STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: January 15, 2014]

LEONARD L. LEPORE	:	
and CAROL A. LEPORE	:	
	:	
v.	:	**C.A. No. PC 12-1469**
	:	
A.O. SMITH CORP., et al.	:	

DECISION

GIBNEY, P. J. Carol Lepore (Plaintiff) and her late husband, Leonard Lepore (Lepore), filed this asbestos-related negligence claim against a number of defendants, including Rhode Island Hospital and Miriam Hospital (Defendants). Defendants move for summary judgment pursuant to Super. R. Civ. P. 56 (Rule 56), and Plaintiff objects. Jurisdiction is pursuant to G.L. 1956 § 8-2-14. For the reasons below, Defendants' Motion for Summary Judgment is denied without prejudice.

I

Facts and Travel

Plaintiff's claims arise from Lepore's alleged exposure to asbestos when he worked at Defendants' properties during the 1960s and 1970s. In particular, Plaintiff alleges that during the course of his work to install ductwork at Defendants' properties, Lepore was exposed to asbestos from insulation that was already in the walls and ceilings of the buildings, as well as from products being brought in by other workers, hired by Defendants, who were working with asbestos near Lepore. Plaintiff now brings a direct liability claim against Defendants for failing to protect Lepore from exposure to these sources of asbestos and a vicarious liability claim for

the alleged negligence of Defendants' workers in exposing Lepore to asbestos.[1]

In bringing the instant motion for summary judgment, Defendants assert that they did not owe Lepore a duty of care and that even if they did, Plaintiff has not put forth sufficient evidence to show that they breached that duty. Defendants further argue that they cannot be held liable for the negligent acts of their workers because those workers were independent contractors. Plaintiff counters that Defendants, as a matter of law, owed Lepore a duty of care for both their own negligence and the negligence of their workers.

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), "summary judgment is appropriate only when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the non-moving 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 made, "[t]he burden rests with 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., LLP, 47 A.3d 319, 323 (R.I. 2012) (quoting Hill v. Nat'l Grid, 11 A.3d

[1] In actuality, the record is unclear as to whether Plaintiff wishes to press a vicarious liability claim against Defendants. At the hearing on the instant motion, Plaintiff's counsel indicated that she was not alleging vicarious liability; yet, Plaintiff's memorandum in opposition to Defendants' motion for summary judgment includes a complete section outlining a vicarious liability claim. In order to consider the facts and evidence in the light most favorable to Plaintiff—the nonmoving party on the instant motion—this Court has considered whether a claim of either direct or vicarious liability can survive Defendants' summary judgment motion.

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 summary judgment motion 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).

III

Analysis

A

Duty of Care

1

Direct Liability

Defendants first argue that Plaintiff cannot establish a prima facie case for her direct negligence claim because she cannot establish that Defendants owed Lepore a duty to protect him from asbestos on their properties. Indeed, well-settled Rhode Island negligence law provides that in order to recover from Defendants on her theory of direct liability, Plaintiff must establish that Defendants owed Lepore "a legally cognizable duty." Jenard v. Halpin, 567 A.2d 368, 370 (R.I. 1989). "Whether a duty exists in a particular situation is a question of law" to be decided by a court. D'Ambra v. United States, 114 R.I. 643, 649, 338 A.2d 524, 527 (1975).

The relationship between Defendants and Lepore is determinative on the question of duty. According to the undisputed facts, Lepore was an independent contractor of Defendants because he was employed by a separate company to perform work which Defendants did not

closely oversee or control. See, e.g., Lake v. Bennett, 41 R.I. 154, 156, 103 A. 145, 145 (1918) (defining an independent contractor as "one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of his work"). In addition, because he entered their properties "at [their] invitation . . . for the transaction of business," Lepore was also a business invitee whom Defendants could have reasonably expected to be on their properties. Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 299, 333 A.2d 127, 129 (1975), superseded by statute on other grounds as stated in Barrett v. Barrett, 894 A.2d 891, 895 (R.I. 2006).

