

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-10-21

MICHAEL MAHAR, Personal
Representative of the ESTATE OF
MYRTLE J. MAHAR,

Plaintiff,

v.

SULLIVAN & MERRITT, INC.,
DEZURIK, INC., F.W. WEBB CO.,
GENERAL ELECTRIC CO., CBS CORP.,
THOMAS DICENZO, INC., GOULDS
PUMPS, INC., WARREN PUMPS, LLC,
JOS. A. BERTRAM, INC.,
PEARSE-BERTRAM, LLC, and
BERTRAM CONTROLS CORP., LLC,

Defendants

DECISION AND ORDER
(Thomas DiCenzo, Inc.)

Defendant Thomas DiCenzo, Inc. (TDI) moves for summary judgment on four counts of Plaintiff's Amended Complaint: negligence (Count I), strict liability (Count II), negligence (Count III), and punitive damages (Count IV). TDI asserts that because it did not receive reasonable notice of two depositions in this case (the depositions of the Decedent, Myrtle J. Mahar, and Sandra Mains), Plaintiff should not be permitted to rely upon the deposition testimony in its opposition to TDI's motion for summary judgment. Absent testimony from these two witnesses, TDI asserts that it is entitled to summary judgment.

I. PROCEDURAL BACKGROUND

Myrtle J. Mahar filed suit in Washington County Superior Court. TDI was served on November 25, 2008, through Curtis Kimball, TDI's corporate clerk and attorney at Rudman

Winchell. (Supp. S.M.F. ¶ 1; Opp. S.M.F. ¶ 1.) In the complaint, Plaintiff asserts four causes of action against TDI: negligent failure to warn (Count I), strict liability failure to warn, *see* 14 M.R.S. § 221 (2011), (Count II), negligence (Count III), and punitive damages (Count IV).¹ In Counts I and II, Plaintiff relies on the Defendants' sale of asbestos containing equipment to the Woodland mill without adequate warning of the dangers of asbestos.² In Count III, Plaintiff alleges that TDI failed to take sufficient precautions in its work at the Woodland mill to protect the Decedent from asbestos dust and particles. In Count IV, Plaintiff seeks punitive damages allegedly resulting from the Defendants' willful and malicious actions that were "in total disregard of the health and safety of the users and consumers of their products." (Compl. ¶ 40.)

On Friday, December 5, 2008, Defendant Joy Technologies, Inc. (Joy) noticed to all counsel of record the deposition of the Decedent. (Depo. Notice filed Dec. 8, 2008.) Attorneys for the Decedent forwarded the notice via e-mail to John McCarthy, attorney at Rudman Winchell, on December 5, 2008. (Supp. S.M.F. ¶¶ 2-3; Opp. S.M.F. ¶¶ 2-3.) The signed deposition notice stated that Joy would take the deposition on Tuesday, December 9, 2008 at 1:00 p.m. at the Baileyville Town Office in Baileyville, Maine. (Supp. S.M.F. ¶ 4; Opp. S.M.F. ¶ 4.)

Also on December 5, 2008, Plaintiff's counsel forwarded by e-mail to Rudman Winchell an unsigned notice of a video deposition to occur on Thursday, December 11, 2008, at 9:00 a.m. in Pembroke, Maine. (Supp. S.M.F. ¶ 5; Opp. S.M.F. ¶ 5.) Plaintiff's counsel attached to the e-

¹ Count III is the only count that is asserted solely against TDI; the remaining counts are asserted against all Defendants. TDI suggests in its memorandum of law that the only count asserted against it is Count III. (Def.'s Memo 2 n.1.) The Amended Complaint, however, lists TDI as a Defendant against whom Counts I, II, and IV are asserted. (Amend. Compl. ¶ 17, 33-34, 36, 40.)

² It is not clear from the record whether TDI was "engaged in the business of mining, and/or milling, and/or manufacturing, and/or fabricating, and/or supplying, and/or selling asbestos-containing products to which Plaintiff was exposed" (Amend. Compl. ¶ 28), but the complaint also alleges in support of Counts I and II that Defendants are liable because they "used, and/or specified, and/or removed products containing asbestos" (Amend. Compl. ¶ 33.)

mail notice a series of documents: Plaintiff's Complaint, medical records, income tax returns, W-2 statements, and answers to Standard Interrogatories. (Supp. S.M.F. ¶ 5; Opp. S.M.F. ¶ 5; A.S.M.F. ¶ 1; Reply S.M.F. ¶ 1.) By letter to Plaintiff's counsel on December 8, 2008, Attorney McCarthy objected to the December 9, 2008, deposition citing M.R. Civ. P. 30(a) and (b). (Supp. S.M.F. ¶ 6; Opp. S.M.F. ¶ 6.)

