

Zic v City of New York
2020 NY Slip Op 30420(U)
February 14, 2020
Supreme Court, New York County
Docket Number: 159201/2012
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH

PART

IAS MOTION 32

Justice

-----X

INDEX NO. 159201/2012

VELIMIR ZIC, MARILYN ZIC,

Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 009

- v -

THE CITY OF NEW YORK, THE METROPOLITAN
TRANSPORTATION AUTHORITY, THE NEW YORK CITY
TRANSIT AUTHORITY, TISHMAN CONSTRUCTION
CORPORATION, AECOM TECHNOLOGY CORPORATION,
CITNALTA CONSTRUCTION CORP., JUDLAU
CONTRACTING, INC., THE NEW YORK TIMES COMPANY,
FOREST CITY RATNER COMPANIES, FOREST CITY
ENTERPRISES, AMEC CONSTRUCTION MANAGEMENT,
INC., BOSTON PROPERTIES LIMITED PARTNERSHIP,
QUEENS BALLPARK COMPANY, LLC., HUNT
CONSTRUCTION GROUP, LEND LEASE CORPORATION
LIMITED F/K/A BOVIS LEND LEASE LMB, INC., TOTAL
SAFETY CONSULTING,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

CITNALTA CONSTRUCTION CORP.

Third-Party
Index No. 590041/2014

Plaintiff,

-against-

L&L PAINTING CO., INC

Defendant.

-----X

TISHMAN CONSTRUCTION CORPORATION, AECOM
TECHNOLOGY CORPORATION, LEND LEASE
CORPORATION LIMITED F/K/A BOVIS LEND LEASE LMB,
INC.

Second Third-Party
Index No. 595292/2014

Plaintiff,

-against-

THE CITY OF NEW YORK, THE METROPOLITAN
TRANSPORTATION AUTHORITY, THE NEW YORK CITY
TRANSIT AUTHORITY, L & L PAINTING CO., INC.

Defendant.

-----X

QUEENS BALLPARK COMPANY, LLC.

Plaintiff,

-against-

L&L PAINTING CO., INC.

Defendant.

-----X

Third Third-Party
Index No. 595633/2014

The following e-filed documents, listed by NYSCEF document number (Motion 009) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329

were read on this motion to/for

DISMISS

The motion by defendant the City of New York (the "City") for a protective order cancelling its deposition and to dismiss all third-party claims and cross-claims against it is granted. The motion (incorrectly denominated as a cross-motion) by the Metropolitan Transportation Authority ("MTA") and the New York City Transit Authority ("NYCTA") for a protective order and to dismiss all third-party claims against it is granted.

Background

This action arises out of plaintiff Velimir Zic's work as a painter. Mr. Zic claims that he developed lung cancer and suffered from lead poisoning as a result of working for L&L Painting at various worksites from June 2001 through April 2011. Plaintiffs have no direct claims remaining against the City (those claims were previously dismissed on the ground that plaintiff failed to serve a timely Notice of Claim). Plaintiff's claims against the MTA and NYCTA were also dismissed.

The City attaches an affidavit from Dr. Howard Sandler, who observes that he “conducted a review of published, peer-reviewed studies regarding the relationship between lung cancer and the exposures plaintiff alleges to have sustained during the course of his employment as a lead paint abatement worker and painter” (NYSCEF Doc. No. 276, ¶ 9). He also consulted “published, peer-reviewed studies regarding lead paint exposure and the incidence of disease in adults, including lead poisoning, based on the exposures plaintiff alleged to have sustained” (*id.* ¶ 10).

Dr. Sandler notes that Mr. Zic “was pathologically diagnosed with lung cancer, specifically moderately differentiated squamous cell lung cancer on April 14, 2011 from a biopsy performed during a bronchoscopy. At the time of the diagnosis, the tumor was significant at 3.6 x 2.5 x 2.0 cm, indicating that the tumor initially developed a number of years prior to the clinical diagnosis of lung cancer by biopsy” (*id.* ¶ 14). He added that “Lung cancer has a minimum latency period of ten to twenty years depending on the carcinogen involved, the extent of exposure and other likely factors” (*id.* ¶ 15). Dr. Sandler theorized that the “The latency in this case therefore reflects that it takes a minimum of fifteen to twenty years following first exposure to recognized lung cancer carcinogens to develop a solid tumor such as squamous cell carcinoma. This does not conflict with my ten to twenty year latency period noted above as that was based on the latency of cigarette smoking not being a painter” (*id.*).

“Given the dates of the first alleged exposure in 2001, I conclude with a reasonable degree of medical certainty that plaintiff Velimir Zic’s squamous cell lung cancer cannot have been caused by any alleged exposures from 2001 or later, as the period between first claimed exposure in 2001 and the development of symptoms of lung cancer in early 2011 is not sufficient as it does not meet the minimum medically accepted latency period for lung cancer (*id.* ¶ 16). Dr.

Sandler also suggested that the likely cause of plaintiff's cancer was an HPV infection from 1975 (*id.* ¶ 18).

With respect to the lead poisoning issue, Dr. Sandler reviewed the blood tests conducted on plaintiff (as required by OSHA) and found that his blood lead levels were substantially below the levels commonly associated with lead poisoning (*id.* ¶¶ 27-32). The blood tests were "all within the acceptance range and documented as not producing adverse health effects" (*id.* ¶ 31).

Neither plaintiffs nor any other party offered any expert opinions that contradict Dr. Sandler's conclusions. Therefore, the Court has no choice but to grant the City's motion and the cross-motion by the MTA and NYCTA. The fact is that there is uncontroverted expert evidence that plaintiff's cancer began to develop long before plaintiff worked at sites involving the City, the MTA and NYCTA. And there is no evidence to contradict the City's claim that blood tests performed on plaintiff demonstrated that his lead levels were too low to suffer any deleterious effects. Accordingly, a deposition of these parties would be irrelevant because they could not have caused plaintiff's injuries based on Dr. Sandler's well-reasoned affidavit. And all claims and cross-claims against these parties should be dismissed for the same reason.

The Court observes that plaintiffs did not submit any papers in this motion. Of course, because they no longer have any claims against the City, the MTA or NYCTA, they likely concluded that no submissions were necessary. The only opposition to the City's motion is a "partial opposition" offered by defendant Hunt Construction Group ("Hunt"). Hunt asks permission to file its own motion for summary judgment based on lack of medical causation if the Court were to adopt Dr. Sandler's findings.

Hunt, as well as defendants Tishman Construction Corporation, Aecom Technology Corporation and Lend Lease Corporation Limited f/k/a Bovis Lend Lease LMB, Inc., offer

partial opposition to the cross-motion filed by the MTA and NYCTA. These defendants seek leave from the Court to file their own motions for summary judgment based on medical causation.

Hunt or any party in this litigation need not obtain permission to make a motion for summary judgment as no NOI has been filed in this case. As stated above, plaintiffs did not submit any papers or offer their own expert's view on causation in opposition to the instant motions. To be clear, the Court is not making any findings about causation with respect to any party other than the City, the MTA and NYCTA (the only parties that moved for affirmative relief in this motion sequence).

Accordingly, it is hereby

ORDERED that the motion by the City of New York for a protective order cancelling its deposition and to dismiss all third-party claims and cross-claims against it is granted; and it is further

ORDERED that the cross-motion by the Metropolitan Transportation Authority and the New York City Transit Authority for a protective order cancelling its depositions and to dismiss all third-party claims against these parties is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Next Conference: May 19, 2020 at 2:15 p.m.

2-14-2020

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE