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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000686-MR

MARTHA GARLAND, INDIVIDUALLY,
AND AS EXECUTRIX OF THE
ESTATE OF HORACE GARLAND, DECEASED — APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CI-00602

CERTAINTEED CORPORATION;
PFIZER, INC.; AND
QUIGLEY COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Martha Garland, individually and as Executrix of the estate of Horace Garland[1] (hereinafter the Garlands) appeals an order granting summary judgment entered by the McCracken Circuit Court in an asbestos product liability case. We affirm.

[1] The original complaint and appeal was brought by Horace Garland and Martha Garland. However, since the filing of this appeal Horace has died and Martha was appointed executrix of his estate on July 1, 2002. By order of a three-judge motion panel of this Court, a motion to substitute Martha Garland as executrix of the estate of Horace Garland was granted on August 28, 2002.

The Garlands filed a complaint on June 12, 2001, alleging that Horace suffered adverse health conditions, specifically malignant mesothelioma, as a result of his exposure to asbestos products at his place of employment. The Garlands' complaint named thirty-three (33) defendants that they alleged manufactured, sold or distributed asbestos products in and around McCracken County, Kentucky, and which caused Horace's medical condition. Certainteed Corporation, Pfizer, Inc., and Quigley Company (hereinafter collectively the Appellees) filed answer and denied all allegations.

Discovery in the form of interrogatories, requests for production of documents, requests for admissions and three separate depositions of Horace followed. Also for approximately two months (October 16, 2001 – December 19, 2001) the action was transferred to the United States District Court before being remanded when a third-party complaint against the Tennessee Valley Authority was dismissed.

On January 25, 2002, Appellees filed a motion for an order compelling discovery and/or a motion for summary judgment. The motion was set for hearing on March 1, 2002. At the hearing, the trial court first denied the motion and gave the Garlands four (4) additional months to complete discovery. However, the court, after hearing arguments from the Appellees that the Garlands had failed to produce any evidence that Horace

had been exposed to Appellees' products, changed its ruling and granted Appellees' motion for summary judgment. The order granting summary judgment was entered on March 8, 2002, and this appeal followed.

As stated in the Garlands' appellant brief (page 6), "On appeal, the issue is whether the trial court provided Appellants [the Garlands] with the opportunity to complete discovery before it concluded that no genuine issue as to any material fact existed and entered judgment as a matter of law to Certainteed, Quigley and Pfizer [the appellees]." The Garlands contend they were not afforded the opportunity to complete discovery and develop the facts and circumstances of Horace's exposure to the Appellees' asbestos products. The Appellees, on the other hand, argued in their motion for summary judgment (trial record pages 1295-1296) that "[t]he reality is the plaintiffs have had over 20 years to try to develop a case against [appellees] and have failed to do so. [Counsel for the Garlands] has had almost a year from the filing of this case to find a single witness who can testify that [appellees] somehow contributed to Mr. Garland's alleged injury and has failed. Almost certainly, there exists no good faith basis for the suit against [appellees], and [counsel] should be allowed no further leeway to subject [appellees] to this oppressive and costly fishing expedition".

The Garlands countered by contending that they were not given an opportunity to complete discovery despite the fact that they were proceeding in good faith and in a timely manner. At the hearing on the summary judgment motion, they requested an additional four months to complete discovery which would include taking the deposition of corporate representatives of the Appellees and developing evidence of exposure to Horace by Appellees' products. Appellees respond that based on their answers to interrogatories and production of documents, the Garlands' responses to interrogatories and Horace's three depositions, there is no proof in the record as of the date of the hearing to identify Appellees' products as the cause of Horace's cancer. More specifically, Appellees argue the Garlands have failed to provide any evidence that Horace was exposed to any product of the Appellees nor could the Garlands produce any witness who could identify a product manufactured, sold or distributed by Appellees at Horace's place of employment.

Both parties cite Hartford Insurance Group v. Citizens Fidelity Bank and Trust Co., Ky.App., 579 S.W.2d 628 (1979), which dealt with the issues of summary judgment and a claimant's opportunity to complete discovery. In Hartford, the Kentucky Court of Appeals stated:

Appellant argues that Citizens failed to meet its burden of showing that no genuine issue of a material fact existed and that it was entitled to judgment as a matter of law. In support of its position, appellant cites Roberson v. Lampton, Ky., 516 S.W.2d 838 (1974), and cases cited therein. In considering the propriety of a summary judgment, the court stated that:

> [t]he true purpose of a summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Id. At 840.

In view of a long line of Kentucky cases discussing standards for summary judgment, we believe that Roberson must be interpreted narrowly as holding only that summary judgment may not properly be entered before the respondent has had an opportunity to complete discovery, rather than that a movant must show that it would be impossible to produce evidence. See 7 W. Clay, Kentucky Practice, CR 56.03, Comment 4 (3rd ed. 1974); L'Enfant, Civil Procedure, 64 Ky.L.J. 357 (1976); Hayes v. Rodgers, Ky., 447 S.W.2d 597 (1969); Neal v. Welker, Ky., 426 S.W.2d 476 (1968); Tarter v. Arnold, Ky., 343 S.W.2d 377 (1960); Payne v. Chenault, Ky., 343 S.W.2d 129 (1960). It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so. Here, Hartford had a period of some six months between the filing of the complaint and the date of summary judgment in which to engage in discovery, or to inform the court, pursuant to CR 56.06, why judgment should not be entered or why a ruling on the motion for summary judgment should be continued.

