LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Dec. 29, 2017 Case No. 15CV187950

BRIAN KELLOGG, *et al.*
Plaintiff

Thomas Bevan
Plaintiff's Attorney

VS

GENERAL ELECTRIC CO., *et al.*
Defendant

Perry Doran
Defendant's Attorney

This matter is before the Court on separate Defendant, General Electric Company's ("GE"), Supplemental Brief in Support of Summary Judgment, filed December 5, 2017; Plaintiff's Supplemental Briefing and Evidence Regarding Additional Unresolved Issues, filed December 5, 2017; and, Plaintiff's Motion For Reconsideration, filed December 11, 2017.

Plaintiff's Motion For Reconsideration is not well-taken and is hereby DENIED.

GE's Motion For Summary Judgment is well-taken and is hereby GRANTED. GE is dismissed as a party defendant.

See Judgment Entry.

THE COURT FINDS NO JUST CAUSE FOR DELAY.

IT IS SO ORDERED.

JUDGE D. Chris Cook

cc: Bevan, Esq.
Doran, Esq.
Heller, Esq.
Kristan, Jr., Esq. (Clark Ind. Insulation Co.)
Luxton, Esq. (Gould's Pumps, Inc.)

Pursuant to Civ. R. 54(B), this court enters final judgment as to the issue decided herein, which is less than all the claims in the case and makes the express determination that there is no just reason for delay.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JUDGMENT ENTRY
Hon. D. Chris Cook, Judge

Date Dec. 29, 2017 Case No. 15CV187950

BRIAN KELLOGG, *et al.*
Plaintiff

Thomas Bevan
Plaintiff's Attorney

VS

GENERAL ELECTRIC CO., *et al.*
Defendant

Perry Doran
Defendant's Attorney

INTRODUCTION

This matter is before the Court on separate Defendant, General Electric Co.'s ("GE") Motion For Summary Judgment Based Upon the Statute of Repose, filed June 16, 2016. Since that date, the parties have extensively briefed the issues, including the filing of supplement briefs, and have argued the matter to the Court on two occasions.

PROCEDURAL HISTORY

On November 8, 2017 the Court filed a comprehensive Journal Entry and Judgment[1] wherein the Court granted GE's motion in part, to wit: the Court found that the GE steam turbines ("The Turbines") at issue are improvements to real property. The Court, however, was unable to dispose of GE's motion *in toto* and ordered further briefing and argument to address two issues:

A. Was Plaintiff's decedent, Brian Kellogg, actually exposed to any asbestos-containing products contained within The Turbines?

B. If so, what was the nature of those products? Did they at all times during their utility retain their character as products, or, were they at some point so assimilated or incorporated into The Turbines that they lost their character as products and became improvements to real property themselves?

Those issues have now been fully briefed and argued and are ripe for disposition.

[1] The Court's Journal Entry and Judgment, filed November 8, 2017 referenced above, is hereby incorporated herein.

PLAINTIFF'S MOTION FOR RECONSIDERATION

On December 11, 2017 Plaintiff's Decedent, Brian Kellogg ("Kellogg"), filed a Motion For Reconsideration of the Court's Order finding that The Turbines at issues constitute improvements to real property.

For cause, Kellogg argues that counsel has ". . . discovered new evidence that is determinative of the issue before the Court." He further urges that as the Court's decision on this issue was not a final appealable order and Civ. R 60 provides a means to avail Kellogg with relief, the Court should reconsider its finding.

I disagree.

Succinctly stated, the Rules of Civil Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules. A motion for reconsideration is conspicuously absent within the Rules. Rather the Civil Rules do allow for relief from final judgments by means of Civ.R. 50(B) (motion notwithstanding the verdict), Civ.R. 59 (motion for a new trial), and Civ.R. 60(B) (motion for relief from judgment). Without a specific prescription in the Civil Rules for a motion for reconsideration, it must be considered a nullity. *Pitts v. ODOT* (1981), 67 Ohio St.2d 378.

Here, however, there is no final order. The Court's ruling that The Turbines are improvements to real property is *interlocutory* and subject to review. Moreover, Kellogg also urges review pursuant to Civ. R 60. As such, the Court does have jurisdiction to reconsider its Order.

I reach this conclusion cognizant of a decision from the Ninth District Court of Appeals that addresses (sort of) motions for reconsideration of *interlocutory* summary judgment rulings. See: *Healy v. Goodyear Tire & Rubber Co.,* 9th Dist. No. 25888, 2012-Ohio-2170.

In that case, the Ninth District did not reach this exact issue but did reiterate the standard of review for new evidence, "This Court's decision in *Holden v. Ohio Bur. of Motor Vehicles,* 67 Ohio App.3d 531, 587 N.E.2d 880 (9th Dist.1990), makes clear that when presenting newly discovered evidence the moving party must demonstrate: "(1) that the evidence was actually 'newly discovered'; that is, it must have been discovered subsequent to the trial; (2) that the movant exercised due diligence; and (3) that the evidence is material, not merely impeaching or cumulative, and that a new trial would probably produce a different result." (Citations and quotations omitted.) *Id.* at 540, 587 N.E.2d 880." *Id.* at ¶ 15.

