

Moorecummings v Amchem Prods., Inc.

Supreme Court of New York, New York County

January 10, 2022, Decided

INDEX NO. 190162/2019

Reporter

2022 N.Y. Misc. LEXIS 176 *; 2022 NY Slip Op 30104(U) **

[**1] ANGELA MOORECUMMINGS, Plaintiff, -v-
AMCHEM PRODUCTS, INC., N/K/A RHONE
POULENC AG COMPANY, N/K/A BAYER
CROPSOURCE INC., AMERICAN HONDA MOTOR
CO., INC. (AHM), AMTRAK, BORGWARNER MORSE
TEC LLC., CERTAINTED CORPORATION, DANA
COMPANIES, LLC, FORD MOTOR COMPANY,
GENERAL ELECTRIC COMPANY, HONEYWELL
INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. /
BENDIX, NISSAN NORTH AMERICA, INC., PFIZER,
INC. (PFIZER), TENNECO AUTOMOTIVE
OPERATING COMPANY INC., TOYOTA MOTOR
SALES U.S.A., INC., U.S. RUBBER COMPANY
(UNIROYAL), UNION CARBIDE CORPORATION,
Defendant.

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NOT BE PUBLISHED IN THE PRINTED OFFICIAL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

Core Terms

summary judgment motion, supervise, notice, defective
condition, tile

Judges: [*1] PRESENT: HON. ADAM SILVERA, J.S.C.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF
document number (Motion 002) 112, 113, 114, 115,
116, 117, 118, 119, 120, 121, 122, 123, 124, 125 were
read on this motion to/for *JUDGMENT - SUMMARY*.

Upon the foregoing documents, defendant Amtrak's
motion for summary judgment, pursuant to *CPLR 3212*,
seeking to dismiss the instant action on the grounds that
said defendant has made a prima facie case
demonstrating lack of duty, breach, or causation is
decided below. Plaintiff opposes and moving defendant
replies.

Plaintiff commenced this action seeking monetary
damages for personal injuries sustained as a result of
his exposure to asbestos. Here, defendant Amtrak's
motion contends that plaintiff Ernest Cummings failed to
establish that moving defendant is liable under New
York Labor Law §§ 200 and 241(6) and that plaintiff has
made no showing of negligence on the part of moving
defendant. Defendant Amtrak argues that plaintiff is
unable to establish a defective **[**2]** condition or,
alternatively, that defendant Amtrak had notice of such
defective condition. According to defendant Amtrak,

there is no evidence establishing that it directed or controlled the tile [*2] work at Pennsylvania Station (hereinafter referred to as "Penn Station"). Moving defendant further argues that plaintiff does not fall into the protections of the Labor Law as defendant Amtrak did not supervise or control plaintiff's work, or the tile work, and thus owed no duty to plaintiff.

The standards of summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of 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 \(1985\)](#). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]". [*Zuckerman v City of New York*, 49 NY2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595 \(1980\)](#).

In order to establish negligence, a plaintiff is required to prove "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury". [*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386, 814 N.Y.S.2d 136 \(1st Dep't 2006\)](#), citing [*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 162 N.E. 99 \(1928\)](#). Moreover, the defective condition must be created by the owner, or [*3] the owner had actual or constructive notice of the defect. Such notice must be more than general notice of any defective condition. See [*Lopez v Dagan*, 98 AD3d 436, 438, 949 N.Y.S.2d 671 \(1st Dep't 2012\)](#). [*Labor Law § 241\(6\)*](#) states that

"[a]ll...owners and their agents...when constructing

or demolishing buildings or doing any excavating in connection therewith, shall comply with the following [*3] requirements:...(6) 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."

