STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: November 2, 2016]

In Re: Asbestos Litigation	:	
	:	
CHARLES P. PISANO AND MARY ANN B. GRAHAM, individually and as Co-Executors of the Estate of JOHN A. PISANO	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No. PC-13-5868
	:	
ALFA LAVAL, INC., Individually and as Successor in Interest to SHARPLES CORP., et al.	:	
Defendants.	:	

DECISION

GIBNEY, P.J. The Defendant Sears, Roebuck and Co. (Sears or Defendant) seeks summary judgment in the above-entitled personal injury matter. Defendant argues that there are no genuine issues of material fact, that there is insufficient product identification, that the Decedent's affidavits offered to defeat summary judgment contain inadmissible hearsay, and that Defendant is exempt from liability under Rhode Island's Statute of Repose. Plaintiffs object to the motion and argue that there are genuine issues of material fact for trial, that prior to his death the Decedent provided sufficient product identification via his affidavits, that the affidavits meet the dying declaration exception to the hearsay rule, and that the Defendant is not exempt from liability under the Statute of Repose. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

In September of 2013, John A. Pisano (Mr. Pisano or the Decedent) was diagnosed with asbestos-related mesothelioma. In late October and early November, Mr. Pisano executed three affidavits (the Sears Affidavits) relating to his exposure to asbestos and asbestos-containing products sold in part by Defendant. In November of 2013, Mr. Pisano filed an asbestos-related personal injury action asserting claims of negligence, failure to warn, strict liability, and breach of warranty against Defendant. Three months after his diagnosis, Mr. Pisano died in December of 2013 as a result of his illness. He was never deposed.

In the Sears Affidavits, Mr. Pisano alleged that in 1964, he installed asbestos-containing tiles in his home using mastic purchased from Sears. He alleged that these tiles and mastic came from the Sears Company and remembers the appearance, color, and size of the tiles installed. In the first affidavit, executed on October 25, 2013, Mr. Pisano made statements regarding the installation of asbestos-containing floor tiles in the basement of his home. He recounted that a neighbor helped him with installation and that they had cut the tiles to fit around the edge of the room. The Decedent and his neighbor used a hand saw to cut the tiles, which in turn produced dust that the Decedent inhaled. Mr. Pisano stated that the tiles were 10x10 inches with a "speckled pattern and black and white in color." Pls.' Ex. 1.

A second affidavit executed on November 1, 2013 recounts that same event and stated that the tiles were 9x9 inches and were "black and white in color." Pls.' Ex. 2. Mr. Pisano advised that he had circled a description of the installed tiles, which can be found in the Sears catalog for Spring and Summer of 1964. Finally, the third affidavit executed on November 1,

2013 stated that Mr. Pisano participated in the installation of ceiling tiles in his home. He recalls the size and description of these tiles, which again were sold by Sears. The Decedent stated that the ceiling tiles were 12x12 inches and were an "off white color" with an "egg shell appearance." Pls.' Ex. 3. While there is no direct mention that these ceiling tiles may have contained asbestos, Mr. Pisano stated that he had attached and circled the product in question in a copy of the Sears 1964 catalog. Following Mr. Pisano's death in December of 2013, Plaintiffs brought this action for personal injury against Sears and present all three Sears Affidavits in order to overcome Defendant's Motion for Summary Judgment.

II

Standard of Review

"[S]ummary judgment is an extreme remedy that warrants cautious application." Gardner v. Baird, 871 A.2d 949, 952 (R.I. 2005). Pursuant to Rule 56(c), "[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001). Once a summary judgment motion is presented, "[t]he burden rests upon the nonmoving party 'to prove the existence of a disputed issue of material fact by competent evidence; it cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" Mut. Dev. Corp. v. Ward Fisher & Co., 47 A.3d 319, 323 (R.I. 2012) (quoting Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011)). Thus, "by affidavits or otherwise, [opposing parties] have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998).

