

**Epstein v Atlas Turner, Inc.**

2019 NY Slip Op 31401(U)

May 14, 2019

Supreme Court, New York County

Docket Number: 190065/2017

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

SHARON EPSTEIN, Individually and as Independent Administrator of the Estate of IRA EPSTEIN,

- against - Plaintiffs,

INDEX NO. 190065/2017

MOTION DATE 05/01/2019

MOTION SEQ. NO. 007

ATLAS TURNER, INC., et al., Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by Port Authority of New York & New Jersey:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include: Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... (1-4), Answering Affidavits — Exhibits (5-7), Replying Affidavits (8-9).

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Port Authority of New York & New Jersey's (hereinafter "Port Authority") motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is granted as stated herein.

Plaintiff's decedent, Ira Epstein (hereinafter "decedent"), was diagnosed with mesothelioma on April 22, 2016 and passed away on July 14, 2017 (Opp. Exhs. 1 and 2). Decedent alleged he was exposed to asbestos in a variety of ways. Decedent's alleged exposure - as relevant to this motion - was while employed by a subcontractor as a helper or "gofer" for a pipefitter/steamfitter named "Alvin," on the 72nd floor of Tower 1, at the World Trade Center for approximately sixty (60) days from about June to July (summer) of 1970 (Mot. Exh. E, pgs 173-174, and Exh. F, pgs. 11-12).

Decedent was deposed on March 22, 2017, April 4, 2017 and his de bene esse deposition was conducted on April 5, 2017 (Mot. Exhs. C, E and F). He testified he did not know the name of the subcontractor he worked for, or Alvin's last name, and that Alvin hired him and paid him in cash (Mot. Exh. C, pg. 15 and Exh. E, pgs. 173-174 and 193). Decedent could not recall the names of any of the other contractors or subcontractors at the World Trade Center in 1970. Decedent stated that Alvin's work was welding and soldering pipes together, and that the "gofer" job had him "Go for this, go get his (Alvin's) cigarettes, go get his tools. Stuff like that" (Mot. Exh. C, pgs. 15-16, and Mot. Exh. E, pg. 173). Decedent testified that his work hours were usually from 7:00a.m. thorough 4:00p.m., five days a week. He would meet Alvin outside of the building in the morning and they would take an elevator inside the building to the 72nd Floor (Mot. Exh. E, pgs. 172-174, and 195).

Decedent testified that he observed other trades working in close proximity to him and Alvin on the 72nd floor of the World Trade Center. He stated that electricians, people putting up drywall, people putting down floor tiles, elevator workers and insulators, created asbestos dust that he breathed in. Decedent stated the insulators mixed "mud for insulation." They would mix a powdery substance with water and then using a long drill auger bit would mix them, which would send "stuff flying all over the place." He testified that the insulation was "put on pipes and walls." He could not identify the type of insulation used (Mot.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Exh. C, pgs. 21, 60-61, Exh. E, pgs. 178 and 181, and Exh. F pgs. 21, 23-24). Decedent stated that people putting up walls and cutting sheetrock caused dust to fly "all over the place," and then they used "power brushes" to clean up, that also created dust. Decedent stated that people were sanding drywall and finishing it off. That it looked like "you were in a fog" and that the drywall people also used joint compound or mud to close the seams. He said the drywall came in what looked like 4 x 8 sheets (Mot. Exh. C, pgs. 22, 51-52, Exh. E, pgs. 179 and 185, and Exh. F, pg. 17). Decedent stated that in addition to dust from wallboard there was also asbestos dust from the cutting of floor tiles. He said that the tile workers would cut the floor tiles, which were about 16 x 16, put some "mud" on the back and put the tiles down. The area covered with floor tiles was about 20,000 square feet (Mot. Exh. C, pg. 41, Exh. E, pgs. 180-181 and Exh. F, pg. 14).

Plaintiffs commenced this action on February 22, 2017, alleging the causes of action asserted in the Standard Complaint No. 1. The Port Authority was not named as a defendant in the initial Summons and Complaint (Mot. Exh. A). Plaintiffs' Standard Complaint No. 1 asserts four causes of action: (1) negligence, (2) strict products liability, (3) loss of consortium and (4) punitive damages (Mot. Exh. H). Plaintiffs' Third Amended Summons and Complaint on October 12, 2017 added The Port Authority as a defendant (Mot. Exh. G). The Port Authority acknowledged receipt of the Third Amended Summons and Complaint on November 13, 2017 (Mot. Exhs. K and L). Plaintiffs' Fourth Amended Summons and Complaint included a cause of action for wrongful death and amended the caption to include Sharon Epstein as Independent Administrator of the Estate (Mot. Exh. I).

