

Brown v Bell & Gossett Co.

2013 NY Slip Op 32510(U)

October 11, 2013

Supreme Court, New York County

Docket Number: 190415/12

Judge: Sherry Klein Heitler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

HARRY E. BROWN, ET AL.,

INDEX NO. 190415/12

- v -

MOTION DATE _____

MOTION SEQ. NO. 7

BELLY GOSWETT CO., ET AL.
(CON EDISON)

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is* decided as

*per the separate opinion
of today's date.*

Dated: Oct 11, 2013


HON. SHERRY KLEIN HEITLER ^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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
HARRY E. BROWN and PHYLLIS BROWN,

Index No. 190415/12
Motion Seq. 007

Plaintiffs,

DECISION & ORDER

- against -

BELL & GOSSETT COMPANY, et al.,

Defendants.

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

Defendant Consolidated Edison Company of New York, Inc. ("Con Edison") moves pursuant to CPLR 3212 for an order dismissing plaintiffs' complaint and all cross-claims asserted against it on the ground that there is no evidence to show that Con Edison supervised or controlled any of the work which is alleged to have contributed to plaintiff Harry Brown's asbestos exposure. As more fully set forth below, the motion is granted in part and denied in part.

Mr. Brown, now deceased, commenced this action along with his wife in September of 2012 to recover for injuries allegedly caused by his exposure to asbestos-containing products over the course of his career as an insulator and mechanic.¹ With respect to the defendant, plaintiffs allege that Con Edison violated Labor Law §§ 200² and 241(6)³ and the common law by failing to provide Mr. Brown

¹ Mr. Brown was diagnosed with mesothelioma in June of 2012.

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."

³ 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,

with a safe work environment.

Mr. Brown was deposed on October 10-12, 2012 and January 10, 2013.⁴ He testified that he was exposed to asbestos as a member of the Asbestos Workers Union from 1958 to 1974.⁵ Throughout this sixteen year period Mr. Brown insulated equipment with asbestos insulation at commercial sites throughout New York City, including the Union Carbide building, New York Times building, CBS building, Lincoln Center, Columbia College, and the Rochdale Village Housing Project. Relevant to this motion is Mr. Brown's testimony that from late 1964 through the spring of 1965 he worked for Keasbey, an insulating contractor, on the construction of Unit 3 of Con Edison's Ravenswood Powerhouse. Among other things, Mr. Brown and his coworkers insulated new pipes, boilers, turbines, pumps, and other equipment. Mr. Brown explained in detail how he breathed the dust from this work and was thereby exposed to asbestos.

Con Edison does not dispute that Mr. Brown's work at the Ravenswood Powerhouse caused him to be exposed to asbestos, but instead takes issue with plaintiffs' allegation that it supervised, controlled, and directed his work at that location. In this regard, Con Edison relies on the following testimony (Deposition pp. 446, 447):

Q. Is it fair to say that at any site where you worked for, let's say Keasbey, that it would be Keasbey that was in charge of the work that you did?

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."

⁴ Copies of Mr. Brown's deposition transcripts are submitted as exhibit C to the moving papers ("Deposition").

⁵ Although plaintiffs do not allege that Mr. Brown was exposed to asbestos after 1974, he continued to work as an insulator and mechanic until he retired in 2000.

- A. My foreman would tell me what I had to do.
- Q. Your foreman was employed by Keasbey?
- A. Yes.
- Q. Let's say if you were working for Keasbey, Keasbey would be in charge of your work?
- A. Directly, yes.

However, Mr. Brown also testified that Con Edison directed his supervisors concerning the type of insulation to be used and inspected their work once it was completed (Deposition pp. 386-87, 388-89, 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. When you worked at powerhouses, the Con Ed and the LILCO plants, who was in charge of those job sites?
- A. Con Ed or LILCO. . . .
- 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.

The plaintiff's supervisor, Mr. Jack Novak (Deposition pp. 105, 333), testified in an unrelated asbestos personal injury case in 2004 that he was the Keasbey foreman during the construction of Ravenswood Powerhouse's Unit 3. (Plaintiffs' exhibit 2). He explained that his employees received specifications from Con Edison (*id.*, pp. 49-52) and that Con Edison employees actively inspected Keasbey's progress (*id.* at 174-75):

Q. Okay. Now, you were employed by Keasbey at Astoria and Ravenswood as a foreman, correct?

A. General foreman.

Q. And as a general foreman, you instructed the Keasbey insulators with respect to the work they were to do and how they were to perform it?

