

Cannon v Amchem Prods., Inc.
2020 NY Slip Op 34080(U)
November 30, 2020
Supreme Court, New York County
Docket Number: 190018/2018
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

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WALTER CANNON,

Plaintiff,

- v -

AMCHEM PRODUCTS, INC., CARRIER CORPORATION,
CBS CORPORATION, A DELAWARE CORP., F/K/A
VIACOM INC., CBS CORPORATION, F/K/A VIACOM
INC., CERTAINTEED CORPORATION, CLEAVER BROOKS
COMPANY, INC, COOPER CROUSE-HINDS, EATON
CORPORATION, AS SUCCESSOR -IN-INTEREST TO,
GENERAL ELECTRIC COMPANY, GOULD ELECTRONICS
INC, LEVITON MANUFACTURING CO., INC, MARIO &
DIBONO PLASTERING CO., INC, OWENS-ILLINOIS, INC,
PFIZER, INC. (PFIZER), ROCKWELL AUTOMATION,
INC., AS SUCCESSOR IN INTEREST, SCHNEIDER
ELECTRIC USA, INC. FORMERLY KNOWN AS, TISHMAN
REALTY & CONSTRUCTION CO., INC., U.S. RUBBER
COMPANY (UNIROYAL), UNION CARBIDE
CORPORATION,

INDEX NO. 190018/2018
MOTION DATE 07/24/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendant Tishman Realty & Construction Co., Inc.'s ("Tishman") motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Tishman on the grounds that said defendant has made a prima facie case demonstrating lack of duty; breach; or causation and to dismiss plaintiff's Complaint and all cross-claims against Tishman. Plaintiff opposes the motion.

Tishman's motion contends that plaintiff Walter Cannon has failed to establish that Tishman is liable under New York Labor Law 200, a codification of the common law negligence

law, and that plaintiff has made no showing of negligence on the part of Tishman. The case at issue arises from plaintiff's diagnosis of lung cancer, which plaintiff alleges was caused by his exposure to ultra-hazardous asbestos dust when he worked as an electrician installing lighting fixtures at the World Trade Center ("WTC") construction worksite. Plaintiff alleges that he worked under the employ of Forest Electric ("Forest") at the WTC on weekends for approximately two and a half to three months, shortly before the WTC opened. While working at the WTC, plaintiff testified that he was exposed to asbestos from scraping off asbestos insulation that had been sprayed on steel beams to hang lighting fixtures (Exh 6, at 109-110, 287-288).

Here, upon motion for summary judgment, Tishman alleges that it did not cause plaintiff's lung cancer, which Tishman attributes solely to plaintiff's cigarette smoking history. Tishman further claims that Tishman did not supervise or control plaintiff's work and thus owed no duty to plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The elements of a common-law negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting therefrom (*Jiminez v. Shahid*, 83 A.D.3d 900 [2d Dept 2011]). Labor Law § 200 is a codification of the common law duty that a landowner or general contractor is to provide workers with a reasonably safe place to work (*Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-317 [1981]). An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury" (*Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 [1993] citing *Russin v Picciano*).

The First Department has consistently held that motions for summary judgment be granted where there is no evidence that [a defendant] supervised or controlled a plaintiff's work (*In re New York City Asbestos Litigation. Philbin v. A.C. & S., Inc., Consol. Edison Co. of New York, Inc.*, 25 A.D.3d 374, 374, 807 N.Y.S.2d 84, 85 [1st Dept 2006] [finding that “the mere presence of [defendant’s] personnel at the work site, while perhaps indicative of a general right of inspection, does not suffice to create an inference of supervisory control] citing *Comes*, 82 N.Y.2d at 877; *Mazzocchi v International Business Machines, Inc.*, 294 A.D.2d at 151, 152 [1st Dept 2002]).