The Port Authority seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 458, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 A.D. 2d 192, 663 N.Y.S. 2d 184 [1st Dept. 1997]).

The Port Authority argues that it did not supervise or control decedent's work and that summary judgment dismissing plaintiffs' Labor Law §200, and common law negligence claims is warranted. The Port Authority claims that there is no evidence to establish it knew the composition of every single product used at the World Trade Center during the relevant period or that it had control of every single contractor. The Port Authority further argues that at most it exercised a right of general inspection which is not sufficient to find common law negligence.

Labor Law §200 codifies a general contractor's common-law duty of care to provide construction site workers with a safe place to work (*Comes v. New York State Electric and Gas Corp.*, 82 N.Y. 2d 876, 631 N.E. 2d 110, 609 N.Y.S. 2d 168 [1993]). "Claims for personal injury under the statute arise under two broad categories: those arising from a dangerous defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Prevost v. One City Block LLC.*, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept. 2017]).

A Labor Law §200 claim on the manner and means of work performed requires that "the party charged with that responsibility must have the authority to control the activity bringing about the injury to enable it to avoid or correct an

unsafe condition” (Russin v Louis N. Picciano & Son, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 [1981] and McGarry v. CVP 1 LLC , 55 A.D. 3d 441, 866 N.Y.S. 2d 75 [1<sup>st</sup> Dept., 2008]). An owner is not liable for subcontractor employees over which there was no supervisory control (Cappabianca v. Skanska USA Bldg.,Inc., 99 A.D. 3d 139, 950 N.Y.S. 2d 35 [1<sup>st</sup> Dept., 2012]). Providing “general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability” (Dalanna v. City of New York, 308 A.D. 2d 400, 764 N.Y.S. 2d 429 [1<sup>st</sup> Dept. 2003]). Mere review of on-site safety or coordination of subcontractors at the work site also does not rise to the level of supervision or control for liability under Labor Law §200 (Bisram v. Long Island Jewish Hospital, 116 A.D. 3d 475, 983 N.Y.S. 2d 518 [1<sup>st</sup> Dept. 2014]). Labor Law §200 liability will attach if the owner controls through issuance of detailed specifications directing contractors in the means and methods of applying asbestos products and retained the capacity to exclude or stop work if a dangerous condition arose (In re New York Asbestos Litigation (Brown), 146 A.D. 3d 461, 49 N.Y.S. 3d 1 [1<sup>st</sup> Dept. 2017]).

Plaintiffs speculative reliance on the use of sprayed-on asbestos fireproofing, asbestos sealant and asbestos insulation used on elevator shafts while decedent was working on the 72<sup>nd</sup> floor of the World Trade Center in the summer of 1970, does not raise an issue of fact. Decedent testified that he worked at the World Trade Center starting in June of 1970, after he graduated from high school and after the World Trade Center switched to asbestos-free spray-on insulation products (Mot. Exh. E, pgs 173-174, and Exh. F, pgs. 11-12). Alternatively, decedent never testified to asbestos exposure from any sprayed-on product and only referred to insulation work on walls and pipes using “mud” (Mot. Exh. C, pgs. 21, 60-61, Exh. E, pgs. 178 and 181, and Exh. F pgs. 21, 23-24).

Plaintiffs provide excerpts from the deposition testimony of Joseph Giordano a drywall taper at the World Trade Center during the time period relevant to decedent’s alleged exposure. Mr. Giordano testified about the use of asbestos products manufactured by U.S.G., Gold Bond and Georgia Pacific (Opp. Exh. 6). Plaintiffs also refer to memorandums allegedly sent to the Port Authority personnel in September of 1969 stating the potential hazards of asbestos to show that the Port Authority provided specifications and controlled the use of asbestos materials and safety measures at the World Trade Center (Opp. Exhs. 8, 9, 10, 11 and 12). Although these memorandums are related to spray-on asbestos materials, they raise an issue of fact on the extent of the Port Authority’s control and monitoring of the work, with asbestos based products, performed at the World Trade Center during the relevant time period.

