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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

SHARON EPSTEIN, Individually and as Independent Administrator of the Estate of IRA EPSTEIN,

Plaintiffs,

- against -

ATLAS TURNER, INC., *et al.*,

Defendants.

INDEX NO. 190065/2017
MOTION DATE 10/02/2019
MOTION SEQ. NO. 008
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Tishman Realty & Construction Co., Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	6 - 7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Tishman Realty & Construction Co., Inc.'s (hereinafter "Tishman") motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is granted to the extent of dismissing the plaintiffs' strict products liability and loss of consortium claims.

Plaintiffs' decedent, Ira Epstein (hereinafter "decedent"), was diagnosed with mesothelioma on April 22, 2016 and passed away on July 14, 2017 (Opp. Exhs. 1 and 2). Decedent alleged he was exposed to asbestos in a variety of ways. Decedent's alleged exposure - as relevant to this motion - was while employed by a subcontractor as a helper or "gofer" for a pipefitter/steamfitter named "Alvin," on the 72nd floor of Tower 1, at the World Trade Center for approximately sixty (60) days from about June to July (summer) of 1970 (Mot. Exh. E, pgs 173-174, and Exh. F, pgs. 11-12).

Decedent was deposed on March 22, 2017, April 4, 2017 and his de bene esse deposition was conducted on April 5, 2017 (Mot. Exhs. C, D and E). He testified he did not know the name of the subcontractor he worked for, or Alvin's last name, and that Alvin hired him and paid him in cash (Mot. Exh. C, pg. 15 and Exh. E, pgs. 173-174 and 193). Decedent could not recall the names of any of the other contractors or subcontractors at the World Trade Center in 1970. Decedent stated that Alvin's work was welding and soldering pipes together, and that the "gofer" job had him "Go for this, go get his (Alvin's) cigarettes, go get his tools. Stuff like that" (Mot. Exh. C, pgs. 15-16, and Mot. Exh. D, pg. 173). Decedent testified that his work hours were usually from 7:00a.m. through 4:00p.m., five days a week. He would meet Alvin outside of the building in the morning and they would take an elevator inside the building to the 72nd Floor (Mot. Exh. D, pgs. 172-174, and 195).

Decedent testified that he observed other trades working in close proximity to him and Alvin on the 72nd floor of the World Trade Center. He stated that electricians, people putting up drywall, people putting down floor tiles, elevator workers and insulators, created asbestos dust that he breathed in. Decedent stated the insulators mixed "mud for insulation." They would mix a powdery substance with water and then using a long drill auger bit would mix them, which would send "stuff flying all over the place." He testified that he observed the

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

insulators put insulation "on pipes and walls" (Mot. Exh. C, pgs. 21, 60-61, Exh. D, pgs. 178 and 181, and Exh. E pgs. 21). Decedent stated that people putting up walls and cutting sheetrock caused dust to fly "all over the place," and then they used "power brushes" to clean up, which also created dust. Decedent stated that people were sanding drywall and finishing it off. That it looked like "you were in a fog" and that the drywall people also used joint compound or mud to close the seams. He said the drywall came in what looked like 4 x 8 sheets (Mot. Exh. C, pgs. 22, 51-52, Exh. D, pgs. 179 and 185, and Exh. E, pg. 17). Decedent stated that in addition to dust from wallboard there was also asbestos dust from the cutting of floor tiles. He said that the tile workers would cut the floor tiles, which were about 16 x 16, put some "mud" on the back and put the tiles down. The area covered with floor tiles was about 20,000 square feet. Decedent testified that the people doing tile work were hired by the contractor (Mot. Exh. C, pg. 41, Exh. D, pgs. 180-181 and Exh. E, pg. 14).

Plaintiffs commenced this action on February 22, 2017 alleging the causes of action asserted in Levy Konigsberg LLP's Standard Complaint No. 1. (Mot. Exh. G). On October 12, 2017 Plaintiffs' Third Amended Summons and Complaint added The Port Authority as a defendant (Mot. Exh. I). Plaintiffs' Fourth Amended Summons and Complaint dated November 30, 2017 included a cause of action for wrongful death and amended the caption to include Sharon Epstein as Independent Administrator of the Estate. The Fourth Amended complaint alleges causes of action asserted in Levy Konigsberg LLP' Standard Complaint No. 2 (Mot. Exh. J). Neither of the parties annexed copies of the Levy Konigsberg LLP Standard Complaint No. 1 or 2. A copy of Levy Konigsberg LLP Standard Complaint No. 1 was annexed to another defendant's motion papers and asserts four causes of action: (1) negligence, (2) strict products liability, (3) loss of consortium and (4) punitive damages (See NYSCEF Doc. # 50).

Tishman seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 458, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]); Martin v Briggs, 235 A.D. 2d 192, 663 N.Y.S 2d 184 [1st Dept. 1997]).

Tishman argues that it did not supervise or control decedent's work and that summary judgment dismissing plaintiffs' Labor Law §200, and common law negligence claims is warranted. Tishman claims that there is no evidence to establish it knew which products used at the World Trade Center during the relevant period had asbestos, or that it had control of every single contractor. Tishman further argues that at most it exercised a right of general inspection which is not sufficient to find common law negligence.

