Storey v A.O. Smith Water Prods., Inc.
2015 NY Slip Op 30682(U)
April 27, 2015
Supreme Court, New York County
Docket Number: 190283/2013
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190283/2013

IN RE NEW YORK CITY ASBESTOS LITIGATION

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JOHN F. STOREY and CANDACE STOREY

Plaintiff

-against-

A.O. SMITH WATER PRODUCTS, INC. et al

Defendants

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Plaintiff John Storey ("plaintiff") was diagnosed with mesothelioma on August 5, 2013. His disease, he claims, is connected to his work as a tile setter at various job-sites in New York City from the 1960s to 1980, including at Penn Plaza, the Pfizer Building, and the Avon Building where the moving defendant Morse Diesel ("defendant" or "MD") was the general contractor and/or construction manager.[1] Plaintiffs' John Storey and Candace Storey (collectively "plaintiffs") causes of action against MD are asserted under Labor Law § 200 and common law negligence.

MD moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all claims and cross claims against it. MD's moving affirmation states that the basis is "because there is no triable issue of material fact and because plaintiffs' have failed to identify or establish Morse Diesel as the source of any asbestos exposure nor have plaintiffs demonstrated that Morse

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[1]The parties use the terms general contractor and construction manager interchangeably. For purposes of this motion, the distinction is not important (*see Walls v Turner Constr. Co*, 4 NY3d 861, 864 [2005] ["The label of construction manager versus general contractor is not necessarily determinative"]).

Diesel had any direction or control over others who may have caused John Storey's injuries." (Chetta Affirm ¶ 2). This of course is the incorrect standard, as the moving party (here, MD) must establish a prima facie case.

Arguments

MD asserts that it is entitled to summary judgment because plaintiff has not demonstrated that MD supervised or controlled the injury-producing work. MD cites plaintiff's deposition testimony and the testimony of Mitchell Becker, a MD witness in another case. Plaintiff agreed that there were all kinds of debris at the construction sites (Exh C, Storey TR at 520-24). Plaintiff also stated that he took instructions from his foreman, who was not employed by MD (*id.* at 524-25). Becker testified generally and very briefly regarding MD's role in contracting, consulting and as a construction manager (Exh D, Becker TR at 54).

Plaintiffs oppose the motion, maintaining that (1) defendant has not met its burden of proof because it did not proffer the requisite evidence from someone with personal knowledge, (2) defendant has not met its burden of proof because its moving arguments solely focus on the "methods and means" of the work and fail to address plaintiffs' arguments that MD created the dangerous condition, (3) issues of fact exist for trial as to plaintiffs' common law negligence and Labor Law § 200 claims. Plaintiff cites his testimony specifying the relevant periods of time in which he worked at the three sites (Ex B, Storey TR at 237-41, 246-47, 523 and 606-07). He points to his testimony regarding his exposure to dust in connection with the installation of vinyl asbestos tiles (Ex C, Storey TR at 43-44). He recounts his testimony regarding his observation of *laborers who were hired by MD* sweeping up the dust and debris (*id.* at 64-67, 98-99, 520-21), as well as observing the dust occurring from other tradespeople's work (*id.* at 239, 248 and 608).

In reply, defendant asserts that plaintiffs "have yet to present any evidence to show that Morse Diesel knew or should have known that the debris that its laborer allegedly swept up contained hazardous asbestos fibers."

Discussion

A. Summary Judgment Standards

CPLR 3212 (b) provides, in relevant part:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Thus, a defendant moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). An affidavit from a corporate representative which is "conclusory and without specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig. (DiSalvo)*, 123 AD3d 498 [1st Dept 2014]).

It is only after the burden of proof is met that plaintiff must then 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]). The plaintiff cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept 2010]). In

addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st Dept. 1996] [internal citations omitted]). This is particularly true in asbestos cases, where the testimony presented is often proffered by witnesses attempting to recall remote events that are years and perhaps even decades removed from the present. Furthermore, it is well-settled that in personal injury litigation, a plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which a defendant's liability can be reasonably inferred (*Reid, supra*; *Matter of New York City Asbestos Litg.* (*Brooklyn Nav. Shipyard Cases*), 188 AD2d 214, 225 [1st Dept], *affd* 82 NY2d 821 [1993]).