Broadly, Rhode Island case law makes clear that property owners have "a duty to exercise reasonable care" to protect "persons reasonably expected to be on [their] premises, . . . against the risks of a dangerous condition . . . provided the landowner knows of, or by the exercise of reasonable care would have discovered, the dangerous condition." Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 753 (R.I. 2000) (emphasis added). More specifically, employers owe a duty to warn their own independent contractors of "a hidden danger in the premises" when the employer "has knowledge or by the use of due care would have knowledge" of that danger, and when the independent contractor has no such knowledge. Vandal v. Conrad Mfg. Co., 87 R.I. 112, 116, 138 A.2d 816, 818 (1958) (emphasis added). Likewise, property owners have the duty "to exercise reasonable care to determine whether [their] premises are in a safe condition for [a business] invitee to do those things for which the invitation was issued." Molinari v. Sinclair Refining Co., 111 R.I. 490, 493-94, 304 A.2d 651, 653 (1973). In particular, "landowners have a duty of reasonable care that must be exercised with respect to invitees" when the landowner "knew or should have known of [a] dangerous condition and negligently failed to warn or to remedy the situation." Kurczy v. St. Joseph Veterans Ass'n, Inc., 713 A.2d 766, 771,

772 n.6 (R.I. 1998) (emphasis added). Consequently, "actionable negligence may be found where a reasonably prudent [property owner] would have foreseen that a dangerous condition existing on the premises could cause injury to business invitees." Molinari, 111 R.I. at 493-94, 304 A.2d at 653.

Applying this law to the facts of the case at bar, it is clear that Defendants owed Lepore a duty of care only with respect to any asbestos on their properties, of which they knew or reasonably should have known, and of which Lepore did not know. Consequently, in order to show that Defendants owed Plaintiff a "legally cognizable duty," and thereby establish an essential element of her prima facie case for direct liability, Plaintiff must show that Defendants either did have, or reasonably should have had, such knowledge. Jenard, 567 A.2d at 370; see also Almonte v. Kurl, 46 A.3d 1, 17-18 (R.I. 2012) (explaining that "in any action sounding in negligence, 'a plaintiff must establish a standard of care as well as a deviation from that standard'") (quoting Malinou v. Miriam Hospital, 24 A.3d 497, 509 (R.I. 2011)).

2

Vicarious Liability

Next, with respect to Plaintiff's vicarious liability claim, Defendants argue that they cannot be held liable for the negligence of their workers in bringing asbestos into Lepore's work area because these workers were independent contractors and because employers, as a rule, are not responsible for the negligent acts of their independent contractors. Assuming, without deciding, that these workers were independent contractors, Defendants misconstrue the extent of their duty of care with respect to their workers. "[T]he independent contractor rule," which often insulates employers from liability for the negligence of their independent contractors by absolving them of a duty of care, "is not without exceptions." Konar v. PFL Life Insurance Co.,

840 A.2d 1115, 1117 (R.I. 2004).

In particular, employers can be held vicariously liable for the negligence of their independent contractors when the independent contractors' work could have been reasonably expected to cause injury to others. Ballet Fabrics, Inc. v. Four Dee Realty Co., Inc., 112 R.I. 612, 623, 314 A.2d 1, 8 (1974) (holding that the defendant employer was properly held liable for the negligent acts of its independent contractor because there was a foreseeable risk, which a reasonable employer would have recognized in advance, that harm would come to the injured party if the defendant did not take reasonable precautions); see also Konar, 840 A.2d at 1123; accord Restatement (Third) Torts § 59 (providing that "[a]n actor who hires an independent contractor for an activity that the actor knows or should know poses a peculiar risk is subject to vicarious liability for physical harm when the independent contractor is negligent as to the peculiar risk and the negligence is a factual cause of any such harm within the scope of liability") (emphasis added). In the case at bar, Defendants could only have reasonably expected their workers' activities to cause asbestos-related injury to Lepore if they knew or reasonably should have known that the workers were bringing asbestos into Lepore's work area. See Ballet Fabrics, 112 R.I. at 623, 314 A.2d at 8.

Defendants, therefore, could be held vicariously liable to Plaintiff for their workers' negligence, but only if Defendants knew or reasonably should have known that their workers were exposing Lepore to asbestos. See Ballet Fabrics, 112 R.I. at 620-21, 314 A.2d at 6. Again, Plaintiff has the burden of establishing, as part of her prima facie case, that Defendants had or reasonably should have had such knowledge. Jenard, 567 A.2d at 370; Almonte, 46 A.3d at 17-18.

B

Plaintiff's Evidentiary Showing

Because Defendants can only be held directly or vicariously liable if they knew or reasonably should have known of asbestos on their properties, summary judgment is appropriate here if Plaintiff cannot put forth evidence showing that Defendants, in fact, knew or should have known. See Jenard, 567 A.2d at 370 (noting that the plaintiff has the burden of proving that the defendant breached the duty of care); Kelley, 768 A.2d at 430 (holding that summary judgment is proper where the plaintiff is unable to establish a prima facie case). Defendants maintain that they were unaware of any asbestos-containing materials on their premises while Lepore was working for them and that, moreover, their lack of knowledge was reasonable because none of their personnel supervised or controlled Lepore's or their other independent contractors' work with asbestos. Thus, in order to survive the instant summary judgment motion, Plaintiff has "an affirmative duty" at this juncture to submit some evidence to this Court showing that Defendants did, in fact, know or should have known of the asbestos in question. Bourg, 705 A.2d at 971; see also Selwyn v. Ward, 879 A.2d 882, 888 (R.I. 2005) (upholding a grant of summary judgment for the defendant when the plaintiff had produced no admissible evidence showing that the defendant knew or should have known of the risks of its actions); cf. Bromaghim v. Furney, 808 A.2d 615, 617 (R.I. 2002) (granting judgment as a matter of law in favor of the defendant because the plaintiff had produced "no evidence that the defendants knew or should have known of an unsafe condition . . . on their premises").

Plaintiff has advanced two arguments in response to Defendants' claim of ignorance of the existence of asbestos on their properties. First, Plaintiff has suggested, through counsel's statements at the hearing and in her memorandum in opposition to the instant motion, that

Defendants must have known that asbestos was in their buildings because it was a ubiquitous building material at the time of Lepore's exposure. Although this may be true, Plaintiff submits no actual evidence tending to prove that the presence of asbestos in buildings was common knowledge at the relevant time. Moreover, Plaintiff has submitted no evidence that the particular defendants in this case were privy to this knowledge. Plaintiff's supposition, therefore, is not sufficient to meet her evidentiary burden on summary judgment because it is a "naked and conclusory assertion" and, as such, is "inadequate to establish the existence of a genuine issue of material fact." Weaver v. Am. Power Conversion Corp., 863 A.2d 193, 200 (R.I. 2004).

Plaintiff's second argument is more efficacious. In particular, Plaintiff argues that the instant motion for summary judgment is premature because she has made a discovery request for written contracts between Defendants and various contractors who installed asbestos in their buildings, and these contracts, according to Plaintiff, are likely to demonstrate that Defendants knew or should have known about both the preexisting asbestos in their buildings and about the asbestos brought in by their other workers in Lepore's presence. Defendants have objected to this discovery request, alleging that it is overly broad, unduly burdensome and seeks irrelevant information. Plaintiff, however, challenges Defendants' objection and has filed a motion—which has not yet been decided—to compel Defendants to respond substantively to her requests.

"[W]here a plaintiff's case depends on [her] 'ability to secure evidence within the possession of defendants, courts should not render summary judgment because of gaps in a plaintiff's proof without first determining that plaintiff has had a fair chance to obtain necessary and available evidence from the other party.'" Baltodano v. Merck, Sharp & Dohme (I.A.) Corp., 637 F.3d 38, 41, 43 (1st Cir. 2011) (finding that a trial court's grant of summary judgment was "inappropriate" when the plaintiff was not "given a fair chance to develop the record due to

[the defendant's] stonewalling") (quoting Carmona v. Toledo, 215 F.3d 124, 133 (1st Cir. 2000)); see also Thomas v. Ross, 477 A.2d 950, 952 (R.I. 1984) (relying on federal courts' interpretation of federal summary judgment law in interpreting our own summary judgment standards). Moreover, our Supreme Court has noted that courts are "lenient with the party opposing summary judgment" and "liberal in . . . giving [that party] full opportunity to show any genuine issue which may exist." Mill Factors Corp. v. L. S. Bldg. Supplies, Inc., 103 R.I. 675, 679, 240 A.2d 720, 722 (1968). Because the results of Plaintiff's pending motion to compel may yield evidence establishing that Defendants owed Lepore a duty of care, summary judgment at this time would be premature.

IV

Conclusion

Because Plaintiff continues to engage in efforts to discover probative and pertinent evidence to support her claims, the Court denies Defendants' motion for summary judgment without prejudice. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Leonard L. Lepore and Carol A. Lepore v. A.O. Smith Corp., et al.
CASE NO:	C.A. No. PC 12-1469
COURT:	Providence County Superior Court
DATE DECISION FILED:	January 15, 2014
JUSTICE/MAGISTRATE:	Gibney, P.J.
ATTORNEYS:	
For Plaintiff:	*See attached list
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Leonard L. Lepore and Carol A. Lepore v. A.O. Smith Corp., et al.
C.A. No. PC 12-1469

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