

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET FISHER : CIVIL ACTION
 :
 v. :
 :
 RAPISTAN DEMAG CORPORATION : NO. 96-6319

MEMORANDUM AND ORDER

BECHTLE, J.

SEPTEMBER 12, 1997

Presently before the court in this product liability action is Defendant Rapistan Demag Corporation's ("Rapistan") motion for summary judgment and Plaintiff Margaret Fisher's ("Fisher") response thereto. For the following reasons, the court will grant the motion.

I. BACKGROUND

Fisher was employed by Marshall's Department Stores and worked in the store located at 9169 Roosevelt Boulevard in Philadelphia (the "Store").¹ On June 30, 1994, she permanently injured her right hand on the store's motorized conveyor that was designed and manufactured by Rapistan. On September 18, 1996, Fisher commenced this civil action claiming that her injuries are a result of a defect in the conveyor and Rapistan's negligence. (Compl. ¶¶ 10-11.) On February 6, 1997, Rapistan filed a motion for summary judgment, arguing that 42 Pa. Con. Stat. Ann. § 5536, a statute of repose, bars Fisher's action. On February 19, 1997,

1. The Store was owned by Korvette's when the conveyor was installed. Korvette's sold the Store to Marshall's in 1980.

Fisher filed a response. On March 21, 1997, with leave of court, Rapistan filed a reply, and, on March 26, 1997, Fisher filed a supplemental brief.²

II. LEGAL STANDARD

Summary judgment is proper "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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court must draw all justifiable inferences in the light most favorable to the non-moving party. Id. If the record thus construed could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In response to a motion for summary judgment, the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings, but must "set forth specific facts

2. Fisher is a Pennsylvania citizen and Rapistan is a New York corporation with a principal place of business in Michigan. The amount in controversy exceeds the jurisdictional requirement. Therefore, this court exercises diversity jurisdiction pursuant to 28 U.S.C. § 1332.

showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 322. If the non-moving party does not so respond, summary judgment shall be entered in the moving party's favor because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 322-23.

III. DISCUSSION

A. The Statute

Federal courts sitting in diversity, such as this one, apply substantive state law, but federal procedural law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The relevant statute reads in pertinent part:

(a) General rule. Except as otherwise provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

. . .

(3) Injury to the person or wrongful death arising out of any such deficiency.

42 Pa. Con. Stat. Ann. § 5536. Because Section 5536 is a statute of repose rather than a statute of limitations, it does not merely bar a right to recovery, but completely abolishes and

eliminates the cause of action. Noll v. Harrisburg Area YMCA, 643 A.2d 81, 84 (Pa. 1994). The burden of proof is on the party seeking protection under the statute to prove that: (1) what was supplied is an improvement to real property; (2) more than twelve years have elapsed between the completion of the improvement to real property and the alleged injury; and (3) the activity of the moving party is within the class protected by the statute. Id.

1. Improvement to Real Property

Improvements in this context have been defined broadly as "everything that permanently enhances the value of real property." Noll, 643 A.2d at 87. Under Pennsylvania law, the court must look to whether the addition is a fixture, because a fixture is "by definition an improvement to real property." Id. at 87.

To determine whether the addition is a fixture, and therefore an improvement to realty under 42 Pa. Con. Stat. Ann. § 5536, the court considers the degree and manner in which the object is attached to the real property, the ease of removing the object, whether removal would damage the realty or the value thereof, the length of time of attachment, whether the attachment is necessary or essential to the property, and whether the conduct of the parties objectively evidences an intent to permanently attach the object to the realty. Id. at 88-89.

a. Attachment and Ease of Removal

The conveyor weighs 2000 pounds and sits in a concrete well with a shelf built for its support. It is anchored to the floors on both levels of the Store by large lag bolts. (Whitman Dep. at 29, 44, 47.) Installation took an entire week and required three persons. (Owens Dep. at 7.) It entailed rigging the conveyor, placing the conveyor in the well, attaching the belts, putting guardrails on, bolting it to the floor, and hard-wiring³ it into the store's electrical system by means of metal conduit piping. (Owens Dep. at 35, 41, 51.; Def's Ex. H.) A special access door was created for repair to the conveyor. (Whitman Aff. ¶ 12.)

As evidenced by the description of the installation, removal of the conveyor would be time-consuming and entail extensive labor.⁴ Removal would leave a large empty hole in the store and could damage portions of the real property structure. No reasonable jury could believe Fisher's argument that, like the swimming pool starting blocks at issue in Noll, the conveyor is easily removable because there are only a few bolts attaching it to the real property. (Pl.'s Mem. Opp. Summ. J. at 10.) Further, even if removal would not harm the structure

3. A hard-wired item is wired directly into the conduit, in contrast to an item plugged into the wall. (Whitman Dep. at 48.) Thus, a hard-wired item is more permanent and requires more labor to install and remove.

4. The court has read Dr. Lerner's report stating that the bolts and parts can easily be removed. His averments, however, do not address dismantlement of the entire conveyor or the time and effort that would entail. (Pl.'s Mem. Opp. Summ. J. Ex. D.)

of the realty, it would certainly cause a material loss in value because the site could no longer be used as a retail establishment without installation of a conveyor or elevator to access the basement storage area.

