STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 22, 2016)

In Re: Asbestos Litigation

DENNIS R. BAUMGARTNER and GAIL L. BAUMGARTNER Plaintiffs,	:	
v.	:	**C.A. No. PC-13-4151**
AMERICAN STANDARD, INC., et al., Defendants.	:	

DECISION

GIBNEY, P.J. Before this Court is Plaintiffs Dennis R. and Gail L. Baumgartner's (Plaintiffs) Motion to Reconsider and/or Re-Argue the Court's Decision Dated July 22, 2015 (Plaintiffs' Motion). The Court's Decision on July 22, 2015 (Decision) granted, inter alia, summary judgment for Defendants General Electric Co. (GE), CBS Corp./Westinghouse Electric Corp. (CBS), and Foster Wheeler, LLC (Foster Wheeler) (collectively, Defendants).[1,2] Plaintiffs request that this Court revisit the Decision and vacate its judgment in whole or in part. The Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14. After carefully considering the parties' arguments, the Court declines to reconsider or vacate the Decision, and therefore, Plaintiffs' Motion is denied.

[1] Baumgartner v. American Standard, Inc., No. PC-13-4151, 2015 WL 4523476 (R.I. Super. July 22, 2015).

[2] The Court also granted motions for summary judgment on the Ohio statute of repose for the following Defendants: Cleaver-Brooks Co. Inc., Riley Power, Inc., and Oakfabco, Inc. f/k/a Kewanee Boiler Corp. Plaintiffs' Motion submitted on July 27, 2015 requested relief against a number of Defendants, including Oakfabco, Inc. f/k/a Kewanee Boiler Corp. However, Plaintiffs' Memorandum in support of its Motion submitted on September 18, 2015 sought relief only against GE, CBS, and Foster Wheeler. Only GE, CBS, and Foster Wheeler have submitted briefs in opposition and only these three Defendants orally argued the Motion at the hearing on December 9, 2015. Accordingly, this Court will consider only Plaintiffs' Motion as it concerns GE, CBS, and Foster Wheeler.

I

Facts

A brief recitation of the underlying facts of this case was previously rendered by the Court in its July 22, 2015 Decision regarding Defendants' motion for summary judgment.[3] The Court will augment the facts herein as necessary.

CBS filed a motion for summary judgment on May 22, 2014. Plaintiffs filed an objection to CBS' motion on July 21, 2014 and a sur-reply on February 10, 2015. GE filed a motion for summary judgment on September 8, 2014.

On March 13, 2015, a number of Defendants filed a Motion for Judicial Notice of Ohio Law. Plaintiffs replied to this Motion on March 24, 2015. Foster Wheeler filed its motion for summary judgment on March 27, 2015.

The Court held a hearing on March 31, 2015 (March Hearing). Defendant CBS argued the Motion for Judicial Notice of Ohio Law on behalf of all Defendants and additionally argued its motion for summary judgment. Plaintiffs argued in opposition to both motions.

On April 9, 2015, Plaintiffs filed their objection to Foster Wheeler's motion for summary judgment. This objection included an argument on the Ohio statute of repose, an issue discussed and argued during the March Hearing.

The Court issued its Decision on July 22, 2015. In a comprehensive seventy-page ruling, this Court granted Defendants' motions for summary judgment. The Court held that Ohio's ten-year statute of repose applied to Plaintiffs' claims against Defendants. See Baumgartner, No. PC-13-4151, 2015 WL 4523476 at *17. Specifically, this Court held that GE and CBS' turbines,

[3] See Baumgartner, No. PC-13-4151, 2015 WL 4523476 at *1.

as well as Foster Wheeler's boilers, were improvements to real property, and thereby, Plaintiffs' claims against Defendants were barred by Ohio's statute of repose. See id., at *30–34.

Less than a week later, on July 27, 2015, Plaintiffs filed a Motion to Reconsider and/or Re-Argue the Court's Decision Dated July 22, 2015. This Motion stated that the Court had applied the wrong Ohio statute of repose and that doing so was in error. On September 18, 2015, Plaintiffs filed their motion which requested that the Court reconsider and/or vacate the summary judgment granted in favor of Defendants. Defendants objected and the Court heard oral arguments on December 9, 2015.

