

Krauss v 3M Co.

2013 NY Slip Op 31998(U)

August 22, 2013

Supreme Court, New York County

Docket Number: 190020/12

Judge: Sherry Klein Heitler

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190020/2012
KRAUSS, WILLIAM E.
vs.
3M COMPANY
SEQUENCE NUMBER : 013
SUMMARY JUDGMENT (CUSHMAN + WAKEFIELD)

INDEX NO. 190020/12
MOTION DATE _____
MOTION SEQ. NO. 013

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 8.22.13**

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

FILED

AUG 28 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8.22.13

[Signature], 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
WILLIAM KRAUSS and JEANNE KRAUSS,

Plaintiff,

-against-

3M COMPANY, et al.,

Defendants.
-----X

SHERRY KLEIN HEITLER, J:

Index No.: 190020/12
Motion Seq. 013

DECISION & ORDER

FILED

AUG 28 2013

COUNTY CLERK'S OFFICE
NEW YORK

In this asbestos personal injury action, defendant Cushman & Wakefield, Inc. (“Cushman”) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it on the ground that plaintiffs have not shown that plaintiff William E. Krauss was exposed to asbestos by any product manufactured, distributed, or installed by Cushman, or that Cushman supervised or controlled any of the work which gave rise to Mr. Krauss’s alleged asbestos exposure. Plaintiffs contend that Cushman is responsible for Mr. Krauss’s injuries under New York’s Labor Law and the common law insofar as it negligently supervised certain of his job sites. As more fully set forth below, the motion is granted.

Plaintiffs commenced this action to recover for injuries caused by Mr. Krauss’s alleged exposure to asbestos on or about January 17, 2012. Mr. Krauss was deposed over the course of eight days in February and March of 2012. He sat for a videotaped deposition on April 10, 2012.¹

¹ Copies of Mr. Krauss’s deposition transcripts are submitted as part of the defendant’s papers (“Deposition”).

Mr. Krauss testified that from 1951 to the early 1970's and from 1978 to 1986 he was employed as a union sheet metal worker responsible for installing HVAC systems and associated duct work throughout New York City. Mr. Krauss offered extensive testimony in respect of his alleged exposure and identified the manufacturers of numerous types of equipment and products which he believed contributed to his injuries.

Mr. Krauss worked at a number of new construction sites throughout his career, including a Trump Towers building in Manhattan, the Delta Terminal at LaGuardia Airport, Lincoln Center, and a General Motors building near Central park. While he was unable to specifically identify which general contractor was present at each construction site, he testified that Cushman oversaw some of them (Deposition, pp. 1366, 1294-95):

Q. Do you recall which general contractors you worked with through your career?

A. Well, on the new construction, it was -- can I refer to my list?

Q. If you need your list to refresh your recollection, that's okay.

A. It was, Bechtel did some of the jobs. It was mostly Cushman, Fuller, Tishman, and a lot of occasions Wolf and Munier, and Turner; Turner was a big contractor.

Q. And that was for new construction?

A. Yes, sir.

~~Q. Were these contractors at renovation work that you did, as well, sir?~~

A. Not normally. The work wasn't as extensive enough for them to get involved. It was smaller contractors.

* * * *

Q. . . . Did anyone at Cushman & Wakefield ever direct you how to perform your job responsibilities at any of the sites you were working at where they were involved?

A. It was just mostly progress of the job and how long it may be estimated that we would be in a particular area that they had a particular interest in at that time.

Q. So, based on that, I take it your answer is no, nobody at Cushman ever specifically directed you how to accomplish your job responsibilities?

A. Oh, no, correct, sir; that was correct.

- Q. Anyone at Cushman & Wakefield ever train you at any particular job site on how to do that particular job?
- A. No, sir.
- Q. Anyone at Cushman & Wakefield ever supervise or control the type of work you were doing on any job site that they were involved in?
- A. Well, if they weren't satisfied with a particular situation, they would notify me or the, whoever was the foreman at that time.
- Q. Do you have a specific recollection of that happening?
- A. No, sir.
- Q. Do you know whether, in fact, it ever happened?
- A. Yes, it did.
- Q. With respect to Cushman & Wakefield. How do you know it did?
- A. I remember it happening, but I can't remember exactly the exact location anymore.
- Q. Do you recall it happening just once or more than once?
- A. I would say more than once.
- Q. More than ten times, less than ten times?
- A. Oh, no. It was probably between five and ten times.

On May 10, 2013, the defendant produced Mr. Todd Schwartz, Cushman's Senior Managing Director of Global Operations, for a deposition pertaining to this action. Mr. Schwartz testified that Cushman has never served as a general contractor at any construction site in New York City but its business instead is as a managing and leasing agent. Notwithstanding, relying solely on Mr. Krauss's testimony, plaintiffs argue that there is sufficient evidence to raise a material issue of fact as to Cushman's liability under New York State Labor Law §§ 200² and

² 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."

241(6).³ Plaintiffs argue that such testimony is also sufficient to prove Cushman's liability under the common law by its failure to provide Mr. Krauss with a safe work environment.

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

Plaintiff's testimony does not denote the supervisory control necessary to support his Labor Law § 200 claims. While Cushman may have periodically checked in on the "progress of the job", Mr. Krauss specifically testified that Cushman did not control the manner in which he performed his work. *See Paz v City of New York*, 85 AD3d 519 (1st Dept 2011); *Hughes, supra*; *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003); *Mazzocchi v IBM*, 294 AD2d 151, 151 (1st Dept 2002). Plaintiffs have also failed to cite to any Industrial Code standards which

³ 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."

would support the imposition of a nondelegable duty on Cushman under Labor Law § 241(6) (c.f. *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]) 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.

FILED

ENTER:

AUG 28 2013

COUNTY CLERK'S OFFICE
NEW YORK

DATED:

Aug 22, 2013



SHERRY KLEIN HENTLER
J.S.C.