Theophil v A.O. Smith Water Prods. Co
2022 NY Slip Op 32595(U)
August 1, 2022
Supreme Court, New York County
Docket Number: Index No. 190463/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **13**

Justice

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INDEX NO. 190463/2018

MOTION DATE

MOTION SEQ. NO. 004

WILLIAM THEOPHIL,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC.,AMERICAN BILTRITE INC, ARCONIC, INC, ARMSTRONG INTERNATIONAL, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BEAZER EAST, INC.,BLACKMER, BMCE INC.,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, CLYDE UNION, INC, CONSOLIDATED EDISON COMPANY, COURTER & COMPANY INCORPORATED, CRANE CO., CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, CROLL REYNOLDS ENGINEERING CO., INC, CROSBY VALVE LLC,CROWN BOILER CO., CUPPLES PRODUCTS CORPORATION, DANA COMPANIES, LLC,DOMCO PRODUCTS TEXAS, INC.,ELECTROLUX HOME PRODUCTS, INC.,FLOWSERVE US, INC.,FMC CORPORATION, FORT KENT HOLDINGS, INC.,FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC.,GOULDS PUMPS LLC,GRINNELL LLC,H.H. ROBERTSON COMPANY, HACON, INC.,IMO INDUSTRIES, INC, ITT LLC., KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LENNOX INDUSTRIES, INC, MARIO & DIBONO PLASTERING CO., INC, MILTON ROY COMPANY, MORSE DIESEL, INC.,NORTHROP GRUMMAN CORP. AS SUCCESSOR, O'CONNOR CONSTRUCTORS, INC.,OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RESEARCH-COTTRELL INCORPORATED, RILEY POWER INC, SEQUOIA VENTURES, INC.,SLANT/FIN CORPORATION, SPIRAX SARCO, INC.,SUPERIOR BOILER WORKS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN LIQUIDATING CORP., TISHMAN REALTY & CONSTRUCTION CO., INC, TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UNITED CONVEYOR CORPORATION, VIKING PUMP, INC.,WARREN PUMPS, LLC,WEIL-MCLAIN, A DIVISION OF THE MARLEY-

DECISION + ORDER ON MOTION

WYLAIN COMPANY, YUBA HEAT TRANSFER LLC,PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is hereby ordered that Defendant Arconic, Inc. f/k/a Aluminum Company of America's (hereinafter referred to as "ALCOA") motion for summary judgment is denied for the reasons set forth below.

The instant matter is premised upon Plaintiff William Theophil's diagnosis of mesothelioma as a result of his alleged exposure to asbestos. Plaintiff testified at his deposition that he worked at the World Trade Center for approximately three months in the late 1960s. Plaintiff, who is both a steamfitter and a member of the union, contends that he was exposed to asbestos during his time at the World Trade Center while working on the 7th floor of Tower A, by a fireproofing spray in which Plaintiff claims ALCOA is responsible. Plaintiff further contends that it was apparent he was within proximity of other employees who were engaged in spraying pursuant to ALCOA's contract. Conversely, ALCOA argues, *inter alia,* that Plaintiff was not exposed to asbestos by the spray that was used for the fireproofing and construction of the World Trade Center's curtain wall. ALCOA further contends that they had no control over Plaintiff, and thus, no duty was owed to the Plaintiff. Specifically, ALCOA contends that the spray insulation was performed by Mario and DiBono, a separate party who contracted with the Port Authority, and not ALCOA. ALCOA moves for summary judgment, and Plaintiff opposes. No reply papers were filed.

