IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GEORGE THOMPSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CA# 08C-06-250 JAP
	)	
MURATA WIEDEMANN, INC, OMRON SCHIENTIFIC TECHNOLOGIES, AND AUTOMATED MACHINERY INC.	)	
	)	
Defendant.	)	
	)	

ORDER

The court heard oral argument on the motions for summary judgment in the above captioned case on October 10, 2011. The court reserved ruling on the motions and gave counsel an opportunity to file supplemental briefing materials. This constitutes the court's rulings on the motions for summary judgment.

A moving party is entitled to summary judgment as a matter of law where there is no genuine issue of material fact.[1] In deciding a motion for summary judgment, the court shall view the facts in the light most favorable to the non-

[1] Del. Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Snyder v. Baltimore Trust Co.*, 532 A.2d. 624, 625 (Del. Super. 1986).

moving party.[2] In order for summary judgment to be granted, not only must a moving party show the absence of any contention of material fact but a moving party also must show that the only reasonable inferences that could be drawn from the facts are adverse to the non-moving party.[3]

Defendant, Automated Machinery, Inc.'s ("AMI") first motion for summary judgment argues that AMI did not owe a duty to Plaintiff. There is a genuine issue of material fact as to whether the contract created a duty in this case, therefore AMI's first motion for summary judgment is hereby **DENIED.**

Defendant's, AMI, second motion for summary judgment argues that Plaintiff was more than 50% negligent in proximately causing the accident from which his injuries resulted. There is a genuine issue of material fact as to how the negligence should be apportioned, therefore AMI's second motion for summary judgment is hereby **DENIED.**

Defendants, Murata Wiedemann, Inc., Murata Machinery USA, Inc., Muratec, Warner & Swasey Co., KT Swasey, Cross & Trecker, and MAG Giddings & Lewis, moved for summary judgment based on Delaware's statute of repose.[4] The "Builder's Statute" places a six year limitations period on actions stemming from personal injuries arising from construction, supervision, or design

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[2] *Snyder*, 532 A.2d. at 625.
[3] *Watson v. Shellhorn & Hill, Inc.*, 221 A.2d 506, 508 (Del. 1966).
[4] 10 *Del C.* § 8127.

of an improvement to real property.[5] Builder's Statutes "are prophylactic measures taken by the Legislatures to lessen the construction professions' exposure to the almost unlimited liability which has resulted from the demise of the privity doctrine and the imposition of a discovery rule in tort cases."[6] The statute reads in pertain part:

> "[n]o action, whether in or based upon a contract (oral or written, sealed or unsealed), in tort, or otherwise, to recover damages or for indemnification or contribution for damages, resulting: (1) From any alleged deficiency in the construction or manner of construction of an improvement to real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction; or … (3) From any alleged personal injuries arising out of any such alleged deficiency."[7]

The crux of the argument here is over the meaning of "improvement to real property." The statute defines improvement to "include buildings, highways, roads, streets, bridges, entrances and walkways of any type constructed thereon, and *other structures* affixed to and on land."[8] The court must decide whether the Opti-Shear 412 shearing machine, which weights approximately 26 tons, is an improvement to real property, specifically an "other structure," under the "Builder's Statute."

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[5] *See* 10 *Del. C.* §8127; *Beckler v. Hamada*, 455 A.2d 353, 354 (Del. 1982); *City of Dover v. International Telephone and Telegraph Corp.*, 514 A.2d 1086, 1088-89 (Del. 1986).
[6] *Beckler*, 455 A.2d at 355.
[7] 10 *Del. C.* §8127(b).
[8] 10 *Del. C.* §8127(a)(2) (emphasis added).

The Opti-Shear machine is a large right-angle industrial shearing machine. It measures, 21'4" wide, 8'4" high, 15'5.5" long and weighs 52,500 lbs. It rests on a concrete foundation that is 18 x 22 feet. The device cuts large sheets of metal for use in commercial applications. The device was originally installed in December 1988 and was moved from Eagle Group's Smyrna facility to its Clayton facility in the early 1990's where it has remained.

The Delaware Supreme Court considered the "Builder's Statute" in *City of Dover*.[9] The Court engaged in statutory interpretation. "[T]he doctrine of *ejusdem generis* does not require that the term 'structure' be limited in its scope to the things specifically named in section 8127(a)(2). The listing in the statute is exemplary, not exclusive."[10] The court found that a utility pole was a structure "[s]ince it is unquestionably affixed to land."[11]

Two earlier Superior Court decisions set out a common sense test for determining what constitutes an "improvement" under the "Builder's Statute." Judge Martin looked to other jurisdictions in *Hiab Cranes & Loaders, Inc. v. Service Unlimited, Inc.*[12] and determined that the "common sense" approach was most appropriate in analyzing "improvement."[13] Judge Bifferato embraced Judge Martin's approach, which further defined "'improvement' as: A permanent

[9] 514 A.2d 1086.
[10] *Id.* at 1089.
[11] *Id.* at 1090.
[12] Del. Super, C.A. No. 82C-FE-98, Martin, J. (Aug. 16 1983).
[13] *See Davis v. Catalytic, Inc.*, 1985 WL 189329 at *5 (Del. Super. 1985).

addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."[14] The Court found that a slurry line cooler, a large industrial heat exchange device built of metal piping encased in a steel structure, constituted an improvement to real property based on several facts.[15] Those facts include that the structure was intended to be a permanent addition to real property, it was a free-standing structure, it was anchored in a slab of concrete, it increased the site's productivity, and enhanced the capital value of the real property.[16]

The United States Court of Appeals for the Third Circuit applied Delaware's Builder's Statute in *Woessner v. Air Liquide Inc.*[17] Although not binding on this court, the court finds Judge Ambro's learned opinion examining past Delaware decisions helpful in resolving this matter. The Court also employed the "common sense" approach after examining Delaware law on the issue.[18] The plaintiff in *Woessner* was injured while testing a motor control center before removing the motor for a repair.[19] The Court looked to the motor control center being bolted to

[14] *Id.* (quoting *Pacific Indem. Co. v. Thompson-Yaeger, Inc.* 260 N.W. 548, 545 (Min. Supr. 1977)) (citing Webster's Third New International Dictionary 1138 (1971)).
[15] *Davis*, 1985 WL 189329 at *1, *5.
[16] *Id.* at *5.
[17] 242 F.3d 469 (3rd Cir. 2001).
[18] *See id.* at 475.
[19] *Id.* at 471.

the concrete floor and being an integral part of the building's purpose to support its finding that the motor control center was an improvement to real property.

In this case, the Opti-Shear 412 is a piece of production machinery.[20] It weighs approximately 26 tons and is thus affixed to its concrete foundation. Eagle Group manufactures commercial foodservice equipment and this device furthers its manufacturing capabilities. It makes the property more useful and is distinguished from ordinary repairs to the property.[21] The Opti-Shear 412 shearing machine would ordinarily not be moved once installed and should be considered permanent. Although the device was moved once, it has been in its current location for nearly twenty years and is permanent but for an arduous moving process. It is possible to move nearly any device, but this large device and its foundation are an integral part of the Eagle Group facility. As such, it falls under "other structure" component to the improvement to real property definition and therefore, the motion for summary judgment is **GRANTED.**

SO ORDERED this 17th day of November, 2011.

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Judge John A. Parkins, Jr.

[20] *See id.* at 475-76 (citing *Davis*, 1985 WL 189329).
[21] *See Davis*, 1985 WL 189329 at *5; *see also Pacific Indem. Co.*, 260 N.W. at 545.

oc: Prothonotary
cc: Arthur M. Krawitz, Esquire and Matthew R. Fogg, Esquire, Wilmington, Delaware, Attorneys for Plaintiff
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