC acquired twenty of Circle Floors' subsidiaries. *Id.* at pp. 43-45.

⁷ Plaintiffs' exhibit 7, ¶ 1.2. The only liabilities Circle Floors retained were "obligations . . . to pay the unpaid principal . . . for the acquisition of a predecessor business", "State Franchise Taxes", and "New York City Business Corporation Income Taxes . . . for all periods ending with or prior to the Closing." *Id.* ¶ 1.3.

⁸ Plaintiffs' exhibit 17.

⁹ Plaintiffs' exhibit 19.

¹⁰ Plaintiffs' exhibit 18.

judgment, the plaintiff need only show "facts and conditions from which the defendant's liability may be reasonably inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995); *see also Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994).

The evidence presented on this motion raises material triable issues of fact whether Andal, as successor-in-interest to the Circle corporate entities, is responsible for Mr. Proctor's asbestos exposure at the WTC site by reason of Circle Floors and Star Circle. As such summary dismissal is inappropriate. *Vega, supra*.

The court notes plaintiffs' assertion that Andal has not fully complied with its discovery requests and Andal's assertion that it is in the process of drafting responses to such requests. The parties are directed to promptly contact the Special Master if these discovery issues remain unresolved.

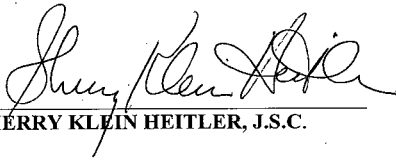
Accordingly, it is hereby

ORDERED that Andal Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED:

6.26.14


SHERRY KLEIN HEITLER, J.S.C.