

Rosato v 2550 Corp.

2008 NY Slip Op 32755(U)

September 18, 2008

Supreme Court, Suffolk County

Docket Number: 99-24701

Judge: Joseph Farneti

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3212 dismissing the complaint and all cross claims against it is granted only to the extent of dismissing all claims of injury and damage relating to the plaintiff's leukemia and anemia, and is otherwise denied.

This is an action to recover damages, *inter alia*, for personal injuries allegedly sustained by plaintiff Elaine Rosato ("the plaintiff") as a result of the presence of environmental contaminants at her workplace. The plaintiff claims that, between August 1996 and October 1997, while she was employed at the law office of Cardino & Cardino, 217 Merrick Road, Amityville, New York, she sustained solvent intoxication, as well as chemically-induced anemia and pneumonia, all due, in part, to the negligence of Sunoco, Inc. (R&M) in permitting underground gasoline tanks to leak and hazardous airborne particles to be released from its premises located at 318 Montauk Highway, Amityville, New York, and to the negligence of 2550 Corporation, the owner of the premises located at 217 Merrick Road, in permitting dangerously high levels of toxins and other chemicals to accumulate and to become airborne within the building where they were subsequently ingested by the building's tenants and their employees. In a supplemental bill of particulars, she claims to have also sustained severe and recurrent sinus infections and bone marrow damage, and, in October 2003, to have developed chronic lymphocytic leukemia, all likewise as a result of her exposure to toxins during the course of her employment at the building. The office building at 217 Merrick Road is located approximately 1,000 feet west-northwest of the gas station located at 318 Montauk Highway.

Now, discovery having been completed and a note of issue having been filed on December 27, 2007, Sunoco moves for summary judgment, alleging that the plaintiff's physical symptoms were not related to any environmental conditions at the Sunoco site, and that any contamination from the Sunoco site could not have impacted the plaintiff's building based on the direction of the groundwater flow. 2550 Corporation cross-moves for summary judgment, alleging that the plaintiff's health condition cannot be attributed to a building condition and, in any event, that it lacked actual or constructive notice of the alleged condition.

Preliminarily, the Court rejects the plaintiffs' argument that Sunoco's motion should be denied as an improper successive motion for summary judgment. Where, as here, the current motion is based on deposition testimony and other evidence that was obtained during discovery, it is not repetitive of the previous motions and a court may rule on its merits without running afoul of the rule against successive summary judgment motions (*see, Schripteck Mktg. v Columbus McKinnon Corp.*, 187 AD2d 800, 589 NYS2d 656 [1992], *lv denied* 81 NY2d 704, 595 NYS2d 399 [1993]; *Beagan v Manhattanville Nursing Care Ctr.*, 176 AD2d 633, 575 NYS2d 70 [1991], *lv denied* 79 NY2d 753, 581 NYS2d 281 [1992]).

As to the cross motion, the plaintiffs correctly note that a party may not avail itself of the abbreviated notice provisions set forth in CPLR 2215 to the extent it seeks relief against a nonmoving party. Additionally, the Court notes that the cross motion is untimely, having been made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). A court may, however, in the course of deciding a timely motion for summary judgment, search the record and grant summary

judgment to any party without the necessity of a cross motion, so long as its search is limited to issues that are the subject of the timely motion (CPLR 3212 [b]; *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 654 NYS2d 335 [1996]), and even an untimely cross motion for summary judgment may be considered by a court where a timely motion for summary judgment has been made on nearly identical grounds, as the issues raised by the untimely cross motion are already properly before the court (*Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2005]). Here, since the issue of whether the plaintiff's injuries are causally related to gasoline constituent contamination is a subject of Sunoco's motion, the Court could have searched the record with respect to that issue and granted summary judgment to 2550 Corporation even had 2550 Corporation not applied for such relief. The Court finds it appropriate, therefore, to overlook the inadequacy of the notice. Moreover, insofar as the cross motion addresses the issue of causation, it is nearly identical to Sunoco's motion and may properly be considered notwithstanding that it was made after the expiration of the 120-day period; the remainder of the cross motion, however, must be denied as untimely (see, *Covert v Samuel*, 53 AD3d 1147, ___ NYS2d ___ [2008]).