Labor Law §200 codifies a general contractor's common-law duty of care to provide construction site workers with a safe place to work (Comes v. New York State Electric and Gas Corp., 82 N.Y. 2d 876, 631 N.E. 2d 110, 609 N.Y.S. 2d 168 [1993]). "Claims for personal injury under the statute arise under two broad categories: those arising from a dangerous defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (Prevost v. One City Block LLC., 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept. 2017]).

A Labor Law §200 claim on the manner and means of work performed requires that "the party charged with that responsibility must have the authority to

control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 [1981] and McGarry v. CVP 1 LLC , 55 A.D. 3d 441, 866 N.Y.S. 2d 75 [1st Dept., 2008]). Providing "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"(Bisram v. Long Island Jewish Hospital, 116 A.D. 3d 475, 983 N.Y.S. 2d 518 [1st Dept. 2014]). Therefore, to be charged with liability under Labor Law §200, a general contractor must perform more than its "general duty to supervise the work and ensure compliance with safety regulations" (De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 757 NYS2d 527 [1st Dept 2003]). However, if a general contractor creates the dangerous condition, the plaintiff need not demonstrate that the general contractor had supervision and control (Murphy v Columbia Univ., 4 AD3d 200, 773 NYS2d 10 [1st Dept 2004]).

Plaintiffs provide excerpts from the deposition testimony of Joseph Giordano a drywall taper at the World Trade Center during the time period relevant to decedent's alleged exposure. Mr. Giordano testified about the use of asbestos products manufactured by U.S.G., Gold Bond and Georgia Pacific (Opp. Exh. 6). Plaintiffs also refer to Tishman correspondence from 1966 and September of 1969 Opp. Exhs. 8, 9, and 10). They provide a June 10, 1970 letter from Mr. James Endler of the Port Authority to Tishman stating that Tishman also had "direct responsibility for obtaining contractor conformance to all applicable safety ordinances and safety needs." The letter further states, "Tishman's personnel not ours are responsible for contractor activities at the site" (Opp. Exh. 11). Although part of this correspondence is related to spray-on asbestos materials, plaintiffs raise an issue of fact on the extent of Tishman's control and monitoring of the work with asbestos based products, performed at the World Trade Center during the relevant time period.

Decedent provided conflicting testimony about who told the tile, drywall, elevator, and insulation guys how or where to do their work. Initially decedent testified he just knew that the contractor hired the subcontractors working on the 72nd floor, and he did not know who told them what to do (Mot. Exh. D, pgs. 174, 177-179 and 196-197). He later testified that the general contractor on the 72nd floor told everybody where to go and what to do first thing in the morning (Mot. Exh. E, pgs. 25, 87, 91-93). Decedent also provided conflicting testimony about his distance from the work performed by other trades. He initially claimed he had no clue of his distance from the work that was being performed and stated he "could have been ten or one hundred feet away" from the drywallers and that the tile workers were right next to them (the drywallers) (Mot. Exh. D, pgs. 182-185). He later testified the work was performed approximately ten feet away from him (Mot. Exh. E, pgs. 15-16).

"It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], Almonte v. 638 West 160 LLC, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018]). Decedent's conflicting testimony presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1st Dept., 1999]).

Plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of decedent's ability to provide a detailed description of his exposure. Decedent's failure to provide specific identification of the contractors or

the products alleged to produce asbestos dust during the relevant time period at the World Trade Center, does not mean that Tishman was unaware or had no control over safety and the means and methods of decedent's work. Plaintiffs have raised triable issues of fact as to whether Tishman's common law negligence and Labor Law §200 liability may be reasonably inferred from decedent's work on the 72nd floor of the World Trade Center.

There remain issues of fact as to whether Tishman has liability for common law negligence and under Labor Law §200 because it was responsible for making sure the contractors complied with specifications at the World Trade Center which included directing the means and methods of applying the asbestos-dust producing products that were identified by the decedent. There also remain issues of fact whether Tishman had the knowledge and ability to stop work for dangerous asbestos related conditions, similar to what occurred with the spray-on fireproofing and insulation. The conflicting evidence and testimony raise issues of fact that cannot be resolved on a motion for summary judgment.

Tishman argues that the plaintiffs have failed to present any evidence that as a general contractor it has strict products liability. Tishman claims there is no evidence that the decedent was exposed to any asbestos-containing product manufactured, distributed, or sold by Tishman, warranting dismissal of plaintiffs' strict products liability claim.

A party that is outside the manufacturing, selling or distribution chain, cannot be held liable for strict products liability (Laurin Maritime AB v. Imperial Chemical Industries, PLC, 301 A.D. 2d 367, 752 N.Y.S. 2d 855 [1st Dept., 2003] citing to Passaretti v. Aurora Pump Co., 201 A.D. 2d 475, 607 N.Y.S. 2d 688 [2nd Dept., 1994]). A defendant that has not manufactured, distributed or sold the product and whose only relationship to the product is its purchase and incorporation into its building for use is not liable under strict products liability (Serna v. New York State Urban Dev. Corp., 185 A.D. 2d 562, 586 N.Y.S. 2d 413 [3rd Dept., 1992]).