> The record contains no affidavit pursuant to CR 56.06.
>
> The record contains only the pleadings of the parties, including the motion for summary judgment and response thereto; the only evidence in the record consists of affidavits filed by appellee in support of its claimed status as a holder in due course. Beyond the answer, no evidence contradicting the affidavits of the employees of Citizen was tendered by Hartford for consideration by the trial court.
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> In Neal v. Welker, supra at 479, the Court considered the burdens of the parties on a motion for summary judgment and said:
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> > [i]t is not required that the adverse party file any sort of answer or defensive pleading or other response to a motion for summary judgment . . .. When the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact.
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> The Court in Neal noted that although the plaintiff there had alleged that, if given the opportunity, evidence would be produced, the plaintiff had not shown why such evidence had not been presented and had not requested a continuance to obtain affidavits pursuant to CR 56.06.

Hartford, supra, at 630, 631.

While the Garlands rely on the one sentence in the opinion that states, in part, that "summary judgment may not properly be entered before the respondent has had an opportunity to complete discovery," the Appellees argue that the holding of the case favors their position that the Garlands have had ample opportunity and have failed to produce any evidence of product identification and summary judgment is appropriate because the Garlands have failed in their burden to present "some" evidence that there is a genuine issue pertaining to a material fact. In Pendleton Bros v. Fin. And Admin. Cabinet, Ky., 758 S.W.2d 24 (1988), cited by the Garlands, the Supreme Court of Kentucky reversed a summary judgment where a party was denied any opportunity to take discovery or seek evidence to prove the allegations of the complaint. The Court found that the summary judgment was in effect a dismissal on grounds that the complaint failed to state a cause of action. Id. at 26. That is not the situation in the case we have before us. This case is more closely in line with Hasty v. Shephard, Ky.App., 620 S.W.2d 325 (1981), which affirmed summary judgment six (6) months after the complaint had been filed, some discovery had been taken and Hasty failed to present any additional proof of his claim not already in the record after the summary judgment motion was filed. Citing Hartford, the Hasty Court held:

> A summary judgment may not properly be granted before a respondent has an opportunity to complete discovery. The key word is "opportunity." Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co., Ky.App., 579 S.W.2d 628 (1979). It is not necessary that the movant for a summary judgment show that it would be impossible for the respondent to produce any evidence.
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> When we consider the case in its entirety, we can only conclude that a summary judgment was proper. CR 56.

Hasty, supra, at 327, 328.

Despite the Garlands' argument to the contrary , they had nearly a year and had yet developed any evidence Horace had ever been exposed to any of the Appellees' products. In fact, Horace testified three times that he was not aware of any exposure to the Appellees' products. The Garlands contend that this type of litigation is complex and complicated and exposing the corporate entities responsible is extremely difficult and that a four-month time period to complete discovery was, therefore, not unreasonable. While such an argument is appealing, the facts remain that this was not the first asbestos litigation by the Garlands' counsel or in the McCracken Circuit Court. All parties hereto and the judge himself were well versed in this type of litigation. The attorneys hereto and the judge had dealt with numerous cases of asbestos litigation and the methods of exposing corporate liability and product identification. The trial court granted continuances to allow

the Garlands' counsel to pursue discovery (for an additional four months) as to two separate corporate defendants, but the court refused to do so as to these Appellees. The trial judge was in the best position to determine if the Garlands were given "ample opportunity" to complete discovery as to the Appellees. There was nothing in the record to identify the Appellees' products as having been manufactured, sold or distributed to any employer of Horace. In addition, after the motion for summary judgment had been filed, the Garlands failed to counter the Appellees' claims by showing in some form (i.e., affidavit, etc.) that there was, in fact, a genuine issue pertaining to a material fact. Neal v. Welker, Ky., 426 S.W.2d 476 (1968). We believe that based upon the record at the time of the hearing, the trial court acted properly in granting summary judgment.

The Garlands also contend that the trial court erred by failing to enforce the court's master order concerning asbestos litigation and discovery. We believe this argument is without merit and deserves no further comment.

For the foregoing reasons, the order of the McCracken Circuit Court granting summary judgment to the Appellees is affirmed.

KNOPF, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. "A summary judgment, which is a final order, should not be entered as a form of penalty for failure of the plaintiff to prove his case quickly enough."[2] "A summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence."[3] I am of the opinion that the trial court abused its discretion by not allowing the appellants the opportunity to complete discovery.[4] I would reverse the summary judgment and remand this matter for further discovery.

BRIEF FOR APPELLANT:

Kenneth L. Sales
Joseph D. Satterley
Louisville, KY

BRIEF FOR APPELLEES:

Stephen M. Bowers
Atlanta, GA

[2] Conley v. Hall, Ky., 395 S.W.2d 575, 580 (1965).

[3] Pendleton Bros. v. Finance & Administration Cabinet, Ky., 758 S.W.2d 24, 29 (1988)(citing Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co., Ky.App., 579 S.W.2d 628 (1979)).

[4] Volvo Car Corp. v. Hopkins, Ky., 860 S.W.2d 777, 779 (1993).