Tishman claims that plaintiff’s medical records show that his lung cancer was caused solely and exclusively by cigarette smoking; however, argue that even if plaintiff’s illness were to have been caused by asbestos exposure, Tishman could not have caused such illness. Tishman avers that it has never mined, milled, manufactured, sold, distributed, installed, or supplied any asbestos containing materials at the WTC (Exh H at 489, 17-25; 490, 1-20). Further, Tishman notes that Tishman contracted with the Port Authority to be its Agent in connection with the original construction of portions of the WTC (Exh I). Tishman claims that based on plaintiff’s description of the WTC during his alleged time of exposure, it can be inferred that plaintiff worked at the WTC in 1974 and not during the original construction.

Mr. Cannon testified that he worked at the WTC in 1966; however, he also testified that there were tenants in the buildings during the time of his work and that both towers had been completely built up and enclosed (Mot, Exh A at 284-286). Tishman notes that there were no tenants in the WTC in 1966. Additionally, Tishman points to plaintiff’s deposition where he testified that he was employed by Forest while working at the WTC. In contrast to plaintiff’s deposition, Tishman attach plaintiff’s social security and union records, which demonstrate that

plaintiff was employed by Forest in 1974 and not in 1966 (Mot, Exh J). The Court agrees with Tishman “it seems more likely that he worked at the WTC site in 1974 in the tenant space” (Mot at 17, ¶81). However, the Court does not agree that Tishman had no role at the WTC by 1974.

In opposition, plaintiff raises an issue of fact as to Tishman’s involvement in oversight of work at the WTC and thus on the issue of whether Tishman supervised or controlled plaintiff’s work. As noted above, pursuant to Labor Law § 200 a party charged with having a duty to provide individuals with a safe place to work, must have the authority to control the activity which brought about the injury. To demonstrate that Tishman did indeed have the authority to control Mr. Cannon’s work removing asbestos at the WTC, plaintiff attaches relevant sections of a contract between Port Authority and Tishman dated April 1, 1967 (“Contract”) (Aff in Opp, Exh 7).

Defendant concedes that Port Authority contracted with Tishman for Tishman to be Port Authority’s Agent in connection with the original construction of portions of the WTC (Mot, Exh I). However, Tishman avers that pursuant to the Contract, Tishman was only involved in the construction of the WTC as an agent to the Port Authority in connection with original portions of the WTC (*id.*). Further, Tishman notes that plaintiff’s testimony that he was employed by Forest, and no one else, establishes that Tishman did not supervise and/or control plaintiff’s work at the WTC (Mot, Exh A at 289, 342-343). As to the Contract and the use of asbestos, plaintiff claims that pursuant to the Contract, it was only responsible for “assist[ing] the [Port] Authority in providing all labor, materials . . . in conformity with the plans and specifications prepared or to be prepared by architects and engineers selected by [Port] Authority” (Mot, Exh I at 2). Tishman claims that this clause of the Contract makes clear that it was not Tishman’s decision to use asbestos containing materials at the WTC site.

The Court has previously addressed Tishman's role in the WTC construction and their duties arising from the use of ultrahazardous asbestos-related work. In contrast to Tishman's claims that it was not responsible for asbestos-related work at the WTC, the Court has found that Tishman was the general contractor/construction manager [as an agent to the Port Authority via the Contract] at the WTC and was responsible for asbestos-related work being performed during the construction (*Blenkensopp v. A.O. Smith Water Products, et al.*, Index No. 104633/07 at 2 [Sup. Ct. NY Cty. Jan. 30, 2012] [finding that evidence suggests that Tishman had the authority to control the fireproofing spray operations and, equally important, knew that such activities created a hazardous working environment citing *Comes* 82 NY at 877; *Russin* 54 NY2d at 317]).