Accordingly, in order for a plaintiff to survive a defendant's motion for summary judgment as to a particular claim, the plaintiff must "produce evidence that would establish a prima facie case for [that] claim." DiBattista v. State, 808 A.2d 1081, 1089 (R.I. 2002). Conversely, summary judgment is proper where the plaintiff is unable to establish a prima facie case. Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 430 (R.I. 2001). "A judge's function when considering a summary judgment motion is not to cull out the weak cases from the herd of lawsuits waiting to be tried; rather, only if the case is legally dead on arrival, should the court take the drastic step of administering the last rites by granting summary judgment." Mitchell v. Mitchell, 756 A.2d. 179, 185 (R.I. 2000).

III

Parties' Arguments

Defendant argues that the Plaintiffs have failed to offer, and have no expectation of offering at trial, proper product identification. Defendant alleges that Plaintiffs cannot demonstrate any causal connection between Mr. Pisano's medical condition and the installation of asbestos-containing tiles, which were sold by Sears during the 1960s. Sears contends that during that time period, Sears sold two nearly identical floor tiles, one which contained asbestos, while the other was solid vinyl. Sears asserts that to the naked eye, there is little difference in the appearance of the tiles and therefore, Mr. Pisano cannot properly identify the product by affidavit alone.

Additionally, Sears argues that the Sears Affidavits are inadmissible hearsay because they do not meet the dying declaration exception to the hearsay rule. Sears asserts that Mr. Pisano executed the affidavits a month before his death and without a sense of his impending death.

Sears contends that the affidavits do not meet the dying declaration exception or any other exception to the hearsay rule.

Finally, Sears contends that it is exempt from liability in the instant case due to Rhode Island's Statute of Repose. Sears argues that it qualifies as a "materialman" as interpreted by Rhode Island courts and as intended by the Legislature. It contends that the facts of this present matter fit the statute's definition of an "improvement to real property" and thus no liability can attach. For the above-mentioned reasons, Sears argues there is no genuine issue of material fact and that the Court should grant its Motion for Summary Judgment.

Plaintiffs contend that there is enough evidence of product identification to defeat the Motion for Summary Judgment. They outline, through the Sears Affidavits, how Mr. Pisano came into contact with mastic adhesive, floor tiles, and ceiling tiles all sold by Sears in 1964. The Sears Affidavits assert that Mr. Pisano bought the products from Sears and then, with the help of a neighbor, installed the tiles in his home over the course of four weeks. Plaintiffs contend that Mr. Pisano was exposed to asbestos when he sawed the tiles to fit around the edge of the room, inhaling dust in the process. The Plaintiffs note that Mr. Pisano circled an image of the tiles installed in his home and identified the product using the Sears catalog.

Secondly, the Plaintiffs contend that the Sears Affidavits meet the dying declaration exception to the hearsay rule. They argue that Mr. Pisano was too ill to be deposed and had executed the Sears Affidavits a month before he died. Plaintiffs assert that Mr. Pisano was aware of his impending death and, due to information from his doctors, feared he would not survive until deposition or trial. Therefore, the Plaintiffs assert that the Sears Affidavits are admissible at trial.

Finally, the Plaintiffs maintain that the Defendant does not qualify for protection under Rhode Island's Statute of Repose because it does not meet the definition of "materialman" as interpreted by Rhode Island courts. Plaintiffs point to legislative language to argue that the Legislature did not intend for the Statute of Repose to apply in this case. They assert that because Sears did not participate in the installation of the tiles, they are not afforded any protection under the Statute of Repose and therefore, they should not escape liability.

IV

Analysis

A

Admissibility of Affidavits

The parties dispute whether Mr. Pisano's affidavits are admissible under both Rhode Island Rules of Evidence 804(b) and 804(c). Defendant contends that the affidavits do not meet the hearsay exception for dying declarations because Mr. Pisano's affidavits were executed a month before his ultimate death and, thus, not made under the belief of impending death. See R.I. R. Evid. 804(b). Further, they argue the affidavits do not meet the hearsay exception for declarations of decedents made in good faith because they do not have sufficient indicia of reliability as required under the good faith analysis. See R.I. R. Evid. 804(c). Plaintiffs contend that the affidavits were executed after the Decedent received a terminal medical diagnosis and that the Decedent did make the statements under belief of impending death. Plaintiffs argue that the affidavits meet the hearsay exception under 804(b) because they are inherently reliable and were sworn to in good faith.