To the extent Sunoco contends that the contaminants allegedly found at the building could not have originated at the gas station site, the Court finds Sunoco's proof insufficient to demonstrate its prima facie entitlement to summary judgment. Sunoco relies, in part, on the deposition testimony of Russell Hammond, who described himself as an "environmental engineer" or "hydrogeologist" employed by Sunoco. He confirmed at his deposition that gasoline constituents had contaminated the groundwater at the station, but asserted that there could not have been any impact on the building. Based on groundwater measurements from wells installed on and off the site and surveying of groundwater levels, it was his opinion that the groundwater in the area of the gasoline station flows to the south and, therefore, according to "physical law," it would be impossible for even "a molecule of water" to flow underground in a westerly direction from the station to the building. Sunoco, however, failed to establish Hammond's qualifications as an expert (see, *Matott v Ward*, 48 NY2d 455, 423 NYS2d 645 [1979]; *Hellert v Town of Hamburg*, 50 AD3d 1481, 857 NYS2d 825 [2008]). Nor, in any event, did Sunoco submit any documents or data, as from the United States Geological Survey, to confirm his conclusion about the groundwater flow, and it does not appear on this record that any groundwater samples were ever taken from locations west of the station to confirm his theory. Sunoco also relies on the affidavit of Robert Ancona, a hydrologist retained by Sunoco to evaluate the presence and transport of contaminants in the vicinity of the site of the gas station. Based on evidence that the groundwater in the area of the gas station flows at an averaged bearing of 192 degrees from north to south, he confirmed Hammond's opinion that any MTBE or other gasoline constituent contamination found at the building could not have come from the station. It is not explained, however, why evidence of a general north-to-south flow regime would negate the possibility of any westerly flow; moreover, it appears that his conclusion is drawn from information taken from data, reports, papers, and maps which are not before the Court. Accordingly, the Court finds his affidavit lacking as well.

On the issue of causation, the Court finds that the defendants have produced expert medical evidence sufficient to establish prima facie the absence of any scientifically-based causal relationship between exposure to MTBE, petroleum distillates, and benzene and the forms of leukemia and anemia

from which the plaintiff allegedly suffers (*see, Nawrocki v Coastal Corp.*, 45 AD3d 1341, 845 NYS2d 896 [2007], *lv denied* 10 NY3d 710, 859 NYS2d 396 [2008]; *B.T.N. v Auburn Enlarged City School Dist.*, 45 AD3d 1339, 845 NYS2d 614 [2007]). Mark B. Wishnuff, a physician certified in internal medicine and occupational and environmental medicine who examined the plaintiff on behalf of Sunoco in July 2006, found that the plaintiff had a mild, microcytic-type anemia which was consistent with an iron deficiency and which was in no way related to exposure to MTBE, petroleum distillates or benzene. He noted that high levels of benzene exposure are instead known to cause other and more severe types of anemia which the plaintiff did not present, and to cause the acute myelogenous form of leukemia, which is distinct from the type of leukemia (CLL) with which the plaintiff was diagnosed. Mark A. Fialk, an oncologist who reviewed the plaintiff's medical records, stated that CLL is relatively common with no proven causative factor, including exposure to chemicals or solvents, and that medical literature does not substantiate any claim of occupational or environmental risk factors which pre-dispose or lead to CLL. The plaintiffs, in opposition, failed to raise a triable issue of fact. While the plaintiffs offered the affidavits of two experts on the subject of exposure to toxic substances—Ernest P. Chiodo, a physician and certified industrial hygienist with a specialization in the medical aspects of toxin exposures, and Roger L. Wabeke, a licensed industrial hygienist, environmental toxicologist, and hazardous materials control engineer—they failed to establish either that the subject contaminants were capable of causing CLL or microcytic anemia, or that the plaintiff was exposed to sufficient levels of the contaminants to cause these illnesses (*see, Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584 [2006]). In fact, neither of the plaintiffs' experts challenged the findings of the defendants' experts regarding the types of leukemia and anemia from which the plaintiff allegedly suffers, and neither disputed their counterparts' conclusions that the subject contaminants were not capable of causing those specific conditions; Wabeke, while noting that benzene does affect blood cell lines and that exposure to benzene causes numerous types of anemia, did not include microcytic types of anemia as among those caused by such exposure. Moreover, Dr. Chiodo's claim that "heavy exposure to gasoline vapors" caused the plaintiff's illnesses is too vague to quantify her exposure and, hence, to constitute scientifically reliable proof of specific causation (*see, Coratti v Wella Corp.*, 14 Misc 3d 1204[A], 831 NYS2d 358 [2006]), nor does it appear that he considered other environmental factors as possible causes.

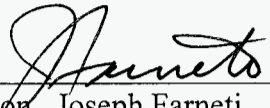
However, since the defendants and their experts failed to address the other injuries claimed by the plaintiff, *i.e.*, solvent intoxication, pneumonia, severe and recurrent sinus infections, and bone marrow damage,¹ the grant of summary judgment is limited to dismissing those claims of injury as to which it has been shown that the plaintiff's alleged exposure to MTBE, petroleum distillates or benzene was not a proximate cause, *i.e.*, the plaintiff's leukemia and anemia.

¹ The affidavit of Vishnudat Seodat, M.D., who appears to have conducted a medical examination of the plaintiff on behalf of 2550 Corporation in November 2007, does not address those claims of injury except to opine that the plaintiffs' ability to demonstrate a causal relationship between those injuries and the conditions in the building would require "a high degree of speculation." As 2550 Corporation has also failed to provide a curriculum vitae or to otherwise establish the affiant's professional credentials, the affidavit falls well short of establishing its prima facie entitlement to summary judgment.

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The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see*, CPLR 3212 [e] [1]).

Dated: 9/18/2008



Hon. Joseph Farneti
Acting Justice Supreme Court

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