STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 13, 2017)

SHIRLEY D'AMICO, Individually and as Executrix for the ESTATE OF FRANK D'AMICO, *Plaintiff,*	:	
v.	:	**C.A. No. PC-12-0403**
A.O. SMITH CORPORATION, et al., *Defendants.*	:	

DECISION

GIBNEY, P.J. The Defendant—Grover S. Wormer Company (the Defendant or Wormer), Individually and as Successor-in-Interest to Wright-Austin Company (Wright-Austin)—brings this Motion to Dismiss the above-entitled asbestos litigation matter brought by the Plaintiff—Shirley D'Amico, Individually and as Executrix for the Estate of Frank D'Amico (the Plaintiff). The Defendant brings its Motion under Super. R. Civ. P. 12(b)(6) and contends that the Plaintiff's claims for liability are barred under Michigan's Business Corporation Act Chapter 8 (the BCA), which governs the dissolution of corporations and provides a Statute of Repose to bar continued liability. The Plaintiff does not contest Defendant's argument that Michigan's BCA is applicable; rather, the Plaintiff maintains that the Defendant has not provided sufficient discovery for this Court to resolve whether the Statute of Repose applies. Additionally, the Plaintiff contends that the Motion should be converted to a Motion for Summary Judgment since the Defendant refers to documents outside the Complaint, and that the Defendant has not met its summary judgment burden. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

Mr. Frank D'Amico (the Decedent) was born on November 19, 1935 in the Bronx, New York, where he lived until his marriage to the Plaintiff. On March 6, 2013, the Decedent died from mesothelioma allegedly caused by years of occupational exposure to asbestos. As a result, the Plaintiff filed the instant action on January 25, 2012. On April 12, 2012, the Plaintiff served general discovery on all named defendants.

On April 18, 2012, the Plaintiff amended her Complaint for the first time and named a new Defendant, Eaton Corporation a/k/a Eaton Hydraulics LLC, successor by merger to Eaton Hydraulics, Inc., f/k/a Vickers, Inc. On September 10, 2014, the Plaintiff amended her Complaint a second time to include Vickers Inc., as successor-in-interest to Haywood Manufacturing, Inc., as successor to Wright-Austin Company. Finally—after two more amended Complaints naming additional successors-in-interest—the Plaintiff filed her Fifth Amended Complaint naming the present Defendant, Wormer, individually and as successor-in-interest to Wright-Austin. The Defendant was incorporated in the State of Michigan, with its principal place of business in Michigan during the years of its incorporation. The Defendant manufactured certain "steam, water compressed air and gas traps" which were used in catapult systems. See Def.'s Ex. A.

On May 15, 1997, a Certificate of Amendment to the Articles of Incorporation changed the company's name to "Grover S. Wormer Company." On January 28, 2008, Wormer was dissolved "in accordance with the Michigan Corporation Code." See id.

II

Parties' Arguments

The Defendant contends that the Michigan BCA applies to any discussion of Wormer's liability since the company was incorporated and had its principal place of business in the State of Michigan. The Defendant maintains that the Plaintiff's claims should be dismissed because a Michigan Statute of Repose bars suits against dissolved companies that are filed more than one year after dissolution. Under Michigan's BCA, the Defendant contends that it cannot be held liable for damages and, in support, provides an affidavit from the now-dissolved company's President, Christiansen von Wormer.[1]

The Plaintiff contends that this Motion should be converted to a summary judgment motion since the Defendant relies on documents outside the Complaint—namely, the affidavit of Christiansen von Wormer detailing the company's dissolution in 2008. The Plaintiff argues that summary judgment is premature at this stage since she has not had sufficient opportunity to conduct discovery on the case and that the Defendant has documents necessary to oppose this Motion in its sole custody and control.

The Plaintiff argues in the alternative that—if this Court should find that summary judgment is not premature—the Defendant has failed to meet its burden for summary judgment under Rhode Island's Rules of Civil Procedure. Although the Plaintiff does not contest the fact that Wormer's liability and dissolution are governed by Michigan's BCA, the Plaintiff maintains

[1] The Defendant contends, arguendo, that under Rhode Island statutory law the Plaintiff's claims are barred since more than two years have passed since dissolution. However, the Defendant maintains that the Michigan BCA properly applies since the Rhode Island Supreme Court has found that Rhode Island statutes regarding liability of dissolved corporations do not apply to foreign companies located in other states.

that the Defendant has not provided sufficient factual information to warrant the application of Michigan's Statute of Repose.

The Plaintiff argues that Michigan's Statute of Repose does not automatically apply upon dissolution; rather, a defendant must demonstrate that proper notice was provided and that assets were fully distributed before the statute can bar claims brought more than one year after dissolution. The Plaintiff contends that the Defendant has not provided sufficient information regarding its notice procedures in order for this Court to determine if notice was proper under Michigan's BCA. Finally, the Plaintiff notes that—even if notice was perfected, warranting application of the Statute of Repose—a plaintiff can contest that application for good cause shown in cases where a company has not yet finished distribution of its assets.

