

<b>Morgan v American Home Assur. Co. Inc.</b>
2019 NY Slip Op 33132(U)
October 21, 2019
Supreme Court, New York County
Docket Number: 190063/16
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: MANUEL J. MENDEZ PART 13**  
*Justice*

**IN RE: NEW YORK CITY ASBESTOS LITIGATION**

**SEVAL MORGAN a/k/a SEVAL HILDEBRAND,**  
Individually and as Personal Representative of the  
Estate of **BERND HILDEBRAND,**

INDEX NO. 190063/16

**Plaintiffs,**  
- against -

MOTION DATE 09/18/2019

**AMERICAN HOME ASSURANCE COMPANY INC., et al.,**  
**Defendants.**

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion for summary judgment by Port Authority of New York and New Jersey:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

**Cross-Motion:    Yes    X No**

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Port Authority of New York and New Jersey’s (hereinafter “Port Authority”) 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 strict products liability and punitive damages claims.

Plaintiff’s decedent, Bernd Hildebrand (hereinafter “decedent”), was diagnosed with mesothelioma in May 2015 and passed away on June 25, 2015. It is alleged that he was exposed to asbestos while he worked at the Pan Am Unit Terminal Building (UTB) at JFK Airport, as an employee of Pan American Airlines (hereinafter “Pan Am”).

Plaintiff’s decedent was not deposed, instead the plaintiff produced Ms. Julia Wissell, decedent’s co-worker at the UTB terminal. Ms. Wissell testified that she started working for Pan Am, at the JFK UTB terminal cargo area, part time beginning in 1969 and full-time from 1976 until 1986. During the 1970’s the Pan Am UTB terminal (as well as the rest of JFK airport) was undergoing a major renovation to expand the terminal areas for increased passenger traffic. She met decedent, who worked for Pan Am in another capacity, in 1973 and continued to work occasionally with him while performing her duties in the cargo area. She stated that there was always construction taking place at the UTB terminal (see Wissell Deposition, Pg. 36 Ln.24 to Pg. 37 Ln.1).

On many occasions she saw bags (which were stacked everywhere) of a powdery white substance that the construction workers would mix with water and then place on the walls. Once this mixture dried, the wall would be sanded, which created dust. The dust would be all over the place and walking into the construction areas at the UTB terminal would be like walking into a dust bowl.

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

She remembered being with decedent many times when construction workers, who worked with the bags of white powder, worked around them applying the mixture, sanding and painting the walls. This mixing and sanding created dust that the people in the area inhaled. she stated that she saw the name Georgia-Pacific on the bags (that were stacked everywhere) containing the powder that the workers mixed, applied to the sheetrock walls and then sanded. The dust that the mixing and sanding created would be breathed in by everyone in the area because the dust was everywhere. She stated that she saw the construction workers apply this white powder in many places (restaurants, gates, etc...) and has no doubt that decedent and anyone else would inhale the dust this work generated. She stated that although the construction workers put up plastic sheeting to keep the dust down, the mixing of the product took place outside this plastic sheeting. Furthermore, she saw troughs of this white powder outside the covered construction area. The Cargo building contained tons of asbestos because she saw it breaking down (see Wissell deposition Pg.48 Ln2 to Pg. 49 Ln.14; Pg. 82 Ln.23 to Pg. 83 Ln. 8; Pg. 87 Ln. 7 to Pg. 88 Ln. 15; Pg. 88 Ln. 25 to Pg. 90 Ln. 5; Pg. 95 Ln. 8 to Pg. 97 Ln. 5; Pg. 99 Ln. 18 to Pg. 100 Ln. 9; Pg. 137 Ln. 1-13; Pg. 147 Ln. 4 to Pg. 159 Ln. 14).

