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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002448-MR

BULK TERMINALS, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 03-CI-001184

ALUMINUM COMPANY OF AMERICA (ALCOA); ARKEMA, INC., SUCCESSOR TO M & T CHEMICALS, INC.; ATLANTIC RICHFIELD CO.; BASF CORPORATION; BLATZ PAINT COMPANY; BLAYLOCK TRUCKING AND WASTE REMOVAL COMPANY, INC.; BOB MONTGOMERY CHEVROLET, INC.; BOWLING GREEN EXPRESS, INC.; THE BOC GROUP (A/K/A AIRCO CARBIDE); CHEMICAL WASTE MANAGEMENT, INC.; CNA HOLDINGS, INC. (F/K/A HOECHST CELANESE CORPORATION); CELWAVE SYSTEMS, INC.; CINCINNATI MILACRON, INC.; CSX TRANSPORTATION, INC.; DEHART PAINT & VARNISH COMPANY; FLEXIBLE MATERIALS, INC.; GENERAL MOTORS CORPORATION; GEORGE M. O'BRYAN; THE GLIDDEN COMPANY (D/B/A ICI PAINTS); GOODRICH CORPORATION (F/K/A THE B.F. GOODRICH COMPANY); THE GOODYEAR TIRE AND RUBBER COMPANY; HERITAGE ENVIRONMENTAL SERVICES, INC.; HONEYWELL INTERNATIONAL, INC. (F/K/A ALLIED-SIGNAL, INC.); INDUSTRIAL WASTE DISPOSAL CO., INC.; IWD CHEMICAL DISPOSAL OF OHIO; JOSEPH E. SEAGRAM & SONS, INC.;

LEAR CORPORATION, SUCCESSOR IN INTEREST TO LEAR SIEGLER SEATING CORPORATION; MARCUS PAINT CO., INC.; MCKESSON CORPORATION; MOBIL OIL CORPORATION (N/K/A EXXON MOBIL CORPORATION); MONARCH MARKING SYSTEMS, INC. (BASE MATERIALS MONARCH SYSTEMS, INC.); MURRY'S, INC. (MURRY'S COMPANY, INC.); OKOLONA SANITATION, INC.; OKOLONA SEPTIC TANK SERVICE, INC.; PARO SERVICES CORP. (CHEM-IDYNE CORPORATION, FORMERLY DOING BUSINESS AS ROYAL CHEMICAL COMPANY); PHELPS DODGE CORPORATION; PPG INDUSTRIES, INC.; PORTER PAINT COMPANY; PROFORM, INC.; PROGRESS PAINT MANUFACTURING, INC.; REYNOLDS ALUMINUM COMPANY; REYNOLDS METAL COMPANY; RMT, INC. (RESIDENTIAL MANAGEMENT TECHNOLOGY, INC.); ROBERT BOSCH TOOL CORPORATION (VERMONT AMERICAN CORP. & MULTIMETALS DIVISION OF VERMONT); SCA SERVICES OF KENTUCKY; SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC. (DR. SCHOLL SHOE COMPANY); THE SHERWIN-WILLIAMS COMPANY; WASTE MANAGEMENT, INC.; and YENKIN-MAJESTIC PAINT CORPORATION

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: Under the discovery rule, the statute of limitations begins to run once a party knows or, in the exercise of due diligence, should know of his injury and its cause. In this case, the injury involved the contamination of groundwater which stemmed from soil contamination which occurred more than twenty years preceding the filing of the complaint. The Jefferson Circuit Court correctly held that approximately six

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

years prior to the filing of the complaint, appellant Bulk Terminals, Inc. took actions which indicated sufficient knowledge of both of the injury and its cause to trigger the running of the applicable five-year statute of limitations. We therefore affirm the court's summary judgment dismissing the complaint as untimely.

Between 1970 and 1980, Bulk Terminals leased a parcel of land to Liquid Waste Disposal of Kentucky. Liquid Waste was in the business of receiving waste or by-product chemicals which were then either redistilled or incinerated. The appellees are parties which disposed of chemicals at Liquid Waste. In 1979, the federal Environmental Protection Agency (EPA) began to investigate potential soil contamination on the property leased to Liquid Waste. After finding soil contamination, the EPA ordered Liquid Waste to cease treating and disposing of chemicals at the site, and it ordered the removal and clean up of the contaminated soil. According to the record, Bulk Terminals paid approximately ten percent of the total clean up costs, while the appellees paid the remaining costs incurred by the EPA.