The Court further stated, "[I]n order to succeed on a Civ.R. 60(B)(2) motion, the moving party must show not only that the evidence was 'newly discovered' and that the movant exercised 'due diligence,' but the movant must also demonstrate to the trial court how this evidence is 'material,' and that it would probably have produced 'a different result.' *First Fin. Servs., Inc. v. Cross Tabernacle Deliverance Church, Inc.*, 10th Dist. No. 06AP–404, 2007–Ohio–4." *Id.* at ¶ 17.

NEW EVIDENCE

The gravamen of Kellogg's "new evidence" argument is that since the matter was initially briefed earlier this year, his attorneys have discovered that the Ohio Revised Code actually defines turbines as tangible property. RC 5727.01(J).

Assuming this is accurate, it is irrelevant. RC 5727.01 is part of Title 57 of the Revised Code captioned "Taxation." There is no relationship to how the Code treats industrial equipment for tax purposes and whether or not that equipment is an improvement to real property. In fact, why can't it be both?

Plaintiff would have this Court parse definitions from the Ohio tax code into Chapter 2305 (Title 23) which deals with jurisdiction and the limitation of actions. The result would be to potentially vitiate an entire section of the Revised Code. This Court is mandated to harmonize statutes and give them their intended effect – not construe them in such a manner that one obliterates another.

Further, and even more problematic, is Kellogg's assertion that this statutory revelation is "new evidence." It is nothing of the sort. RC 5727.01 became effective on June 17, 2010, more than seven years ago. Thus it did not spring into existence since the original briefing. Kellogg cannot realistically argue that this statute, even with due diligence, could not have been discovered by the time his response brief was due.

Moreover, the existence of a statutory definition, even if it was recently passed, is not "evidence." Evidence has been defined as "Something . . . that tends to prove or disprove the existence of an alleged fact." Black's Law Dictionary, Abridged, Seventh Edition, 2000. The nature of The Turbines in this case is a legal conclusion – not a disputed fact that needs to be determined by the weight of the evidence.

Finally, and also troubling, is the fact that Kellogg filed his Motion For Reconsideration on December 11, 2017, one (1) day before the oral hearing. GE had little opportunity to respond, let alone do any research or file a written reply.

Accordingly, and for the forgoing reasons, the Motion For Reconsideration is not well-taken and is DENIED.

SUMMARY JUDGMENT STANDARD OF REVIEW

The standard of review for summary judgment in Ohio is well-settled. In *Slinger v. Phillips,* 9th Dist. Medina No. 13CA0048, 2015-Ohio-357, at ¶9, the Ninth District stated, "This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). 'We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party.' *Garner v. Robart,* 9th Dist. Summit No. 25427, 2011–Ohio–1519, ¶ 8."

Pursuant to Civ.R. 56(C), summary judgment is appropriate when: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, (1977).

To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, (1996). If the movant satisfies this burden, the nonmoving party " 'must set forth specific facts showing that there is a genuine issue for trial.' " *Id.* at 293, quoting Civ.R. 56(E).

Recently, the Ninth District Court of Appeals noted, "Summary judgment proceedings create a burden-shifting framework. To prevail on a motion for summary judgment, the movant has the initial burden to identify the portions of the record demonstrating the lack of a genuine issue of material fact and the movant's entitlement to judgment as a matter of law. *** In satisfying this initial burden, the movant need not offer affirmative evidence, but it must identify those portions of the record that support her argument. ***

Once the movant overcomes the initial burden, the non-moving party is precluded from merely resting upon the allegations contained in the pleadings to establish a genuine issue of material fact. Civ.R. 56(E). Instead, it has the reciprocal burden of responding and setting forth specific facts that demonstrate the existence of a 'genuine triable issue.' *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996)." *McQuown v. Coventry Township,* 9th Dist. Summit No. 28202, 2017-Ohio-7151, at ¶ 10. See also: *Bank of New York Mellon v. Bridge,* 9th Dist. Summit No. 28461, 2017-Ohio-7686, at ¶ 8.

STATEMENT OF PERTINENT FACTS

A. A STIPULATION AS TO THE PRESENCE OF ASBESTOS

At the second oral argument on this issue, held December 12, 2017, the parties entered into a stipulation for the limited purpose of disposing of GE's dispositive motion, that for this purpose only, there were materials within The Turbines that contained asbestos to which Kellogg was exposed.[2]

B. WHAT WAS THE NATURE OF THE ASBESTOS-CONTAINING PRODUCTS INCORPORATED INTO THE TURBINES

Based upon the supplemental briefs, oral argument, and Supplemental Affidavit of David Skinner ("Skinner"), the asbestos-containing items can best be described as "heat retention materials." They manifest themselves in two distinct products, to wit: 1) block insulation; and, 2) blanket insulation.[3]

1) Block Insulation

Block insulation, also referred to as "steam turbine high pressure shells" consist of a top half and bottom half that are attached to the turbine during operation. They are made of a "metal-like" material, are bolted onto the turbine, remain in operation for "decades," are custom-made for a particular turbine, can only be removed with cranes, and are essential to the operation of a turbine.