III

Conversion to Summary Judgment

Rhode Island's Superior Court Rule of Civil Procedure 12(b) states that when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" Super. R. Civ. P. 12(b); see also Palazzo v. Big G Supermarkets, Inc., 110 R.I. 242, 244, 292 A.2d 235, 236 (1972). The Rhode Island Supreme Court has stated that a trial justice is not obligated to consider affidavits or other matters outside the pleadings offered by the parties, but—when choosing to do so—should make the record clear as to how the motion was treated. See Menzies v. Sigma Pi Alumni Ass'n of RI, 110 R.I. 488, 490, 294 A.2d 193, 194-95 (1972).

In the present case, the Defendant has brought its Motion to Dismiss under Super. R. Civ. P. 12(b)(6), but in support has attached an affidavit labeled "Exhibit A" from the former President of Wormer to support its claim that the company is dissolved. Both the Defendant and

Plaintiff reference the content of that affidavit in support of their arguments and, as such, this Court will consider the affidavit and convert the Defendant's Motion to Dismiss to a Motion for Summary Judgment. See Menzies, 110 R.I. at 490, 294 A.2d at 194-95.

IV

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 Super. R. Civ. P. 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). In a motion for summary judgment, the moving party bears the initial burden of establishing the absence of a genuine issue of fact; the burden then shifts to the nonmoving party who has an affirmative duty to demonstrate a genuine issue of fact. McGovern v. Bank of Am., N.A., 91 A.3d 853, 858 (R.I. 2014); Robert B. Kent et al., Rhode Island Civil Procedure § 56:5, VII-28 (West 2006). The party opposing the motion for summary judgment cannot rest on allegations or denials in the pleading or on conclusions or legal opinions. Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996). 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 granted 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 last rites by granting summary judgment." Mitchell v. Mitchell, 756 A.2d. 179, 179 (R.I. 2000).

V

Analysis

A

Discovery

The Plaintiff contends that summary judgment is premature since there has been insufficient time for the Plaintiff to conduct discovery with the Defendant. The Plaintiff maintains that the information needed to oppose summary judgment is in the sole custody and control of the Defendant. The Plaintiff argues that she searched for the name of the proper defendant for years before successfully naming Wormer, and that, in similar cases, the Court has found that a motion for summary judgment was premature when the parties did not have enough time to exchange discovery and to obtain necessary documents. In support of her argument, the Plaintiff cites a past decision of this Court, Brandt v. A.W. Chesterton Co., 2008 WL 3819273 (R.I. Super. July 25, 2008).

In Brandt, this Court determined that summary judgment was premature since there was insufficient time for discovery. Id. However, in that matter, less than a year had passed since the complaint was filed and when the plaintiff had served upon the defendant a master set of interrogatories. Id. In that decision, this Court also cited Thibeault v. Square D Co., which

stated that a party in a simple products liability case cannot claim lack of time for discovery to oppose a summary judgment motion when the case had been pending for two and one-half years. 960 F.2d 239, 242 (1st Cir. 1992).

In the present matter, the Plaintiff served general discovery on all named defendants on April 12, 2012; such general discovery was not served upon the current Defendant, which was not named until September 10, 2014. See Pl.'s Br. 2. After filing her original complaint in 2012, the Plaintiff searched for the proper defendant for a period of years and finally named Wright-Austin in 2014 and Wormer on June 11, 2015, respectively. After naming Wright-Austin in 2014, the Plaintiff has not served discovery on the Defendant since that time, approximately two and one-half years later. Therefore, in accord with the Court's holding in Thibeault, this Court declines to adopt the Plaintiff's argument that summary judgment is premature based on insufficient time to conduct discovery, and the Court will continue with its summary judgment analysis. See 960 F.2d at 242; see also Battista v. Muscatelli, 106 R.I. 514, 526-27, 261 A.2d 636, 643 (1970) (denying argument that summary judgment was premature where parties had three months to request and exchange discovery prior to hearing on motion).[2]

B

Michigan's Statute of Repose

The Defendant argues that the Plaintiff's claims are barred under Michigan's BCA, which provides a Statute of Repose for claims brought against dissolved corporations. The Defendant maintains that after dissolution, claims must be brought within one year—after which time, all claims are void by law. In support, the Defendant presents an affidavit from the former

[2] The Court in Battista suggested that, in the alternative, the party could have filed an affidavit under Super. R. Civ. P. 56(f), which allows a party seeking additional discovery prior to a summary judgment hearing to request more time from the Court in order to properly oppose the motion. 106 R.I. at 527, 261 A.2d at 643. No such affidavit was filed in this present action.

President of Wormer, Christiansen von Wormer. The Defendant contends that—since the company was dissolved in 2008 and the Plaintiff brought her claim in 2014—Michigan's Statute of Repose bars such a claim.

