

Gordon v Bird & Son, Inc.

2013 NY Slip Op 31228(U)

May 31, 2013

Supreme Court, New York County

Docket Number: 190190/12

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 : 190190/2012
GORDON, MILTON A
vs
BIRD & SON, INC.
Sequence Number : 006
SUMMARY JUDGMENT (CUSHMAN WAKEFIELD)

INDEX NO. 190190/12
MOTION DATE
MOTION SEQ. NO. 006

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 5.31.13

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

Dated: 5.31.13

HON. SHERRY KLEIN HEITLER, J.S.C.

- 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
MILTON GORDON,

Index No.: 190190/12
Motion Seq. 006

Plaintiff,

DECISION & ORDER

-against-

BIRD & SON, INC., et al.,

Defendants.

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

Plaintiff Milton Gordon commenced this action on January 15, 2013 to recover for injuries¹ allegedly caused by his exposure to asbestos. From approximately 1968 to 2007 he worked as a mason at commercial construction sites throughout New York City. In this capacity Mr. Gordon primarily cut and installed sheetrock and applied joint compound to seams. Mr. Gordon alleges that he was exposed to asbestos when he breathed in dust created from this work.

Mr. Gordon testified² that defendant Cushman & Wakefield, Inc. (“Cushman”) and “Tishman” were the general contractors at almost all of the buildings at which he worked throughout his career. For the most part, he could not identify which buildings were managed by which company because he worked at so many job sites, but he specifically recalled that the Lionel Hampton Houses construction project located at 130th Street and 8th Avenue, where he

¹ Mr. Gordon has been diagnosed with lung cancer.

² Mr. Gordon was deposed over the course of six days in August and September of 2012. Portions of Mr. Gordon’s deposition transcripts were submitted as Exhibit A to defendant Cushman & Wakefield, Inc.’s moving papers (“Deposition”). Full copies were submitted by email on May 15, 2013.

worked for about three months in the 1970s, was managed by Cushman. In this regard, he testified as follows (Deposition, pp. 700-703):

- Q. How did you know that Cushman was the general contractor at that site?
- A. They have shanties on the job site. All contractors have shanties on the job site.
- Q. What exactly is a shanty? . . .
- A. Not a shanty, a trailer. . . .
- Q. Why do you think that Cushman was there because of the trailers?
- A. Because the writing was on the wall -- the trailer.
- Q. What did the writing say?
- A. Cushman Wakefield. . . .

* * * *

- Q. Do you recall anyone from Cushman working at that site?
- A. Yes, of course. . . .
- Q. And what did they do at that site?
- A. They managed their -- the job. They were the bosses of the job.
- Q. Did you report to them?
- A. No, of course not.
- Q. Who reported to them?
- A. The contractors, subcontractors.
- Q. And you were employed by a subcontractor there?
- A. I was employed by the Local 780, that's who I was employed by.
- Q. So you were working for the Local 780 when you worked at the Lionel Hampton Houses.
- A. Yes, who in turn -- Dic Underhill, Dic Concrete, one of those major concrete corporations. Those are the ones that paid me by check.
- Q. And did you personally have any contact with anyone who worked at Cushman?
- A. No.
- Q. Did you wear any personal protective equipment when you worked at that site?
- A. No.
- Q. Did anyone at the building, at the site, wear any protective equipment?
- A. Yes. . . .

- Q. Who wore the personal protective equipment?
- A. The men that were installing the boilers and the plumbers and the ironworkers.
- Q. Did they also work for Dic Underhill?
- A. No.
- Q. Who did they work for?
- A. Their own companies. . . .
- Q. Did you ever take any direction from anyone who was employed by Cushman & Wakefield?
- A. No, of course not.

Cushman moves pursuant to CPLR 3212 for summary judgment on the ground that it did not supervise, control, or manage any of the job sites where Mr. Gordon's alleged exposures occurred. Relying solely on Mr. Gordon's deposition testimony, plaintiff argues that Cushman violated New York State Labor Law §§ 200³ and 241(6)⁴ and the common law by failing to provide Mr. Gordon with a safe work environment.⁵

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or

³ Labor Law § 200 provides in relevant part that "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."

⁴ Labor Law § 241(6) provides that "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

⁵ At oral argument, plaintiff's counsel requested the opportunity to depose a corporate representative of Cushman. On May 1, 2013, Cushman produced Mr. Todd Schwartz, Senior Managing Director of Global Operations, who testified that Cushman has never served as a general contractor at any construction site in New York City.

general contractor to provide construction site workers with a safe place to work. *Nevins v Essex Owners Corp.*, 276 AD2d 315, 316 (1st Dept 2000). “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 N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993) (quoting *Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). It is settled law that “[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).

Assuming, *arguendo*, that Cushman was a general contractor in New York City during the plaintiff’s exposure period, the evidence fails to denote the degree of supervisory control necessary to support plaintiff’s Labor Law § 200 claims against it. *See Mazzocchi v IBM*, 294 AD2d 151, 151 (1st Dept 2002) (“It does not avail plaintiff that defendant maintained a shack on the work site for employees who had a right to inspect the progress of the work or other general right of supervision.”); *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003) (“There is no evidence that defendant general contractor gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200.”); *Hughes, supra*.

Moreover, plaintiff has failed to cite any Industrial Code standards which would support the imposition of a nondelegable duty on Cushman under Labor Law § 241(6) or provide any evidence to show that Cushman was negligent under the common law.

Accordingly, it is hereby

ORDERED that Cushman & Wakefield, 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

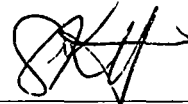
ORDERED that this case shall continue against the remaining defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This is the decision and order of the court.

ENTER:

DATED: 5.31.13



SHERRY KLEIN HEITLER
J.S.C.