STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 23, 2014)

DAVID M. REERA, EXECUTOR	:	
FOR THE ESTATE OF JAMES M. REERA	:	
	:	
v.	:	**C.A. No. PC 12-0379**
	:	
A.O. SMITH CORP., et al.	:	

DECISION

GIBNEY, P.J. Prior to his death, James M. Reera (Reera) filed this asbestos suit against a number of defendants, including Boston Edison Company (Defendant).[1] Reera's son and executor of his estate, David M. Reera (Plaintiff), now continues the lawsuit. Before the Court is Defendant's Motion for Summary Judgment, pursuant to Super. R. Civ. P. 56(c) (Rule 56(c)), and for Entry of Final Judgment, pursuant to Super. R. Civ. P. 54(b) (Rule 54(b)). Plaintiff objects to this motion. For the reasons set forth below, Defendant's motion is granted.

I

Facts and Travel

Plaintiff has brought a premises liability claim against Defendant arising from Reera's alleged exposure to asbestos when he worked at Defendant's Mystic Generating Station (Mystic) for approximately seven months in 1974. At that time, Reera was employed by Brand Insulation, which was a subcontractor hired to install insulation on a new boiler at Mystic's Unit 7. Reera's work included installing insulation, transporting insulation materials and tools to mechanics, and cleaning up the jobsite. Plaintiff alleges that Reera was exposed to asbestos in the course of this

[1] Boston Edison Company is now NSTAR Electric and Gas.

work at Mystic when he connected the new boiler's pipes into Unit 7's existing piping, which was encased in old insulation. Plaintiff, however, has produced no evidence suggesting that the old insulation contained asbestos or that Reera's work entailed disturbing the old insulation such that asbestos fibers were released into the ambient air. In addition to those of Brand Insulation, the employees of another subcontractor, New England Insulation, were working in the same general area at Mystic as Reera, installing and maintaining older boilers and high-pressure steam lines. Plaintiff also alleges that Reera was exposed to asbestos when the New England Insulation employees cut strips of insulation to fit onto pipes, an activity which Reera testified created a lot of "white, chalky" dust that he inhaled. In evidentiary support of this allegation, Plaintiff offers only Reera's deposition testimony in which he stated that he thought the New England Insulation workers were using asbestos insulation.

Plaintiff alleges that Defendant owed Reera a duty of care to protect him from or warn him about both the existing asbestos that he allegedly encountered while connecting the pipes of the new boiler and the asbestos insulation allegedly used by the New England Insulation workers. Claiming that Defendant breached that duty, Plaintiff seeks to hold Defendant liable for Reera's contraction of and subsequent death from mesothelioma. In bringing the instant motion for summary judgment, however, Defendant asserts it is protected from liability by the independent contractor doctrine, as both Brand Insulation and New England Insulation, according to Defendant, were independent contractors. In applying the independent contractor doctrine to this case, Defendant asks the Court to apply the law of Massachusetts. Moreover, Defendant maintains that Plaintiff's premises liability claim must fail because there is no admissible evidence demonstrating that Reera was exposed to asbestos at Mystic or any other property controlled by Defendant.

II

Standard of Review

A

Summary Judgment

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). In deciding if the parties dispute any issues of material fact, the Court must neither "pass[] on the weight and credibility of the evidence" nor "determine issues of fact." Palazzo v. Big G Supermarkets, Inc., 110 R.I. 242, 245, 292 A.2d 235, 237 (1972). Rather, the Court's role in ruling on a motion for summary judgment is "only [to] determine whether there are any issues of fact to be resolved" and "'whether as a matter of law one party is entitled to a judgment.'" Id. (quoting Warren Educ. Ass'n v. Lapan, 103 R.I. 163, 168, 235 A.2d 866, 870 (1967)).

Once a summary judgment motion is made, "[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). "[A] litigant cannot avoid summary judgment by merely posing factual possibilities without submitting admissible evidence thereof." Nichols v. R.R. Beaufort & Assocs., Inc., 727 A.2d 174, 177 (R.I. 1999). Accordingly, when the

nonmoving party would have the burden of proof as to a particular claim at trial, that party must "produce evidence that would establish a prima facie case for [that] claim" in order to survive a summary judgment motion. DiBattista v. State, 808 A.2d 1081, 1089 (R.I. 2002). Conversely, summary judgment is proper if the plaintiff cannot set forth a prima facie case. Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 430 (R.I. 2001).

