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., et al.,

Defendants

DECISION AND ORDER
(Motion for Summary Judgment)

This matter is before the Court on the Motion for Summary Judgment of Defendant Sullivan & Merritt, Inc. (S&M), by which motion S&M seeks summary judgment on all counts asserted against it by Plaintiff Michael Mahar, Personal Representative of the Estate of Myrtle J. Mahar. In this action, Plaintiff seeks to recover damages resulting from Myrtle Mahar's exposure to asbestos while working at the Georgia Pacific Paper Mill in Woodland, Maine. More specifically, Plaintiff contends that S&M is liable due to its alleged negligence (Count I) and under a theory of strict liability, *see* 14 M.R.S. § 221 (2012), (Count II). Plaintiff also requests punitive damages (Count IV).[1]

In its motion, S&M argues: 1) that it owed no duty to Myrtle Mahar (the Decedent) as a general contractor neither employed by the Mill nor handling asbestos; and 2) that it cannot be liable for harm to the Decedent between 1988 and 2006 because it is a successor to the original Sullivan & Merritt, Inc., purchasing only the assets of the original entity in 1988. In response, Plaintiff asserts that S&M did in fact handle asbestos in its work at the Mill, that the Decedent

[1] At the hearing on the motion for summary judgment, the parties agreed that judgment could be entered on the strict liability claim. The remaining issue for the Court's consideration is S&M's negligence claim.

was exposed to asbestos handled by S&M, and that S&M is a continuation of the original Sullivan & Merritt, Inc. and thus liable for its predecessor's torts.

FACTUAL BACKGROUND

The Decedent worked in the Mill in Woodland, Maine, from April 29, 1977, until June 25, 2008. (S.S.M.F. ¶¶ 1-2, 53; O.S.M.F. ¶¶ 1-2; 53.) S&M, a general contracting company, was started in 1977 by Peter Sullivan and John Merritt. (S.S.M.F. ¶¶ 92-93; O.S.M.F. ¶¶ 92-93.) In January of 1988, John Lee and Douglas Herman purchased the company name and assets of S&M, and agreed to provide labor for S&M's existing jobs/obligations. (S.S.M.F. ¶ 94; O.S.M.F. ¶ 94.) The agreement by which Lee and Herman acquired the name and assets provides: "Buyer shall complete Seller's work-in-progress, including, but not limited to, work arising from outstanding bids, described in Exhibit G attached hereto." (Pl.'s Exh. 16 at 3, § 9(a).) Exhibit G lists ongoing work by internal bill number; it does not contain any information identifying the location of the work. (Pl.'s Exh. 16, Exh. G.) The statements of material fact do not identify any work-in-progress completed by S&M at the Mill. Lee and Herman did not expressly purchase the liabilities of S&M (S.S.M.F. ¶ 96).[2] Lee and Herman sold S&M in August 2006. (S.S.M.F. ¶ 97; O.S.M.F. ¶ 97.)

DISCUSSION

I. 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." *See also Beal v.*

[2] Plaintiff qualifies this statement to note that whether certain liabilities were assumed is question of law (O.S.M.F. ¶ 96).

Allstate Ins. Co., 2010 ME 20, ¶ 11, 989 A.2d 733. A party wishing to avoid summary judgment must present a prima facie case for each element of the claim or defense that is asserted against it. *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." *Arrow Fastener Co. v. Wrabacon, Inc.*, 2007 ME 34, ¶ 18, 917 A.2d 123 (quotation marks omitted).

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. "Neither party may rely on conclusory allegations or unsubstantiated denials, but must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions and affidavits to demonstrate either the existence or absence of an issue of fact." *Kenny v. Dep't of Human Svcs.*, 1999 ME 158, ¶ 3, 740 A.2d 560 (quoting *Vinick v. Comm'r*, 110 F.3d 168, 171 (1st Cir. 1997)).

II. Analysis

A. *Successor Liability*

S&M argues that it has no liability for any of the Decedent's exposure to asbestos before 1988 and after 2006 because it did not purchase the liabilities of its predecessor, and thus has no successor liability. The Law Court has held that "absent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a bona fide, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation." *Dir. of Bureau of Labor Standards v. Diamond Brands, Inc.*, 588 A.2d 734, 736 (Me. 1991); *accord Jordan v. Hawker*

Dayton Co., 62 F.3d 29, 31-32 (1st Cir. 1995) (applying Maine law). *Diamond Brands* was a contract case, but the same principle applies to tort liability.

> The general rule of nonliability in the case of a mere acquisition of the assets of one corporation by another, subject to the exceptions set forth in this chapter, applies equally well to the liability of the transferee company for the torts of the transferor company. Thus, generally, when a corporation acquires the assets of another company but does not acquire the stock of that company, it is not obligated for the liabilities of the corporation from which the assets are acquired.

15 Fletcher Cyclopedia of the Law of Corporations § 7123 (WestLaw, updated through Sept. 2012). One of these exceptions is the mere continuation of business exception, which Plaintiff asserts should apply here.

"The mere continuation of business exception to the nonliability of successors applies when the transferee corporation is merely a continuation or reincarnation of the transferor corporation." 15 Fletcher Cyclopedia of the Law of Corporations § 7124.10.

> The mere continuation theory of successor liability envisions a reorganization transforming a single company from one corporate entity into another. [T]he indices of a 'continuation' are, *at a minimum*: continuity of directors, officers, and stockholders; and the continued existence of only one corporation after the sale of assets. In essence, the purchasing corporation is merely a 'new hat' for the seller.

Milliken & Co. v. Duro Textiles, LLC, 887 N.E.2d 244, 255 (Mass. 008) (emphasis added) (quotation marks and citations omitted).

Plaintiff, relying on *Milliken*, argues that successor S&M is the same in substance as its predecessor, with the same name, carrying out work in progress, and relying on the familiarity and name recognition of its predecessor and representing to the world it was a continuation of an existing business. (Opp'n MSJ 5.) Plaintiff asserts that under these circumstances it is equitable for S&M to assume liability for how the work was performed, including tort liability from negligent performance. (Opp'n MSJ 6.)

Milliken, however, involved the sale of the assets of a corporation and circumstances that *did* involve a "continuity of directors, officers, and stockholders," and facts that are wholly dissimilar from the facts here. Presuming the exception would be applied in Maine, Plaintiffs have failed to establish a factual record to support their theory. To the contrary, the summary judgment record establishes that the exception is inapplicable. Lee was an employee of S&M's predecessor (*see* S.S.M.F. ¶ 98; O.S.M.F. ¶ 98)—the record is silent as to Herman's association with S&M—but there is no evidence that either Lee or Herman were shareholders or stockholders of the predecessor S&M, or involved in management of the predecessor entity. Further, the purchase and sale agreement indicates an arm's length transaction and Plaintiff has not alleged otherwise. *See Diamond Brands, Inc.*, 588 A.2d at 736 (stating the purchase of assets only in a bona fide arms length transaction does not impose liability on the purchaser).

Having failed to present sufficient facts wherein any exception to the general rule should apply to the circumstances to this case, Plaintiff cannot recover from S&M for the Decedent's exposure to asbestos before the purchase of S&M in 1988 and after the 2006 sale.

B. *Substantive Tort Claims*

"The essential elements of a claim for negligence are duty, breach, proximate causation, and harm." *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 bringing about the harm." *Spickler v. York*, 566 A.2d 1385, 1390 (Me. 1993) (internal citations omitted); *see also Bonin v. Crepeau*, 2005 ME 59, ¶ 10, 873 A.2d 346 (outlining negligence cause of action for supplying a product without adequate warnings to the user); RESTATEMENT (SECOND) OF TORTS § 388 (1965). "Maine's strict liability statute, [14 M.R.S. § 221 (2011)],

imposes liability on manufacturers and suppliers who market defective, unreasonably dangerous products," including liability for defects based on the failure to warn of the product's dangers. *See Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 537 (Me. 1986); *see also Pottle v. Up-Right, Inc.*, 628 A.2d 672, 674-75 (Me. 1993).

S&M's motion asserts that because S&M did not supply or produce any asbestos, the case is outside the parameters of a typical defective products case based on a duty to warn. S&M characterizes the relevant inquiry as "whether a general contractor has a duty to warn a non-employee that her work environment, over which the general contactor has no responsibility or control, may contain asbestos." (MSJ 6.) S&M answers this question in the negative, citing *Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 1999 ME 144, ¶ 12, 738 A.2d 839:

> There does not exist a general obligation to protect others from harm not created by the actor. "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." Restatement (Second) of Torts § 314 (1965).

S&M asserts there is no duty in this case because S&M did not handle or disturb any asbestos material.[3]

Plaintiff asserts that S&M did in fact handle asbestos at the Mill, and that the Decedent was exposed to asbestos handled by S&M at the Mill. (MSJ 3-4; R.S.M.F. ¶¶ 27-32.) Thus, Plaintiff contends that S&M engaged in activity that put mill workers at risk of exposure to asbestos, and thereby owed a duty to either warn or protect those workers from the asbestos.

In support of this argument, Plaintiff relies upon the testimony of Brian Canane, a former employee of S&M. Mr. Canane maintains that S&M removed asbestos insulation in an unsafe manner so that the work on a project would continue, and so that S&M would be rehired by the Mill. (*See* A.S.M.F. ¶¶ 13-14.). When asked about the instruction or guidance that he received

[3] S&M also argues that this case does not involve a "special relationship," such that such a duty might be imposed. *See Dragomir v. Spring Harbor Hosp.*, 2009 ME 51, ¶ 18, 970 A.2d 310.

about the dangers of airborne asbestos during his apprenticeship as a pipefitter, Mr. Canane said, "[t]here was talk. Again, they did not sit us down and say this is what you don't do. We never had that. I guess it was assumed that everybody would use common sense when they got into those kind of conditions." (Pl.'s Exh. G 64:1-5.). Mr. Canane further testified:

> Q Okay. Was it common sense that if there was asbestos that needed removal, that you would make sure no one was exposed to it?
>
> A Yes, it was common sense, yes. Did it happen? No.
>
> Q Why was that common sense procedure of making sure no one else was exposed to the asbestos [not] followed?
>
> A How do I explain this without making it sound wrong?
> You do what the companies want, you keep your job. You don't do what they want, you're laid off.
>
> Q And by companies, are you talking about Commercial Union – or Commercial Welding, Sullivan & Merritt, Willette Brothers?
>
> A I can honestly say every contractor I've worked for in Maine.

(Pl.'s Exh. G 65:16-66:4.). Mr. Canane further testified that while working for S&M in 1989 or 1990, he stripped asbestos off piping and threw it on the floor, and the Decedent picked up the asbestos pipecovering that was torn off pipes in 1989 or 1990. (*See* A.S.M.F. ¶ 15.)

On the current record, which includes the testimony of Mr. Canane, a fact finder could reasonably conclude that S&M had notice that its removal of asbestos containing material generated a risk of potential harm to those working in the mill, but failed to take reasonable measures, which include a failure to warn, to reduce the risk of harm to those working in the vicinity of S&M employees who were handling asbestos containing material.

A remaining issue is whether Plaintiff has previously asserted such a theory of liability. In Plaintiff's Amended Complaint, Plaintiff asserts:

> 33. . . . The condition of the Plaintiff was a direct and proximate result of the *negligence* of the Defendants, both jointly and severally, in that they produced, supplied, and/or sold, and/or used, and/or specified, *and/or removed products containing asbestos and other dangerous ingredients* which products Defendants knew, or in the exercise of reasonable care, should have known, were inherently and excessively dangerous to the Plaintiff without properly warning or safeguarding Plaintiff.

(Amend. Compl. ¶33 (emphasis added).) While the theory might not have been the primary focus of the Amended Complaint, the theory upon which Plaintiff relies in opposition to S&M's motion for summary judgment, which theory is supported by the testimony of Mr. Canane, is included within the Amended Complaint. The Court concludes, therefore, that Plaintiff can proceed on this theory of negligence. Accordingly, summary judgment is not appropriate.

CONCLUSION

Based on the foregoing analysis, the Court grants S&M's Motion for Summary Judgment on Plaintiff's strict liability claim. The Court also grants S&M's Motion for Summary Judgment on the issue of successor liability. The Court denies S&M's Motion for Summary Judgment on Plaintiff's negligence claim.

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

Date: 7/18/13

John C. Nivison
Justice, Maine Business & Consumer Court

Entered on the Docket: 7/19/13
Copies sent via Mail __ Electronically ✓