The Decedent's deposition in fact occurred on December 10 and 11, 2008, in Baileyville Maine; TDI was not represented at the deposition. (Supp. S.M.F. ¶¶ 7, 9; Opp. S.M.F. ¶¶ 7, 9.) Sandra Mains, one of the Decedent's co-workers, was deposed on December 10, 2008, in Baileyville; TDI did not receive notice of the Mains deposition and was not represented at the Mains deposition. (Supp. S.M.F. ¶¶ 7-9; Opp. S.M.F. ¶¶ 7-9.)³

TDI filed its answer and cross-claim on January 16, 2009. (See Supp. S.M.F. ¶¶ 10-11; Opp. S.M.F. ¶¶ 10-11 (indicating TDI sought and received an unopposed extension of time to answer Plaintiff's complaint). The Decedent passed away on October 1, 2009. (See Sugg. of Death filed Mar. 29, 2010.) The Estate of Myrtle J. Mahar was substituted for the Decedent on July 11, 2011.

II. FACTUAL BACKGROUND

In February of 1979, TDI contracted to perform work for Georgia-Pacific: the No. 9 Boiler demolition. (A.S.M.F. ¶ 5.) In August of 1980, TDI contracted to demolish a strong liquor storage tank, including "all associated piping, insulation, and cladding." (A.S.M.F. ¶ 6.) In March of 1981, TDI contracted to demolish a building and tank. (A.S.M.F. ¶ 8.) In

³ Plaintiff denies that TDI did not receive notice of the Mains deposition, asserting that the deposition notice was served on TDI via e-mail attachment on December 5, 2008. (Opp. S.M.F. ¶ 8.) The cited exhibit, however, does not support that assertion. Plaintiff's Exhibit 1 consists of copies of the e-mail transmittals, but the electronically attached documents are not included in the exhibit and the file names do not reflect that the Mains deposition notice was included. (See Pl.'s Exh. 1.) Plaintiff has failed to contradict Attorney McCarthy's sworn testimony and the statement is deemed admitted. See M.R. Civ. P. 56(h)(4).

September of 1982, TDI contracted to remove black liquor and demolish old insulation and cladding. (A.S.M.F. ¶ 7.) TDI objects to the preceding four statements on the grounds that the supporting documents are not authenticated properly and hearsay without an exception, but does not otherwise admit, deny, or qualify each statement.⁴ (Reply S.M.F. ¶¶ 5-8; *see* A.S.M.F. ¶ 4, Reply S.M.F. ¶ 4 (constituting the allegedly defective authentication).)

Nevertheless, TDI admits that it performed demolition work at the Georgia-Pacific plant for twenty years (A.S.M.F. ¶ 12; Reply S.M.F. ¶ 12)⁵, and eyewitnesses confirm that TDI performed demolition work at the plant (A.S.M.F. ¶¶ 13-19; Reply S.M.F. ¶¶ 13-19)⁶. TDI, along with several other contractors, tore down the Number 8 Boiler, which work included removing asbestos insulation. (A.S.M.F. ¶ 14; Reply S.M.F. ¶ 14.)⁷ The Decedent worked in the area when TDI and other contractors demolished the Number 8 boiler. (A.S.M.F. ¶ 15; Reply S.M.F. ¶ 15.) In the late 1970s and early 1980s, TDI removed pipe insulation while working in the bleach plant, and the Decedent cleaned up that pipe covering from an alleyway. (A.S.M.F. ¶ 18; Reply S.M.F. ¶ 18.) When TDI performed work at the Woodland mill, it did not cordon off its areas. (A.S.M.F. ¶ 19; Reply S.M.F. ¶ 19.) At her deposition, the Decedent testified to having cleaned up debris thrown out of the windows into an alleyway on a regular basis. (A.S.M.F. ¶ 10.)⁸

⁴ Because use of these documents is not necessary to establish that TDI actually performed demolition work at the Woodland mill, these authentication issues are not discussed any further.

⁵ Technically, TDI only admitted that “Edward Leavitt *testified* that he recalled DiCenzo doing demolition work at Georgia-Pacific for twenty years,” (A.S.M.F. ¶ 12), not that TDI did in fact perform demolition work at Georgia-Pacific for 20 years.

⁶ TDI objects to these statements of material facts on various grounds, but does not deny that TDI did perform work at the plant.

⁷ TDI asserts that the cited testimony of Gregory Reardon is speculative and not based on personal knowledge because elsewhere in the deposition, Mr. Reardon states that he has no “specific recollections of Thomas DiCenzo working with asbestos.” (Reply S.M.F. ¶ 14; Pl.’s Exh. 12 41:9-11.) TDI’s objection goes to the weight of the evidence, not the admissibility; the statement of material fact is supported by a record citation.

⁸ Counsel for Defendant WLB Holding, Inc., a distributor of piping and asbestos pipe covering, cross-examined the Decedent at the deposition. (A.S.M.F. ¶ 11.) TDI objects to the preceding statements because they cite the

III. DISCUSSION

A. Standard of Review

Pursuant to M.R. Civ. P. 56(c), a moving party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . show that there is no genuine issue as to any material fact set forth in those statements and that [the] party is entitled to a judgment as a matter of law.” A party wishing to avoid summary judgment must present a prima facie case for each element of a claim or defense that is asserted. *See Reliance Nat’l Indem. v. Knowles Indus. Svcs.*, 2005 ME 29, ¶ 9, 868 A.2d 220. At this stage, the facts in the summary judgment record are reviewed “in the light most favorable to the nonmoving party.” *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶ 6, 816 A.2d 63. “If material facts are disputed, the dispute must be resolved through fact-finding.” *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18. A factual issue is genuine when there is sufficient supporting evidence for the claimed fact that would require a fact-finder to choose between competing versions of the facts at trial. *See Inkel v. Livingston*, 2005 ME 42, ¶ 4, 869 A.2d 745.

