

Brown v Bell & Gosset Co.

2013 NY Slip Op 32403(U)

September 30, 2013

Sup Ct, New York County

Docket Number: 190415/12

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 : 190415/2012
BROWN, HARRY E.
vs
BELL & GOSSETT COMPANY
Sequence Number : 004
SUMMARY JUDGEMENT *(NATIONAL GRID)*

INDEX NO. 190415/12
MOTION DATE _____
MOTION SEQ. NO. 004

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 Sept 30, 2013**

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

Dated: 9-30-13


_____, 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
HARRY E. BROWN and PHYLLIS BROWN,

Index No. 190415/12
Motion Seq. 004

Plaintiffs,

DECISION & ORDER

- against -

BELL & GOSSETT COMPANY, et al.,

Defendants.

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

Defendant National Grid Generation, LLC, sued herein as “Keyspan Generation LLC, f/k/a Long Island Power Authority” (“LILCO”) moves pursuant to CPLR 3212 for an order dismissing plaintiffs’ Labor Law §§ 200¹ and 241(6)² claims against it on the ground that there is no evidence to show that LILCO supervised or controlled any of the work which gave rise to plaintiff Harry Brown’s alleged asbestos exposure. As more fully set forth below, the motion is granted in part and denied in part.

In 2012, Mr. Brown, now deceased, was diagnosed with mesothelioma. He and his wife

¹ 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.”

² Labor Law § 241(6) provides that “1. 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.”

commenced this action in September of 2012. His deposition took place on October 10-12, 2012 and January 10, 2013.³ Mr. Brown began working as an apprentice mechanic for Asbestos Construction in 1958. His primary job duty was to insulate equipment and boilers at Consolidated Edison's Astoria Powerhouse. Over the next sixteen years, Mr. Brown insulated equipment with asbestos insulation for various employers at commercial sites throughout New York City, including the Union Carbide building, New York Times building, CBS building, and Columbia College. Relevant to this motion is Mr. Brown's testimony that he worked at the Northport Powerhouse for four months in 1967.

On direct examination, Mr. Brown testified that he was given instructions solely by his foreman and superintendent, both of whom, along with Mr. Brown, were employed by King Insulation (Deposition pp. 141, 341-43):

Q. Where did you work for King?

A. LILCO powerhouse in Northport.

* * * *

Q. Was there a foreman or a supervisor from King Insulation who gave you your instructions at Northport?

A. Yes, on that one there was.

Q. Was it a foreman or something else?

A. Foreman, yes.

Q. Do you recall the foreman's name?

A. Al Dickoff would be his name.

Q. Aside from Al Dickoff, did anybody else give you any instructions regarding your work at Northport?

A. No.

Q. Was there anybody on the site that Mr. Dickoff reported to from King Insulation?

A. The superintendent I guess.

Q. Do you recall who the superintendent was?

³ Copies of Mr. Brown's deposition transcripts are submitted as exhibits D through G to the moving papers.

- A. That would be Anthony Demery, I think.
- Q. He was from King Insulation as well?
- A. Yes.
- Q. Where did you get your materials that you used and your tools?
- A. From a supplier.
- Q. Who was the supplier?
- A. I don't remember.
- Q. Who actually provided it to you at the site?
- A. Well, it was brought there, put there and we used from that stock.
- Q. Do you know who brought it?
- A. I don't remember who the delivery was.

On cross-examination Mr. Brown testified that he was directed by the owner or general contractor at each of the sites at which he worked concerning the type of insulation to be used (Deposition pp. 386-388, 389, objections omitted):

- Q. As an insulator between 1958 and 1974, you've testified that there were some times when the insulation that you would use would be something other than asbestos, and I believe you testified that there were air cell, that there was fiberglass, that there were other types of insulation. Was it your decision, and by your I mean was it the insulation trade, was it the local union, was it King Insulation, was it Keasbey, was it you insulators that would make the decision of what type of insulation to use when insulating? . . .
- A. No.
- Q. Who told you to use asbestos?
- A. The top down to our people.
- Q. So if you were working on a site where there was a general contractor or an owner, are you saying that it was the owner or general contractor that told you [] what type of insulation to use? . . .
- A. Yes.
- Q. What about regarding a particular piece of equipment, did you insulators make the decision on what type of insulation to apply to a particular type of equipment?
- A. No.
- Q. Do you know whether the manufacturer of that equipment had some role in specifying what type of insulation to apply to it? . . .
- A. Yes.