Federal case law provides that for affidavits to be utilized relative to summary judgment motions, the first requisite is that the information they contain (as opposed to the affidavits

themselves) would be admissible at trial. U.S. v. Hangar One, Inc., 563 F.2d 1155 (5th Cir. 1977) (finding that the threshold issue of admissibility must be resolved before determining whether unresolved questions of fact exist). Rhode Island Superior Court Rules of Civil Procedure 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Super. R. Civ. P. 56(e). Although otherwise admissible evidence may be submitted in inadmissible form at the summary judgment stage, inadmissible hearsay alone may not be used to defeat summary judgment. See Nichola v. Fiat Motor Co., 463 A.2d 511, 513-14 (R.I. 1983) (finding that affidavits that fail to comply with an element of Rule 56(e) are useless in establishing if a genuine issue of material fact exists). Therefore, before considering whether any genuine issues of material fact exist, this Court must first analyze the admissibility of Mr. Pisano's affidavits under Rules 804(b) and 804(c). Id.

Rhode Island Rules of Evidence 804(b) provides that a declarant's statements made while under belief of impending death are admissible if the declarant is later unavailable at trial. R.I. R. Evid. 804(b). The subjective state of mind of the declarant may be proven by express language, by the surrounding circumstances of the particular case, or by statements made to the declarant regarding his or her medical condition. State v. Scholl, 661 A.2d 55, 60 (R.I. 1995). The foundational requirements of the exception are (1) that the declarant is unavailable; (2) that the declarant made the statement under a belief of impending death; and (3) that the statement relates to the cause and circumstances of what the declarant perceives to be his or her impending death. R.I. R. Evid. 804(b); Scholl, 661 A.2d at 60. The Rhode Island Supreme Court has noted that underlying the purpose of this hearsay exception is the necessity created by a declarant's

unavailability and the fact that impending death likely removes any motivation to fabricate the claims. Scholl, 661 A.2d at 59; State v. Gazerro, 420 A.2d 816, 819 (R.I. 1980); see R.I. R. Evid. 804(b)(2) Advisory Committee Note (asserting that a belief in impending death induces a person to speak the truth).

This Court must consider whether Mr. Pisano's belief of impending death was sufficient under the dying declaration hearsay exception. In State v. Dalton, the Supreme Court suggested that no time limit applies in terminal illness cases when analyzing the definition of "impending." 20 R.I. 114, 114, 37 A. 673, 675-76 (1897) (holding that in terminal illness cases it is not necessary to apprehend immediate death; having no expectation of surviving the injury inflicted by defendant will suffice); see Gazerro, 420 A.2d at 819. In Quackenbos v. Am. Optical Corp., this Court considered the fact that doctors had told the declarant that his condition was "incurable [and] inoperable" when it held that the decedent's statements constituted a dying declaration, despite the fact that the declarant died approximately three months after making those statements. No. PC 04-6504, 2008 WL 914390 (R.I. Super. Jan. 17, 2008).

In the present matter, Mr. Pisano was diagnosed with malignant mesothelioma on September 27, 2013. He executed and notarized the first of his affidavits on October 25, 2013, followed by two more on November 1, 2013. In the second set of notarized affidavits executed on November 1, 2013, Mr. Pisano stated that he made the statements with personal knowledge, that the statements related to his work with asbestos-containing materials, and that he was "making these statements with the understanding that [he] may not be well enough to survive through the time of a deposition or trial." Indeed, this case was filed on November 16, 2013 and counsel for Sears entered their appearance on December 16, 2013—the same day that Mr. Pisano died.