B

Entry of Final Judgment

Rule 54(b) constitutes an exception to the general rule that an appeal may be taken only from a "final judgment, decree or order." G.L. 1956, § 9-24-1. Rule 54(b) provides in pertinent part:

> "When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Thus, "the rule attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants." 10 Wright & Miller, Federal Practice and Procedure, Civil 3d § 2654 at 35 (1998); see also Astro-Med, Inc. v. R. Moroz, Ltd., 811 A.2d 1154, 1156 (R.I. 2002) (noting that because our Rule 54(b) is substantially similar to Federal Rule of Civil Procedure 54(b), "this Court may properly look to a federal court interpretation of the analogous federal rule for guidance in applying our own state's rule").

"Pursuant to Rule 54(b), a motion justice may certify an interlocutory disposition as a final judgment if two considerations provided for in the rule are met." Metro Props., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 934 A.2d 204, 207 (R.I. 2007). First, the Court must

consider whether the action for which one of the parties requests disposition involves either multiple parties or multiple claims, or both, and whether such disposition would adjudicate one or more but fewer than all of the claims before it. See Westinghouse Broad. Co. v. Dial Media, Inc., 122 R.I. 571, 577, 410 A.2d 986, 989 (1980). Second, this Court must employ its discretion to determine whether there is "no just reason for delay." Rule 54(b); see also Metro Props., Inc., 934 A.2d at 207. In exercising this discretion, the Court "'must take into account judicial administrative interests as well as the equities involved.'" Astro-Med, Inc., 811 A.2d 1156 (citing Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 8 (1980)). In considering the judicial administrative interests, the Court must take into account "any 'transactional relationship between a remaining unadjudicated claim and a claim that has been disposed of,' as well as the possibility of overlapping appeals, and uneconomic use of judicial resources." Metro Props., Inc., 934 A.2d at 207 (citing Astro-Med, Inc., 811 A.2d at 1156-57). Therefore, "if the claims in an action are closely related and there is a risk of repetitive appeals, the [trial] court may decide that there is a reason for delaying review and refuse to make the determination required by Rule 54(b)." Wright & Miller, supra, at 36; see also Spiegel v. Trustees of Tufts Coll., 843 F.2d 38, 44 (1st Cir. 1988) (holding that federal Rule 54(b) certification is rarely appropriate where "the contestants on appeal remain, simultaneously, contestants below").

III

Analysis

A

Motion for Summary Judgment

In support of its motion for summary judgment, Defendant claims that Plaintiff cannot establish a prima facie case because he has not put forth sufficient evidence to show that Reera

was exposed to asbestos at Mystic. Defendant maintains that, on the contrary, the evidence on the record shows the insulation that Reera worked with at Mystic did not contain any asbestos. In response to this argument, Plaintiff asserts that his evidence demonstrates that Reera could have been exposed to asbestos both while connecting the new boiler in Unit 7 to old, preexisting pipes and while working in close proximity to others who were installing insulation on other boilers. Plaintiff further argues that Defendant's summary judgment motion must fail because "Defendant has not produced veritable evidence to dispute Plaintiff's allegations."

Plaintiff's argument, however, reverses the burden imposed on each party on a motion for summary judgment. Defendant, as the moving party and as the party that does not bear the burden of proof at trial, has no obligation to refute Plaintiff's allegations in order to succeed on its motion for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (ruling that there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim") (emphasis in original). Rather where, as here, the moving party would not have the burden of proof at trial, the moving party must only "inform[] the [trial] court of the basis for its motion, and identify[] those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323 (quoting Fed. R. Civ. P. 56). In contrast, "[i]t is well established that a litigant opposing a motion for summary judgment has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions, or mere legal opinions." Santucci v. Citizens Bank of R.I., 799 A.2d 254, 257 (R.I. 2002); see also Barrett v. Barrett, 894 A.2d 891, 894 (R.I. 2006) (holding that "[o]nce the party seeking summary judgment has alleged the absence of any

disputed issues of material fact, the opposing party, to avoid summary judgment, must come forward with proof sufficient to establish the existence of a specific, material, triable fact"). The question for the Court on the instant motion is, therefore, whether Plaintiff has produced such "competent evidence" in support of his allegations that would establish "a disputed issue of material fact." Santucci, 799 A.2d at 257; see also Rule 56(c).