II

Standard of Review

A motion for reconsideration is not recognized under the Superior Court Rules of Civil Procedure. See Francis v. Brown, 836 A.2d 206, 211 n.8 (R.I. 2003) ("This motion was treated as a motion for a new trial pursuant to Rule 59 of the Superior Court Rules of Civil Procedure because a motion for reconsideration is not recognized."). Nevertheless, parties routinely file motions for reconsideration and/or motions to vacate. See id.; see also Armand's Eng'g, Inc. v. Town & Country Club, Inc., 113 R.I. 515, 518, 324 A.2d 334, 337 (1974); see also Muliero v. A.C. and S., Inc., No. 99-2703, 2002 WL 31455695 at *1 (R.I. Super. Oct. 16, 2002). This lack of fidelity to the court rules presents a threshold issue for the Court: whether it is best to treat the motion as being filed under Super. R. Civ. P. 59 (e) (Rule 59(e)) or Super. R. Civ. P. 60(b) (Rule 60(b)). See Armand's Eng'g, Inc., 113 R.I. at 518, 324 A.2d at 337; see also Super. R. Civ. P. 59(e), 60(b). Although both Rule 59(e) and Rule 60(b) require heightened levels of judicial scrutiny, the rules are distinct. See Super. R. Civ. P. 59(e), 60(b). A motion for reconsideration and/or to vacate filed within ten (10) days of the judgment is typically treated as being filed

under Rule 59(e). See Armand's Eng'g Inc., 113 R.I. at 518, 324 A.2d at 337. This is true even for motions filed after summary judgment. See, e.g., Muliero, 2002 WL 31455695 at *1 (treating the motion for reconsideration as being filed under Rule 59(e) after summary judgment). Here, Plaintiffs filed their Motion just five days after this Court's Decision. Accordingly, the Court will construe Plaintiffs' Motion as a motion to alter a judgment under Rule 59(e). See Sarni v. Meloccaro, 113 R.I. 630, 636, 324 A.2d 648, 651 (1974) ("We look to substance, not labels.").

Rule 59(e) provides litigants with a narrow avenue to "alter or amend [a] judgment." Super. R. Civ. P. 59(e). Our Supreme Court has held that "[a] trial justice may review . . . her own decision after a nonjury trial in a civil matter 'only if [she] found a manifest error of law in the judgment entered or if there was newly discovered evidence but unavailable at the original trial and sufficiently important to warrant a new trial.'" Bogosian v. Bederman, 823 A.2d 1117, 1119 (R.I. 2003) (quoting Am. Fed'n of Teachers Local 2012 v. R.I. Bd. of Regents for Educ., 477 A.2d 104, 105–06 (R.I. 1984)). In so reviewing, this Court is afforded broad discretion. See Labossiere v. Berstein, 810 A.2d 210, 213 (R.I. 2002).

A manifest error of law is one that is "'apparent, blatant, conspicuous, clearly evident, and easily discernible from a reading of the judgment document itself.'" Bogosian, 823 A.2d at 1119 (quoting Am. Fed'n of Teachers Local 2012, 477 A.2d at 106). As such, "'[i]f the error is not obvious unless one reads the underlying decision . . . , the error is not a manifest error in our opinion.'" Id. (quoting Am. Fed'n of Teachers Local 2012, 477 A.2d at 106). Newly discovered evidence is evidence that was "not available at the original trial that is of sufficient importance to warrant a new trial. See Corrado v. Providence Redevelopment Agency, 110 R.I. 549, 554–55, 294 A.2d 387, 390 (1972) (citing Colvin v. Goldenberg, 108 R.I. 198, 273 A.2d 663 (1971)).

The burden remains on the moving party to prove either a manifest error of law or newly discovered evidence. See id.

III

Discussion

Plaintiffs advance two species of argument: (1) a procedural argument that the Court ruled on summary judgment motions not set for hearing which deprived Plaintiffs of the opportunity to fully oppose those motions; and (2) a substantive argument that the Court incorrectly interpreted and applied Ohio's statute of repose.[4]

A

Procedural Argument

Plaintiffs maintain that they were unaware that the motions for summary judgment were properly before the Court at the hearing date and that they were therefore deprived of an opportunity to fully and meaningfully oppose the individual Defendants' motions for summary judgment. Defendants respond that Plaintiffs were, in fact, aware that the motions for summary judgment were before the Court and that Plaintiffs had filed written oppositions to these motions for summary judgment.

The Court finds little merit to Plaintiffs' procedural arguments. The transcript of the March Hearing belies Plaintiffs' assertions that they were unaware of the issues properly before the Court. Plaintiffs' counsel stated that

> "I believe that all of the defendants have raised the Ohio statute of repose argument. So it seemed to me to make sense for the Court to make a determination on the repose argument . . . . And we're prepared to—Attorney Kanca [Plaintiffs' co-counsel] is prepared to argue that statute of repose today . . . . [W]e could argue in the context of [Defendant CBS's] motion for summary judgment, in which, really, the only issue, as I understand it, is the statute of

[4]Although Plaintiffs' Motion lists six arguments, the Court finds that the arguments reduce into two main categories.