This Court is satisfied that Mr. Pisano was fully aware of the terminal nature of his illness after being diagnosed with malignant mesothelioma in September of 2013. See Dalton, 20 R.I. at 114, 37 A. at 675-76. Mr. Pisano sufficiently stated his belief of impending death in an explicit manner and through his own words. See Scholl, 661 A.2d at 60 (relying on a decedent's own words to find an impending belief of death). Further, the circumstances surrounding his diagnosis and the timeline of Mr. Pisano's death suggest that at the time the Decedent executed the affidavits, he accurately believed that he would not live long enough to be deposed or to attend a trial. Id. This Court finds that the affidavits were made with personal knowledge and belief of impending death, and include all the necessary indicia of truthfulness and reliability that is at the core of Rule 804(b). R.I. R. Evid. 804(b); see Scholl, 661 A.2d at 60; Gazerro, 420 A.2d at 819. Plaintiffs have provided sufficient admissible evidence for consideration at the summary judgment stage, and the Court turns to the issue of product identification. See Nichola, 463 A.2d at 513-14; Hangar One, 563 F.2d at 1155.

B

Product Identification

The Defendant contends that the Plaintiffs have failed to provide sufficient product identification in relation to Sears's products that were sold to the Decedent and installed in his home. Rhode Island courts require proof of both product identification and exposure evidence in asbestos-injury cases. See Thomas v. Amway Corp., 488 A.2d 716, 718-722 (R.I. 1985). This Court has, in the past, looked to both Massachusetts and Federal case law on product identification to determine the various ways that a plaintiff might meet his or her burden at the summary judgment stage. In re Asbestos Litigation, No. Civ.A. 01-0696, 2002 WL 1378959 (R.I. Super. June 20, 2002) (turning to Massachusetts and Federal cases where the law and its

design are substantially similar to Rhode Island law). Specifically, Welch v. Keene Corp. addresses the ways in which a plaintiff might sufficiently allege contact with a defendant's asbestos-containing product—including, but not limited to, affidavits with a particular or specific date or range of contact, the proximity and frequency of any contact, and any witnesses who could support contact with the product. 575 N.E.2d 766, 769 (Mass. App. Ct. 1991). Ultimately, any question of product identification will be evaluated on a case-by-case basis. Id.

Sears argues that Plaintiffs have not sufficiently identified which Sears's products allegedly injured the Decedent, considering that—during the time period in question—Sears sold two identical tiles: one containing asbestos and the other made entirely of vinyl. Plaintiffs argue that the Decedent has sufficiently identified the specific asbestos-containing products via two sworn affidavits. In the first affidavit signed on October 25, 2013, the Decedent described, from personal knowledge, the installation of floor tiles in the basement of his home. He stated that the tiles were 10"x10" and contained asbestos. Further, he stated that the tiles sold by Sears had a black and white speckled pattern. A second affidavit—signed on November 1, 2013 and describing the same incident—includes a sample of the Sears Spring and Summer Catalog from 1964. In that affidavit, Mr. Pisano described and circled the image of the asbestos-containing product that he installed in his home. In this second affidavit, the Decedent now describes the tiles as 9"x9" and black and white in color. Mr. Pisano states that the package of floor tiles contained the name "Sears" and that he bought the product from one of the Defendant's stores.

Applying the factors outlined in Welch to the present matter, this Court finds that the Plaintiffs have alleged sufficient product identification in relation to the Defendant. See 575 N.E.2d at 769 (finding product identification when decedent could point to specific date and time period of alleged exposure). The Decedent alleged through two sworn affidavits that he

purchased asbestos-containing products directly from Sears' 1964 product line. He provided detailed descriptions of the products, circled an image from the Sears Catalog, and described the installation process stating that he sawed the tiles and inhaled dust fibers. Such testimony from a source with personal knowledge is sufficient to overcome product identification requirements at the summary judgment stage. Totman v. A.C. and S., Inc., No. Civ.A. 00-5296, 2002 WL 393697 (R.I. Super. Feb. 11, 2002) (holding affidavits provided sufficient product identification at summary judgment where decedent alleged he had worked in vicinity of possible asbestos-containing products).

