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

PRESENT: HON. SHERRY KLEIN HEITLER Justice

PART 30

Index Number : 190082/2011
CRANE, PAUL
vs.
A.O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. 190082/11

MOTION DATE

MOTION SEQ. NO. 006

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided as per the memo decision 9.5.12.

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

FILED

SEP 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9.5.12

_____, J.S.C.

HON. SHERRY KLEIN HEITLER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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PAUL CRANE and ARLENE CRANE

Plaintiff,

- against -

A.O. SMITH WATER PRODUCTS CO., et al.

Defendants.

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Index No. 190082/11
Motion Seq. 006

**DECISION & ORDER**



**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant National Grid Generation, LLC, sued herein as Long Island Lighting Company ("LILCO"), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it on the ground that under New York's Labor Law and the common law that it cannot be held responsible for plaintiff Paul Crane's alleged asbestos exposure. For the reasons set forth below, the motion is denied.

## BACKGROUND

Plaintiff Paul Crane was diagnosed with mesothelioma in February of 2011. This action was commenced in March of 2011 by Mr. Crane and his wife Arlene Crane to recover for personal injuries allegedly caused by Mr. Crane's exposure to asbestos. Relevant to this motion is plaintiffs' claim that Mr. Crane was exposed to asbestos while working at the Shoreham Nuclear Power Plant construction site ("Shoreham") as a steamfitter from 1975 to 1986.

Mr. Crane was deposed over the course of three days between May 24, 2011 and May 26, 2011.[1] He testified that while at Shoreham he worked for steamfitting subcontractor Courter & Co.

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[1] Copies of his deposition transcripts are submitted as defendant's exhibits D and E ("Deposition").

("Courter"), primarily in the reactor and turbine rooms, where he was responsible for installing and repairing pipes. He testified that particular concern had to be paid to the integrity of the Shoreham site due to strict nuclear regulations, and he was required to wrap all of the pipes in asbestos blankets to protect them from falling equipment and other hazards. After working several years as an insulator at Shoreham, Mr. Crane was trained as a welder, in which capacity he continued to use pure asbestos blankets to protect himself while he performed his duties. These same blankets were then cut into smaller pieces and used to wrap the pipes. Other steamfitters working in Mr. Crane's presence would often remove and replace these blankets by hand.

Mr Crane testified that in or about 1977 the pure asbestos blankets were replaced with Novatex-brand asbestos-containing blankets. During this replacement process the work areas were neither cordoned off nor wetted down to prevent dust from spreading throughout the facility.

The defendant does not dispute that Mr. Crane was exposed to asbestos when he personally handled the pure asbestos blankets and Novatex asbestos-containing blankets. Nor does the defendant dispute that Mr. Crane's co-workers manipulated asbestos-containing products in his presence. Defendant contends under Labor Law § 200 and the common law that it is not a proper party to this case because whether or not it was an owner of the Shoreham site it did not supervise or control the work which brought about Mr. Crane's injuries. In support the defendant submits contracts with Courter and the Stone & Webster Engineering Corporation ("Stone & Webster") to show that such contractors managed everyday construction at the Shoreham site. Plaintiffs in opposition submit documentary evidence to show that LILCO did indeed exercise the requisite degree of supervision and control over Mr. Crane and his work processes such that it is strictly liable to plaintiffs pursuant to New York's Labor Law.

## DISCUSSION

Labor Law § 200[2] codifies the common-law duty imposed on an owner or general contractor to provide construction workers with a safe work site. *See Nevins v Essex Owners Corp.*, 276 AD2d 315 (1st Dept 2000). Liability under § 200 is limited to parties who "exercised direct supervisory control over the manner in which the activity alleged to have caused the injury was performed" (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 380-81 [1st Dept 2007]) or who create or have actual or constructive notice of an unsafe condition which causes the injury. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 877 (1993).

To refute the defendant's claim that it did not exercise control over Mr. Crane's work, the plaintiffs must show that LILCO 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 LILCO had actual or constructive notice of the defective condition that caused the injury, *see LaRose v Resinick Eighth Ave. Assoc., LLC,* 26 AD3d 470 (2nd Dept 2006); *see also Comes*, *supra*, at 877. The key issue is whether LILCO was in a position to "avoid or correct [the] unsafe condition." *Russin*, *supra*, 54 NY2d at 317.

Despite the defendant's contentions, Mr. Crane's testimony evinces LILCO's general control over the Shoreham site (Deposition p. 105-06):

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[2] Labor Law § 200, entitled "General duty to protect health and safety of employees; enforcement", provides in relevant part, that

"1. 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."

Q: And at any time when you were at Shoreham were you ever warned or told by LILCO or anyone else that there was something dangerous about the air you were breathing?

A: No.

Q: And what was, generally speaking, LILCO's role at the Shoreham power plant?

A: Well, they oversaw the job site. I mean, Stone & Webster was the engineering firm, but they had to answer to LILCO. LILCO was actively involved in the site.

Q: Did you ever see any LILCO people, LILCO employees on the site?