B. Applicable Substantive Law

“The essential elements of a claim for negligence are duty, breach, proximate causation, and harm.”⁹ *Baker v. Farrand*, 2011 ME 91, ¶ 11, 26 A.3d 806. A plaintiff must demonstrate that “a violation of the duty to use the appropriate level of care towards another, is the legal cause of harm to” the plaintiff and that the defendant’s “conduct [was] a substantial factor in

Decedent’s deposition and TDI was not represented at that deposition. *See* M.R. Civ. P. 32. (Reply S.M.F. ¶¶ 10-11.)

⁹ In the Complaint, Plaintiff alleges that TDI failed to warn the Decedent of the dangers of asbestos, asserting causes of action both in negligence and strict liability. The summary judgment record, however, contains no allegations that TDI supplied or marketed any product that harmed the Decedent; rather, the record indicates that it was TDI’s alleged removal of asbestos insulation that injured the Decedent. Because the Court is denying TDI’s motion for summary judgment and the negligence claim, the Court will allow the other causes of action to remain.

bringing about the harm.” *Spickler v. York*, 566 A.2d 1385, 1390 (Me. 1993) (internal citations omitted). Plaintiff does not in fact identify the duty owed by TDI, but one can be inferred from the complaint: TDI, by undertaking the removal of hazardous materials at the mill, had a duty to protect employees at the Woodland mill from exposure to asbestos dust and particles. TDI breached this duty by failing to take reasonable precautions to prevent the disturbance of asbestos in the course of their work. In order to survive the motion for summary judgment Plaintiff must show that the Decedent was exposed to asbestos from TDI’s negligent handling of the substance. “If a plaintiff produces such evidence, which can be either direct or circumstantial, the question of whether the defendant’s [conduct] was a ‘substantial factor’ in causing the plaintiff’s damages is for the jury.” *Rumery v. Garlock Sealing Techs.*, 2009 Me. Super. LEXIS 73, at *8 (Apr. 24, 2009); *see also Addy v. Jenkins, Inc.*, 2009 ME 46, ¶ 19, 969 A.2d 935 (“Proximate cause is generally a question of fact for the jury.”).

C. Analysis

The parties raise a series of arguments surrounding the Decedent’s deposition and whether it can be used against TDI because TDI did not receive adequate notice of the deposition and was not represented at the deposition.¹⁰ *See* M.R. Civ. P. 12(a); M.R. Civ. P. 30(a), (b)(1); M.R. Civ. P. 32(a), (d)(1); M. R. Evid. 804(b)(1). The Court does not address these arguments any further because the statements of material fact supported by unchallenged, admissible evidence are sufficient to make out a prime facie case of negligence. Whether and to what extent the Decedent’s deposition may be used in the future course of these proceedings will be determined as necessary.

¹⁰ Plaintiff takes no position on the deposition of Sandra Mains and has not relied upon it in the summary judgment record. (Pl.’s Opp’s MSJ 3.)

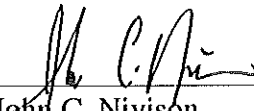
In response to TDI's motion for summary judgment, Plaintiff cites the testimony of Greg Reardon and Mary Austin. Mr. Reardon testified that TDI, along with several other contractors, tore down the Number 8 Boiler, which work included removing asbestos insulation. (A.S.M.F. ¶ 14; Reply S.M.F. ¶ 14.)¹¹ He also testified that the Decedent worked in the area when TDI and other contractors demolished the Number 8 boiler. (A.S.M.F. ¶ 15; Reply S.M.F. ¶ 15.) Further, Ms. Austin testified that when TDI did work at the Woodland mill, it did not cordon off its areas. (A.S.M.F. ¶ 19; Reply S.M.F. ¶ 19.) Through this evidence, Plaintiff has made out a prima facie case in negligence. TDI is not, therefore, entitled to summary judgment.

III. CONCLUSION

Based on the foregoing analysis, the Court denies TDI's motion for summary judgment.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 7/26/12



John C. Nivison
Justice, Maine Business & Consumer Court

Entered on the Docket: 7-31-12
Copies sent via Mail Electronically

¹¹ As previously noted, TDI asserts that the cited testimony of Gregory Reardon is speculative and not based on personal knowledge because elsewhere in the deposition, Mr. Reardon states that he has no "specific recollections of Thomas DiCenzo working with asbestos." (Reply S.M.F. ¶ 14; Pl.'s Exh. 12 41:9-11.) TDI's objection goes to the weight of the evidence, not the admissibility; the factfinder can evaluate the credibility of Mr. Reardon at trial.