More specifically, in ruling on the Defendant's motion for summary judgment, the Court must determine whether Plaintiff has produced sufficient evidence to satisfy all of the elements of his prima facie case. Lavoie v. N. E. Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007) (ruling that "summary judgment should enter 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case'") (quoting Celotex Corp., 477 U.S. at 322); see also DiBattista, 808 A.2d at 1089; Kelley, 768 A.2d at 430. By definition, the establishment of a prima facie case entails the production of enough competent evidence to allow the fact finder to find in the proponent's favor, which, in this case, must be by a preponderance of the evidence. See Griggs & Browne Co. v. Healy, 453 A.2d 761, 762 (R.I. 1982) (explaining that "[p]rima facie evidence is generally defined as that quantum of evidence which, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue"); Riley v. Stone, 900 A.2d 1087, 1095 (R.I. 2006) (noting that the plaintiff's evidentiary burden in negligence actions is a preponderance of the evidence). Moreover, in this context, "competent evidence" means admissible evidence. See Rotelli v. Catanzaro, 686 A.2d 91, 93 (R.I. 1996) (explaining that summary judgment is appropriate when, "after reviewing the admissible evidence in the light most favorable to the nonmoving party, [the Court] conclude[s] that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law"); see also Nichols, 727 A.2d at 177 (holding that "a litigant cannot avoid summary judgment by merely

posing factual possibilities without submitting admissible evidence thereof"); but see Celotex Corp., 477 U.S. at 324 (holding that the nonmoving party need not "produce evidence in a form that would be admissible at trial," e.g. affidavits from witnesses who will produce admissible testimony at trial is a sufficient evidentiary showing in opposing a motion for summary judgment).

Here, demonstrating that asbestos was present at Defendant's premises and caused Reera's injuries is an essential element of Plaintiff's prima facie case. See Jenard v. Halpin, 567 A.2d 368, 370 (R.I. 1989) (noting that "in order to gain recovery in a negligence action, a plaintiff must establish . . . [inter alia] causation between the [defendant's] conduct and the resulting injury"). Consequently, Plaintiff's claim against Defendant may only survive the instant summary judgment motion if he has adduced sufficient evidence to establish the causation element of his prima facie case by a preponderance of the evidence. See Lavoie, 918 A.2d at 228; Riley, 900 A.2d at 1095.

1

Reera's Alleged Exposure to Asbestos Through His Own Work

Plaintiff alleges that Reera could have been exposed to asbestos when he connected the pipes of the new boiler at Mystic's Unit 7 to old pipes and when he walked through old sections of the Mystic facility to access his jobsite. However, Plaintiff submits no evidence supporting either of these contentions. Pointing only to Reera's deposition testimony in which he stated that he worked around preexisting insulation at Unit 7, Plaintiff has failed to produce any evidence indicating that such insulation contained asbestos or that such insulation was disturbed and released respirable asbestos fibers into the ambient air in Reera's presence. On the contrary, Reera testified that he could not recall what products he was interacting with on the jobsite, what

kind of insulation was preexisting in the boiler room where he worked, or whether any of his or his co-worker's activities disturbed existing insulation around the old pipes at Unit 7. Reera Dep. 114-16, Feb. 29, 2012; Reera Dep. 201-02, Mar. 1, 2012; see also Santiago ex rel. Martinez v. First Student, Inc., 839 A.2d 550, 552 (R.I. 2004) (upholding the trial justice's grant of a defendant's motion for summary judgment where the plaintiff had no recollection of several details that were critical to her ability to make out her prima facie case for negligence). Furthermore, the evidence on the record shows that neither the boiler itself nor the insulation materials applied to it contained any asbestos. Specifically, Reera testified that, to the best of his knowledge, the insulation he applied to the boiler was asbestos-free, and Defendant has also produced evidence showing that the insulation installed on the new boiler contained no asbestos. Reera Dep. 120, Mar. 22, 2012; Santa Maria Dep. 27-28, 88, Sept. 18, 1996.