A: Yes.

Q: What were they generally doing?

A: Walking around with clipboards and checking, I guess, making sure the piping was installed. I'm sure that Stone & Webster or Courter was billing them, so they would check that kind of stuff.

The court recognizes that under Labor Law § 200 general supervisory authority in and of itself is insufficient to constitute supervisory control. *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007). It must also be demonstrated that the owner "controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed." *Id.*

The defendant's contracts with its construction manager, Stone & Webster[3], and its steamfitting subcontractor, Courter, (*see* defendant's exhibits F & G) more than sufficiently show that LILCO exercised the requisite degree of control over the site. The May 31, 1973 agreement between LILCO and Stone & Webster provides that Stone & Webster's responsibilities "shall not include day to day supervision" of any subcontractors. (Defendant's exhibit F, p. 2). The contract

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[3] Notably, Stone & Webster's title changed from "construction manager" to "constructor" in 1973, two years before Mr. Crane began to work at the Shoreham construction site. (Defendant's exhibit F, Amendment to Contract Dated as of June 1, 1967, at 1).

further provides that "various positions within the construction supervisory force may be staffed by qualified LILCO construction personal as designated by LILCO and as agreed upon by Stone & Webster." (*Id.* at 4). The logical implication of these provisions is that LILCO itself retained a significant degree of supervisory responsibilities. Perhaps even more inculpatory of the defendant's authority is its January 2, 1974 contract with Courter, which in relevant part provides that "[a]ll piping, valves, pipe supports equipment and materials to be installed shall be furnished by [LILCO] to the Contractor." (Defendant's exhibit G, p. 2).

Moreover, the documentary evidence submitted by plaintiffs also demonstrate control, starting with two National Institute for Occupational Safety and Health ("NIOSH") reports which were issued in response to a confidential request for a health hazard evaluation from employees at the Shoreham power plant who were concerned about the use of Novatex blankets. (Plaintiffs' exhibit D). The first report, which was issued in November of 1979, confirms Mr. Crane's testimony concerning the use of such blankets and plaintiffs' claims that the use of such blankets caused the workers to be exposed to asbestos. LILCO was aware of these inspections because the report reveals that NIOSH investigators met with both company and union representatives while touring the site. NIOSH issued a follow-up report in or about February 1980, in which it concluded that "a hazard of occupational exposure to airborne asbestos fibers exists at the Shoreham Nuclear Power Plant construction site." (Plaintiffs' exhibit E, p. 1). NIOSH recommended, among other things, that Novatex not be used as a kneeling blanket, that workers be given instructions to pick up and properly dispose of Novatex scraps, and that all cleanup of asbestos dust be accomplished via vacuum cleaners and wet cleaning methods as opposed to dry sweeping methods.

On or about April 14, 1980, LILCO assistant project manager W.J. Museler responded to the

NIOSH reports. (Plaintiffs' exhibit F). While Mr. Museler did not concur with NIOSH's primary conclusion regarding the potential for occupational asbestos exposure at the Shoreham site, he conceded that "several of [NIOSH's] recommendations . . . are worthwhile and *we are proceeding to reduce the use of Novatex even further.*" *Id* (emphasis added). In or about May 1, 1980, Mr. Museler sent a memorandum to all of the Shoreham construction site supervisors and contractors regarding the proper handling of Novatex materials. Mr. Museler attached a "compilation" of handling and disposal guidelines to his memorandum, several of which did comport with NIOSH's earlier recommendations. These LILCO guidelines were distributed to all of the steamfitters by Courter, Mr. Crane's employer.

LILCO argues that the plaintiffs have failed to show that it exercised any supervision or control over the steamfitters' use of the blankets prior to NIOSH's involvement. According to LILCO, this is crucial because the "'health hazard was the 'improper use' of the blankets, not the blankets themselves", and because Mr. Crane does not allege that he was exposed to asbestos at the Shoreham site after NIOSH became involved in late 1979. (Defendant's Reply Affirmation, p. 3). In LILCO's view, it cannot be charged with a duty under the Labor Law in the absence of such evidence. But it appears to this court that since LILCO was integral to the implementation of safety guidelines for the use and handling of asbestos blankets after NIOSH issued its reports, a reasonable inference may be drawn that LILCO supervised or controlled which materials would be used at the Shoreham site prior to NIOSH's involvement. LILCO has not presented any evidence to the contrary.

Overall, the evidence shows that LILCO was responsible for the presence of pure asbestos blankets and Novatex blankets at the Shoreham nuclear power plant. It also shows that LILCO

directed and implemented safety procedures regarding those materials. This evidences LILCO's authority to supervise and control the exact unsafe conditions which plaintiffs allege caused Mr. Crane's injuries. The defendant's denial of supervisory authority prior to NIOSH's involvement is without merit.

Accordingly, it is hereby

ORDERED that National Grid Generation, LLC's motion for summary judgement is denied in its entirety.

This constitutes the decision and order of the court.

**DATED:** 9.5.12

**SHERRY KLEINHEITLER**
**J.S.C.**