Any question of whether Sears did indeed sell two products that were identical to the human eye is a genuine issue of material fact to be addressed by a jury. See Turnbaugh v. GAF Corp., 765 F. Supp. 1537, 1540 (W.D. Pa. 1991) (finding that factual issues of product identification in an asbestos case was a question for the jury); Delta Airlines, 785 A.2d at 1126. By his affidavits, the Decedent identified which Sears's products, in particular, he installed in his home and how he inhaled asbestos after sawing the tiles to fit in the room. He stated that he worked on this project, along with his neighbor, over the course of four weeks. Defendant, alternatively, argues that there is no way for the Decedent to be clear on *which* tile he installed with sufficient specificity because Sears sold multiple products that were visually similar. However, any comparison of the appearance or pattern of the tiles is a question for the jury. See Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981) (stating that trial judge's role is to look for factual issues, not to determine them, and accordingly the trial judge should not pass upon credibility or weight of evidence). This Court has found sufficient product identification to preclude summary judgment and to submit questions of product identification to a jury. See Volino v. Gen. Dynamics, 539 A.2d 531, 532-33 (R.I. 1988).

C

Statute of Repose

In the alternative, the Defendant argues that Plaintiffs' case must fail at the summary judgment stage because Plaintiffs' claims against Defendant are barred by Rhode Island General Laws § 9-1-29 (Statute of Repose). The Statute of Repose states, in relevant part, that

> "No action . . . in tort to recover damages shall be brought against any. . . material suppliers who furnished materials for the construction of the improvements, on account of any deficiency in the design, planning, supervision, or observation of construction or construction of any such improvements or in the materials furnished for the improvements[.]" Sec. 9-1-29.

The Statute of Repose goes on to state that it applies to any injury to the person for wrongful death arising out of any such deficiency in materials occurring more than ten years after substantial completion of the improvement to real property. Sec. 9-1-29. The Rhode Island Legislature enacted § 9-1-29 in reaction to the elimination of the doctrine of privity in order to shield contractors, installers, and engineers from liability after a certain number of years. Qualitex, Inc. v. Coventry Realty Corp., 557 A.2d 850, 852 (R.I. 1989).

The Rhode Island Supreme Court has previously explored the definition of "materialman" in Qualitex and noted that the Legislature originally designed the Statute of Repose to protect contractors, architects, installers, etc. in scenarios where an individual's negligence in making an improvement might result in liability for the materialman years later. 557 A.2d at 853. In that same case, the Court found that the defendant was entitled to immunity under the Statute of Repose because it had "designed, manufactured, sold and installed the sprinkler unit" in question. Id. (emphasis added). Similarly, in Desnoyers v. R.I. Elevator Co., the Supreme Court found that the Statute of Repose applied to a manufacturer who took an active

role in the construction of the improvement that ultimately caused the plaintiff's injury. 571 A.2d 568, 570 (R.I. 1990).

The present set of facts is inapposite to the scenario in Allbee v. Crane Co., 644 A.2d 308 (R.I. 1994). This Court has previously distinguished a simple manufacturer of asbestos-containing products from the defendants in Qualitex—noting that the Supreme Court's decision in Qualitex focused on the defendant's role in both manufacturing and installing the product in question. 557 A.2d at 853; Sharp v. AFC-Holcroft, No. PC 08-6456, 2010 WL 3643306 (R.I. Super. Sept. 16, 2010). In the current matter, Sears did not participate in the installation of the product but it allegedly manufactured and sold an asbestos-containing product. The Decedent himself installed the tiles and was allegedly injured by a defect in the product that was preexisting at the time of sale and installation. To apply the Statute of Repose in this case would contravene the Legislature's intent and the Supreme Court's interpretation of the Statute of Repose and would further eliminate liability for any defendant that sold harmful, asbestos-containing products more than ten years ago. See Desnoyers, 571 A.2d at 568; Qualitex, 557 A.2d at 853. Therefore, this Court finds that Defendant does not meet the definition of materialman as interpreted by the Rhode Island Supreme Court and thus is not protected by the Statute of Repose. See Desnoyers, 571 A.2d at 568; Qualitex, 557 A.2d at 853.

V

Conclusion

This Court finds that genuine issues of material fact exist. Defendant does not meet the definition of "materialman" under Rhode Island's Statute of Repose and therefore, is not exempted from liability under § 9-29-1. The Defendant's Motion for Summary Judgment is denied. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Charles P. Pisano, et al. v. Alfa Laval, Inc., et al.

CASE NO: PC 2013-5868

COURT: Providence County Superior Court

DATE DECISION FILED: November 2, 2016

JUSTICE/MAGISTRATE: Gibney, P.J.

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