

Szamatulski v American Art Clay Co., Inc.
2012 NY Slip Op 31850(U)
July 11, 2012
Supreme Court, New York County
Docket Number: 190079/11
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

Ronald Szamatulski

INDEX NO.

190079/11

MOTION DATE

MOTION SEQ. NO.

012

MOTION CAL. NO.

American Art Clay Co.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the
memorandum decision dated 7.11.12

FILED

JUL 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7.11.12

[Signature]
HON. SHERRY KLEIN HEITLER ^{s.c.}

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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

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

----- X
RONALD SZAMATULSKI,

Index No. 190079/11
Motion Seq. 012

Plaintiff,

DECISION & ORDER

- against -

AMERICAN ART CLAY COMPANY, INC., *et al.*

FILED

Defendants.

JUL 16 2012

----- X
SHERRY KLEIN HEITLER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Tishman Liquidating Corporation, Inc. ("Tishman Liquidating")¹ 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 granted.

BACKGROUND

This action was commenced on or about March 2, 2011 by Ronald Szamatulski ("Plaintiff") to recover for personal injuries caused by his exposure to asbestos. On April 12, 2011, Plaintiff served answers to interrogatories on all counsel, wherein Plaintiff identified "Tishman" as the "General Contractor" for the construction of an apartment building at 190 East 72nd Street, New York, NY ("Tower East"), where he worked as a pipefitter and plumber for approximately 18 months from 1961 through 1962.

¹ According to the defendant, Tishman Liquidating was established in 1978 for the purpose of liquidating some of the assets of Tishman Realty & Construction Co., Inc. ("Tishman Realty") for certain insurance policies.

Mr. Szamatulski worked as a pipe fitter for H. Sands Company at the Tower East worksite. (Defendant's exhibit B, p. 553). He testified² that he was exposed to asbestos primarily from the work of pipe coverers who used asbestos in his presence while cutting pipe insulation in the Tower East boiler room. (Deposition, p. 235).

The defendant filed this motion for summary judgment on the grounds that Mr. Szamatulski has failed to come forward with any proof that he was exposed to asbestos-containing products manufactured, rebranded, sold, shipped, installed, or distributed by Tishman Liquidating or Tishman Realty, or that either Tishman entity was even present at Tower East during the time Plaintiff worked there. The defendant also argues that, even if it was present at the construction of Tower East, Plaintiff has presented no evidence that Tishman Liquidating directed, supervised or controlled any of Mr. Szamatulski's work. Plaintiff suggests that Tishman Realty was not just present at the worksite, but was awarded the exclusive construction contract for the Tower East apartment building. Thus Plaintiff argues there are issues of fact regarding the defendant's supervision and control over Mr. Szamatulski's work sufficient to withstand summary judgment.

DISCUSSION

A party moving for summary judgment must demonstrate the absence of any material issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). One opposing a motion for summary judgment must "produce evidentiary proof in admissible

² Mr. Szamatulski was deposed over the course of nine (9) days: June 28-30, 2011, and August 2, 10, 11, 12, and 15. A Copy of the transcript was submitted as defendant's exhibit "B" ("Deposition").

form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form. . .” *Id.* In asbestos-related litigation, if a defendant has made a *prima facie* showing of entitlement to summary judgment, “[t]he plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant’s liability may be reasonably inferred.” *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Tishman Liquidating has demonstrated from Mr. Szamatulski’s deposition testimony that he did not identify it as Tower East’s general contractor. (Deposition, pp. 233-34):

Q: And do you know who employed those pipe coverers in New York City?

A: That I -- I can’t recall who they were. I don’t know if I could recall, but I have to give that some thought because I don’t know right now because I didn’t expect to know who they were.
I mean, we’re talking New York City in the place that we – we didn’t know what was going on. We, we were employed by the Local 638 and went on the job, and we did it, but I do know that we worked for H. Sands Company. I do know that Turner was the main contractor, and let me see, Tishman or – there was another name over there.
I’m trying to think, and I think they, they did the plumbing on it. Schlosberg or something like that or some name anyway. I don’t know if Schlosberg is the right name or not, but they, they did the plumbing on it.

