

DeFilippis v A.O. Smith Water Prod. Co.

2012 NY Slip Op 32833(U)

November 29, 2012

Sup Ct, New York County

Docket Number: 104644/2003

Judge: Sherry Klein Heitler

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

FRANCIS R. DEFILIPPIS and DOROTHY DEFILIPPIS,

INDEX NO. 104644/03

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

AMERICAN OPTICAL, et al.,

MOTION CAL. NO. _____

Defendants.

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This motion is decided in accordance with the attached memorandum decision dated 11.29.12

FILED

DEC 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11.29.12

SKH
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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
FRANCIS R. DEFILIPPIS and DOROTHY DEFILIPPIS,

Index No. 104644/2003
Motion Seq. 001

Plaintiffs,

DECISION & ORDER

- against -

A.O. SMITH WATER PRODUCTS CO., *et. al.*,

FILED

Defendant(s).

DEC 03 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

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

BACKGROUND

Plaintiffs Francis DeFilippis and Dorothy DeFilippis commenced this action on or about March 12, 2003 to recover for personal injuries caused by Mr. DeFilippis' exposure to asbestos. Mr. DeFilippis was deposed over the course of three days from July 24, 2012 to July 26, 2012.² He testified that he worked as an ironworker at various sites throughout New York City and Long Island from 1953 to 1999 including powerhouses, airports, and hospitals. Among other construction sites, Mr. DeFilippis testified that he worked at Fordham University in the Bronx where he worked with welding rods, and the CBS Staging Warehouse in Manhattan where he hung cradles to

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.

² Copies of Mr. DeFilippis' deposition transcripts are submitted as plaintiffs' exhibits B through D ("Deposition").

reinforce the ceiling, among other things.

On this motion for summary judgment Tishman asserts that Mr. DeFilippis could not positively identify Tishman as the general contractor at any of the locations at which he worked throughout his career. Tishman also asserts that even if it had been the general contractor at any of the sites at issue, there is no evidence that it directed, supervised, or controlled any of Mr. DeFilippis' work as to render it liable under New York's Labor Law. Plaintiffs argue that Mr. DeFilippis' identification of Tishman as the general contractor that oversaw and directed his work on a number of jobs raises a material issue of fact regarding Tishman's liability sufficient to preclude summary judgment.

DISCUSSION

Summary judgement is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 1995). A party moving for summary judgment must demonstrate the absence of any material issue of fact to be granted judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Should a moving defendant make a *prima facie* showing of entitlement to summary judgment, the plaintiff must then show there exists a triable issue of fact. *See id.* In asbestos-related litigation, it is sufficient if the plaintiff shows facts and conditions from which the defendant's liability may be reasonably inferred. *See Reid v Georgia Pacific Corp.* 212 AD2d 462, 463 (1st Dept 1995).

Tishman argues that plaintiffs have not demonstrated that Tishman was the general contractor at any of Mr. DeFilippis' work sites. But Tishman overlooks that Mr. DeFilippis testified to his belief that, as two examples, Tishman was the general contractor at Fordham University and the CBS Staging Warehouse (Deposition pp. 275, 277, 78):

Q. Do you know where you went after working at the 39th Street powerhouse for Con Ed?

A. I think we went to Fordham University.

* * * *

Q. Was there a general contractor at this job?

A. I think the general contractor there was Tishman.

* * * *

Q. How long were you at CBS?

A. About a month, a month and a half.

Q. Was there a general contractor there?

A. Yes.

Q. Do you remember who it was?

A. I think it was Tishman, I think it was.

Tishman relies on Mr. DeFilippis' testimony on later cross-examination to argue that he does not actually recall who the general contractors were at these sites (Deposition pp. 472, 473, 469, 470) objections omitted):

Q. Let's go to another location while you were working for Hallen and that's Fordham, Fordham University.

* * * *

Q. Was there a general contractor that you associate with this? . . .

A. There was but I don't recall who it was.

* * * *

Q. . . . And what CBS building are we talking about, where was the location?

A. Eighth Avenue, I think, 59th Street and Eighth Avenue. It's a warehouse where they keep all the props and all the stage equipment.