> repose . . . . We probably shouldn't argue it twice, unless the Court wishes us to." Hr'g Tr. 4–5, Mar. 31, 2015.

These statements indicate that Plaintiffs' counsel was aware of the pending motions for summary judgment and was fully prepared to argue the application of the Ohio statute of repose. The Court's Decision granted summary judgment to Defendants on the basis of Ohio's statute of repose. The Court is therefore satisfied that Plaintiffs had a full and fair opportunity to present their arguments at the March Hearing.

Even assuming, arguendo, that Plaintiffs' counsel was unaware that the March Hearing concerned the pending motions for summary judgment, the travel of the case indicates that Plaintiffs had ample opportunity to present their arguments. Plaintiffs filed the following prior to the Court's Decision: an objection to CBS' motion for summary judgment on July 21, 2014, a sur-reply to that same motion on February 10, 2015, and an objection to Foster Wheeler's motion for summary judgment on April 9, 2015. The "'absence of an opportunity to supplement written submissions with oral advocacy [does not] constitute a denial of due process.'" Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 188 (R.I. 2008) (quoting Cruz v. Melecio, 204 F.3d 14, 19 (1st Cir. 2000)). Plaintiffs here cannot "'point to [a] single, definable aspect of its position which could not have been adequately presented by a written submission . . . .'" Id. (quoting Domegan v. Fair, 859 F.2d 1059, 1065 (1st Cir. 1988)). The Court is satisfied that even without oral argument, Plaintiffs fully opposed Defendants' motions for summary judgment. Procedurally, the Court finds no manifest error of law. Am. Fed'n of Teachers Local 2012, 477 A.2d at 106. Accordingly, the Court declines to alter its Decision on the basis of an alleged lack of opportunity to fully oppose the motions for summary judgment.

B

Substantive Argument

Plaintiffs further maintain that the Court incorrectly interpreted and applied the Ohio statute of repose. In particular, Plaintiffs insist that Defendants' products were not improvements to real property. Defendants argue that Plaintiffs failed to present a manifest error of law or any newly discovered evidence and thus Plaintiffs have failed to meet their burden. Defendants further contend that Plaintiffs are relitigating issues that were already decided by the Court. In the alternative, Defendants assert that the Court properly applied the Ohio statute of repose.

The Court finds that Plaintiffs have failed to meet their burden and show a manifest error of law. Despite voluminous submissions to the Court, Plaintiffs do not identify any manifest error of law in the Court's Decision that is "'apparent, blatant, conspicuous, clearly evident, and easily discernible from a reading of the judgment document itself.'" Bogosian, 823 A.2d at 1119 (quoting Am. Fed'n of Teachers Local 2012, 477 A.2d at 106). Instead, Plaintiffs argue that the Court incorrectly interpreted and applied the Ohio statute of repose and that Defendants' products were not improvements to real property, a series of arguments that could have been and, in fact, were raised prior to the Court's Decision. These arguments are clear attempts to "relitigate old matters [and are] not available under Rule 59(e)." Am. Fed'n of Teachers Local 2012, 477 A.2d at 106.

Moreover, Plaintiffs do not present any newly discovered evidence. Plaintiffs ask this Court to look anew at affidavits, Defendants' answers to interrogatories, and documents provided by Defendants. These pieces of evidence were available prior to the Court's Decision and at the time the motions for summary judgment were filed. See Corrado, 110 R.I. at 554–55, 294 A.2d at 390 (holding that newly discovered evidence does not include evidence previously available).

Furthermore, the Court finds that this evidence is insufficient to warrant new consideration. Bogosian, 823 A.2d at 1119 (quoting Am. Fed'n of Teachers Local 2012, 477 A.2d at 106). Accordingly, the Court declines to alter its Decision to review such evidence.

In declining to alter its Decision, the Court notes that this finding comports with the judiciary's general reluctance to reconsider or vacate its own decisions just months or even weeks after deciding them. See, e.g., Bogosian, 823 A.2d at 1119. A motion to alter is not a furtive tool for a litigant to present the same arguments or same issues a second time, only louder. See Am. Fed'n of Teachers Local 2012, 477 A.2d at 106. The option of a second bite at the apple "is completely at odds with the philosophical basis of the rules of civil procedure . . . ." Murphy v. Bocchio, 114 R.I. 679, 685, 338 A.2d 519, 524 (1975).

IV

Conclusion

For the aforementioned reasons, this Court denies Plaintiffs' Motion to Reconsider and/or Re-Argue the Court's Decision Dated July 22, 2015.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Baumgartner v. American Standard, Inc., et al.**
CASE NO:	**PC-13-4151**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 22, 2016**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
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