

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC

Filed March 25, 2008

SUPERIOR COURT

JOSEPH LAPOINTE
Plaintiff

v.

3M COMPANY, et al.
Defendant

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C.A. No. PC 06-2418

DECISION

GIBNEY, J. The Defendant, Homasote Company (“Homasote”), moves for summary judgment pursuant to Super. R. Civ. P. 56. Homasote asserts that no issue of material fact exists, and such motion should be granted. The Plaintiff, Joseph LaPointe (“Mr. LaPointe”), objects to the motion.

Facts and Travel

Mr. LaPointe filed a complaint in this Court on May 6, 2006, alleging, inter alia, that he had suffered injuries as a result of occupational and household exposure to asbestos products. In addition to job-related exposure to asbestos-containing boilers or pressure vessels, Mr. LaPointe claims that he was exposed to asbestos while performing various home construction projects between 1950 and 1960. He used sheetrock or rock lath during this construction, which he identified as a product consisting of cement and asbestos formerly produced by Defendant Homasote. Mr. LaPointe contends that during his work he inhaled or ingested asbestos fibers, causing him to develop malignant mesothelioma.

Defendant Homasote has filed the instant motion, arguing that Mr. LaPointe has failed to satisfy the threshold obligation of product identification. Defendant relies in part on Mr.

LaPointe's deposition in which he conceded his uncertainty as to whether the sheetrock he used was, in fact, produced by Homasote. Homasote further contends that Mr. LaPointe's description of the material he used supports a conclusion that he misidentified the sheetrock as a Homasote product. Mr. LaPointe described the material as whitish on the front and grayish on the back and sides, and he stated that it measured in 2 by 4 sheets or 4 by 8 sheets. He did not recall any markings or logos on the sheetrock or rock lash. Mr. LaPointe kept some portion of these materials in his attic and made them available to Defendant. However, Defendant presents the affidavit of Andrew Miele, who was employed by Homasote from 1950-1990. Mr. Miele's affidavit supports Defendant's conclusion that the material used by Mr. LaPointe was not a Homasote product. Defendant argues that Mr. LaPointe cannot show that the asbestos product he was exposed to was in fact produced by Homasote.

Standard of Review

In ruling on a motion for summary judgment, the trial judge considers the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits and determines whether these documents, when viewed in a light most favorable to the nonmoving party, present a genuine issue of material fact. Kirshenbaum v. Fid. Fed. Bank, F.S.B., 941 A.2d 213 (R.I. 2008); Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001) (citations omitted); Volino v. General Dynamics, 539 A.2d 531, 532-533 (R.I. 1988). It is well-settled that a genuine issue of material fact is one about which reasonable minds could differ. See e.g. Brough v. Foley, 572 A.2d 63, 67 (R.I. 1990). The moving party bears the initial burden of establishing that no such issues exist. Heflin v. Koszela, 774 A.2d 25, 29 (R.I. 2001). If the moving party is able to sustain its burden, then the opposing party must demonstrate the existence of substantial

evidence to dispute that of the moving party on a material issue of fact. See Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950, 954 (R.I. 1994); Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998).

While it need not disclose all of its evidence, the party opposing summary judgment must demonstrate that evidence beyond mere allegations exists to support its factual contentions. See e.g. Ludwig v. Kowal, 419 A.2d 297, 301 (R.I. 1980); Nichols v. R.R. Beaufort & Assoc., Inc., 727 A.2d 174, 177 (R.I. 1999); Bourg, 705 A.2d at 971. The trial justice reviews the evidence without passing upon its weight and credibility, and will deny a motion for summary judgment where the party opposing the motion has demonstrated the existence of a triable issue of fact. See Palmisciano v. Burrillville Racing Ass'n., 603 A.2d 317, 320 (R.I. 1992).

Analysis

In asbestos litigation, the Plaintiff must identify the Defendant's asbestos product and establish that the product was a proximate cause of his or her injury. See Celotex Corp. v. Catrett, 477 U.S. 317, 319-320 (1986). Here, Plaintiff contends that summary judgment is inappropriate, as he has raised a genuine issue of fact regarding the identity of the asbestos-containing sheetrock to which he was exposed and because he has demonstrated a causal nexus between this exposure and his injury.

In support of his objection, Plaintiff avers that his answers to Defendant's Interrogatories clearly identify Homasote as a manufacturer of an asbestos-containing product that Plaintiff contacted. He further contends that in his deposition, although he acknowledged that he could not confirm that the sheetrock or rock lash product he used was Homasote, he believed that it was. Plaintiff has submitted a Homasote catalogue which depicts material similar to what Mr.

LaPointe described and kept in his attic. The insulating material in the catalogue was available in the same proportions as Mr. LaPointe's sheetrock. He notes that the material he kept was never tested by Defendants, and that the catalogue clearly indicates that the similar material sold by Homasote contained asbestos.

In arguing for summary judgment, Defendant contends that Plaintiff's evidence is insufficient. Defendant proffers that the deposition testimony demonstrates Mr. LaPointe's misguided belief that Homasote was a generic name rather than a specific product. Defendant argues that this deposition testimony, taken with the affidavit of the Homasote employee—which states that the pictures of the products kept in Mr. LaPointe's attic were not Homasote products—provides conclusory evidence of the products' identity.

In general, the party moving for summary judgment may submit evidence to negate an essential element of the non-moving party's claim or to demonstrate that the non-moving party will be unable to establish an essential element of the claim. See Celotex Corp., 477 U.S. at 231. Although Homasote intends to negate Mr. LaPointe's evidence as to the identity of the product, the evidence provided is inconclusive. Therefore, this Court could not make such a finding of product identity without issuing a credibility determination and weighing the evidence, actions inappropriate for the Court on summary judgment. See Palazzo v. Big G. Supermarkets, Inc., 110 R.I. 242, 292 A.2d 235 (1972).

As it has found in previous cases, this Court reiterates that the questions of whether the Plaintiff was ever exposed to asbestos by working near the Defendant's product or whether such exposure was the cause of Plaintiff's injury are questions for the jury to determine. See e.g. Totman v. A. C. and S., Inc., C.A. No. 00-5296, 2002 R.I. Super. LEXIS 23 (February 11, 2002); Downs v. 3M Co., C.A. No. 06-1710, 2007 R.I. Super. LEXIS 146 (R.I. Super. Ct. 2007). The

parties here have clearly presented contradictory evidence as to product identity, and therefore summary judgment is inappropriate in this case.

Conclusion

Summary judgment is an extreme remedy that should not be used as a substitute for trial or as a device intended to impose a difficult burden on the nonmoving party to save his or her day in court. North Am. Planning Corp. v. Guido, 110 R.I. 22, 25, 289 A.2d 423, 425 (1972). It is not for the Court to sift out cases that are weak, improbable or unlikely to succeed, and so summary judgment will be denied unless a case is “legally dead” on arrival. Mitchell v. Mitchell, 756 A.2d 179, 185 (R.I. 2000). Mr. LaPointe has set forth a prima facie case and has established that genuine issues of material fact exist as to the essential elements of his claim. Accordingly, Homasote’s motion for summary judgment is denied. Counsel shall prepare the appropriate order for entry.