- Q. What's your understanding of that? . . .
- A. They specified what had to be done or used.
- Q. What did they specify that you use between 1958 and 1974? . . .
- A. A hard plaque material with dust.
- Q. Made out of what?
- A. Asbestos and other things I guess. . . .
- Q. I'm asking who told you to use asbestos insulation? . . .
- A. The manufacturer.

* * * *

- Q. To your understanding, who was it at those job sites, and by those job sites, I'm referring to the Con Ed, the Astoria, the Ravenswood, 14th Street and for LILCO the Northport, who was it that told the insulators and the boilermakers and the steamfitters and the electricians and the plumbers, who was it that told all of the trades what to do? . . .
- A. LILCO or Con Ed.
- Q. Did LILCO and Con Ed inspect work after it was completed?
- A. Yes.
- Q. If they found mistakes, did they direct that the work be corrected?
- A. Yes.

Labor Law § 200 codifies the common law duty imposed on an owner or general contractor to provide construction workers with a safe work site. To pursue a Labor Law § 200 claim, plaintiffs must show that LILCO 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 LILCO had actual or constructive notice of the defective condition that caused the injury, *LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470 (2nd Dept 2006); *see also Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993).

LILCO argues that Mr. Brown's testimony does not indicate the level of supervision and control necessary to sustain plaintiffs Labor Law § 200 claim. However, the cases cited by LILCO in this regard are inapposite. In *Torino v KLM Construction, Inc.*, 257 AD2d 541 (1st Dept 1999), the defendant contractor's representative at the plaintiff's work site merely observed the progress and

method of his work. Similarly, in *Reilly v Newireen Assocs.*, 303 AD2d 214 (1st Dept 2003), there was no evidence that the site manager exercised any supervision or control whatsoever over the plaintiff's work. *Id.* at 220.

In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, (*see Angeles v Aronsky*, 105 AD3d 486, 488-89 [1st Dept 2013]) and all reasonable inferences should be resolved in the non-movant's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990). In this case, whether or not Mr. Brown testified that he received instructions from his employer, he also testified that the site owners or general contractors where he worked selected the insulation materials that he would use. *See Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002) ("Any inconsistencies in the several accounts of the incident go to the weight of the evidence, not its competence, and the value to be accorded to the evidence is a matter for resolution by the trier of fact."); *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. . .").

Relying on *Richichi v Construction Mgmt. Techs.*, 244 AD2d 540 (2d Dept 1997), LILCO argues that even if it instructed Mr. Brown's employers to use asbestos-containing materials, plaintiffs still have failed to demonstrate the level of supervisory authority and control necessary to sustain their Labor Law claims. *Richichi*, however, is clearly distinguishable from the case at bar insofar as the plaintiff in that case was injured while attempting to remove a tree stump at a construction site despite instructions from the general contractor that he was only to "keep the job site clean' by picking up and throwing away construction debris." *Id.* The court opined that no one instructed the plaintiff to remove the tree stump and that his attempt to do so was not foreseeable. The opposite is true in this case. Mr. Brown's principal responsibility was to insulate equipment with the asbestos insulation that

was supplied to him, the exact conduct that is alleged to have caused his injuries.

Plaintiffs do not oppose LILCO's motion to dismiss their Labor Law 241(6) claims, nor is there any evidence upon which to sustain same.⁴

Accordingly, it is hereby

ORDERED that LILCO's motion for summary judgement is granted in part and denied in part; and it is further

ORDERED that plaintiffs' Labor Law § 241(6) claim is hereby dismissed as against LILCO; and it is further

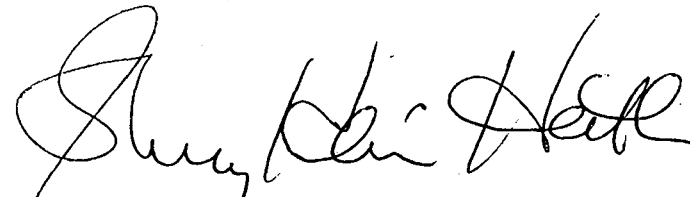
ORDERED that LILCO's motion for summary judgment dismissing plaintiffs' Labor Law § 200 claims against it is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 9-30-13



SHERRY KLEIN HEITLER
J.S.C.

⁴ Labor Law 241(6) requires a plaintiff to show that a premises owner or contractor violated an Industrial Code regulation that sets forth a specific standard of care. See *Comes, supra*, at 878.