As his deposition continued, there is no further mention of Tishman. Mr. Szamatulski did however more positively testify to his belief that Turner was the Tower East general contractor. (Deposition, pp. 555-58):

Q: Okay. Why do you believe that Turner was the general contractor at the job, sir?

A: Well, because of the fact that they had Turner on their building that they went into, and they had meetings there and all. My bosses and all, they had meetings about the job and everything like that. And Turner, they went in the Turner building. And Turner was the main contractor more or less directing the work to continue.

Q: And when you say the Turner building, is that a shack on the site?

A: Yeah.

* * * *

Q: Do you recall if there was anything written on that shack?

A: Yeah. Turner.

* * * *

Q: Was your supervisor at that site someone from Sands Company?

A: Yes.

Q: And did you take your direction from that person from Sands Company?

MR. STRAUSS: Objection to form.

THE WITNESS: Yes.

* * * *

Q: Did anyone other than someone from Sands Company tell you how to do your work at that site?

MR. STRAUSS: Objection to form.

THE WITNESS: Well, you had Turner people around coming around watching and making sure it was being done right, especially with the hangers and to make sure they're in the right place for holding the pipe. And I'm pretty sure we had other people over there, and they were from Turner.

This testimony is enough to satisfy Tishman's *prima facie* burden. Plaintiff submits a memorandum of law which suggests that as a matter of law Tishman Liquidating is strictly liable for Mr. Szamatulski's injuries pursuant to section 200 of the Labor Law, which is a codification of the common-law duty imposed upon owners or general contractors to provide construction site workers with a safe place to work. *Nevins v Essex Owners Corp.*, 276 AD2d 315 (1st Dept 2000). But where, as here, a claim arises out of alleged defects or dangers arising from a contractor's methods or materials, recovery against the general contractor "cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993). In this regard, "[g]eneral

supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed.” *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007); see also *Matthews v A.C. & S.*, Index No. 118368/01 (Sup. Ct. NY Cty. Dec. 6, 2002, Freedman, J., at 1) (the “mere presence of a representative of a general contractor who has no supervisory role or control” over the plaintiff does not render the contractor liable where there is no evidence to show that the defendant contractor was present “at the exact time plaintiff was present”).

In this respect, in addition to its memorandum of law, Plaintiff submits an affidavit which Mr. Szamatulski issued after his deposition, neither of which are sufficient to rebut the defendant’s *prima facie* case. Mr. Szamatulski’s affidavit merely serves to confirm that he worked at Tower East. It does not mention whether or not Tishman was present at the Tower East construction site or whether he took any directions from Tishman on that job. Moreover, Plaintiff’s answering papers do not evidence any supervision and control sufficient to render Tishman Liquidating liable for Mr. Szamatulski’s injuries. *Ross, supra*, 81 NY2d at 505; *Hughes, supra*, 40 AD3d at 306.

Plaintiff merely speculates that if Tishman Realty was a general contractor at Tower East, Tishman Liquidating is legally responsible for Mr. Szamatulski’s alleged asbestos exposures from his work at that construction site. Accordingly, it is hereby

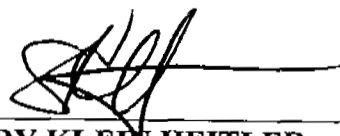
ORDERED that Tishman Liquidating Corporation, Inc.’s motion for summary judgment is granted, and that this action and any cross-claims related to this defendant are severed and dismissed in their entirety, and it is further

ORDERED that this case shall continue against the remaining defendants, and it is further
ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 7. 11. 12



SHERRY KLEIN HEITLER
J.S.C.

FILED

JUL 16 2012

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