The Plaintiff contends that Michigan's Statute of Repose does not apply because the Defendant has failed to meet its burden on summary judgment that such a statute is applicable.[3] The Plaintiff maintains that under the Michigan BCA—in order for the Statute of Repose to apply and bar all claims—a corporation must dissolve and then provide proper notice to all potential claimants. The Plaintiff notes that such notice can be made directly to currently interested parties or via general newspaper circulation. The Plaintiff argues that after proper notice is made and the required time period has elapsed, only then can the Statute of Repose apply. The Plaintiff maintains that the Defendant has offered insufficient evidence of the company's dissolution and notice procedures for her claim to be barred.

Michigan's BCA Chapter 8 § 450.1833 governs the dissolution of corporations and states that dissolved corporations shall continue their corporate existence for the purpose of winding up their affairs. See § 450.1833. The BCA goes on to state that corporations may sue and be sued in their corporate name—and process may issue by and against the corporation—in the same manner as if dissolution had not occurred. See § 450.1834. In response to this potential continuing and never-ending liability for a dissolved corporation, the Michigan Legislature created a Statute of Repose that applies when certain conditions are met. See §§ 450.1841a and 450.1842a.

[3] Neither party contests that Michigan's BCA is applicable to the dissolution—and thus, liability of the Defendant corporation—since, under Rhode Island law, a company's continuing liability after dissolution is controlled by the laws of that company's state of incorporation and principal place of business. See Riddell v. Rochester German Ins. Co. of N.Y., 35 R.I. 45, 85 A. 273, 276 (1912).

As stated in the Statute of Repose itself—and espoused by Michigan courts—the Michigan Statute of Repose will only apply to bar claims if required procedures are followed, including notice to interested parties and potential claimants. See § 450.1842a; see also Freeman v. Hi Temp Prods., Inc., 580 N.W.2d 918, 921-23 (Mich. Ct. App. 1998) ("In order for a corporation that has dissolved to take advantage of the protections afforded by these sections, it must furnish or publish notice 'at any time after the effective date of dissolution.'"). According to the Michigan BCA, dissolved corporations can issue notice directly to currently identified claimants or issue notice to all potential yet-unknown claimants via newspaper publication. See §§ 450.1841a- 450.1842a; see also Freeman, 580 N.W.2d at 921-23. If proper notification procedures are followed, the Michigan Statute of Repose will bar all claims not brought within one year of dissolution, even against claimants who did not receive direct notice or whose claim is "contingent or based on an event occurring after the effective date of dissolution." See § 450.1842a(3)(c).

In the present case, the Defendant has offered evidence of dissolution via an affidavit from the former President of Wormer in support of its Motion to Dismiss, which was converted to a Motion for Summary Judgment. In that affidavit, former President Christiansen von Wormer states that the corporation was founded in Michigan in 1918, with its principal place of business located in that state during its years of incorporation. Def.'s Ex. A at 1. The affiant states that on May 15, 1997, the corporation's name was changed to the "Grover S. Wormer Company." Id. at 2. The former President then states that "[o]n January 28, 2008 Grover S. Wormer Company was dissolved, in accordance with the Michigan Corporation Code." Id.

The affidavit provided by the Defendant in support of its Motion does not contain any details on how the corporation was dissolved or whether the corporation provided any notice at

all to current or potential claimants. See Def.'s Ex. A. The affidavit does not provide evidence of notice procedures undertaken by Wormer after dissolution—which is required by the Michigan BCA in order for the Statute of Repose to apply. The Defendant does not offer facts to establish if notice was published, how it was published, when it was published, whether it was published in an appropriate newspaper, or whether that notice claimed that all suits brought after one year of dissolution would be barred. Without such necessary facts, this Court cannot make a determination on the applicability of Michigan's Statute of Repose. See Freeman, 580 N.W.2d at 921-23; see also Pettit v. Duro Supply Co., 2003 WL 22976175 (Mich. Ct. App 2003) (holding that Statute of Repose would bar claim against defendant that perfected notice to all claimants after dissolution).[4]

Therefore, this Court finds that the Defendant has not met its burden on summary judgment in that it has failed to establish an absence of genuine issues of material fact. See McGovern, 91 A.3d at 858. Genuine issues of material fact remain as to the applicability of Michigan's Statute of Repose and the Defendant's compliance with notification requirements. See Freeman, 580 N.W.2d at 921-23

VI

Conclusion

This Court finds that the Defendant has failed to establish an absence of genuine issues of material fact in respect to the applicability of Michigan's Statute of Repose and compliance with

[4] In Pettit, the Michigan Appeals Court also found that the Statute of Repose bars claims not brought within one year—even when that claim is based on an asbestos-related injury. The court noted that the Statute of Repose applies to claims that are "contingent or based on an event occurring after the effective date of dissolution," and that—for the purpose of mesothelioma—the date of the event is the date of the claimant's discovery of their illness. 2003 WL 22976175, *1.

notice requirements. Therefore, the Defendant's Motion for Summary Judgment is denied at this time, without prejudice. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Shirley D'Amico v. A.O. Smith Corporation, et al.**
CASE NO:	**PC-12-0403**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 13, 2017**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
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For Defendant:	**Brian D. Gross, Esq.** **Andrew R. McConville, Esq.**