

Smith v 3M Company
2014 NY Slip Op 33287(U)
December 12, 2014
Supreme Court, New York County
Docket Number: 190137/13
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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ANASTASIA SMITH, Individually and as the Executor
of the Estate of CLIFFORD SMITH,

Index No. 190137/13
Motion Seq. 012

Plaintiffs,

DECISION & ORDER

-against-

3M COMPANY, f/k/a Minnesota Mining and
Manufacturing Co., et al.,

Defendants.
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SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Consolidated Edison Company of New York, Inc. (“Con Ed”) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims asserted against it on the ground that it did not direct or control any of the work that is alleged to have contributed to plaintiffs’ decedent Clifford Smith’s injuries. In opposition plaintiffs assert that Con Ed violated Labor Law § 200¹ and the common law insofar as it actively supervised Mr. Smith’s work and provided him with the asbestos-insulated wires to which he was exposed.

Mr. Smith worked as an electrician in the construction industry from 1959 through 2003. In or about March of 2013 he was diagnosed with mesothelioma, a condition which plaintiffs’ experts have attributed to his occupational exposure to asbestos. Mr. Smith was deposed regarding his work experiences and alleged exposure over the course of eight days during the summer of 2013.²

Specifically at issue on this motion is Mr. Smith’s testimony that he worked at Con Ed’s Indian Point

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.”

² Complete copies of Mr. Smith’s deposition transcripts are submitted as plaintiffs’ exhibits 1-3 (“Deposition”).

powerhouse on and off from 1970 to 1977. In this regard Mr. Smith explained that he worked in several areas of the powerhouse, including the docks, the vicinity of the nuclear reactor (referred to as “the ball”), and the visitors center. Regardless of the location, however, Mr. Smith’s duties were the same; he pulled wire and cable, ran conduit, and installed light fixtures.³ Mr. Smith testified that the process of scoring, cutting, and peeling the insulation from the wires and cables caused him to be exposed to asbestos dust.⁴

Claims brought against a general contractor pursuant to Labor Law § 200, which codifies the common law duty imposed on a general contractor to provide a safe workplace, are predicated on a showing that the contractor either 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 the plaintiff’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).

Con Ed asserts that while it might have told Mr. Smith and his coworkers *where* to work, it never told them *how* to do their job (Deposition pp. 977, 979-81, 988-89, 990-91, objections omitted):

Q. Now can I direct your attention to your work at the dock first. Okay? How many Con Ed employees were present while you were working there, on average let’s say, during the six months that you spent on the dock?

A. One or two.

* * * *

Q. Okay. By the way, any of those Con Ed employees would never tell you [sic] how to skin a wire, would they?

A. They weren’t interested in that kind of detail. They were interested in pursuing the job, making sure that we had our wire, that we put it where they wanted to, that we finished the

³ Deposition pp. 62, 80.

⁴ Deposition pp. 65-67, 70-72, 77-79.

job in the allotted amount of time, and that we did it in the way that they wanted us to do it, and they talked to us to make sure that we did.

Q. So basically their job was to make sure the job got done; correct, in a timely fashion? Is that essentially what they were there for? . . .

A. And in their -- and in their way of doing -- they were very interested in us doing it in their way, how they wanted it done.

Q. Sir, was this same Irish named fellow your foreman inside the ball or was there a different foreman?

A. No.

Q. Okay. Who was the foreman?

A. He was an Italian named fellow. . . .

Q. But he was employed by Fischbach and Moore just like you were; correct?

A. Yes.

Q. You would take your direction and what you had to do on a daily basis from him, right?

A. He would -- he would lay out what we were going to do and Con Ed would stand over us and make sure we did it the way they wanted it.

* * * *

Q. Are you sticking with your answer, sir, that you gave? Did they actually tell you how to do your electrician's work?

A. Yes, they were pretty --

Q. They told you how to skin a wire?

A. They didn't worry about those details, but they did tell us how to do it, and when they wanted us to finish, and where they wanted us to work.

Q. So they essentially told you where to work, and encouraged you to finish your job; is that essentially what they told you to do? . . .

A. Yes. The word encouraged, you could say that.

* * * *

Q. Did you ever speak directly with any of those Con Edison employees?

A. No, they spoke to me, I did not speak to them.

Q. Okay. What do you recall specifically them telling you?

A. They were directing us on the scheduling of pulling wire, and they were directing us on which pulls to accomplish at a particular day.