[*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. See [*Russin v Louis N. Picciano & Son*, 54 NY2d 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 have the authority to control the activity bringing about the injury". [*Comes v New York Stale Elec. and Gas Corp.*, 82 NY2d 876, 877, 631 N.E.2d 110, 609 N.Y.S.2d 168 \(1993\)](#)(internal citations omitted). 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 plaintiffs work. See [*Philbin vA.C. & S., Inc.*, 25 AD3d 374, 374, 807 N.Y.S.2d 84 \(1st Dep't 2006\)](#). The Appellate Division, First Department, held in [*Philbin*](#) that [*4] "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." *Id* (internal citations omitted).

In opposition, plaintiff argues that it is defendant Amtrak's burden to establish that it did not create the defective condition or have actual or constructive notice of it. According to plaintiff, defendant Amtrak has failed to meet such burden. Plaintiff was diagnosed lung cancer, which plaintiff alleges was caused by his exposure to ultra-hazardous *asbestos* dust when he worked as a train conductor with the Long Island

Railroad from 1971 to 1996 and made stops at Penn Station. Defendant Amtrak took ownership of Penn Station in 1976. Plaintiff testified that during his over two decade career, all of his train routes went through Penn Station and that there was always renovation in the main concourse. Plaintiff further testified that tile work was performed in Penn Station at all hours of the day and that he frequently spent time in the main concourse during his time in between routes and during his lunch break where he would walk **[**4]** right along the construction areas. **[*5]** Plaintiff testified that during these times he would see debris everywhere and asbestos dust in the air. According to plaintiff, he observed boxes of tile in the construction area which were labeled asbestos.

A careful review of all the papers reveal that defendant Amtrak relies upon, *inter alia*, plaintiffs testimony to establish that moving defendant was not supervising or directing the work. When asked who directed the work, plaintiff testified "I would go with Amtrak, Amtrak owned Penn Station." Affirmation in Opposition to Defendant Amtrak's Motion for Summary Judgment, Exh. 3, Depo. Tr. of Ernest Cummings, p. 695, In. 20-23. Plaintiff further testified, when asked who the workers reported to, "I would say Amtrak supervisors, whoever was in charge of the job." *Id.* at p. 695 In. 24-p. 696 1n.5. The Appellate Division has held that "[a] defendant can...establish its prima fade entitlement to judgment as a matter of law in a premises liability case by showing that the plaintiff cannot identify the cause of his or her accident. A plaintiff's inability in a premises liability case to identify the cause...is fatal to the cause of action because a finding that the defendant's negligence, **[*6]** if any, proximately cause the plaintiffs injuries would be base on speculation." [Gani v Ave. R Sephardic Congregation, 159 AD3d 873, 874, 72 N.Y.S.3d 561 \(2nd Dep't 2018\)](#)(internal citations omitted). The Appellate Division in [Gani](#) held that a defendant may

establish entitlement to summary judgment through the use of plaintiff's deposition transcript. *Id.* Here, defendant Amtrak relies upon plaintiffs speculative testimony in establishing that moving defendant did not have control and did not supervise the work performed in Penn Station. Plaintiffs speculative testimony alone is insufficient to establish that defendant Amtrak directed or supervised the work.

The instant action involves the potential of dust from construction work done in Penn Station either traveling to the train where plaintiff was working or being inhaled by plaintiff as **[**5]** he was on a break from work. Here, no issue of fact raised has been raised that defendant Amtrak was directing or supervising the work being done in Penn Station. Moreover, the Court finds that plaintiff was not working within the original zone of the tile work. Thus, defendant Amtrak's motion for summary judgment, pursuant to *CPLR 3212*, for a finding in favor of said defendant on the grounds that said defendant made a prima facie case demonstrating **[*7]** lack of duty, breach, or causation and to dismiss the complaint and all cross-claims against it is granted.

Accordingly, it is

ORDERED that defendant Amtrak's motion for summary judgment seeking to dismiss plaintiff's complaint and all cross-claims against it is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Amtrak with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court

bear the amended caption; and it is further

ORDERED that within 30 days of entry, defendant Amtrak shall serve a copy of this Decision/Order upon plaintiff with notice of entry.

This Constitutes the Decision/Order of the Court

1/10/2022

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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