In the absence of any direct evidence showing that Reera encountered asbestos at Mystic, Plaintiff claims that he has designated various expert witnesses who will testify at trial "as to the typical use and availability of asbestos-containing products found at sites like Mystic Powerhouse during the relevant time period." However, Plaintiff has not submitted any affidavits or other evidence indicating the anticipated nature of this expert testimony. Because Plaintiff "cannot avoid summary judgment by merely posing factual possibilities without submitting admissible evidence thereof," the time for Plaintiff to come forward with evidence of his prima facie case is now. Nichols, 727 A.2d at 177; see also Barrett, 894 A.2d at 894. Plaintiff's promise to produce evidence at trial is therefore insufficient to satisfy his burden in opposition to Defendant's motion for summary judgment. See Santucci, 799 A.2d at 257; Barrett, 894 A.2d at 894.

Plaintiff's lack of evidence would not enable a reasonable fact finder to conclude that

Reera was exposed to asbestos while performing his job functions at Mystic. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, (1986) (holding that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"). Thus, there is "no genuine issue as to any material fact" on the issue of Reera's asbestos exposure because "'complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Lavoie, 918 A.2d at 228 (quoting Celotex Corp., 477 U.S. at 323); Rule 56(c). Because "summary judgment should enter 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,'" the Court finds that Defendant is entitled to judgment as a matter of law, and that summary judgment is appropriate. Lavoie, 918 A.2d at 228 (quoting Celotex Corp., 477 U.S. at 322); see also Rule 56(c).

2

Reera's Alleged Exposure to Asbestos Through the Work of Others

Plaintiff submits only Reera's deposition testimony as evidentiary support for his claim that Reera was exposed to asbestos from the New England Insulation workers cutting up pieces of insulation in Reera's work area. In particular, Reera's testimony demonstrates that he was exposed to a white, chalky dust created by these workers cutting an insulation product called "cal sil." Reera further testified that he believed that the New England Insulation workers were using asbestos insulation and that he based that belief on "the history of what we found out since then." Reera Dep. 66, Mar. 22, 2012.

This testimonial evidence, however, is insufficient prima facie evidence to show that the New England Insulation workers used asbestos materials, as opposed to some other insulation materials, in proximity to Reera because it is not competent, admissible evidence. A witness is

incompetent to testify about a matter of which he lacks personal knowledge. R.I. R. Evid. 602. Accordingly, testimony "'is inadmissible . . . if . . . the witness could not have actually perceived or observed that which he testifies to.'" State v. Ranieri, 586 A.2d 1094, 1098 (R.I. 1991) (quoting M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 681 F.2d 930, 932 (4th Cir.1982)). It is clear from Reera's deposition testimony that he did not "actually perceive[] or observe[]" anything that would have given him personal knowledge that the "cal sil" contained asbestos because Reera explained that he only came to that assumption in the years after he worked at Mystic when he learned about the prevalence of asbestos in insulation materials. Id. Thus, in considering the instant motion for summary judgment, the Court must reject Reera's testimony regarding the asbestos content of the "cal sil." See Rotelli, 686 A.2d at 93 (explaining that the Court must consider admissible evidence in ruling on a motion for summary judgment).

Even taking Reera's deposition testimony as true and drawing all justifiable inferences in Plaintiff's favor, the rest of Plaintiff's evidence is likewise insufficient to establish Plaintiff's prima facie case by a preponderance of the evidence. Anderson, 477 U.S. at 255 (holding that in ruling on a summary judgment motion, evidence put forward by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor"). "[A] 'preponderance of the evidence' means that a jury must believe that the facts asserted by the proponent are more probably true than false . . . ." Parker v. Parker, 103 R.I. 435, 442, 238 A.2d 57, 61 (1968). Presented only with evidence that the insulation emitted a white, chalky dust, a reasonable fact finder would be unable to conclude that it is "more probably true than false" that the insulation contained asbestos. Id. Plaintiff's lack of some evidence showing that all or most white, chalky insulation materials produced during the relevant time contained asbestos leaves open the possibility that the "cal sil" contained no asbestos. Thus, Plaintiff's evidence would give the fact

finder no basis on which to find that it is "more probably true than false" that the insulation to which Reera was exposed contained asbestos. Id. Consequently, any such finding would necessarily be based on impermissible "speculation or conjecture." Hill v. State, 121 R.I. 353, 355, 398 A.2d 1130, 1131 (1979) (explaining that if the jury's "findings would be based on speculation or conjecture," the Court may decide the issue as a matter of law). Accordingly, Reera's testimony could not, as a matter of law, establish Plaintiff's prima facie case. Id. Because Plaintiff submits no other evidence showing that the New England Insulation workers exposed Reera to asbestos, the Court finds that "there is no genuine issue as to any material fact" under this claim and that Defendant "is entitled to judgment as matter of law." Rule 56(c); Lavoie, 918 A.2d at 228.