* * * *

Q. And was Hallen the only contractor called in on this project?

A. As far as I know, yes.

Q. So, there was no GC for that project?

A. Not that I know of.

The court's function on a motion for summary judgment is not to determine a witness' credibility, but to determine whether there exist factual issues that require resolution at trial. *See Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997); *see also Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . ."). That Mr. DeFilippis' testimony may contain discrepancies goes only to the weight of such testimony and not to its admissibility. *Dollas, supra*. For purposes of this motion, therefore, Mr. DeFilippis' testimony is sufficient to raise material issues for the trier of fact that Tishman acted as general contractor at the relevant sites, and in this regard Tishman's motion is denied.

However, that Tishman may have been the general contractor at these sites does not automatically render it liable under Labor Law § 200³, which codifies the common-law duty imposed on an owner or general contractor to provide construction workers with a safe place to work. *See Nevins v Essex Owners Corp.*, 276 AD2d 315 (1st Dept 2000). Liability under § 200 is limited to parties who "exercise[] direct supervisory control over the manner in which the activity alleged to have caused the injury was performed" (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 380-81 [1st Dept 2007]), or who create or have actual or constructive notice of an unsafe condition which causes the injury (*see Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 877

³ Labor Law § 200, entitled "General duty to protect health and safety of employees; enforcement", provides in relevant part, that

"1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

[1993]). In this regard, plaintiffs must show that Tishman had the “authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that Tishman had actual or constructive notice of the defective condition that caused the injury (*see LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470, 471 [2nd Dept 2006]; *see also Comes, supra*, at 878).

Mr. DeFilippis was questioned in detail about the role that general contractors played at his job sites. He responded, in relevant part, as follows (Deposition, pp. 644-648, objections omitted):

- Q. You’ve testified that on a number of jobs the general contractor would speak to you or your partner Patty?
- A. Yes.
- Q. What was the reason you had to speak to the general contractor?
- A. The work that he wanted done for the day, how far we advanced, what we were doing, you know, the meetings that were available, you know. Everything was job related.
- Q. If the work that was done by your employer wasn’t up to the standards of the general contractor, what would happen? . . .
- A. We would have to – you’d have to do it to what the standard was.
- Q. Would the general contractor comment about the work done by your employer?
- . . .
- A. Yes.
- Q. And is this the case regardless of who the general contractor was on the jobs you worked? . . .
- A. Yes.
- Q. Did you ever observe employees of any of the general contractors that were on sites where you worked overseeing the work you were doing? . . .
- A. Yes.
- Q. Were those general contractors also responsible for the work of other subcontractors on the site? . . .
- A. Yes. . . .
- Q. Is that the case for jobs sites where Tishman was the contractor? . . .
- A. Yes. . . .

- * 7]
- Q. And you made a comment earlier today when discussing jobs where Morse Diesel was the contractor where you indicated that on alteration jobs the general contractor would tell you to remove asbestos before you connected hangers to steel; do you recall that testimony?
- A. Yes
- Q. Was that only done by Morse Diesel general contractors or other general contractors? . . .
- A. It was done by all the general contractors.
- Q. And why would they tell you to do that?
- A. That's the only way they could get the -- that's the only way you could do the job, you know.
- Q. Why is that?
- A. Well, if you had to lay out something, you had to take the measurement on the ground, you'd get the scaffold, you'd go up and you'd scrape it. They wouldn't take a laborer or somebody else off the job that they were doing and send it to your job site to scrape it and all, so you did all the scraping and all the, all the preparation that was necessary.
- Q. Do you believe that when you followed those instructions that you breathed in asbestos dust? . . .
- A. Yes.

This testimony raises the issue of Tishman's authority to supervise and control the conditions which plaintiffs allege caused Mr. DeFilippis' injuries, and, at the very least, it raises the issue of Tishman's notice thereof. Therefore, with regard to whether Tishman is liable under Labor Law § 200, this motion is similarly denied.

Accordingly, it is hereby

ORDERED that Tishman Liquidating Corporation, Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 11.29.12

FILED
DEC 03 2012
NEW YORK
SHERRY KLEIN HEICLER'S OFFICE
J.S.C.