In 1995, a contractor who was installing a water line notified Bulk Terminals' owner, Kenneth Helfrich, of a suspicious odor on a portion of the property previously occupied by Liquid Waste. Since Bulk Terminals was winding up its operations on the property in preparation for its potential sale or transfer, it hired environmental consultants to determine whether any contamination was present on the property. Initial tests in November 1996 showed possible contamination, and further tests in early 1997 showed groundwater contamination. In April 1997, Bulk Terminals notified the Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet)

of the test results. In addition, on April 17, 1997, Bulk Terminals, through its attorney, wrote its insurance company "to make an environmental contamination claim under comprehensive general liability insurance policies issued . . . to Bulk Terminals from August, 1967 through February 15, 1983." The letter also included the following:

> Environmental consultants have conducted initial environmental sampling indicating environmental contamination of Bulk Terminals' property. It is my understanding that there also may be contamination on property adjoining Bulk Terminals' property. Pursuant to Kentucky law, Bulk Terminals is notifying the Commonwealth of Kentucky of the contamination. Because **Bulk Terminals believes that Kentucky law will require that the contamination be remediated**, it is hereby demanding that Aetna indemnify and reimburse it for all costs associated with said investigation and remediation.

(Emphasis added). In October 1997, Helfrich sent a letter to one of his consultants, stating in part that "there is a possibility that the people who sent material to the [Liquid Waste] site on our property could be assessed for the clean up costs."

In February 2003, Bulk Terminals filed this action alleging, under theories of negligence and nuisance, that the appellees were responsible for the groundwater contamination at the site. After conducting discovery related to the statute of limitations issue, the appellees filed a motion for summary judgment. The Jefferson Circuit Court granted the motion, and Bulk Terminals appeals.

Bulk Terminals argues that under the discovery rule, its cause of action did not accrue until July 1998 when it first knew or should have known that damage had occurred. It asserts that only at this point did the Cabinet and its environmental

consultants complete their testing and inform Bulk Terminals that the property was damaged and that remediation would be required.

The parties agree that KRS 413.120(4), the five-year statute of limitations for damage to real property, controls in this case. Contrary to appellees' argument that Kentucky does not adhere to the federal discovery rule in actions involving damage to real property, in *Rockwell International Corp. v. Wilhite*, 143 S.W.3d 604, 617 (Ky.App. 2003), a panel of the court squarely adopted and applied the discovery rule to actions involving chemical contamination of, and damage to, real property. Under the discovery rule, "'[a] cause of action will not accrue . . . until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.'" *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979), *quoting Raymond v. Eli Lilly & Co*., 117 N.H. 164, 371 A.2d 170, 174 (1977).

As recognized by the trial court, the real issue in this case is not whether the discovery rule applies, but when Bulk Terminals discovered or, in the exercise of reasonable diligence, should have discovered its injury, i.e., the groundwater contamination. Bulk Terminals argues that it did not know it was injured until July 1998, when its consultants advised it that the contamination would require remediation. We disagree. As noted by the court in *Rockwell*, "a plaintiff's lack of knowledge as to the extent of his injury does not toll a statute of limitations to which the discovery rule is applied." 143 S.W.3d at 612-13. In this case, the injury was present as far back as 1980, and Bulk Terminals was aware of the renewed concerns about the possibility of

contamination at least as early as 1995. Certainly, Bulk Terminals had knowledge that contamination was present when it sent the letter to its insurance company in April 1997, stating that "Kentucky law will require that the contamination be remediated." The trial court did not err in its determination that the statute of limitations started to run no later than April 1997, and that this action therefore was untimely when it was filed in February 2003.

Finally, we cannot agree with Bulk Terminals' argument that the issue of when the statute of limitations began to run should be submitted to a jury. In interpreting the statute of limitations for the discovery rule under the Federal Employers Liability Act in *Lipsteuer v. CSX Transp., Inc*., 37 S.W.3d 732 (Ky. 2000), the Kentucky Supreme Court stated that the question of when a plaintiff was put on notice about the cause of his injury was an issue of fact to be answered by the fact finder. However, whether that notice occurred within the statutory period of limitations was a question of law. *Id.* at 737. While *Lipsteuer* may superficially appear to support Bulk Terminals' contention, we note that the disputed issue in *Lipsteuer* involved the timing of the plaintiff's notice regarding the cause of his injury. In *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky. 1965), a case relied upon by the court in *Lipsteuer*, the court admonished that "[w]here the pertinent facts are not in dispute, the validity of the defense of the statute of limitations can and should be determined by the court as a matter of law."

In this case, Bulk Terminals makes no allegation that it was unaware of the cause of the injury. Bulk Terminals alleged in its complaint that the initial contamination occurred between 1970 and 1980. In 1979-80, the EPA conducted extensive remedial

clean up of the property, ninety percent of the cost of which was borne by the appellees. Bulk Terminals knew of a suspicious smell on the property in 1995, and the presence of chlorinated solvents was confirmed by January 1997. The initial report of Bulk Terminals' experts in March 1997 was significant enough that Bulk Terminals put its insurance company on notice of the contamination in an April 1997 letter which both unequivocally stated its belief that Kentucky law would require remediation, and demanded indemnification for the costs of investigation and remediation. Under these facts, no reasonable jury could find that Bulk Terminals did not know of its injury in April 1997. The action filed in February 2003 was therefore untimely.

The summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth L. Sales
Paul J. Kelley
Louisville, Kentucky

BRIEF FOR APPELLEES ALUMINUM COMPANY OF AMERICA, INC. (ALCOA); BASF CORPORATION; BLATZ PAINT COMPANY; BLAYLOCK TRUCKING & WASTE REMOVAL COMPANY, INC.; CHEMICAL WASTE MANAGEMENT, INC.; CINCINNATI MILACRON, INC.; THE GLIDDEN COMPANY (D/B/A ICI PAINTS); INDUSTRIAL WASTE DISPOSAL CO., INC.; IWD CHEMICAL DISPOSAL OF OHIO; MURRY'S, INC. (MURRY'S COMPANY, INC); OKOLONA SANITATION, INC.; PROGRESS PAINT MANUFACTURING, INC.; REYNOLDS ALUMINUM COMPANY.; REYNOLDS METAL COMPANY.; SCA SERVICES OF

KENTUCKY; THE SHERWIN-WILLIAMS COMPANY.; and WASTE MANAGEMENT, INC.:

Dennis J. Conniff
Steven M. Crawford
Amy D. Cubbage
Louisville, Kentucky

BRIEF FOR APPELLEE LEAR CORPORATION, SUCCESSOR IN INTEREST TO LEAR SIEGLER SEATING CORP.:

Joseph A. Gregg
Toledo, Ohio

Dustin E. Meek
Louisville, Kentucky

BRIEF FOR APPELLEE BOB MONTGOMERY CHEVROLET, INC.:

J. Matthew Carey
Louisville, Kentucky

BRIEF FOR APPELLEE PROFORM, INC.:

Richard J. Kelber
Mark B. Peterson
Minneapolis, Minnesota

BRIEF FOR APPELLEES PHELPS DODGE CORPORATION; PPG INDUSTRIES, INC.; PORTER PAINT CO.; and ARKEMA, INC., SUCCESSOR TO M & T CHEMICALS, INC.:

Marcus P. McGraw
Lexington, Kentucky

BRIEF FOR APPELLEE GOODRICH CORPORATION (F/K/A THE B.F. GOODRICH CO.):

Heidi B. Goldstein
Erin Alkire
Cleveland, Ohio

BRIEF FOR APPELLEE OKOLONA SEPTIC TANK SERVICE, INC.:

Michael S. Maloney
Louisville, Kentucky

BRIEF FOR APPELLEE ROBERT BOSCH TOOL CORPORATION (VERMONT AMERICAN CORPORATION AND MULTI-METALS DIVISION OF VERMONT AMERICAN CORPORATION):

Charles G. Middleton III
Dana L. Collins
Louisville, Kentucky

BRIEF FOR APPELLEE MOBIL OIL CORPORATION (N/K/A EXXON MOBIL CORPORATION):

Stephen C. Cawood
Pineville, Kentucky

Howard E. Jarvis
Knoxville, Tennessee

BRIEF FOR APPELLEE DEHART PAINT & VARNISH COMPANY:

Walter J. Swyers, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE GEORGE M. O'BRYAN:

Michael L. Maple
Louisville, Kentucky

BRIEF FOR APPELLEES CNA HOLDINGS, INC. (F/K/A HOECHST CELANESE CORPORATION); and THE GOODYEAR TIRE AND RUBBER COMPANY:

Thomas T. Terp
Laura R. Ringenbach
Robert B. Craig
Cincinnati, Ohio

BRIEF FOR APPELLEES CSX TRANSPORTATION, INC.; FLEXIBLE MATERIALS, INC.; HONEYWELL INTERNATIONAL, INC. (F/K/A ALLIED-SIGNAL, INC.); SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC. (DR. SCHOLL SHOE COMPANY); and PARO SERVICES CORP. (CHEM-IDYNE CORPORATION, FORMERLY DOING BUSINESS AS ROYAL CHEMICAL COMPANY):

Donald Kelly
Louisville, Kentucky

BRIEF FOR APPELLEE RMT, INC. (RESIDENTIAL MANAGEMENT TECHNOLOGY, INC.):

Matthew Gay
Louisville, Kentucky

BRIEF FOR APPELLEE YENKIN-MAJESTIC PAINT CORPORATION:

James Cooper

Lexington, Kentucky

BRIEF FOR APPELLEE MCKESSON CORPORATION:

Charles L. Cunningham, Jr.
Louisville, Kentucky

John D. Edgcomb
Shannon L. Fagan
San Francisco, California

BRIEF FOR APPELLEE JOSEPH E. SEAGRAM & SONS, INC.:

Philip A. Grashoff, Jr.
Bloomfield Hills, Michigan

BRIEF FOR APPELLEES ATLANTIC RICHFIELD CO.; THE BOC GROUP (A/K/A AIRCO CARBIDE); CELWAVE SYSTEMS, INC.; and GENERAL MOTORS CORPORATION:

Harry K. Herren
Jill F. Endicott
Louisville, Kentucky

BRIEF FOR APPELLEE MONARCH MARKING SYSTEMS, INC. (BASE MATERIALS MONARCH SYSTEMS, INC.):

Timothy C. Ammer
Cincinnati, Ohio

BRIEF FOR APPELLEE HERITAGE ENVIRONMENTAL SERVICES, INC.:

Donna Marron
Alexandria Sylvia
Amy Romig
Indianapolis, Indiana