Plaintiff's inability to establish his prima facie case necessitates that Defendant's motion for summary judgment be granted. Because the Court decides the instant motion solely on that basis, it is unnecessary to reach Defendant's independent contractor and application of foreign law arguments.

B

Motion for Entry of Final Judgment

Because this case involves multiple defendants, this Court's decision to grant Defendant's motion for summary judgment is not final and appealable until judgment is entered under Rule 54(b) or until all of Plaintiff's claims against other parties have been finally resolved. See Brookens v. White, 795 F.2d 178, 179 (D.C. Cir. 1986) (noting that "[i]t is elementary that a grant of summary judgment as to some parties in a multi-party litigation does not constitute a final order unless the requirements of Fed. R. Civ. P. 54(b) are met); see also 15B Wright & Miller, Federal Practice and Procedure, Civil 2d § 3914.28 (1982) (explaining that "[s]ummary

disposition of fewer than all claims among all parties ordinarily is not final"). Accordingly, Defendant requests that the Court enter final judgment in its favor, pursuant to Rule 54(b). Plaintiff has articulated no reason why the Court should not direct entry of final judgment on Plaintiff's claims against Defendant.

The Rhode Island Supreme Court has ruled that a trial court may certify the entry of final judgment on what would otherwise be an interlocutory disposition if two criteria are satisfied. Metro Props., Inc., 934 A.2d at 207. The first criterion requires that the action involve either multiple parties or multiple claims and that the disposition for which entry of final judgment is requested pertain to fewer than all the parties or claims. Id. This criterion is clearly satisfied in the instant matter, as Plaintiff has brought suit against numerous defendants, and the Court's decision on Defendant's motion for summary judgment pertains only to one party.

The second criterion under the Rule 54(b) analysis requires the Court to determine whether there is any just reason for delaying entry of final judgment. Id. In making this determination, the Court must consider both the equities involved and issues of judicial economy, that is, whether the claim adjudicated is separable from the remaining claims and whether an appellate court would likely be required to revisit an issue if there were subsequent appeals. Id.; see also Astro-Med, Inc., 811 A.2d at 1156; Curtiss-Wright Corp., 446 U.S. at 8. The issue decided in this Decision—specifically, whether Plaintiff has put forth sufficient evidence to establish that Reera was exposed to asbestos at Mystic—is highly fact-specific with respect to the Mystic premises and has no relationship to Plaintiff's claims against the remaining defendants. Consequently, entering final judgment as to Plaintiff's claims against Defendant would not lead to repetitive appeals. But cf. Hogan v. Consol. Rail Corp., 961 F.2d 1021, 1026 (2d Cir. 1992) (noting that "the interrelationship of the dismissed and surviving claims is

generally a reason for not granting a Rule 54(b) certification"). Furthermore, because an entry of final judgment granting Defendant's motion for summary judgment would have no bearing on Plaintiff's ability to sustain his claims against the other defendants in this action, there is no equitable reason to deny Defendant's request for entry of final judgment. See Astro-Med, Inc., 811 A.2d at 1156.

IV

Conclusion

After reviewing the materials submitted by both parties in the light most favorable to the Plaintiff, this Court grants Defendant's motion for summary judgment on the grounds that there are no issues of material fact because, as a matter of law, Plaintiff is unable to establish the causation element of his prima facie case against Defendant. As a result, Defendant is entitled to judgment as a matter of law. Additionally, because there is no just reason for delay, the Court directs entry of final judgment in granting Defendant's motion for summary judgment. Counsel shall prepare an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Reera v. A.O. Smith Corp., et al.**
CASE NO:	**PC-12-0379**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 23, 2014**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
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For Defendant:	**James P. Marusak, Esq.**