A. That's right.

Q. Okay. Did any other trades instruct you with respect to how your insulators were to perform their work?

A. No, just the two Con Edison inspectors, they want to make sure that we did the job the right way, but they didn't have to instruct me.

In this regard, plaintiffs submit a copy of Con Edison's "General Insulation Specification for Piping and Equipment, All Stations" dated March 15, 1963. This booklet provides specific instructions to insulating contractors, i.e., "All covering must in every case fit closely to the surface to which it is applied. In each case of improper fit, according to the intent of this specification the Contractor shall promptly remove and reapply insulation upon request by the company"; "no substitution of material shall be permitted without specific prior approval of the Company" (Plaintiffs' exhibit 3, p. 4, §IV(a); p. 11, §IV(j)). Mr. Novak testified that while he understood that wetting asbestos insulation could reduce the amount of dust in the air, he felt constrained by Con Edison inspectors from doing so (plaintiffs' exhibit 2, pp. 74-75):

- Q. How about did you take any steps at any time to hold down whatever dust might be created from cutting insulation materials?
- A. There was no ways you can prevent that. There was no ways. You cut it and it goes all over the place.
- Q. Did you ever wet down the insulation material before you cut it?
- A. Only cement. They didn't want you to water down any other material, because that takes the effect of the asbestos from it.
- Q. When you say they --
- A. I mean the inspectors on the job, Con Edison people.
- Q. Con Edison people didn't want you to water down any of the insulation materials because it might affect its performance?
- A. We never did it, so there was no reason for them to tell me no.
- Q. And you never observed anyone from Keasbey ever wetting down insulation materials before it was cut?
- A. Like I say, we know it was no good for -- no, we didn't do it. I never see -- maybe some people did it on their own that nobody could see, but cement we did, we put plenty of water in the cement to make sure that it doesn't go all over the place, but pipe covering and blocks, we didn't. I think it would be against specification to do.

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 Con Edison 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 Con Edison 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).

Viewing the evidence in the light most favorable to plaintiffs, (*Angeles v Aronsky*, 105 AD3d 486, 488-89 [1st Dept 2013]) and resolving all reasonable inferences in plaintiffs' favor, (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]), Con Edison's motion must be denied. Notwithstanding Mr. Brown's testimony that he received instructions from his Keasbey foreman, he also testified that Con Edison selected the insulation materials that contributed to his exposure. The

court is also persuaded by Mr. Novak's testimony that Con Edison's strict specifications prevented insulators from wetting down their asbestos-containing materials. This clearly indicates that Con Edison was keenly positioned to "avoid or correct [the] unsafe condition" that is alleged to have contributed to Mr. Brown's injuries. *Russin, supra*, 54 NY2d at 317; *see also Pacheco v South Bronx Mental Health Council, Inc.*, 179 AD2d 550, 551 (1st Dept 1992).

The defendant's arguments on this motion really go to the weight to be accorded to Mr. Brown's testimony at trial by the trier of fact and do not warrant summary judgment. *See Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997) (The court's function on a motion for summary judgment is to determine whether there exist factual issues that require resolution at trial, not to assess credibility); *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. . . ."); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983) ("On a motion for summary judgment, the court is not to pass on the credibility of the witnesses; but rather must determine whether material issues of fact exist.")

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

Accordingly, it is hereby

ORDERED that Consolidated Edison of New York, Inc.'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 Con Edison; and it is further

⁶ 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.

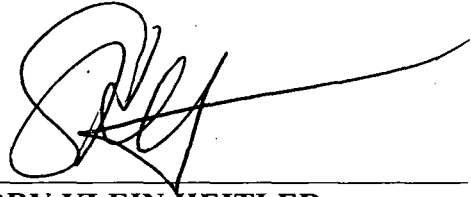
ORDERED that Con Edison's motion for summary judgment dismissing plaintiffs' Labor Law § 200 claims against it is denied; and it is further

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

This constitutes the decision and order of the court.

DATED: *Oct. 11, 2013*

ENTER:



SHERRY KLEIN HEITLER
J.S.C.