B. Labor Law § 200 and Common Law Negligence

"The duty at common law was, inter alia, to furnish a safe place to work . . .This duty has been extended by statute (Labor Law, § 200, subd. 1) to include the tools and appliances without which the place to work would be incomplete" (*Hess v Bernheimer & Swartz, Pilsener Brewing Co.*, 219 NY 415, 418 [1916]). Thus, Section 200 (1) of the Labor Law codifies owners' or general contractors' common-law duty of care to provide construction site workers with a safe place to work (*see Cappabianca v Skanska USA Build. Inc.*, 99 AD3d 139, 143 [1st Dept 2012]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the

manner in which the work was performed" (*id.* at 143-44).

Where an existing defect or dangerous condition caused the injury, "liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*id.* at 144; *see also Murphy v Columbia University,* 4 AD3d 200 [1st Dept 2004] [court held there was sufficient evidence from which the jury could conclude the general contractor had either created the unsafe condition, by installing the flammable cardboard, or had actual or constructive notice of the defect]). Unlike injuries arising under the methods of the work, where the injury arises from a condition, supervision and control over the injury-producing work need not be shown (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553 [1st Dept 2009]). However, the defendant must have some control of the area at issue (*Urban,* 62 AD3d at 556 ["a general contractor is unlikely to have notice without some control or supervision over the work site"]). Control of the area is required so that liability is not imposed on a defendant who does not have the ability to avoid or correct the unsafe condition (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]).

Premises condition cases are sometimes lumped together with Labor Law § 200 cases where "a party who was duty-bound to provide a safe place to work affirmatively and negligently causes the subject accident" (Shoot, *Labor Law § 200: Commonly Involved But Frequently Misunderstood*, NYLJ, February 13, 2015). "Although courts sometimes merge this type of claim with the 'premises condition' type of claim-thus stating that liability may be imposed if the defendant had notice of or caused the injury-producing condition-such is imprecise inasmuch as it is immaterial whether the defendant caused the accident by creating a dangerous 'premises condition,' as opposed to causing

the accident in some other manner" *(id.)*.[2]

Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually knew or should have known of the unsafe practice or tool and exercised supervisory control over the injury-producing work (*Cappabianca*, 99 AD3d at 144). General supervisory authority is not enough to constitute supervisory control (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

MD has failed to establish a prima facie case. No evidence was proffered that MD's laborers did not create a dangerous condition by sweeping up asbestos debris. Nor did MD proffer any evidence that it did not know, or should not have known, of the dangers of asbestos debris or that it did not have constructive notice that other laborers swept up such dangerous debris (*see Cerverizzo v City of NewYork*, 111 AD3d 535 [1st Dept 2013]) ["Yonkers failed to establish prima facie that it neither created nor had actual or constructive notice of the dangerous condition . . . Yonkers's own workers performed excavation in the area and were responsible for providing protection from excavation holes"]).

Further, the deposition testimony does not support a prima facie case that MD did not exercise the requite level of supervision and control. While plaintiff's and Becker's general and very brief testimony regarding MD's role (which admittedly, did not span the relevant time period) provides some evidence, it is insufficient to meet MD's burden on summary judgment demonstrating

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[2]This concept is also found in garden variety negligence cases where the defendant may be liable if it "causes and creates" the dangerous condition (*see Corprew v City of New York*, 106 AD3d 524 [1st Dept 2013]).

a lack of supervision and control.[3]

Even if MD had met its burden, issues of fact exist for trial. Plaintiffs point to the United States Department of Labor Occupational Safety & Health Administration ("OSHA") regulations in 1971 regulating the amount of asbestos exposure considered safe for employees. Plaintiffs also point to testimony in a case before Judge Madden where their expert testified that in 1974 OSHA published an alert to the construction industry warning of the dangers of asbestos. [4] The OSHA website also reflects the development of regulations aimed at the construction industry in particular starting in 1983. Thus, on this record, an issue of fact exists as to whether MD violated Labor Law § 200 and was negligent because as a general contractor, it should have known of the dangers from MD laborers (or other laborers) sweeping up asbestos debris.

It is hereby

ORDERED that Defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: April 27, 2015

HON. PETER H. MOULTON
J.S.C.

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[3]While it may be difficult at trial for a plaintiff to meet his or her burden to establish the requisite level of supervision and control under Labor Law § 200, it is not impossible to do so (*see e.g., Matter of New York City Asbestos Litig.*, 121 AD3d 230 [1st Dept 2014] [court upheld a jury verdict finding that a general contractor exercised the requisite level of supervision and control]).

[4]Plaintiffs also point to the expert's testimony of "a general awareness throughout the construction industry in the 1970s." Plaintiffs state that they intend to introduce evidence at trial regarding MD's knowledge.