2) Blanket Insulation

Blanket insulation is surprisingly similar to what one might imagine – it is a giant, custom-made product with uniquely designed "blankets" that are individually measured and sewn to fit together on the turbine. Each individual blanket contains a numbered metal tag and is mapped to a specific position on the turbine. When fully assembled and attached to a turbine, it completely covers the high pressure shell of the turbine to prevent heat loss and looks like a mammoth insulated jacket.

---

[2] GE's stipulation is only pertinent and applicable to its pending Motion For Summary Judgment and GE retains the right to withdraw this stipulation or limit its use for any other purpose.

[3] The Court is aware that Kellogg argues in his Supplemental Brief that he was exposed to asbestos from other sources such as plastic insulating cement, pre-formed pipe insulation, sprayed asbestos, finishing cement, asbestos cloth, and a fire-resistant weatherproof jacket. However, none of these items are incorporated into The Turbines nor is there any evidence that GE manufactured them.

Both block and blanket insulation are essential and integral to the operation of The Turbines. They prevent catastrophic damage to The Turbines from heat loss or too rapid cooling. They also make The Turbines, and by extension, the power generating facility, more efficient.

ANALYSIS

This Court has already determined that The Turbines are improvements to real property such that RC 2305.131, Ohio's Statute of Repose, is applicable. As GE has entered a "limited purpose" stipulation that The Turbines incorporated materials that contained asbestos and that Kellogg was exposed to them, the only remaining issue for resolution is determination of the nature of the asbestos-containing materials.

THE BLOCK INSULATION AND BLANKET INSULATION MATERIALS ARE SO INCORPORATED AND CONCATENATE WITH THE TURBINES THAT THEY THEMSELVES ARE IMPROVEMENTS TO REAL PROPERTY

This Court has previously determined (in excruciating detail) that The Turbines are improvements to real property based upon numerous decisions from Ohio courts, other state courts, and federal courts. As such, I will not regurgitate the legal precedent and standards of analysis again. Instead, the Court will limit its focus to the block and blanket insulation incorporated into The Turbines.

As noted *supra,* the block and blanket insulation are primarily heat retention materials designed to insulate and protect the inner-workings of The Turbines. They both keep heat in and prevent too-quick cool-downs. They are exactingly manufactured for specific turbines; are huge, being constructed of metal or heavy, blanket-like material; they have a lifespan of decades and are exceedingly costly. And, most importantly, they are essential to the operation of The Turbines. When the block and blanket insulation is removed, The Turbines cannot operate. They create efficiency and are integral to the operation of The Turbines which are indispensible to the power plant for the production of electricity.

Moreover, the block and blanket insulation have none of the characteristics of products contemplated by RC 2307.71 such that RC 2307.10, Ohio's Bodily Injury or Injury to Personal Property statute should apply. As this Court noted in its prior Entry, items such as asbestos-containing gloves or aprons, asbestos-laden tape, brakes, and asbestos-containing cloth and welding rods, asbestos-containing block and paper are examples of items that started off as products and retained at all times during their utility their character as products. They are usually smaller, tangible, fungible, easily obtained, moved, used, and discarded items. And, they are usually inexpensive. Such

Pursuant to Civ. R. 54(B), this court enters final judgment as to the issue decided herein, which is less than all the claims in the case and makes the express determination that there is no just reason for delay.

items, by their very nature, are different in character than block or blanket insulation permanently affixed to steam turbines.

In addition, there is precedent that when construing the Statute of Repose for application to a complex system, "the entire system" must be considered, not just some of its individual components. "Consequently, we find that if a component is an essential or integral part of the improvement to which it belongs, then it is itself an improvement to real property." *Hilliard v. Lummus,* 834 F.2d 1352 (1987). See also: *Adair v. Koppers Co.,* 741 F.2d 111(1984) holding that a conveyor was an "integral component" of a coal handling system; and, *Harder v. Acands,* 179 F.3d 609 (1999), previously cited, holding that blanket insulation, once attached to a steam turbine, " . . . became improvements to real property . . ."

For the foregoing reasons, this Court finds that The Turbines, and all of their assimilated components, are improvements to real property such that RC 2305.131 is applicable. As such, Kellogg "has no claim" against GE as his claim was barred once ten years elapsed after installation of The Turbines at CEI, his former employer. See: *Seder v. Knowlton Const. Co.,* 49 Ohio St.3d 193 (1990).

CONCLUSION

After review of the pleadings and extensive briefing, the Affidavits and other Civ. R. 56(E) materials, consideration of the oral arguments of counsel and perusal of Civ. R 56(C) as well as the relevant case law supplied by the parties, the Court finds the following:

Because there are no genuine issues of material fact in dispute, to wit: The GE Turbines at issue are improvements to real property and RC 2305.131, Ohio Statute of Repose is applicable, General Electric Co.'s Motion For Summary Judgment is hereby well-taken and GRANTED. General Electric Co. is dismissed as a party defendant.

THE COURT FINDS NO JUST CAUSE FOR DELAY.

IT IS SO ORDERED.

JUDGE D. Chris Cook