SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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August 23, 2011

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RE: John Mendez v. Residential Construction Services, LLC and Sherman Heating Oils, Inc. and George Sherman Corporation
Civil Action No. 10C-03-204 WCC

Submitted: July 22, 2011
Decided: August 23, 2011

Dear Counsel,

The Court has before it motions for summary judgment filed by the defendants, motions for default filed by the plaintiff and plaintiff's motion in limine. After considering the arguments of counsel and the submissions made as to each motion, the following letter opinion is issued to decide those motions.

A. Plaintiff's Motion in Limine

During the deposition of Jerry Bowen, the owner of Residential Construction Services, LLC, (Residential) he testified that he believed the fire was a result of an arson. It appears he based this conclusion on hearsay statements reflecting that Mr. Mendez had indicated that he was having financial difficulty supporting the home. The defendant would like to now introduce similar evidence during the trial, particularly during the testimony from the Fire Marshal.

There is no indication in any report that investigated this fire that its cause was an act of arson. As such, Mr. Bowen's statement is simply unsupported speculation that has no evidentiary basis and may not be introduced into the trial. As such, the motion in limine will be granted and this area should not be the subject of testimony.

B. Defendant Sherman Heating Oils, Inc. Motion for Summary Judgment

The defendant Sherman Heating Oils, Inc.'s (Sherman) motion for summary judgment is centered around two arguments. First, since the installation of the stove, the propane tank readings reflect that very little propane had been consumed and therefore there is no evidence that a leak ever occurred. Secondly that the experts agree that once the interlocking valve fittings are tightened and engaged it forms a pressure resistant leak type seal. Since the defendant asserts that the lines were tested at the time of installation without any evidence of leaking, they argue there is nothing to suggest that Sherman's conduct was the cause of the fire. The defendant further asserts that since the stove had been connected for some period of time without any evidence of anyone smelling a leak, it further reflects that the work performed was appropriate and their conduct was not the cause of the fire. Unfortunately the Court finds that the facts are not nearly as clear and precise as that argued by Sherman and will deny the motion.

First, while disputed by the defendant's expert, the plaintiff's expert report reflects that it is his belief that the stop valve used to open or close the flow of propane to the stove was not fully engaged and appears to have eventually leaked propane. The report of Mr. Zazula states the following:

On December 17, 2009, an SEM evaluation was conducted on the stop valve and flexible appliance hose. The outlet side of the stop valve fitting has approximately six threads. The SEM evaluation revealed the first three threads were clean. The corresponding three threads on the inlet side of the appliance hose fitting appeared to be engaged with the first three threads on the outlet side of the stop valve. The remaining three threads of the valve appeared to have contaminants present consistent with by-products of the fire. If all threads were engaged there would be no evidence of contaminants on the threads (Photos 16 - 20).

The aforementioned stop valve is used to open or close the flow of LP to the stove. The valve fitting utilizes an opposing tapered flare for its sealing surface. The outlet fitting of the stop valve has approximately six threads which engage the same number of threads on the inlet side of the flexible appliance hose fitting. The two sealing surfaces are tapered at approximately 45°. Once properly tightened/engaged this sealing surface produces a pressure-resistant, leak-tight seal.

As mentioned above, during my April 2, 2009 leak test, the outlet side of the valve was leaking between the mating surfaces of the fitting and flexible appliance hose.

The SEM evaluation indicated only three of the approximate six threads of each corresponding fitting were engaged at the time of the fire. This is based upon the evident contaminants present on the non-engaged threads. The three corresponding engaged threads were clean due to their mating. The SEM evaluation indicates the stop valve for the stove was loose and likely leaking LP at the incipient stage of the fire.

There does not appear to be a dispute based upon the Fire Marshal's investigation and subsequent investigation performed by the insurance company that the origin of the fire was in the area behind the stove located in the kitchen of the home. If true, and since there is nothing to suggest that the stove malfunctioned in any manner, there can only be two logical conclusions as to the cause of the fire. Either the stove was not properly connected to the propane line or a subsequent intervening act by some individual working in the area of the stove caused the fire. While the plaintiff because of the fire may not be able to precisely determine which event occurred here, he is able to put before the jury evidence to support these conclusions. Which of these situations is factually supported is a matter for the jury to decide. Candidly, the expert testimony would support either conclusion and the jury will be required to consider the totality of the evidence to determine which theory, if any, is supported by a preponderance of the evidence. While a difficult task for the plaintiff, it does not foreclose his presentation of the evidence at this time.

The defendant makes much of the fact that if the rate of flow from the hose was the same before the fire as it was in the post fire testing, the propane tank would have been emptied way before the date of the fire. While this is mathematically correct, the expert has opined that the flow rate is affected by the positioning of the flex hose behind the stove, and there is simply no way of establishing what the rate would have been prior to the fire occurring because of the damage that has now occurred. As such, the flow rate calculation is not dispositive of the case.

Also during oral argument, it was mentioned that the Sherman employee who installed this connection and who allegedly performed the testing was terminated several days later for drinking on the job. Assuming for the purposes of this motion that this occurred, it clearly would call into question whether the appropriate testing was actually performed. There also appears to be an issue of whether the necessary certifications by the technicians who subsequently connected the stove were appropriately issued. These facts are all circumstantial evidence relating to the issue of who is at fault.

The Court is not suggesting by this decision that defendant Sherman's argument may not win the day of trial since it raises some significant issues. The evidence may lead the jury to conclude that the plaintiff has not sufficiently met his burden or it may even lead the Court to conclude based upon the evidence that

a directed verdict is appropriate. However, at this juncture, the Court simply finds it would be inappropriate under the standards of summary judgment[1] to take this decision away from the jury. As such, the motion for summary judgment is hereby denied.[2]

C. Plaintiffs Motion for Default Judgment against Sherman Heating Oils, Inc.

This motion is premised upon the assertion the defendant Sherman failed to provide in the discovery a propane delivery ticket that would assist in determining the amount of propane that was in the tank before the fire. The Court finds that there has been no intentional destruction or suppression of this evidence by the defendant and will deny the motion.

This billing to the plaintiff which would have allegedly established that 25 additional gallons were delivered appears to be merely an accounting error. The Court is satisfied that the $71.25 billing reflected in the plaintiff's credit card was for the initial 25 gallons placed in the tank at the time of installation.[3] As such, this appears to be a double billing, and the defendant has provided all requested records regarding the delivery of propane. The Court finds no records have been withheld and the motion will be denied.

D. Plaintiffs Motion for Default against Residential Construction Services, LLC

This motion stems from the late production of construction records. Discovery requests were appropriately made by the plaintiff and in response the defendant produced a limited number of documents relating to the contract. Mysteriously once the motion for default was filed by the plaintiff, the defendant

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[1] *E.g.*, *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) ("A summary judgment may not be granted under Rule 56 unless there are no material issues of fact."); s*ee also AeroGlobal Capital Management, LLC v. Cirrus Industries, Inc.,* 871 A.2d 428, 443 (Del. 2005) ("Summary judgment should be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law").

[2] Residential Construction Services LLC has also filed a summary judgment motion which was based on the theory that if Sherman Heating could not be held responsible, a similar ruling would apply to them. Since the Court has denied the motion for summary judgment by Sherman Heating, the motion filed by Residential Construction will also be denied without further comment.

[3] This decision is further supported by the fact that the plaintiff disputed the credit card billing and adjustments were made by the defendant after it was brought to their attention.

has now "found" the construction file and it was produced only a few weeks prior to the argument on this motion. While the late production is concerning to the Court and clearly unacceptable conduct, the records have now been produced and it does not appear the plaintiff has been prejudiced by the late production. The plaintiff continues to assert that the "punch list" document is not in the file and is critical to the determination of the issues here and in particular to counter defendant Sherman's argument that some intervening conduct has occurred. While the Court will not grant default, it will reserve its decision on whether an adverse inference jury instruction should be given until it has heard testimony at trial. Plaintiff should be prepared to establish through the witnesses that a punch list was created and the document has not been preserved. If that has occurred, without any reasonable explanation, the Court will be inclined to grant such instruction. The Court however will be in a better position to judge this issue after hearing the testimony.

The Court believes this resolves all outstanding motions, and unless a settlement occurs, the parties should be prepared for the pretrial this Thursday, August 25th at 9:15 a.m. and to proceed to trial on September 6, 2011, as this is the only trial remaining on my calendar for that day.

Sincerely yours,

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Christy Magid, Civil Case Manager