Pursuant to CPLR 3212(b), a motion for summary judgment, "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." "[T]he 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 demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers'". *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

Plaintiff provides that he was present at the time ALCOA conducted their operations, as "ALCOA and its spray subcontractor were still spraying asbestos – containing fireproofing as of April 21, 1970." Plaintiff's Opposition To Defendant ALCOA's Motion For Summary Judgment, p. 6, ¶ 23. Plaintiff also testified that he was in the presence of sprayers while the fireproofing took place. *See* Notice of Motion, Exh. H, Depo. Tr. of William Theophil dated July 7, 2020, p. 120, ln. 14-24. Conversely, ALCOA relies upon the testimony of the Plaintiff that he was not exposed to asbestos since the worksite was not enclosed. When asked to describe the seventh floor of the north tower, Plaintiff testified that there were no windows at the time. *See Id.* at p. 207, ln. 25 - p. 208, ln. 7. ALCOA also contends that "[a] review of plaintiff's own testimony reveals that the work he was performing while at the WTC was on interior portions of

the 7th floor, and not associated with Alcoa's installation of the curtain wall on the perimeter of the building." Memorandum of law, p. 2. It is long standing precedent that when deciding a motion for summary judgment, the Court must afford the non-moving party "the benefit of every favorable inference which can be drawn from the evidence." *Haseley v Abels,* 84 AD3d 480, 482 (1st Dept 2011) (internal citations omitted). Here, Plaintiff's testimony reflects that he was in the presence of sprayers during his time at the World Trade Center. In providing the benefit of every favorable inference to the Plaintiff, the Plaintiff has demonstrated that he was present where ALCOA conducted their operations. As such, ALCOA has failed to meet their initial burden to demonstrate that no triable issues of fact exist, and that Plaintiff has not been exposed to fireproofing spray containing asbestos.

Plaintiff further argues that ALCOA had complete control over the fireproofing spray pursuant to its contract, subjecting ALCOA to Labor Law § 200. Namely, Plaintiff contends that ALCOA proposed the use of CAFCO D brand asbestos containing fireproofing spray and controlled the application of the spray which Plaintiff was allegedly exposed to, such that ALCOA breached a duty of care to the Plaintiff. According to Plaintiff, ALCOA met with the Port Authority of New York, the landowner Tishman Realty & Construction Co., Inc., the construction manager, and the spray contractor Di Bono, wherein ALCOA prepared specifications of the spray, insisted on its use, and tested its product. *See* Plaintiff's Opposition, *supra,* at p. 8, ¶ 32. However, ALCOA refers to Plaintiff's deposition testimony to demonstrate that ALCOA did not supervise or control the Plaintiff's work. Specifically, ALCOA argues that Plaintiff testified he took his instructions from the deputy foreman who was employed by Coulter, and that only employees of Coulter instructed Plaintiff on how he conducted his work. *See* Notice of Motion, Exh. H, Depo. Tr. of William Theophil dated July 7, 2020, p. 209, ln. 2 –

12. Pursuant to Labor Law § 200(1), "[a]ll . . . devices . . . shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons." AOLCA states that the "[f]ireproofing of interior portions of the building were ongoing pursuant to Contract 113.00 between The Port Authority, as owner of the building, and Mario & DiBono Plastering. . . [which] was separate insulation work completely unrelated to Alcoa's installation of the curtain wall." Memorandum Of Law, p. 4. (internal italics omitted). The Appellate Division, First Department, in *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012), held that "[w]here 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 exercised supervisory control over the injury-producing work." In order to demonstrate whether a general contractor exercised supervisory control, the Courts must look at whether the general contractor "had the authority to control the activity bringing about the injury." *In re New York Asbestos Litig.*, 146 AD3d 461, 461 (1st Dept 2017) (internal quotations omitted). In the case at bar, questions of fact are raised as to ALCOA's supervision and control over the fireproofing spray. Namely, that ALCOA instructed Mario & Di Bono on how to test the performance of CAFCO. *See* Plaintiff's Opposition, Exh. 18, ALCOA's letter to Di Bono, dated October 6, 1967. As such, issues of fact exist precluding summary judgment.

As genuine issues of material facts exist regarding Plaintiff's alleged exposure to asbestos, and ALCOA's contractual obligations including the control over the fireproofing spray, ALCOA's motion for summary judgment is denied.

Accordingly, it is

ORDERED that Defendant Aluminum Company of America's motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the court.

8/1/2022
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE