

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Bruce Collins and Theresa Collins)
)
 Plaintiffs,)
)
)
 v.)
)
 Ashland, Inc., Ashland Specialty)
 Company, Benjamin Moore &)
 Company, ICI Paints in North)
 America, Inc., RPM International,)
 Inc., Sherwin Williams Company,)
 WM Barr & Company, Inc., XIM)
 Products, Inc., PPG Industries, Inc.,)
 and United States Steel Corporation)
)
 Defendants.)

C.A. No. 06C-03-339-JRJ

Date Submitted: July 7, 2008
Date Decided: August 12, 2008

Upon Defendant Benjamin Moore & Company's Motion for Summary Judgment:
DEFERRED.

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James J. Freebery, IV, Esq., 405 N. King Street, 8th Floor, P.O. Box 111, Wilmington, Delaware, 19801, attorney for defendant Benjamin Moore & Company.

Jurden, J.

I. Background

Before the Court is Defendant Benjamin Moore & Company's (BM&C) Motion for Summary Judgment on Product Identification. The lawsuit giving rise to this motion was filed March 31, 2006 by Bruce and Theresa Collins. Mr. Collins passed away on July 10, 2006. His surviving spouse, Theresa Collins ("Plaintiff"), individually and on behalf of her husband's estate, claims that Mr. Collins contracted Acute Myelogenous Leukemia as a proximate result of excessive exposure to benzene containing products manufactured by BM&C.

Pursuant to an Order issued by the Hon. Joseph R. Slight, III on September 28, 2007, the parties were to complete all fact discovery on product identification and causation by February 29, 2008 (the "Discovery Cutoff"). The Discovery Cutoff passed without Plaintiff taking any depositions or propounding any third party discovery.¹ After the Discovery Cutoff had passed, Plaintiff moved to re-open discovery in order to take the depositions of three of Mr. Collins' co-workers: Jerry Hood, Robert Dyar and Robert Stancil. Commissioner Mark S. Vavala held a hearing on Plaintiff's Motion to Re-open Discovery on March 20, 2008 and denied it on May 7, 2008. BM&C filed its Motion for Summary Judgment on

¹ According to BM&C, "[f]rom the time Plaintiff's initiated this case, in March 2006, through February 29, 2008 – the product nexus discovery cut-off – Plaintiff's sought and obtained zero (0) commissions, noticed zero (0) third-party depositions, and sought zero (0) documents from third-parties. Defendants, on the other hand, obtained commissions, conducted third-party depositions, and obtained documents from third-parties. It was not until after discovery closed that Plaintiffs ever sought to conduct third-party discovery, with the filing of their motions to re-open discovery (ID #18988856)." BM&C Reply Br. at 3.

Product Identification on April 24, 2008. In opposition to BM&C's Motion, Plaintiff produced affidavits from co-workers Hood and Dyar, claiming these affidavits "provide sufficient evidence of decedent's use of relevant Benjamin Moore products to overcome defendant's Motion for Summary Judgment."²

BM&C argues that the Court should strike these affidavits because, among other reasons, these affidavits impermissibly introduce new facts after the Discovery Cutoff and, coupled with Plaintiff's renewed request for additional discovery, constitute an impermissible fourth attempt to re-open discovery in this matter.³ BM&C further argues that if the Court allows the Hood affidavit,⁴ BM&C is still entitled to summary judgment because the Hood affidavit fails to create a genuine issue of material fact with regard to BM&C. According to BM&C, the Hood affidavit describes use of BM&C products that were not available during the time period at issue, 1984, and fails to provide sufficient evidence of product nexus.

In opposition, Plaintiff argues that the Hood Affidavit is properly before the Court and Hood's testimony creates genuine issues of material fact which preclude summary judgment. Plaintiff further argues that although (1) she may have been "sloppy" in discovery in that she failed to adequately answer interrogatories

² Pl. Answ. Br. at 2.

³ See BM&C Reply Br. at 2.

⁴ The parties agree that the Dyar Affidavit is irrelevant to Plaintiff's claims against BM&C.

seeking identification of all persons with knowledge of products utilized by Mr. Collins in 1984, (2) she probably should have sought to extend the February 29, 2008 Discovery Cutoff before it passed, and (3) she should have appealed the Commissioner's decision denying her motion to re-open discovery, in the interest of justice, the Court should, five months after the Discovery Cutoff and after Defendant prepared, filed and presented its summary judgment motion, allow her to re-open discovery (thereby overruling the Commissioner even though the Plaintiff failed to timely appeal his decision) by allowing the affidavits. In the alternative, Plaintiff asks the Court to defer ruling on the summary judgment motion and re-open discovery to allow her to take additional discovery on product identification/nexus.

II. STANDARD

On a motion for summary judgment, the Court examines “all facts in a light most favorable to the non-moving party, and determine[s] whether there is a genuine issue of material fact requiring a trial.”⁵ “When a motion for summary judgment is supported by evidence showing no material issues of fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact

⁵ *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. 2006), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

requiring trial.”⁶ “Summary judgment is not meant to be an exercise in which the defendant must put all of his cards on the table in order to allow a plaintiff to determine if his hand is adequate or if he needs to open a new pack of cards to re-stack the deck. Rather, the Court’s rules of civil procedure provide the plaintiffs with an opportunity in discovery to develop the factual evidence needed to support his legal claim(s) and to identify that evidence in response to properly propounded discovery requests. Once the period for discovery is closed, the defendant is then entitled to test the sufficiency of the plaintiff’s evidence with confidence that the record is fixed.”⁷

III. DISCUSSION

At the time of the Discovery Cutoff, the only evidence of record to show that Mr. Collins was exposed to BM&C products was the affidavit that he executed before his death concerning Benjamin Moore (the “Collins Affidavit”) and the accompanying Interrogatory Responses. This evidence constitutes inadmissible hearsay⁸ insufficient to create a genuine issue of material fact as to product identification or exposure.⁹

⁶ *Id.*; see also *In re Asbestos Litig.* (“*Helm*”), 2007 WL 1651968, at *15 (Del. Super.) (setting forth the standard of review on a motion for summary judgment).

⁷ *Stigliano v. Nosroc Corp.*, 2006 WL 3492209, at *1 (Del. Super.).

⁸ See Delaware Uniform Rule of Evidence (“DRE”) 801; DRE 802.

⁹ The Court will not consider inadmissible hearsay when deciding a motion for summary judgment. *Continental Cas. Co. v. Ocean Accident & Guar. Corp.*, 209 A.2d 743 (Del. 1965).

The Collins Affidavit is not admissible as a “dying declaration” under DRE 804(b)(2) because it was not made under the sense of impending death.¹⁰ In order to constitute a “dying declaration,” Plaintiff must establish that Mr. Collins’ death was “imminent” when he executed the affidavit.¹¹ Mr. Collins executed the affidavit 149 days before he died. Such a significant lapse in time precludes a finding of imminence needed to satisfy the dying declaration exception.¹² The Collins Affidavit is also not admissible under the narrowly construed “residual exception” found in DRE 807 because it lacks sufficient indicia of trustworthiness to fall within that exception.¹³ In making this determination, the Court relies heavily on the fact that in the affidavit Mr. Collins claimed to have been exposed to thirteen different products manufactured by BM&C while working for Rosing Paints in 1984. Research conducted by Benjamin Moore reveals, however, that nine of those products did not even exist in 1984.¹⁴ In light of the fact that Mr. Collins, regrettably, cannot be cross-examined on this affidavit, the Court finds the

¹⁰ See DRE 804(b)(2): “[a] statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.”

¹¹ *Id.*

¹² See *Stigliano*, 2006 WL 3026168, at *1 (Del. Super.) (finding that a hearsay statement made 73 days before the declarant’s death lacked imminence).

¹³ See *Cabrera v. State*, 840 A.2d 1256, 1268 (Del. 2004).

¹⁴ Pl. Op. Br. at 5.

affidavit insufficiently trustworthy to allow its admission under the “residual exception.”¹⁵

The Interrogatory Responses constitute inadmissible hearsay for the same reasons as the Collins Affidavit. Pursuant to Superior Court Rule 33(c), interrogatory responses are admissible at trial “to the extent permitted by the rules of evidence.” Because the Interrogatory Responses are inadmissible at trial as barred by the rules of evidence, they are also insufficient to create a genuine issue of material fact pertaining to product identification.¹⁶

Plaintiff’s only hope of surviving summary judgment hinges on the admissibility of the Hood affidavit. At oral argument, Plaintiff’s counsel asked the Court more than once not to penalize Plaintiff for her failure to take third party discovery on product identification and to fully answer interrogatories before the Discovery Cutoff. Like BM&C, the Court is not happy with the situation now created by Plaintiff’s discovery strategies and missteps. BM&C followed the rules, met the Court’s deadline, and timely filed its summary judgment motion – believing, as it was entitled to do, that discovery was complete and the record was closed.¹⁷ Only after filing its motion did BM&C learn of the anticipated trial

¹⁵ See *Stigliano*, 2006 WL 3026168, at *1 (Del. Super.).

¹⁶ See Super. Ct. Civ. R. 33(c); DRE 801; DRE 802.

¹⁷ See *Stigliano*, 2006 WL 3492209, at *1 (Del. Super.) (“[o]nce the period for discovery is closed, the defendant is then entitled to test the sufficiency of the plaintiff’s evidence with confidence that the record is fixed.”).

testimony of one of Mr. Collins' co-workers on product identification/nexus.¹⁸ Plaintiff should have identified Hood as a product identification/nexus witness against BM&C in its discovery responses.¹⁹ Having failed to properly identify Hood (other than as a co-worker) and having adopted a discovery strategy that did not call for deposing Hood, and knowing BM&C was likely to move for summary judgment on product identification, Plaintiff should have provided an affidavit from Hood before the Discovery Cutoff. And, having recognized she probably needed testimony from Hood to overcome summary judgment, Plaintiff should have timely appealed the Commissioner's Order denying the re-opening of discovery. Had Plaintiff simply done any one of these things, the parties and Court would have saved much time and expense.

Having said all this, however, the Court is not inclined to strike the Hood Affidavit. Although Hood was not identified as a product identification/nexus witness against BM&C, he was identified early on in the litigation as a co-worker of Mr. Collins during the relevant time period, and Defendants could have interviewed him or deposed him. In the interest of justice, despite Plaintiff's

¹⁸ Before the Discovery Cutoff, BM&C served Plaintiff with requests for admission, interrogatories and requests for production specific to any allegations plaintiff had with respect to BM&C. This discovery asked Plaintiff to provide evidence supporting her allegations that Mr. Collins was exposed to BM&C products and to identify any and all witnesses they intended to call. See Oral Arg. Tr. at 5.

¹⁹ See *Stigliano*, 2006 WL 3492209 (Del. Super.) (stating that in order to put the defendant on sufficient notice, Plaintiff is required to identify and specifically designate as a "product nexus" witness any witness who will be utilized to establish product nexus).

failure to properly respond to discovery and/or take third party discovery, the Court will consider the affidavit. But this comes with a price to Plaintiff's counsel. If BM&C wishes to depose Hood, Plaintiff's counsel shall pay BM&C's costs and reasonable attorneys fees incurred in connection with the preparation and taking of the deposition. Furthermore, Plaintiff's counsel shall reimburse BM&C for costs and reasonable attorneys fees incurred in connection with reviewing the Hood Affidavit and the preparation and filing of its Reply Brief and any supplemental briefing necessitated by Hood's deposition (if BM&C opts to depose him). In addition, the Court will permit BM&C to take any additional discovery it deems necessary as a result of the Hood Affidavit, and BM&C may petition for reimbursement by Plaintiff's counsel for its fees and costs associated with such additional discovery. The Court defers ruling on the summary judgment motion until BM&C advises whether it will depose Hood and whether it requires additional discovery.

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary - Original