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| <b>Velez v A.O. Smith Water Prods. Co.</b>                                                                                                                                                                                     |
| 2021 NY Slip Op 30020(U)                                                                                                                                                                                                       |
| January 5, 2021                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 190070/2018                                                                                                                                                                                                     |
| Judge: Adam Silvera                                                                                                                                                                                                            |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

PRESENT: HON. ADAM SILVERA

PART

IAS MOTION 13

*Justice*

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VERONICA VELEZ, AS EXECUTRIX FOR THE ESTATE  
OF JOSE M. VELEZ, AND VERONICA VELEZ,  
INDIVIDUALLY,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID  
SYSTEMS CORPORATION, AMCHEM PRODUCTS,  
INC., AMERICAN BILTRITE INC., AURORA PUMP  
COMPANY, BLACKMER, BORGWARNER MORSE TEC  
LLC, BURNHAM, LLC, BW/IP, INC. AND ITS WHOLLY  
OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS  
CORPORATION, F/K/A VIACOM INC., CERTAINTEED  
CORPORATION, CLEAVER BROOKS COMPANY, INC,  
COMPUDYNE CORPORATION, COURTER & COMPANY  
INCORPORATED, CRANE CO, CROSBY VALVE  
LLC, CROWN BOILER CO., DOMCO PRODUCTS TEXAS,  
INC, ECR INTERNATIONAL, CORP., ELECTROLUX HOME  
PRODUCTS, INC., FLOWSERVE US, INC., FMC  
CORPORATION, FORT KENT HOLDINGS, INC., FOSTER  
WHEELER, L.L.C., GARDNER DENVER, INC, GENERAL  
ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL  
LLC, IMO INDUSTRIES, INC, ITT INDUSTRIES, INC., ITT  
LLC., JENKINS BROS, KEELER-DORR-OLIVER BOILER  
COMPANY, KOHLER CO, LENNOX INDUSTRIES, INC,  
MARIO & DIBONO PLASTERING CO., INC, MORSE  
DIESEL, INC, NORTHROP GRUMMAN CORP. AS  
SUCCESSOR, O'CONNOR CONSTRUCTORS,  
INC., OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES,  
INC, PFIZER, INC. (PFIZER), RHEEM MANUFACTURING  
COMPANY, RILEY POWER INC, SLANT/FIN  
CORPORATION, SPIRAX SARCO, INC., THE FAIRBANKS  
COMPANY, TISHMAN LIQUIDATING CORP, TISHMAN  
REALTY & CONSTRUCTION CO., INC, TREADWELL  
CORPORATION, TURNER CONSTRUCTION COMPANY,  
U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE  
CORPORATION, UTICA BOILERS, INC., VELAN VALVE  
CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN, A  
DIVISION OF THE MARLEY-WYLAIN COMPANY, ZURN  
INDUSTRIES LLC INDIVIDUALLY AND SUCCESSOR TO  
ERIE IRON WORKS A/K/A ERIE CITY BOILERS,

Defendant.

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INDEX NO. 190070/2018MOTION DATE 05/11/2020MOTION SEQ. NO. 001

## DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245

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. Plaintiffs oppose the motion.

Tishman's motion contends that plaintiffs have 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 Jose Velez's ("Decedent") diagnosis of lung cancer, which plaintiff alleges was caused by his exposure to ultra-hazardous asbestos dust when he worked as a steamfitter installing various equipment (i.e. pipes, coils, gaskets, pumps, valves, etc.) at the World Trade Center ("WTC") construction worksite. Plaintiffs allege that Decedent worked as a steamfitter at the WTC for a few months on and off before the WTC was completed (Exh 5 at 64, 66). While working at the WTC, plaintiff testified that he was exposed to asbestos from both his direct work as well as a bystander to other trades.

Here, upon motion for summary judgment, Tishman alleges that it did not owe a duty to plaintiff and that there is no evidence that there was any asbestos contamination. Tishman alleges that plaintiffs have failed to demonstrate that Decedent's work was supervised or controlled by Tishman.

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 argues that plaintiff’s illness could not have been caused by Tishman as it has never mined, milled, manufactured, sold, distributed, installed, or supplied any asbestos containing materials at the WTC (Exh G at 489-490). 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 H). Tishman claims Decedent's social security records demonstrated that he worked for "John Grace & Co Inc" in 1986, years after the original construction of the WTC. However, Decedent testified that he may have worked for "Grace" in 1970 at the WTC but that he changed employers a lot (Mot, Exh 5 at 64). Decedent also testified that in November 1970 he joined the Local 638 Steamfitters Union and that the first location where he worked was the WTC. The Court notes that Tishman had a role at the WTC in 1970.

In opposition, plaintiffs raise 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 Decedent'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 Decedent's work at the WTC, plaintiff attaches relevant sections of a contract between Port Authority and Tishman dated April 1, 1967 ("Contract") (Aff in Opp, Exh 6).

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 H). 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 Decedent's testimony that tenants were in the lower floors of the building when he worked there and that the building was "pretty much closed in" demonstrates that construction was too far along for it to be 1970 (Exh A at 67, 400-401). As to the Contract and the use of asbestos, Tishman 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 ultra hazardous 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, 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. 190170/10, 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 that involved the use of 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 and union records demonstrate that plaintiff worked at the WTC in 1970, 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, plumbing, mechanical heating and ventilating and air-conditioning systems” (*id.*).

Regardless of whether plaintiff worked at the WTC in 1970, 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 pipes, coils, gaskets, pumps, valves were installed at the WTC is in direct contrast to the plain language of the Contract. Tishman had a responsibility to oversee and control the type of work performed by plaintiff, which created a duty to provide a safe work place for plaintiff.

The Court notes that in a recent decision in *Cannon v Amchem*, Index No. 190018/2018, motion sequence 001, dated November 30, 2020, this Court denied Tishman’s motion for summary judgment to dismiss a plaintiff’s complaint for the same reasons brought forth in the present motion. The Court found that “[r]egardless 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”(*id.* at 7). The Court examined the same Contract at issue in this case between Tishman and Port Authority and determined that 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” (*id.*). Here, the Court finds that the present case is analogous to that in *Cannon*.

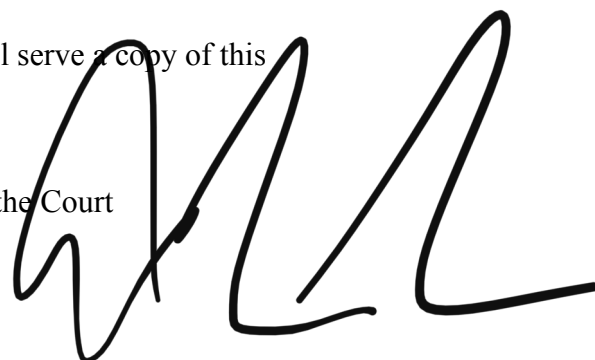
Plaintiff has raised issues of fact concerning Tishman’s knowledge of the dangers associated with the use of asbestos product at the WTC and concerning the Contract sufficient to deny Tishman summary judgment. Thus, Tishman’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor 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 is denied.

Accordingly, it is

ORDERED that defendant’s 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 plaintiffs’ Complaint and all cross-claims against Tishman is denied; and it is further

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

This Constitutes the Decision/Order of the Court



ADAM SILVERA, J.S.C.

1/5/2021

DATE

CHECK ONE:

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CASE DISPOSED

☒

NON-FINAL DISPOSITION

☐

GRANTED

☒

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

☐

REFERENCE

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