Plaintiffs argue that the decedent was exposed to asbestos carpentry products, sprayed asbestos fireproofing, asbestos sealant and asbestos insulation used on elevator shafts while working on the 72nd floor of the World Trade Center in 1970. In support of their arguments on products liability plaintiffs cite to the Affidavit of Rino M. Monti, the Construction Manager for the World Trade Center World Trade Department of the Port Authority from 1965 through October of 1972 (Opp. Exh. 7). Mr. Monti's affidavit, prepared in an unrelated action, addresses interior spray-on asbestos fireproofing of floor trusses, columns and beams, including areas located in elevator shafts. The Port Authority selected and approved U.S. Mineral's asbestos spray-on fireproofing product which was used starting in 1969 (Opp. Exh. 7). Mr. Monti states that the Port Authority and Tishman were unaware of asbestos in the spray-on product and worked with recommendations made by both New York City personnel and Dr. Selikoff of Mount Sinai to control the conditions and the amounts of asbestos emissions that occurred when spray-on fireproofing was applied. Mr. Monti states that in May of 1970 the Port Authority switched to use of U.S. Mineral's asbestos free spray-on fireproof products (Opp. Exh. 7).

Plaintiffs claim that decedent was allegedly exposed to sprayed asbestos fireproofing, asbestos sealant and asbestos insulation used on elevator shafts while decedent was working on the 72nd floor of the World Trade Center in the summer of 1970, is unsupported by his testimony, and is speculative. Plaintiffs do not raise an issue of fact on strict product liability. Plaintiffs reference to correspondence from 1966 and September of 1969 (Opp. Exhs. 8, 9 and 10), does not raise an issue of fact or establish that Tishman controlled the manufacture of the asbestos products used at the World Trade Center, or was otherwise responsible for the distribution or sale of the products identified by the decedent as producing asbestos dust. Tishman has made a prima facie showing, warranting summary judgment on the second cause of action for strict products liability.

Tishman is entitled to summary judgment on the third cause of action for spousal loss of consortium because the decedent's alleged injuries from his work at the World Trade Center in 1970, occurred before he was married to his wife, plaintiff Sharon Epstein (See Joseph Lee De'Leone ex rel. Angel v. City of New York, 45 A.D. 3d 254, 845 N.Y.S. 2d 241 [1st Dept. 2007] and Holmes v. Maimonides Medical Center, 95 A.D. 3d 831, 943 N.Y.S. 2d 573 [2nd Dept. 2012] citing to Anderson v. Eli Lilly & Co., 79 N.Y. 2d 797, 588 N.E. 2d 66, 580 N.Y.S. 2d 168 [1991]). The decedent testified that he married his wife, Sharon Epstein, in 1994, after the alleged period of exposure in 1970 (Mot. Exh. C, pg. 101). Decedent was married three times and none of his marriages occurred prior to 1975 (Mot. Exh. C, pgs. 82- 84 and Exh. B). Plaintiffs did not provide evidence to raise an issue of fact or otherwise sustain the third cause of action for loss of consortium against Tishman.

Tishman seeks summary judgment on the cause of action for punitive damages arguing that it is not a manufacturer as in the talc cases and did not intentionally fail to warn the decedent about any asbestos containing products.

The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent that plaintiffs argue that Tishman was aware of the use of asbestos by contractors at the 72nd Floor of the World Trade Center and intentionally failed to issue warnings, although it was aware of potential hazards from asbestos prior to the decedent's exposure, this creates an issue best left to be determined by the trial judge after submission of all evidence (See In the Matter of the 91st Street Crane Collapse Litigation, 154 A.D. 3d 139, 62 N.Y.S. 3d 11 [1st Dept., 2017] and *Camillo v. Olympia & York Properties Co.*, 157 A.D.2d 34, 554 N.Y.S.2d 532 [1st Dept. 1990] supra).

Accordingly, it is ORDERED, that defendant Tishman Realty & Construction Co., Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it is granted to the extent of dismissing plaintiffs' second cause of action for strict products liability and the third cause of action for spousal loss of consortium, and it is further,

ORDERED, that plaintiffs' second cause of action for strict products liability and third cause of action for spousal loss of consortium asserted against Tishman Realty & Construction Co., Inc., are severed and dismissed with prejudice, and it is further,

ORDERED, that the plaintiffs' first cause of action for common law negligence and Labor Law §200 liability and fourth cause of action for punitive damages remain in effect, and it is further,

ORDERED, that the defendant Tishman Realty & Construction Co., Inc. serve a copy of this Order with Notice of Entry on the remaining parties, the General Clerk's Office (Room 119), and on the County Clerk, who are directed to mark their records accordingly, and it is further,

ORDERED, that the remainder of the relief sought in this motion is denied.

ORDERED, that the Clerk of the Court enter judgment accordingly.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: October 17, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE