RENDERED: July 28, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002620-MR

JAMES FULTON and
LENNA FULTON — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
CIVIL ACTION NO. 98-CI-00661

JOHN CRANE, INC. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER AND MINTON,[1] JUDGES; HUDDLESTON,[2] SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: James Fulton began working as a carpenter in 1965 and retired in 2001. During his long career, Fulton was employed by numerous contractors in western Kentucky and primarily worked at industrial job sites such as power plants and large chemical plants. According to Fulton, he spent most of his time either building scaffolds for pipe workers,

[1] Judge John D. Minton concurred in this opinion prior to his resignation to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

boilermakers and insulators or building forms in which to pour concrete. In 1998, Fulton was diagnosed with asbestosis. In that same year, Fulton filed a products liability lawsuit[3] in McCracken Circuit Court against numerous companies claiming that he had been exposed to insulation and other building materials containing asbestos that caused him to develop asbestosis. One of the several defendants named in Fulton's lawsuit was John Crane, Inc., a company which manufactured gaskets and gasket material that allegedly contained asbestos.

Before we get to the merits of this appeal, we must wade through a procedural morass. On November 4, 2004, after this case had been pending for some six years, John Crane filed a motion for summary judgment and set it for a hearing on December 3, 2004. The motion was not accompanied by a memorandum setting forth the reasons why the movant was entitled to judgment in its favor. Pursuant to a master order governing this case, Fulton was to have filed a response to this dispositive motion within fifteen days, but he did not do so.

John Crane tells us in its brief that a couple of days prior to the scheduled hearing, Fulton's counsel called John Crane's counsel and asked that the December 3, 2004, hearing be postponed. John Crane's counsel agreed, and on December 3, 2004, Fulton's associate counsel appeared in court and asked

[3] Fulton's wife, Lenna, joined in his lawsuit seeking damages for loss of consortium.

that John Crane's motion be removed from the motion docket. For reasons not apparent from the record, the circuit court went ahead and ruled on the motion, granting John Crane summary judgment. Fulton did not move to set the judgment aside, but instead, on December 17, 2004, timely appealed to this Court. Upon the filing of the notice of appeal, McCracken Circuit Court lost jurisdiction of this case.

Subsequent to December 3, 2004, John Crane re-noticed its motion for summary judgment for a hearing on January 7, 2005. John Crane's counsel appeared at the hearing, but Fulton's counsel did not. On February 3, 2005, the motion was again sustained and summary judgment in favor of John Crane was granted. Since, as previously noted, McCracken Circuit Court had already lost jurisdiction over this case because an appeal was pending in this Court, the second summary judgment is of no moment and need not be addressed. So we are left with the December 3, 2004, summary judgment and the question whether it was properly granted. Our first inquiry is whether there are material issues of fact. If the answer is "no," we then look to see whether John Crane was entitled to judgment as a matter of law.

Fulton argues that summary judgment in favor of John Crane was not proper because the gasket manufacturer never explained in a memorandum why summary judgment should have been

granted. According to Fulton, by moving for summary judgment without explanation, John Crane attempted to force Fulton to produce evidence that he was entitled to go to trial. Citing *Robert Simmons Construction Co. v. Powers Regulator Co.*,[4] Fulton argues that John Crane never meet its initial burden of showing that no issue of material fact exists. In addition, relying on *Hoke v. Cullinan*,[5] Fulton argues that he was deprived of his opportunity to properly respond to John Crane's motion since he was waiting for John Crane to file a memorandum in support of its motion before he filed a response. Thus, Fulton insists, a grant of summary judgment was premature.

When considering a motion for summary judgment, the circuit court must view the record in a light most favorable to the party opposing the motion (in this case, Fulton) and must resolve all doubts in favor of that party.[6] However, the party opposing the motion must present, at the very least, some affirmative evidence demonstrating the existence of a genuine issue of material fact that requires a trial.[7] The court should not grant summary judgment if any issue of material fact exists.[8]

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[4] 390 S.W.2d 901 (Ky. 1965).

[5] 914 S.W.2d 335, 338 (Ky. 1995).

[6] *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

[7] *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992).

[8] *Steelvest, Inc. v. Scansteel Service Center, Inc., supra,* note 5.

We, on the other hand, must determine whether the circuit court correctly found that no genuine issue of material fact exists and whether, as a matter of law, the moving party (in this case, John Crane) was entitled to judgment in its favor.[9] Since findings of fact are not in issue, we review the circuit court's decision *de novo*.[10]

We are not persuaded by Fulton's argument that summary judgment was inappropriate because John Crane failed to file a memorandum in support of its motion. Kentucky Rules of Civil Procedure (CR) 56.01 through 56.07 govern motions for summary judgment. CR 56 does not require a party seeking summary judgment to file an accompanying memorandum, although we agree that it is a better practice to do so. Nor does Fulton refer us to any local rule, statute or case law that supports his argument that John Crane was required to support its motion with a memorandum.

Neither do we agree with Fulton that he was deprived of an opportunity to respond to John Crane's motion. Fulton states unequivocally that he was waiting for John Crane to file its memorandum in support of summary judgment before he filed his response. However, as we discussed above, John Crane was not required to file such a memorandum. Nor was Fulton required

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[9] *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

[10] *Id.*

to wait for such a memorandum before he responded to John Crane's motion. Fulton could have filed within fifteen days, according to the master order, a response arguing that John Crane's motion failed to provide a basis for summary judgment. After judgment was entered, Fulton could have filed a CR 59.05 motion to alter, amend or vacate the December 3rd order on the ground that judgment had been prematurely granted since the parties had agreed that John Crane's motion for summary judgment would be removed from the docket and rescheduled for a hearing at a later date.

Fulton argues that by filing such a perfunctory motion, John Crane was simply trying to force Fulton to produce evidence that he was entitled to a trial. Fulton contends that this is prohibited. However, a party opposing a motion for summary judgment is required to do just that, produce some affirmative evidence showing that a genuine issue of material fact exists warranting a trial.[11]

Fulton testified in a discovery deposition that during his career as a carpenter he occasionally saw boxes with the logo "Crane Company" on them. He said that these boxes contained gaskets which he felt may have contained asbestos. But, John Crane observes that the Crane Company is a company that manufactured gasket material, which may or may not have

[11] *Hubble v. Johnson, supra,* note 6.

contained asbestos; furthermore, John Crane points out that the Crane Company has no affiliation whatever with John Crane. Simply stated, the record contains no evidence that Fulton was exposed to products manufactured by John Crane, although there is some evidence that Fulton may have been exposed to products manufactured by the Crane Company. Thus, no genuine issue of material fact exists regarding Fulton's claim against John Crane, and summary judgment was proper.

The judgment is affirmed.

ALL CONCUR.

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