

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STANDARD FIRE INSURANCE)
COMPANY, et al.,)
)
Plaintiffs)
)
v.)
)
REGINALD L. THOMPSON,)
et al. and)
BLACK & DECKER (U.S.))
INC., et al.,)
)
Defendants)
_____) Civil No. 02-5-B-S
)
REGINALD L. THOMPSON, et al.,)
)
Third-Party Plaintiff)
)
v.)
)
BLACK & DECKER (U.S.) INC.,)
et al.,)
)
Third-Party Defendant)

RECOMMENDED DECISION

On April 28, 2003, United States District Court Judge Gene Carter gave third-party defendant Black & Decker leave to file a motion for summary judgment after the dispositive motion deadline. It did so on May 8, 2003. (Docket No. 109). Third-party plaintiff Reginald Thompson was given until May 28, 2003 to have new counsel enter an appearance on his behalf because he indicated to Judge Carter that he intended to retain a new attorney after dismissing his prior counsel. As of today's date Thompson has failed

to respond pro se to the pending motion for summary judgment and has failed to cause new counsel to appear on his behalf. I now recommend that the court **GRANT** Black & Decker's motion and enter judgment for Black & Decker on Thompson's third-party complaint.

Procedural Background

The procedural background of these four cases involving two separate fires at the Jericho Bay Boatyard in Deer Isle, Maine, would make interesting fodder for a law school civil procedure final examination. Fortunately, it is unnecessary to attempt to reconstruct the entire procedural history for purposes of dealing with the pending motion. The present case, CV-02-5, pertains to a fire that occurred at the boatyard on April 28, 2001. This case is an insurance subrogation case brought by three insurance companies who insured the owners of boats stored at the boatyard. Originally the insurance companies sued Reginald Thompson and the co-owners of the boatyard, alleging that they had negligently caused the fire and were responsible for the damage to the boats.¹ The boatyard owners responded by bringing a third-party complaint against Black & Decker alleging that a defective battery charger manufactured by Black & Decker had caused the fire. The insurance companies then were given leave to file an amended complaint naming Black & Decker as a defendant.

As the litigation progressed other plaintiffs, insured by additional insurance companies and represented by other counsel, were added to claims in connection with the April fire, but the central allegations remained the same. Because of the present

¹ The same insurance companies also brought a second complaint relating to a December, 2001, fire at the boatyard. That action ultimately involved other boat owners insured by other companies and an entirely different third-party defendant. That case was tried to a jury and a verdict was entered against Thompson. The outcome of that case has nothing to do with the pending motion.

settlement posture of the case Black & Decker has narrowly targeted its motion for summary judgment, asking only that this court enter judgment against Thompson in his capacity as the third-party plaintiff. Therefore this recommended decision does not address the merits of the plaintiffs' complaint against either the boatyard owners or Black & Decker. Black & Decker only seeks judgment on Thompson's third-party complaint against it.

Summary Judgment Standard

Summary judgment is appropriate only 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 and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" FDIC v. Anchor Properties, 13 F.3d 27, 30 (1st Cir. 1994) (quoting Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. Levy v. FDIC, 7 F.3d 1054, 1056 (1st Cir. 1993). Here, however, Third-party Plaintiff did not file an opposing statement of material facts as required by the local rule. See D. Me. Loc. R. 56(c) ("A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts."). As required by the local rule, I will therefore accept third-party defendant's statement of material facts as true. See D. Me. Loc. R. 56(e) ("Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.").

Pursuant to the Supreme Court’s holding in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), a plaintiff who ultimately will have the burden of proof at trial, often must produce the evidence supporting a claim despite the defendant’s failure to introduce evidence negating the claim. Id. at 323-24. Indeed, the Supreme Court has indicated that defendants, in order to have a motion for summary judgment considered, need not introduce claim-negating evidence at all, so long as they “point[] out . . . that there is an absence of evidence to support the nonmoving party’s case.” Id. at 325; see also id. at 326 (“[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.”). Third-party defendant Black & Decker’s motion proceeds under the Celotex framework.

