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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001248-MR

LUKE KEITH, JR. APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
CIVIL ACTION NO. 06-CI-00071

EPPERSON ELECTRIC APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

BUCKINGHAM, JUDGE: Luke Keith, Jr., appeals from an order of the Laurel Circuit Court granting Epperson Electric's motion for summary judgment.[2] Keith argues that the

[1] Senior Judges Michael L. Henry and David C. Buckingham sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

[2] Keith is representing himself in this appeal.

trial court erred in finding that his claim was barred by the statute of limitations. We affirm.

In February 2002 Keith hired Epperson to install gas logs in his residence.[3] This work included the installation of a natural gas line. Keith alleges that employees of Epperson were negligent in the installation of the gas logs because they assured him that the chimney pathway was open so that gases and soot from the fireplace could escape.

Keith states that soon after the installation he hired a chimney sweep to clean the chimney because items inside the home were getting covered with black soot. The chimney sweep discovered that a metal plate had been concreted into place inside the chimney, blocking it and allowing smoke and soot from the fireplace to escape into the home.[4]

Keith claimed that he suffered property damage, and he subsequently filed a claim with his insurer. On February 2, 2004, Keith received a settlement for the property damage in the amount of $14,949.08 from his insurer.[5]

On January 6, 2006, Keith filed a complaint against Epperson, claiming personal injuries as a result of the alleged negligent work done by Epperson in installing the gas logs. Keith alleged in his complaint that he had "suffered repercussions with his health by breathing in the gas fumes from the gas logs" and had consequently been

[3] The exact date of the installation is disputed by the parties. Viewing the record in a light most favorable to Keith, we accept his statement that the work was done in February 2002.

[4] A previous homeowner had installed the metal plate.

[5] The insurer is seeking restitution from Epperson Electric in a separate action. *See Kentucky Farm Bureau Insurance Company v. Epperson Electric*, Laurel Circuit Court, Civil Action No. 04-CI-00124.

treated for a “persistent cough.” Following Epperson’s answer denying the allegations, it moved the trial court to award it summary judgment, arguing that Keith’s claim was barred by the statute of limitations. On May 16, 2006, the trial court entered an order granting Epperson’s motion. This appeal by Keith followed.

The standard of review of a trial court's grant of summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Keith contends that the trial court erred by finding that the statute of limitations had run prior to the filing of his action against Epperson. We disagree.

Keith’s one-page brief and reply, although lacking citation to any legal authority or the record, allege that he did not discover the source of his injury until July 2005, over three years after the gas logs were installed. He thus argues that the statute of limitations does not bar his complaint because he filed it in January 2006, well within the one-year period for bringing such claims. *See* KRS 413.140(1)(a), which provides that a claim for personal injury must be filed within one year of when the action occurred.

Although not explicitly stated, Keith's argument centers around the "discovery rule" exception to the one-year limitation period on bringing personal injury claims.

"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." *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709, 712 (Ky. 2000), *quoting Hazel v. General Motors Corp.*, 863 F.Supp. 435, 438 (W.D. Ky. 1994).

Keith acknowledged having health problems, including a persistent cough, more than one year prior to filing suit against Epperson Electric. He maintains that he did not discover until July 2005 when he was at the Veteran's Hospital in Lexington, Kentucky, that "the gas logs which were installed were the root cause of his health problems."

In *McLain v. Dana Corporation*, 16 S.W.3d 320 (Ky.App. 1999), this court stated:

> [u]nder Kentucky law, the discovery rule provides that a cause of action accrues when the injury is, or should have been, discovered. However, the discovery rule does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer unless there is a fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries. A person who has knowledge of an injury is put on "notice to investigate" and discover, within the statutory time constraints, the identity of the tortfeasor.

Id. at 326.

Under this rule of law, Keith had one year from the time his injury (health/breathing problems) was or should have been discovered to bring suit against Epperson. While it may be true that Keith did file suit within one year of realizing that his health problems and the breathing of the fumes and soot allegedly caused by Epperson's negligence may be related, that does not save the timeliness of the filing of his civil complaint. As the identity of Epperson was known to him, and as Epperson did not fraudulently conceal or misrepresent its alleged role in causing Keith's health problems, Keith had one year from the onset of his health problems to file the complaint. In short, the trial court did not err in awarding Epperson summary judgment.

The order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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