Ms. Wissell stated that her father, Gustav Krepplein, was a Union Iron worker with Local 580 and was one of the original workers building the JFK Pan Am UTB terminal. Her father became ill and received a diagnosis of mesothelioma, eventually dying from the disease in 1984. She learned from speaking to him ( and at his deposition in his personal injury action to recover for asbestos exposure) the names of many asbestos containing products that were being used during construction and renovation at the Pan Am UTB terminal, and that the white powder in the Georgia-Pacific bags that she saw stacked everywhere in the UTB terminal contained asbestos. She never discussed with any of the contractors the work they were doing. Pan Am never discussed with her that she was working in an asbestos contaminated area, and that any work that was done first had to be approved by the Port Authority (see Pg. 40 Ln. 19 to Pg. 41 Ln. 2; Pg. 43 Ln. 19 to 25; Pg. 57 Ln. 3-8; Pg. 62 Ln. 20 to Pg. 63 Ln. 10; Pg. 88 Ln. 25 to Pg. 90 Ln. 5; Pg. 131 Ln. 13 to Pg. 132 Ln. 20).

Plaintiffs commenced this action on March 7, 2016 seeking to recover against the Port Authority for negligence, violation of Labor Law § 200, strict products liability and punitive damages. The Port Authority seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it.

The Port Authority argues that the court should dismiss this action because the witness produced by the plaintiff had no personal knowledge that asbestos containing materials were being used during the construction/renovation of the UTB terminal; that the dust she allegedly saw or inhaled while standing with decedent contained asbestos or that the construction companies and workers at the UTB terminal were under the Port Authority's supervision and control. Furthermore, it argues that the strict products liability claim should be dismissed because it is not a manufacturer, seller or distributor of any product. Finally, it argues that as a government entity it is immune from punitive damages.

Plaintiff withdraws the causes of action for strict products liability and for punitive damages. Those causes of action are dismissed. The court will only address the remaining causes of action for common law negligence and violation of Labor Law §200.

Plaintiff brings a claim against the Port Authority for violation of Labor Law §200 alleging that as owner of the Pan Am UTB Terminal it controlled the activity that brought about decedent's injury. In support of this claim Plaintiff provides a copy of the lease agreement between the Port Authority and Pan Am, and the deposition transcript of Mr. Frank Grill who was a project manager for Pan Am at JFK airport (see opp. Exhibits 5 and 6).

Mr. Grill stated that during the period he worked at the Pan Am JFK terminal (1962 to 1975) any plans or specification for new construction projects or alterations at the terminal were submitted for review and approval by the Port Authority through the Tenant Construction Review Unit. There was Port Authority personnel (resident engineers) at the airport who inspected construction projects during construction to assure compliance with regulations and specifications. The lease between Pan Am and the Port Authority gave the Port Authority the right to approve any construction plans and specifications; approve the architect and building contractors; inspect the construction work and plans and specifications thereof; approve and obtain samples of materials to be used in the construction or renovation and perform testing on any part of the construction work; approve the use or removal of material in accordance with recommendation of their environmentalists; plan and prepare drawings and procedures for removal of material and dictate how material would be removed; re-enter the leased premises to inspect the same, observe the performance by lessee of its obligation under the lease and to do any act or thing which the Port Authority would be obligated or have the right to do under the lease.

The Port Authority argues that as an out of possession landlord it should not be held liable for decedent's injury and since decedent was not a construction worker, he is not a member of the protected class, therefore the claim for violation of Labor Law §200 should be dismissed. Furthermore, it argues that it neither had actual or constructive knowledge of any defect, or direct, supervise or control the means and methods of the work.

Labor Law §200 codifies an owner's or 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]; Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 841 N.Y.S.2d 249 [1<sup>st</sup>. Dept. 2007]). The fact that plaintiff was not employed or involved in construction, or work with a construction company at the time of his injury does not preclude him from asserting a Labor Law §200 claim. The application of Labor Law § 200 is not limited to construction work and does not exclude an action from an employee at the premises such as plaintiff (Agli v. Turner Construction, 246 A.D.2d 16, 676 N.Y.S.2d 54 [1<sup>st</sup>. Dept. 1998]; Longo v. Metro-North Commuter Rail Road, 275 A.D.2d 238, 712 N.Y.S.2d 531 [1<sup>st</sup>. Dept. 2000]).

