

**Calamari v Bakers Pride Oven Co.**

2012 NY Slip Op 30517(U)

February 27, 2012

Sup Ct, NY County

Docket Number: 190186/10

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER  
*Justice*

PART 30

Index Number : 190186/2010  
CALAMARI, PATRICIA  
VS.  
BAKERS PRIDE OVEN COMPANY  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 190186/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the  
memorandum decision dated 2-27-12.

**FILED**  
MAR - 5 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 2-27-12

  
\_\_\_\_\_, J.S.C.  
**HON. SHERRY KLEIN HEITLER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

----- X

PATRICIA CALAMARI,

Index No. 190186/10  
Motion Seq. 001

Plaintiffs,

**DECISION AND ORDER**

-against-

BAKERS PRIDE OVEN CO., et al.,

Defendants.

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**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant David Fabricators of N.Y., Inc. s/h/a David Fabricators of New York, Inc. (hereinafter, "David Fabricators"), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is held in abeyance pending an application to the Workers' Compensation Board for a determination of the parties' rights under the Workers' Compensation Law.

**BACKGROUND**

This action was commenced by Patricia Calamari, now deceased ("Plaintiff"), to recover for personal injuries allegedly caused by Ms. Calamari's exposure to asbestos at, among other places, a factory operated by defendant David Fabricators. Plaintiff testified<sup>1</sup> that she was exposed to asbestos while visiting her father at David Fabricators from the age of 6 or 7 until her mid-teens, at least once a month during her youth, and increasing in frequency as she grew older.

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<sup>1</sup> Ms. Calamari was deposed on July 6, 2010 and September 30, 2010. Copies of her deposition transcripts are submitted as plaintiff's exhibit A and B.

Ms. Calamari testified that she was exposed from sweeping dust off of the factory floor and also from laundering the clothes she had worn during these visits, which she claimed were covered in asbestos-containing dust. While Plaintiff continued to visit her father at David Fabricators once she began to attend college, it is not argued by Plaintiff that the defendant caused Ms. Calamari to be exposed during this time period, or at any other time thereafter.<sup>2</sup>

David Fabricators argues that Plaintiff's claims are barred by New York's Workers' Compensation Law ("WCL") because Ms. Calamari's alleged asbestos exposure occurred during the course of her employment there. It also argues that any take-home exposure from asbestos Ms. Calamari may have suffered from laundering her own clothes is precluded by the WCL and by the Court of Appeals ruling in *Holdampf v A.C. & S., Inc.*, 5 NY3d 486 (2005).

#### DISCUSSION

Workers' Compensation is the sole exclusive remedy available against an employer when an employee is injured during the course of employment. WCL § 11. The universe of injuries covered by the WCL is extremely broad and includes not only physical injuries, but also asbestos-related diseases. *See Acevedo v Consolidated Edison of New York Inc.*, 189 AD2d 497, 500 (1st Dept 1995); *see also Blair v Bendix Corp.*, 85 NY2d 834 (1995). Under certain circumstances, family members providing unpaid services to a for-profit business may be considered employees for workers' compensation coverage purposes. *See e.g.*, WCL §§ 2, 3; *see also Minkowitz, Practice Commentaries*, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 3, at 349-53.

Here, David Fabricators contends that all of Ms. Calamari's alleged incidents of exposure

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<sup>2</sup> See Affirmation of James M. Kramer dated October 21, 2011, pp. 2, 9.

at its factory took place while she was in its employ and her claims against it are thus barred by the WCL. Plaintiff argues that Ms. Calamari was not a David Fabricator employee when she was exposed such that the WCL does not apply to this matter.

The Workers' Compensation Board has primary jurisdiction to determine factual issues concerning whether an individual is covered by the WCL. *See O'Rourke v Long*, 41 NY2d 219, 228 (1976) ("where the availability of workmen's compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions. The Legislature has placed the responsibility for these determinations with the Workers' Compensation Board and there it must remain"); *Botwinick v Ogden*, 59 NY2d 909, 911 (1983) ("primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board . . . it is therefore inappropriate for the courts to express views with respect thereto pending determination by the board"); *Valenziano v Niki Trading Corp.*, 21 AD3d 818, 820 (1st Dept 2005).

The controlling authorities confirm that this court should not express its opinion regarding the applicability of the WCL in these circumstances where the parties have failed to avail themselves of the expertise of the Workers' Compensation Board in the first instance. *See Kayen v Shames Realty, LLC*, 298 AD2d 362, 363 (2d Dept 2002) ("the Supreme Court should not have decided the respective motions for summary judgment . . . and the matter should be referred to the Workers' Compensation Board for a determination . . .") Since Ms. Calamari's employment status is the primary issue between the parties, and despite her testimony that she was not employed by David Fabricators during her youth, the undisputed facts are that, among

other things, she swept and cleaned her father's office and the factory floor, sometimes for multiple hours a day, over the course of many years. Simply put, her deposition testimony raises the question of whether or not for purposes of the WCL Ms. Calamari was employed by David Fabricators. This court is required to defer to the Workers' Compensation Board for the answer to this question. *See O'Rourke, supra; Valenziano, supra.*

Therefore, it is hereby

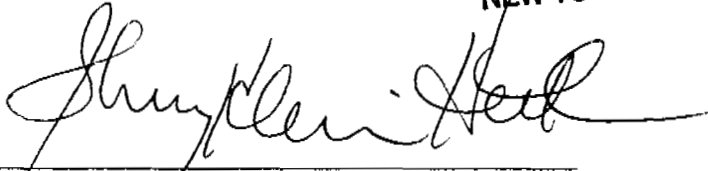
ORDERED that David Fabricators' motion for summary judgment is held in abeyance pending a prompt referral by plaintiff to the Workers' Compensation Board for a determination of the parties' status and/or rights and obligations under the Workers' Compensation Law.

It is respectfully requested that the Workers' Compensation Board expedite Plaintiff's application. Upon receipt of the Workers' Compensation Board determination, either party may reinstate the within motion on 10 days written notice to the court and the opposing party.

This constitutes the decision and order of the court.

**FILED**  
MAR - 5 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

DATED: Feb 27, 2012



SHERRY KLEIN HEITLER  
J.S.C.