Decedent provided conflicting testimony about who told the tile, drywall, elevator, and insulation guys how or where to do their work. Initially decedent testified he just knew that the contractor hired the subcontractors working on the 72<sup>nd</sup> floor, and he did not know who told them what to do (Mot. Exh. E, pgs. 174, 177-179 and 196-197). He later testified that the general contractor on the 72<sup>nd</sup> floor told everybody where to go and what to do first thing in the morning (Mot. Exh. F, pgs. 25, 87, 91-93). Decedent also provided conflicting testimony about his distance from the work performed by other trades. He initially claimed he had no clue of his distance from the work that was being performed and stated he “could have been ten or one hundred feet away” from the drywallers and that the tile workers were right next to them (the drywallers) (Mot. Exh. E, pgs. 182-185). He later testified the work was performed approximately ten feet away from him (Mot. Exh. F, pgs. 15-16).

“It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1<sup>st</sup> Dept., 2015]). Conflicting testimony raises credibility issues that

cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], *Almonte v. 638 West 160 LLC*, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1<sup>st</sup> Dept., 2016] and *Doumbia v. Moonlight Towing, Inc.*, 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1<sup>st</sup> Dept., 2018]).

There is no proof that decedent's contradictory testimony was for purposes of obtaining a favorable outcome in this action or in summary judgment. Decedent's conflicting testimony presents a credibility issue to be determined by the trier of fact (See *Luebke v. MBI Group*, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1<sup>st</sup> Dept. 2014] citing to *Vazieiyan v. Blancato*, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1<sup>st</sup> Dept., 1999]).

Plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of decedent's ability to provide a detailed description of his exposure. Decedent's failure to provide specific identification of the contractors or the products alleged to produce asbestos dust during the relevant time period at the World Trade Center, does not mean that the Port Authority was unaware or had no control over the means and methods of decedent's work. Plaintiffs have raised triable issues of fact as to whether the Port Authority's common law negligence and Labor Law §200 liability may be reasonably inferred from decedent's work on the 72<sup>nd</sup> floor of the World Trade Center.

There remain issues of fact as to whether the Port Authority is liable for common law negligence and Labor Law §200 liability because it issued detailed specifications at the World Trade Center directing the means and methods of applying asbestos-dust producing products that were identified by the decedent. There also remain issues of fact whether the Port Authority had the knowledge and ability to stop work for dangerous asbestos related conditions similar to what occurred with the spray on fireproofing and insulation. The conflicting evidence and testimony raise issues of fact that cannot be resolved on a motion for summary judgment.

The Port Authority argues that the plaintiffs have failed to present any evidence that it is liable as the owner of the premises on their second cause of action for strict products liability. The Port Authority claims there is no evidence that the decedent was exposed to any asbestos-containing product manufactured, distributed, or sold by the Port Authority, warranting dismissal of plaintiffs' strict products liability claim.

A party that is outside the manufacturing, selling or distribution chain, cannot be held liable for strict products liability (*Laurin Maritime AB v. Imperial Chemical Industries, PLC*, 301 A.D. 2d 367, 752 N.Y.S. 2d 855 [1<sup>st</sup> Dept., 2003] citing to *Passaretti v. Aurora Pump Co.*, 201 A.D. 2d 475, 607 N.Y.S. 2d 688 [2<sup>nd</sup> Dept., 1994]). A defendant that has not manufactured, distributed or sold the product and whose only relationship to the product is its purchase and incorporation into its building for use is not liable under strict products liability (*Serna v. New York State Urban Dev. Corp.*, 185 A.D. 2d 562, 586 N.Y.S. 2d 413 [3<sup>rd</sup> Dept., 1992]).

Plaintiffs argue that the decedent was exposed to asbestos carpentry products, sprayed asbestos fireproofing, asbestos sealant and asbestos insulation used on elevator shafts while working on the 72<sup>nd</sup> floor of the World Trade Center in 1970. In support of their arguments on products liability plaintiffs cite to the Affidavit of Rino M. Monti, the Construction Manager for the World Trade Center World Trade Department of the Port Authority from 1965 through October of 1972 (Opp. Exh. 7). Mr. Monti's affidavit, prepared in an unrelated action, addresses interior spray-on asbestos fireproofing of floor trusses, columns and beams, including areas located in elevator shafts. The Port Authority selected and approved U.S. Mineral's asbestos spray-on fireproofing product which was used starting in 1969 (Opp. Exh. 7). Mr. Monti states that the Port Authority and Tishman were unaware of asbestos in the spray-on product and worked with recommendations made by both New York City personnel and Dr. Selikoff of

Mount Sinai to control the conditions and the amounts of asbestos emissions that occurred when spray-on fireproofing was applied. Mr. Monti states that in May of 1970 the Port Authority switched to use of U.S. Mineral's asbestos free spray-on fireproof products (Opp. Exh. 7).

Plaintiffs claim that decedent was allegedly exposed to sprayed asbestos fireproofing, asbestos sealant and asbestos insulation used on elevator shafts while decedent was working on the 72<sup>nd</sup> floor of the World Trade Center in the summer of 1970, is unsupported by his testimony, and is speculative. Plaintiffs do not raise an issue of fact on strict product liability. Plaintiffs reference to memorandums sent to the Port Authority personnel in September of 1969 (Opp. Exhs. 8, 9, 10, 11 and 12), does not raise an issue of fact or establish that the Port Authority controlled the manufacture of the asbestos products used at the World Trade Center, or was otherwise responsible for the distribution or sale of the products identified by the decedent as producing asbestos dust. The Port Authority has made a prima facie showing, warranting summary judgment on the second cause of action for strict products liability.

The Port Authority is entitled to summary judgment on the third cause of action for spousal loss of consortium because the decedent's alleged injuries from his work at the World Trade Center in 1970, occurred before he was married to his wife, plaintiff Sharon Epstein (See Joseph Lee De'Leone ex rel. Angel v. City of New York, 45 A.D. 3d 254, 845 N.Y.S. 2d 241 [1<sup>st</sup> Dept. 2007] and Holmes v. Maimonides Medical Center, 95 A.D. 3d 831, 943 N.Y.S. 2d 573 [2<sup>nd</sup> Dept. 2012] citing to Anderson v. Eli Lilly & Co., 79 N.Y. 2d 797, 588 N.E. 2d 66, 580 N.Y.S. 2d 168 [1991]). The decedent testified that he married his wife, Sharon Epstein, in 1994, after the alleged period of exposure in 1970 (Mot. Exh. C, pg. 101). Decedent was married three times and none of his marriages occurred prior to 1975 (Mot. Exh. C, pgs. 82- 84 and Exh. B). Plaintiffs did not provide evidence to raise an issue of fact or otherwise sustain the third cause of action for loss of consortium against the Port Authority.

The Port Authority seeks summary judgment on the fourth cause of action for punitive damages arguing that it is entitled to immunity. In support of its argument the Port Authority, a hybrid entity created by a bi-state compact between New York and New Jersey (See McKinneys Unconsolidated Laws §6404), cites to federal precedent which has determined that the Port Authority enjoys the same immunity from punitive damages as a municipality (Recreation World v. Port Authority of N.Y. and N.J., 97 cv 5549 (LAP), 1998 WL 107362 [SDNY, 1998] and Shifa Services, Inc. v. Port Authority of N.Y. and N.J., 96 cv 1361(AGS), 1997 WL 563301 [SDNY 1997]). Although there has been no determination on this issue by the United States Second Circuit Court in New York, the Port Authority's immunity from punitive damages claims has been upheld by the United States Third Circuit Court in New Jersey (See Urbina v. Port Authority of New York, 2017 WL 3600424 [SDNY 2017] citing to Evans v. Port Authority of N.Y. & N.J., 273 F. 3d 346 [3<sup>rd</sup> Cir. 2001]). Plaintiffs fail to cite to other precedent or otherwise raise an issue of fact on the issue of the Port Authority's immunity warranting summary judgment on the fourth cause of action.

Accordingly, it is ORDERED, that Defendant Port Authority of New York & New Jersey's motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is granted to the extent of dismissing plaintiffs' second cause of action for strict products liability, third cause of action for spousal loss of consortium and fourth cause of action for punitive damages, and it is further,

ORDERED, that plaintiffs' second cause of action for strict products liability, third cause of action for spousal loss of consortium and fourth cause of action for punitive damages, are severed and dismissed with prejudice, and it is further,

ORDERED, that the plaintiffs' third cause of action for common law negligence and Labor Law §200 liability remain in effect, and it is further,

ORDERED, that the Defendant Port Authority of New York & New Jersey serve a copy of this Order with Notice of Entry on the remaining parties, the Trial Support Clerk located in the General Clerk's Office (Room 119), and on the County Clerk, who are directed to mark their records accordingly, and it is further,

ORDERED, that the remainder of the relief sought in this motion is denied.

ORDERED, that the Clerk of the Court enter judgment accordingly.

ENTER:

Dated: May 14, 2019

  
\_\_\_\_\_  
MANUEL J. MENDEZ J.S.C. MANUEL J. MENDEZ J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST     REFERENCE