

Carroll v CBS Corp.
2015 NY Slip Op 30518(U)
March 23, 2015
Supreme Court, New York County
Docket Number: 190262/12
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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JOHN P. CARROLL and MARY CARROLL,

Index No. 190262/12
Motion Seq. 002

Plaintiffs,

-against-

DECISION & ORDER

CBS CORPORATION, *et al.*,

Defendants.

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

In this asbestos personal injury action, defendant Morse Diesel, Inc. (hereinafter "Morse Diesel") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiffs have not established its liability under Labor Law § 200.¹ Plaintiffs respond that Morse Diesel's liability is premised not on the Labor Law, but on the fact that its laborers violated the common law by negligently sweeping up asbestos-containing debris in plaintiff John Carroll's vicinity, causing him to be exposed to asbestos-laden dust.

John Carroll worked as a carpenter from 1965 to 1980 at commercial work sites throughout New York City. He testified² that laborers at these sites were always employed by the general contractor, and identified Morse Diesel as one of these general contractors (Deposition pp. 386-388, objections omitted):

¹ Labor Law § 200 codifies the common-law duty of a premises owner or employer to provide a safe workplace. It 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 Relevant portions of Mr. Carroll's deposition transcripts are submitted as defendant's exhibit B and plaintiffs' exhibit B ("Deposition").

- Q. I actually want to talk to you now about laborers specifically. Now, you had testified throughout the last couple of days that the laborers essentially were always employed by the general contractor; is that fair? . . .
- A. That is correct.
- Q. Now, when you were asked to name general contractors that you recall seeing at job sites throughout your career, you named the following. Morse Diesel, Fuller, Tishman and Turner. Do you recall that?
- A. That's correct. . . .
- Q. You had testified that laborers cleaned up after all the other trades that worked around you and after the work that you did yourself; is that correct?
- A. That is correct.
- Q. Did they generally do so in the same way regardless of the job site at which you were working?
- A. Yes.
- Q. I know you cannot give me specific job sites for the most part in terms of the general contractors that you saw; is that correct?
- A. That's correct.
- Q. Did you work on job sites where Morse Diesel was the general contractor?
- A. Yes.

Read in conjunction with the following testimony, plaintiffs allege that there is a triable issue whether Morse Diesel laborers caused Mr. Carroll to be exposed to asbestos dust (Deposition pp. 87-88, 98-99):

- Q. Do you know who employed the laborers at the New York telephone building?
- A. I'm not sure who employed them. Obviously the general contractor there.
- Q. What was the laborers' job at the telephone building?
- A. Their job is to clean the floors, keep the floors clean, constantly sweeping back and forth. Anything that falls. You are insulating, something is going to fall on the floor. Electrician has a piece of BX, he throws it on the floor. Pipe coverer, he throws it on the floor. Everything. The sheetrock, the dust, sometimes the floor is white. He sweeps it. He just sweeps it, but he is not helping your health.
- * * * *
- Q. The laborers at 55 Water Street, were they doing the same cleanup work that you already told us about?

A. Exactly the same, yes.

Plaintiffs do not dispute Morse Diesel's assertion that the evidence does not support a case against it under Labor Law § 200, which would have required plaintiffs to show that Morse Diesel 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 (*Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]). Rather, plaintiffs assert that Morse Diesel is liable for their injuries under common-law negligence principles. However, there is no evidence to show that Morse Diesel purchased any of the alleged asbestos-containing products at issue, knew or should have known that the debris its laborers swept up contained asbestos, or knew or should have known that such debris was hazardous. *See Lopez v Dagan*, 98 AD3d 436 (2012), *lv. app. den.* 21 NY3d 855 (2013); *Dombrower v Maharia Realty Corp.*, 296 AD2d 353, 353 (1st Dept 2002); *see also 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).

Plaintiffs' reliance on this court's decision in *McKay-O'Dea v A.O. Smith Water Prod. Co.*, 2013 NY Misc LEXIS 5699, 2013 NY Slip Op 33083(U) (Sup. Ct. NY. Co. Dec. 2, 2013, Heitler, J.) is misplaced. In *McKay*, unlike this case, there was clear evidence that the defendant knew of the hazards associated with asbestos yet allowed its subcontractors to use asbestos-containing products and even instructed its own personnel to sweep up asbestos-laden dust and debris without implementing safety protocols.

Accordingly, it is hereby

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

ORDERED that this action and any cross-claims against Morse Diesel, Inc. are severed and dismissed in their entirety; and it is further

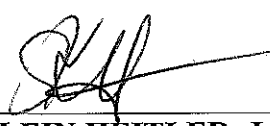
ORDERED that this case shall continue against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 3-23-15



SHERRY KLEIN HEITLER, J.S.C.