

Smith v. AC Light. & Elec. Supplies, LLC

Supreme Court of New York, New York County

May 10, 2021, Decided

INDEX NO. 190261/2016

Reporter

2021 N.Y. Misc. LEXIS 2424 *; 2021 NY Slip Op 31577(U) **

[1]** CAROLINE SMITH, Individually and as the Personal Representative of the Estate of Alvin Smith, Plaintiffs, - v-AC LIGHTING & ELECTRICAL SUPPLIES, LLC, et al., Defendants.

532, 533, 534, 535, 575, 585, 588, 590, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, were read on this motion to/for JUDGMENT - SUMMARY.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Before the Court is defendant National Grid Generation LLC d/b/a National Grid's ("National Grid") motion for summary judgment, pursuant to [CPLR 3212](#), for a finding in favor of National Grid on the grounds that there is no merit to the allegations in Plaintiff's Complaint against National Grid, and there are no triable issues of fact against National Grid. Plaintiff opposes the motion.

Core Terms

summary judgment, allegations, asbestos

[2]** National Grid's motion contends that plaintiffs have failed to establish that National Grid is liable under [New York Labor Law 200](#), a codification **[*2]** of the common law negligence law, and that plaintiffs have made no showing of negligence on the part of National Grid. The case at issue arises from plaintiff decedent Alvin Smith's ("Decedent") diagnosis of malignant mesothelioma, which plaintiffs allege was caused by Decedent's exposure to ultra-hazardous asbestos dust from his work as an electrician from 1961 to 1994. Specific to National Grid, plaintiffs allege that Decedent was exposed to asbestos when he worked as an electrician at the Northport Power Plant ("Northport") during 1967 and 1968. Plaintiff alleges that he worked under the supervision of Long Island Lighting Company ("LILCO") and that National Grid is the successor in interest to LILCO. While working at the Northport, Decedent testified that he was exposed to and breathed in significant amounts of asbestos dust from working on and cleaning pump motors (Exh 6, at 689-692; 882; 1036-1045; 1796-1799).

Judges: **[*1]** PRESENT: HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 528, 529, 530, 531,

Here, upon motion for summary judgment, National Grid alleges that it did not cause Decedent's mesothelioma and did not supervise or control plaintiff's work and thus owed no duty to plaintiff. The proponent of a summary judgment motion must make a prima facie showing of **[*3]** entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). The elements of a common-law negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting therefrom (*Jiminez v. Shahid*, 83 A.D.3d 900, 922 N.Y.S.2d 123 [2d Dept 2011]). *Labor Law § 200* is a codification of the common law duty that a landowner or general contractor is to provide workers with a reasonably safe place to work (*Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]). An implicit precondition to this duty "is that the party charged with that responsibility **[**3]** have the authority to control the activity bringing about the injury" (*Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 [1993] citing *Russin v Picciano*).

The First Department has consistently held that motions for summary judgment be granted where there is no evidence that [a defendant] supervised or controlled a plaintiff's work (*In re New York City Asbestos Litigation. Philbin v. A.C. & S., Inc., Consol. Edison Co. of New York, Inc.*, 25 A.D.3d 374, 374, 807 N.Y.S.2d 84, 85 [1st Dept 2006] [finding that "the mere presence of [defendant's] personnel at the work site, while perhaps indicative of a general right of inspection, does not suffice to create an inference of supervisory control] citing *Comes*, 82 N.Y.2d at 877; *Mazzocchi v International Business Machines, Inc.*, 294 A.D.2d 151, 152, 742 N.Y.S.2d 217 [1st Dept 2002]).

National Grid alleges that Decedent worked at Northport for a joint venture between Rao Electrical Equipment Co., Inc. ("Rao") and Arc Electric ("Arc") for 15 months, **[*4]** from about March 1967 until June 1968. Movant attaches Decedent's Social Security/Employment records which indicate that from the first quarter of 1967 through and including the second quarter of 1968, Decedent was employed by Rao (Mot Exh E at 5). National Grid notes that Decedent took direction from his area foreman, Abe Pfeffer, who worked for Rao/Arc (Mot, Exh D at 1086). Decedent testified that LILCO personnel were present but did not instruct Decedent on how to perform his work and that

he had no information that LILCO told other trades at the work site how to work beyond compliance with contract requirements (*id.* at 1087-1089). Thus, movant has made a prima facie showing that LILCO did not exercise supervisory control over the work done that allegedly exposed Decedent to **asbestos** and the burden shifts to plaintiff to raise an issue of fact.

[4]** In opposition, plaintiff raises an issue of fact as to LILCO's involvement in oversight of work at Northport and thus on the issue of whether LILCO supervised or controlled Decedent's work. As noted above, pursuant to *Labor Law § 200* a party charged with having a duty to provide individuals with a safe place to work, must have the authority to control the **[*5]** activity which brought about the injury. Plaintiff avers that there is an overwhelming amount of evidence that LILCO controlled every aspect of the work being done with **asbestos** at Northport while Decedent was working there. To demonstrate that LILCO did indeed have the authority to control Decedent's work at Northport, plaintiff attaches the deposition of Richard Gallagher, a former LILCO employee, who testified that he worked at Northport continuously from March 1967 through his retirement in December 1998 (Aff in Op, Exh 8 at 423-424). Mr. Gallagher testified that while LILCO hired independent contractors to perform construction work at Northport, it was LILCO employees who were responsible for overseeing the work (Aff in op, Exh 8 at 431-432). Defendant concedes that National Grid is the successor to LILCO (Mot at 1).

In order for liability to be incurred for the injuries sustained by an employee of a subcontractor, it must be proven, for purposes of common-law negligence and *Labor Law §200*, that LILCO exercised actual supervision and control over Decedent's activity. Here, plaintiff has raised an issue of fact by proffering evidence that LILCO exercised such control over Decedent's activity. **[*6]**

LILCO had a responsibility to oversee and control the work performed by Decedent, which created a duty to provide a safe workplace for Decedent. Plaintiff has raised issues of fact concerning LILCO's exercise of control over Decedent's work sufficient to deny defendant's motion for summary judgment. Thus, defendant's motion for summary judgment, pursuant to *CPLR 3212*, for a finding in favor of defendant on the grounds that said defendant has made a **[**5]** prima facie case demonstrating that there is no merit to the allegations in Plaintiff's Complaint against National Grid, and that there are no triable issues of fact against

National Grid, is denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to [CPLR 3212](#), for a finding in favor National Grid on the grounds that there is no merit to the allegations in Plaintiff's Complaint against National Grid, and there are no triable issues of fact against National Grid, is denied; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this Decision/Order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court.

5/10/2021

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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