The Court addressed near-identical issues in four decisions and found that where plaintiff alleged that he had been exposed to asbestos at the WTC from, among other things, fireproofing spray, and in each case this court held that there were issues of fact concerning Tishman's knowledge of the dangers associated with the use of such product at the WTC sufficient to deny it summary judgment" (*id.* citing *Doherty v A.C.ceS., Inc., et al.*, Index No. 123065/01 [Sup. Ct. NY Cty. 2012]; *Wulsh v A.O. Smith Water Products, et al.*, Index No. 190358/09,2010 NY Slip Op 33523U [Sup. Ct. NY Cty. 2010]; *Kersten v A.O. Smith Water Products, et al.*, Index No. 190129/10,2011 NY Slip Op 30066U [Sup. Ct. NY Cty. 2010]; *Robinson v A.O. Smith Water Products, et al.*, Index No. 1901 70/10,2011 NY Slip Op 32037U [Sup. Ct. NY Cty. 2011]).

The case at bar is distinct from the Court's previous findings in that it involves the removal of asbestos rather than its application as supervised by Tishman. The crux of the Court's analysis of the present motion hinges on whether Tishman was in fact the general contractor/construction manager [as an agent to the Port Authority via the Contract] at the WTC during the time that plaintiff performed work removing asbestos at the WTC. Plaintiff argues

that even if Tishman was no longer the general contractor at the WTC, that Tishman is still liable for plaintiff's asbestos related disease because Tishman's negligence, as adjudicated in prior case law, "launched a force or instrument of harm" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 143 [2002] citing *H.R. Moch Co. Inc., v Rensselaer Water Co.*, 247 NY 160 [1928]).

In order for liability to be incurred for the injuries sustained by an employee of a subcontractor, it must be proven, for purposes of common-law negligence and NYLL §200, that Tishman exercised actual supervision and control over plaintiff's activity. If Tishman had indeed finished it's work at the WTC, no such supervision and control can be attributed to plaintiff's work. Plaintiff's testimony, social security records, and union records demonstrate that plaintiff was employed by Forest in 1974, a year which Tishman alleges its role as general contractor ceased (Mot, Exh J-K). However, upon close examination of the Contract the Court finds that Tishman was under a contractual obligation with regards to electrical work, the type of work which plaintiff was engaged in.

Pursuant to the Contract, Tishman had a duty attached to construction work including electrical work performed by plaintiff. Tishman was contracted to act as general contractor until the completion of the task of constructing the WTC. Pursuant to the Contract, Tishman was responsible for "[a]ll construction work as necessary or desirable to render World Trade Center complete and ready for occupancy and use, including interior and exterior finishes and walls, *electrical*, plumbing, mechanical heating and ventilating and air-conditioning systems, and elevators and escalators" (Mot, Exh I at 4-5, section 1.03 (f) VIII).

The Court finds Tishman's argument that it was under no obligation to plaintiff as general contractor because it's work had finished during the stage of construction in which plaintiff worked at the WTC to be unavailing. The Contract clearly states that Tishman was

responsible for all construction work necessary including electrical work. While the contract is silent on a defined term or year of completion for the WTC project, the Contract holds Tishman responsible for “all construction work . . . including . . . electrical” (*id.*).

Regardless of whether plaintiff worked at the WTC in 1974, when the building had been enclosed, or during the original construction of the WTC, Tishman owed a duty to plaintiff. Tishman’s argument that it had completed its role as General Contractor while electrical work was installed at the WTC is in direct contrast to the plain language of the Contract. Tishman had a responsibility to oversee and control the electrical work performed by plaintiff, which created a duty to provide a safe work place for plaintiff. Plaintiff has raised issues of fact concerning Tishman’s knowledge of the dangers associated with the use of asbestos product at the WTC and concerning the Contract sufficient to deny Tishman summary judgment. Thus, Tishman’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor Tishman on the grounds that said defendant has made a prima facie case demonstrating lack of duty; breach; or causation and to dismiss plaintiff’s Complaint and all cross-claims against Tishman is denied.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor Tishman on the grounds that said defendant has made a prima facie case demonstrating lack of duty; breach; or causation and to dismiss plaintiff’s Complaint and all cross-claims against Tishman is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendant with notice of entry.

This Constitutes the Decision/Order of the Court



11/30/2020

DATE

ADAM SILVERA, 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