"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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept., 2008]). An owner is not liable for a subcontractor's employees

over which there was no supervisory control (*Cappabianca v. Skanska USA Bldg., Inc.*, 99 A.D. 3d 139, 950 N.Y.S. 2d 35 [1<sup>st</sup> Dept., 2012]). 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” (*Dalanna v. City of New York*, 308 A.D. 2d 400, 764 N.Y.S. 2d 429 [1<sup>st</sup> Dept. 2003]). Mere review of on-site safety or coordination of subcontractors at the work site also does not rise to the level of supervision or control for liability under Labor Law §200 (*Bisram v. Long Island Jewish Hospital*, 116 A.D. 3d 475, 983 N.Y.S. 2d 518 [1<sup>st</sup> Dept. 2014]). However, Labor Law §200 liability will attach if the owner controls the work through the issuance of detailed specifications directing contractors in the means and methods of applying asbestos products and retained the capacity to exclude or stop work if a dangerous condition arose (*In re New York Asbestos Litigation (Brown)*, 146 A.D. 3d 461, 49 N.Y.S. 3d 1 [1<sup>st</sup> Dept. 2017]).

The Port Authority retained the right to: refuse to grant approval of Pan Am’s plans and specification for the UTB terminal if its requirements with respect to external and interior building materials and finishes did not comply with the Port Authority’s requirements; approve or disapprove the architect or architects; approve all plans and specifications for the work to be completed; approve all contracts and contractors, and Pan Am is to include in all contracts such provisions and conditions as may be required by the Port Authority; to inspect the construction work and the plans and specifications thereof and to take samples and perform testing on any part of the construction work; to enter upon the premises to observe the performance of Pan Am of its obligations under the lease and to make repairs, replacements or alterations as in its opinion may be deemed necessary ( see Opp. Exhibit 5, Lease).

In addition, according to Mr. Grill they approved and obtained samples of materials to be used in the construction or renovation, performed testing on any part of the construction work, approved the use or removal of materials in accordance with recommendations from their environmentalists, planned and prepared drawings and procedures for the removal of materials and dictated how material would be removed. Finally, according to Mr. Grill there was a team of resident engineers from the Port Authority constantly at the construction site overseen and approving all aspects of the construction.

Although generally an out-of-possession owner is not liable for injuries resulting from the condition of leased premises, “an owner may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*Azad v. 270 5<sup>th</sup> Realty Corp.*, 46 A.D.3d 728, 848 N.Y.S.2d 688 [2<sup>nd</sup>. Dept. 2007], quoting *Keating v. Nanuet Board of Education*, 40 A.D.3d 706 835 N.Y.S.2d 705 [2<sup>nd</sup>. Dept. 2007]; *Dirschneider v. Rolex Realty Company, LLC*, 157 A.D.3d 538, 69 N.Y.S.3d 40 [1<sup>st</sup>. Dept. 2018]).

To prevail on a motion for summary judgment, the proponent must make 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]).

“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 Dombia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018]).

There are issues of fact precluding dismissal of plaintiff’s Labor Law §200 and common-law negligence claims. The testimony of Ms. Wissell, the deposition transcript of Mr. Grill, the lease between Pan Am and The Port Authority raise issues of the extent of The Port Authority’s control of the work site at the time of Mr. Hildebrand’s asbestos exposure and whether it had actual or constructive notice of a dangerous condition at the premises.

Accordingly, it is ORDERED, that Defendant the Port Authority of New York and New Jersey’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’ causes of action for strict products liability and for punitive damages, and it is further,

ORDERED, that plaintiffs’ causes of action for strict products liability and for punitive damages, are severed and dismissed with prejudice, and it is further,

ORDERED, that plaintiff’s causes of action for common-law negligence and Labor Law §200 liability remain in effect, and it is further,

ORDERED, that the Defendant the Port Authority of New York and New Jersey 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, and it is further,

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

ENTER:

MANUEL J. MENDEZ  
J.S.C.

  
MANUEL J. MENDEZ  
J.S.C.

Dated: October 21, 2019

Check one:      FINAL DISPOSITION      X NON-FINAL DISPOSITION  
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