Donovan v ACF Indus., LLC
2015 NY Slip Op 30024(U)
January 6, 2015
Supreme Court, New York County
Docket Number: 190110/13
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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MARGARET DONOVAN, Individually and as Administrator for the Estate of RAYMOND T. DONOVAN,

Index No. 190110/13
Motion Seq. 004

Plaintiffs,

DECISION & ORDER

-against-

ACF INDUSTRIES, LLC, et al.,

Defendants.

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SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant SeaRiver Maritime, Inc. ("SeaRiver") moves pursuant to CPLR 3212 for an order dismissing plaintiffs' complaint and all cross-claims asserted against it for failing to demonstrate its liability under Labor Law § 200.[1] In opposition plaintiffs assert that SeaRiver is responsible for their injuries under the Labor Law inasmuch as its predecessor, Exxon Corporation ("Exxon")[2], directed, supervised, and controlled the work on its vessels that is alleged to have contributed to plaintiffs' decedent Raymond Donovan's asbestos exposure and failed to adequately warn him of the hazards associated therewith. For the reasons set forth below, the defendant's motion is granted.

Plaintiffs allege that Mr. Donovan was exposed to asbestos throughout his nearly 40 year career as an insulator, pipefitter, mechanic, and supervisor. Relevant to this motion is the approximately

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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 SeaRiver describes itself as "the entity in whom successor liability resides for the domestic vehicles once owned and operated by the maritime entities that are predecessors of Exxon Corporation, its affiliates and subsidiaries." Reply Affirmation of Afigo Fadahunsi, Esq., dated September 30, 2014, n. 1.

seven year period from 1975 to 1982 during which he worked for Caddell Drydock and Repair ("Caddell"), a prominent ship repair business located in Staten Island, New York. Although Mr. Donovan regularly wore a respirator mask, he testified[3] that he was exposed to asbestos aboard three of Exxon's vessels by working with insulation associated with pumps and valves. He also testified that he worked in the vicinity of another trade that used fire retardant asbestos cloth while performing wheel changes (Video Deposition pp. 110-112, Deposition pp. 211, 274, 638-640, objections omitted)[4]:

Q. Sir, do you believe you were exposed to asbestos while working for Cadell at any of these jobs that were done for Exxon?

A. Yes. . . .

Q. Now, sir, and just to dig a little deeper, how did you -- what work do you believe you were exposed to asbestos that [you] did on those ships?

A. The insulation work.

Q. Okay.

A. Any insulation that I removed and replaced. It could have been -- if it was an asbestos insulation I removed and I put back some asbestos, I could have put back fiberglass, but I did all types of work on not only Exxon, a few different barges . . .

* * * *

Q. Were you using a mask or other breathing apparatus throughout your entire time at Cadell?

A. If I was working on a particular job, yes.

* * * *

Q. Am I correct that Cadell made masks or breathing protection available to you? . . .

A. Yes.

* * * *

Q. And you did work on the "Exxon New York", sir?

A. Yes.

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3 Mr. Donovan was deposed in April, May, and July of 2013. Copies of his deposition transcripts are submitted as defendant's exhibits D-F ("Deposition"). A copy of Mr. Donovan's videotaped deposition is submitted as defendant's exhibit H ("Video Deposition").

4 The transcript refers to Mr. Donovan's employer as "Cadell" as opposed to "Caddell".

Q. And I believe from your testimony on, either on the second day or the third day, you described what I understood to be a wheel change on the "Exxon New York"; is that correct? . . .

A. Right. . . .

Q. As part of that work, an asbestos fire protection cloth would be used?

A. A lot of times they would put the cloth around the back of the wheel. When they heated the wheel, they had to heat that up and they used like a blowtorch. It was almost like a flamethrower. It was a kerosene torch and they would heat this wheel in order to release it from the shaft.

Q. Did you yourself ever do that, the actual function of using the flamethrower?

A. No.

Q. Did you ever do that task of protecting the part of the tug with the asbestos cloth?

A. No. I was not -- that was the wheel gang. I would have nothing to do with that.

Q. Were you ever present when that work was being done?

A. Yes.

Q. How close were you when those wheel changes or propeller changes were being done?

A. Sometimes, what are we, six feet apart, sometimes that far apart.

Q. Why would you be so close to that work?

A. That was my job, I would be the ship's supervisor.

Exxon contracted with Caddell to repair its vessels in 1974.[5] The Agreement provides, among other things, that Caddell would "effect the repairs, renewals and/or betterments to vessels" and provide "all necessary labor, machinery, tools, and equipment furnished . . . at its own cost and expense".[6] The Agreement further provides that any work performed by Caddell "may be altered, enlarged or modified by Exxon's designated representative" but that "the detailed manner and method of doing the work shall be under the control of [Caddell], Exxon being only interested in the results obtained . . . ."[7]

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5 A copy of the March 15, 1974 agreement is submitted as defendant's exhibit I ("Agreement").

6 Agreement p. 1.

7 Agreement pp. 1, 5.

Referring to Mr. Donovan's testimony, plaintiffs argue that in spite of the Agreement Exxon's own port engineers were the real authority aboard its ships and had the final say in terms of the work performed on board (Video Deposition pp. 95-99, objections omitted):

Q. . . . Did you ever see any representatives of the companies present while you were working for Cadell?

A. Yes. Any company that ever came into the shipyard had what they called a port engineer.

Q. What is a port engineer?

A. The port engineer was in charge of the slip that came in. If it was an Exxon tug in New York, I remember quite a bit, New York -- the Exxon Albany, the Connecticut . . . These people would come in, and if you did something they didn't like or they didn't believe it was being done properly, they would stop you. That was their ship or their tug.

Q. Let's take a step back for second, sir. You are using this phrase "port engineer." Can you explain to the jurors what does that mean, port engineer?

A. The port engineer was the company representative in charge of the work being performed for that particular ship, barge, tug, whatever it was. . . .

Q. Okay. If you had Cadell there and you had the port engineer, who had control of the work site? . . .

A. Port engineer.

Q. And how do you know that?

A. I got stopped twice by Exxon port engineer. There is the guy I made a mistake . . . He stopped me twice because he didn't like the way something was being done, and we stopped the job. He went upstairs. They went over the specifics -- and I was there. We went over with what the job specs called for, and what he wanted were a little bit different, but they compromised and we did what he wanted anyway. But, he had overall say of what was really going on. . . .

Q. When you say "he", you mean the port engineer?

A. The port engineer . . . It is any port engineer, whether it was Exxon, Mobil, any of them, they had the final say.

Q. And did that include the scope of the job, and the equipment and what your role was supposed to be? . . .

A. Yes.

Q. So, did you understand, while you were working for Cadell, that the port engineer was the authority in whatever job you had? . . .

A. Exactly.

Labor Law § 200 codifies the common law duty imposed on a general contractor to provide a safe workplace. In general, Labor Law § 200 claims 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).

Asbestos exposure is a factor in this case because of the conduct of Mr. Donovan's work. Thus, to attach liability to SeaRiver the court must find that Exxon exercised supervision and control over his work to the extent that it "controlled the manner in which the . . . injury-producing work was performed." *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007). In this regard Mr. Donovan testified as follows (Video Deposition pp. 218-220, objections omitted):

Q. Sir, with respect to the port engineer, was the port engineer a crew member of the vessel?

A. No. The port engineer was like a building manager who was in charge of the entire fleet, and Exxon had a few of them . . . I can't remember the other port engineer's name that stopped me twice . . . . But, he stopped me from doing work twice. The port engineer, all the port engineers, had the final say.

Q. You just said that someone stopped you twice?

A. Yes.

Q. Was it work that you specifically were doing?

A. No. I was in charge of [the] job. I was the ship supervisor and he did not want a certain -- I forget the specific job, but he didn't want something being done at the time and we had to stop.

Q. And what was that?

A. I don't recall. I just told you I don't recall what the specific job was. They stopped me twice.

Q. And you don't recall any details about those two jobs?

A. No. But I believe it was on the Exxon New York and he stopped that job twice.

Q. At any point in time while you were, you personally were performing insulation work at Cadell shipyard, did any port engineer direct the way you did your insulation work? . . .

A. No.

Q. At any point in time while you were doing your pipefitting duties, did any port engineer direct the way you did your work? . . .

A. No. The port engineer would not speak to a mechanic personally. If I was working as a mechanic he, wouldn't speak to me. He would go to the ship supervisor. They did not interfere with the people working. He would go to the person in charge.

Q. As you sit here today, do you recall any time when you were doing either insulation work or pipefitting work where the supervisor, the ship supervisor, came to you to tell you that the port engineer didn't want you doing the work that you were doing?

A. No.

This testimony shows only that Exxon exercised general supervisory authority over the projects taking place aboard its ships which is insufficient to impose liability on it as a matter of law. In other words, plaintiffs have failed to demonstrate that Exxon controlled the manner in which Mr. Donovan performed his work. *See Hughes, supra*, at 306; *see also Pipia v Turner Constr. Co.*, 114 AD3d 424, 428 (1st Dept 2014) (plaintiff's supervisor instructed him on how to perform his work); *Fiorentino v Atlas Park LLC,* 95 AD3d 424, 426 (1st Dept 2012) (right of contractor to stop unsafe work insufficient to establish requisite supervision or control); *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 (1st Dept 2011) (no control even though defendant was always on site, inspected the work, and admonished the plaintiff to work more quickly); *Dalanna v City of New York,* 308 AD2d 400, 400 (1st Dept 2003) (monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200); *Mazzocchi v IBM,* 294 AD2d 151, 151 (1st Dept 2002) (no liability where defendant maintained a shack on the work site for employees); *Gonzalez v UPS.*, 249 AD2d 210 (1st Dept 1998) (general oversight over timing and quality cannot be equated with direct supervision and control).

Gallo v Supermarkets Gen. Corp., 112 AD2d 345 (2d Dept 1985), upon which plaintiffs rely, is inapposite. In *Gallo*, the Second Department found that the defendant "retained a significant degree of control over the construction project at which the injuries occurred." *Id.* at 347. The *Gallo* court noted that, in addition to choosing subcontractors, the defendant "order[ed] changes in both the specifications and the methods used, inspected the project on a regular basis, and discussed both the progress and the details of the job with the general contractor's representative." *Id.* No such control is presented here.

Plaintiffs' argue that the use of asbestos cloth was in and of itself a defective condition of which Exxon had notice. However, there is no evidence presented to show that Exxon was responsible for such work, that it oversaw such work, that it knew such cloth contained asbestos, or that the use of such asbestos cloth even caused the released of asbestos-laden dust.

In light of the foregoing, it is hereby

ORDERED that SeaRiver Maritime, Inc.'s motion for summary judgment is granted; and it is further

ORDERED that this action and any cross-claims against SeaRiver Maritime, Inc. 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:

DATED: 1.6.15

SHERRY KLEIN HEITLER, J.S.C.