Undisputed Material Facts

Black & Decker is a corporation which designs, manufacturers, and sells a variety of tools including the Dewalt DW9107 battery charger. Reginald Thompson alleges that due to a design defect in the Dewalt DW9107 battery charger, he suffered property damage. The third-party complaint contains counts including strict liability, failure to warn, negligence, and breach of express and implied warranties.²

Reginald Thompson, the third-party plaintiff in the above referenced action, did not independently retain any cause and origin or product design experts outside of those designated by the plaintiffs nor did Thompson contribute to the retention of the plaintiffs’ various experts. Plaintiffs have now reached a settlement agreement with Black & Decker, contingent upon the resolution of Thompson’s claims against Black & Decker, and as a result of that settlement agreement intend to discharge the experts they have

² Black & Decker’s record citations for these points simply come from the third-party complaint.

previously retained. Since Thompson did not contribute to the retention of the cause and origin experts and the product design experts retained by the insurance companies, those experts will not be available to testify on Thompson's behalf at trial. (Affidavits of Leonard Langer and Timothy Daly, ¶¶ 4, 5, & 7). Thus Black & Decker contends that Thompson has no evidence in support of his claims and his third-party complaint should be dismissed.

Discussion

Pursuant to Maine law "it is essential that the plaintiff prove that a product's defective design or the defendant's negligent conduct proximately caused the plaintiff's injuries." Ames v. Dipietro-Kay Corp., 617 A.2d 559, 561 (Me. 1992). Likewise, under either a breach of express or implied warranty claim a plaintiff must prove that the breach proximately caused his injury. Porter v. Pfizer Hosp. Products Group, Inc., 783 F.Supp. 1466, 1473 (D.Me. 1992) (ruling against breach of warranty claim on basis of finding that "[p]laintiff failed to prove by a preponderance of the evidence that his injuries were caused by the Defendant's product"). There is simply no evidence in this summary judgment record that the boatyard fire on April 28, 2001 was caused by the battery charger.

If plaintiff has no admissible evidence, expert or otherwise, tending to prove that the fire originated because of a defect in the battery charger, then plaintiff has no case to present at trial. As Black & Decker points out in its memorandum, summary judgment "allows courts and litigants to avoid full blown trials in unwinnable cases, thus conserving the parties' time and money and permitting courts to husband scarce judicial resources." Irivar v. Corporacion In Sular de Seguros, 928 F. Supp. 141, 143 (D. P.R.

1996). While Black & Decker's summary judgment record does not present any evidence negating Thompson's allegation that the battery charger caused the fire, the important consideration here is that Thompson has not presented any evidence in support of his claim that the battery charger caused the fire. On this record the motion should be granted.

Conclusion

Based upon the foregoing I recommend that the court **GRANT** third-party defendant's motion and enter judgment against third-party plaintiff Reginald Thompson on his third-party complaint.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated June 12, 2003

LEAD, STANDARD, PORTLAND

**U.S. District Court
District of Maine (Bangor)**

CIVIL DOCKET FOR CASE #: 1:02-cv-00005-GZS
Internal Use Only

STANDARD FIRE INS, et al v. THOMPSON, et al

Assigned to: Judge GEORGE Z. SINGAL

Referred to:

Demand: \$0

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1331 Fed. Question: Personal Injury

Date Filed: 01/04/02

Jury Demand: Both

Nature of Suit: 380 Personal

Property: Other

Jurisdiction: Federal Question

Consol Plaintiff

PHELPS BROWN

represented by **LEONARD W. LANGER**
TOMPKINS, CLOUGH,
HIRSHON & LANGER
THREE CANAL PLAZA
P.O. BOX 15060
PORTLAND, ME 04112-5060
207-874-6700
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

MARSHALL J. TINKLE
TOMPKINS, CLOUGH,
HIRSHON & LANGER
THREE CANAL PLAZA
P.O. BOX 15060
PORTLAND, ME 04112-5060
207-874-6700

BETTY C BROWN

represented by **LEONARD W. LANGER**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

MARSHALL J. TINKLE
(See above for address)

STANLEY E MYERS

represented by **LEONARD W. LANGER**
(See above for address)

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

MARSHALL J. TINKLE
(See above for address)

PETER COLBY

represented by **LEONARD W. LANGER**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

MARSHALL J. TINKLE
(See above for address)

TERRY COLBY

represented by **LEONARD W. LANGER**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

MARSHALL J. TINKLE
(See above for address)

Plaintiff

**STANDARD FIRE
INSURANCE COMPANY**

represented by **DAVID J. DALY**
DALY, CAVANAUGH &
FLYNN, LLP
27 MICA LANE
WELLESLEY, MA 02481
(781) 237-0600
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

STEPHEN J. BURLOCK
WEATHERBEE, WOODCOCK,
BURLOCK & WOODCOCK
P. O. BOX 1127

BANGOR, ME 04402
942-9900
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PAUL F. CAVANAUGH, II
DALY, CAVANAUGH &
FLYNN, LLP
27 MICA LANE
WELLESLEY, MA 02481
(781) 237-0600

TIMOTHY J. DALY
DALY, CAVANAUGH &
FLYNN, LLP
27 MICA LANE
WELLESLEY, MA 02481
(781) 237-0600

**INSURANCE COMPANY OF
NORTH AMERICA**

represented by **DAVID J. DALY**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

STEPHEN J. BURLOCK
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PAUL F. CAVANAUGH, II
(See above for address)

TIMOTHY J. DALY
(See above for address)

**ACE AMERICAN
INSURANCE COMPANY**

represented by **DAVID J. DALY**
(See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

STEPHEN J. BURLOCK
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PAUL F. CAVANAUGH, II
(See above for address)

TIMOTHY J. DALY
(See above for address)

V.

Defendant

REGINALD THOMPSON

represented by **REGINALD THOMPSON**
15789 MISSOURI ROAD
BOKELIA, FL 33922
PRO SE

dba

JERICHO BAY BOATYARD

V.

Consol Defendant

DANIELLE THOMPSON

represented by **BARRY K. MILLS**
HALE & HAMLIN
10 STATE STREET
P. O. BOX 729

ELLSWORTH, ME 04605
667-2561
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

dba
JERICHO BAY BOATYARD

ThirdParty Plaintiff

REGINALD THOMPSON

represented by **REGINALD THOMPSON**
15789 MISSOURI ROAD
BOKELIA, FL 33922
PRO SE

dba
JERICHO BAY BOATYARD

V.

ThirdParty Defendant

BLACK & DECKER (U S) INC

represented by **HAROLD J. FRIEDMAN**
FRIEDMAN, GAYTHWAITE,
WOLF & LEAVITT
SIX CITY CENTER
P. O. BOX 4726
PORTLAND, ME 04112-4726

761-0900
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

LAURENCE H. LEAVITT
FRIEDMAN, GAYTHWAITE,
WOLF & LEAVITT
SIX CITY CENTER
P. O. BOX 4726
PORTLAND, ME 04112-4726
761-0900
ATTORNEY TO BE NOTICED

dba
**DEWALT INDUSTRIAL
TOOL CO**

Defendant

BLACK & DECKER (U S) INC

represented by **DANIEL R LANIER**
MILES & STOCKBRIDGE P.C.
10 LIGHT STREET
BALTIMORE, MD 21202-1435
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

HAROLD J. FRIEDMAN
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

LAURENCE H. LEAVITT
(See above for address)

dba
**DEWALT INDUSTRIAL
TOOL CO**

JEFFREY THOMPSON

represented by **BARRY K. MILLS**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

WILLIAM H. WELTE
(See above for address)
TERMINATED: 03/31/2003
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

dba
JERICHO BAY BOATYARD

LEANNA B JONES

represented by **BARRY K. MILLS**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

dba
JERICHO BAY BOATYARD