Focusing specifically on Mr. Smith's testimony that Con Ed was not interested in how he cut the wires,

Con Ed asserts that it at most exercised general supervisory control over the work site which is

insufficient to make out a claim under the Labor Law. *See Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007) (Labor Law § 200 requires a showing that the contractor “controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed.”); *see also Pipia v Turner Constr. Co.*, 114 AD3d 424, 428 (1st Dept 2014); *Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 (1st Dept 2012); *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 (1st Dept 2011); *Tortorella v A.C.&S, Inc.*, 25 AD3d 375 (1st Dept 2006); *Philbin v A.C.&S, Inc.*, 25 AD3d 374 (1st Dept 2006); *Dalanna v City of New York*, 308 AD2d 400, 400 (1st Dept 2003); *Mazzocchi v IBM*, 294 AD2d 151, 151 (1st Dept 2002); *Gonzalez v UPS.*, 249 AD2d 210 (1st Dept 1998).

The degree of supervision and control in this case is arguably much greater than the degree of supervision and control present in the above-referenced cases. In any event, the testimony is quite clear that Con Ed provided Mr. Smith with the wires and tools he needed to perform his duties (Deposition pp. 62-63, 71-72, 74-75, 84-85, objections omitted):

Q. I'd like to first discuss your time when you said you were working at the dock. Could you tell me what specific job duties you had while working at the dock?

A. We were pulling cables, well, before that even began, we were laying five and six inch conduit in the ground to manhole covers and to the dock, and then we were pulling the cables to feed the equipment that they had at the dock and pulling in the other direction to go into the turbine room. The turbine is the generator that creates the electrical output.

Q. And where were you obtaining this cable that you were pulling from the dock area?

A. I was obtaining it from Con Ed.

* * * *

Q. And what tools were you using to cut the cable? . . .

A. I was using loppers and a hacksaw.

Q. You described your work cutting cable with a hacksaw. Can you tell us what, can you describe for us what the work entails in using loppers to cut cable?

A. Loppers were a tool . . . about three and a half feet long with rubber handles at the far end. The conduit, the pipe from which it was made was about an inch and a half in diameter, and you would take that lopper and open up the lopper, actually, you would take it and put it on

the edge of the, on the edge of the manhole or on the ground and press down on the lopper until you got a complete cut through the diameter of the wire and all of the insulation. . . .

Q. And what were the air conditions around the cable while you were lopping it with the loppers? . . .

A. Dusty. But not nearly as much dust as using the hacksaw.

Q. Were the loppers your own tool at the site?

A. No.

Q. Who gave you, provided you with the loppers?

A. The loppers were provided by Con Ed people.

Q. Did you breathe in the dust that resulted from the loppers to cut the cable at Indian Point? . .

A. Yes.

* * * *

Q. Are you aware if there was any particular reason why you had to pull multiple manufacturers of cable at Indian Point? . . .

A. That's what they gave me to pull.

Q. Who's they?

A. Con Ed.

* * * *

Q. Was, could you tell me, tell us specifically what Con Ed was directing you to do at their site? . . .

A. They were giving us the materials. They were telling us what section of the visitors center to mount it in. They were giving us the time frame they expected the work to take. And they were directing the progress and outcome of the work in a very specific way. . . .

Q. You had just testified that they had given you materials. Can you tell me, can you tell us specifically what materials were provided to you by Con Ed?

A. Yes, cable and fixtures.

Thus, even though Con Ed may not have instructed Mr. Smith in terms of cutting and pulling, the mere fact that it provided him asbestos-insulated wires and the tools needed to remove such asbestos-containing insulation raises a triable issue of fact whether Con Ed was positioned to prevent Mr. Smith's injuries. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998); *Ross v*

Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993); *Russin, supra*, 54 NY2d at 317; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 683 (2d Dept 2005).

The records submitted by Con Ed to show that another entity was responsible for the specific Indian Point units at issue should have been submitted with its moving papers, not for the first time in reply. *See Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 (1st Dept 1992) (it does not “avail [the moving party] to shift . . . by way of reply affidavit, the burden to demonstrate a material issue of fact at a time when [the nonmoving party] has neither the obligation nor the opportunity to respond absent express leave of court.”); *see also Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 (1st Dept 1995); *Azzopardi v American Blower Corp.*, 192 AD2d 453, 453-54 (1st Dept 1993); *Dannasch v Bifulco*, 184 AD2d 415, 416-17 (1st Dept 1992). Still, such records do not negate Mr. Smith’s testimony that Con Ed provided him with the wires and tools at issue and that his work with such wires and tools caused him to be exposed to asbestos-laden dust. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013) (*quoting Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]) (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge”; *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 320 (1st Dept 1996) (“The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment . . .”).

Accordingly, it is hereby ORDERED that Consolidated Edison of New York, Inc.’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED:

12-12-14



 SHERRY KLEIN HEITLER, J.S.C.