The court is not persuaded by Fisher's argument that because the item was not unique, Rapistan is not covered by the statute. The law is clear that identical design does preclude a finding that the addition is an improvement. See Homrighausen v. Westinghouse Elec. Corp., 832 F. Supp. 903, 906 (E.D. Pa. 1993).

b. Length and Necessity

The conveyor was installed in 1959, while the building was being constructed. It has never been moved or removed. (Whitman Dep. pp. 24-25.) As a retail establishment, the Store must stock additional merchandise and store it in the basement. The conveyor is the only practical means of moving merchandise from the trucks to the basement storage area and from the storage area to the sales floor. No reasonable jury could believe Fisher's argument that the conveyor is not necessary because merchandise could be walked up the stairs. (Pl.'s Mem. Opp. Summ. J. at 10.)

Fisher argues that McCormick v. Columbus Conveyor Co., 564 A.2d 907 (Pa. 1989), is inapposite. She argues that the conveyor in that case was an essential part of the realty because it was part of a system, and the instant conveyor is not part of a system. Fisher's emphasis is misplaced. The conveyor in that

case, like the conveyor in this case was necessary to the daily operations of the company. The daily operations of the power plant in McCormick, required the transportation of coal by means of a conveyor. Likewise, the daily operations of the retail store in this case require the transportation of stock from trucks in the loading area to the basement storage area and from that location to the sales floor. There is no other feasible manner of moving this merchandise.

c. Intent

The Store purchased a permanent conveyor, not a portable conveyor, which does not require expert installation, has a plug, and most likely weighs less. (Owens Dep. at 10.) A layperson could not disassemble and reassemble this conveyor. It is firmly affixed to both floors of the store, and removal could damage the realty and would damage the value of the realty. It was part of the original structure, added to make the realty suitable for a retail establishment, and, in thirty-five years, has never been moved or removed. Because there is no other means to transport merchandise from the basement to the sales floor, it is necessary to the daily operation of the Store. The conveyor is so large that all repairs must be done on site and a special access door was built for that purpose. Further, when the original owner, Korvette's sold the store to Marshall's in 1980, the conveyor was sold as part of the store. (Def.'s Reply Mem. Supp. Summ. J. at 8.) The parties actions evidence an intent to

make the conveyor a permanent fixture and integral part of the Store.⁵

2. Twelve Years

The conveyor was designed, manufactured, and installed in 1959. Fisher alleges that she was injured June 30, 1994. (Compl. ¶ 4.) There is no dispute that more than twelve years have passed since the completion of the improvement.

3. The Class Protected by the Statute

The statute is intended is to protect persons such as engineers, architects, and contractors who are "involved in the design, planning, supervision, construction or observation of the construction of an improvement to real property," and perform acts of individual expertise akin to builders, as opposed to those who merely manufacture or supply component products.

McConnaughey v. Building Components, Inc., 637 A.2d 1331, 1334 (Pa. 1994); see also Noll 643 A.2d at 85; McCormick, 564 A.2d at 910.

5. Although this court makes an objective determination based on the facts before it, it notes that the Pennsylvania Supreme Court has addressed the status of a conveyor under this statute, and found that it was an improvement to real property. See McCormick, 564 A.2d at 908. For other cases in which similar additions have been found to be improvements, see Vargo v. Koppers Co., 681 A.2d 815, 820 (Pa. Super. Ct. 1996) (door machine in steel coke plant was an improvement to real property because it had remained on site since early 1950's, was connected to permanently attached rail system, and was so large repairs had to be made on site); Radvan v. General Elec. Co., 576 A.2d 396, 397 (Pa. Super. Ct. 1990) (weld and side trim machine was an improvement because machine had never been moved, it was bolted to floor, connected to conduit piping for power and would be difficult to dismantle), appeal denied, 589 A.2d 692 (Pa. 1991).

Rapistan manufactured the conveyor parts. (Owens Dep. at 5-9.) Rapistan of Pennsylvania, a subsidiary of Rapistan, sold and installed the conveyor. Id. at 16-17, 26. In sharp contrast to the manufacturer in McConnaughey, who merely supplied parts that were assembled by someone else, Rapistan measured the site, and designed and manufactured the conveyor for that site. (See Owens Dep. at 8.) These are acts of expertise protected by the statute.

The court is not persuaded by Fisher's argument that Rapistan is not entitled to protection because Rapistan did not install the conveyor.⁶ (Pl.'s Suppl. Mem. Opp. Summ. J. at 5.) She agrees that the manufacturer, the Rapids-Standard Company, Inc., was a predecessor of Rapistan, but argues the installers were employed by Rapistan of Pennsylvania, Inc., a different company, and Rapistan is therefore not entitled to protection under the statute. The court disagrees. Rapistan of Pennsylvania is a subsidiary of Rapistan that was created for the sole purpose of installing conveyors. (Owens Dep. at 47.)

Even if it were not part of Rapistan, work performed by subcontractors is protected by the statute. See Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 115 (3d Cir. 1992). Further, Rapistan's involvement exceeds mere production of component parts because it measured the site, drew up

6. This is contrary to the pleading in her Complaint that Rapistan, or a predecessor thereof, manufactured, sold, installed and serviced the conveyor. (Compl. ¶¶ 6-9.)

blueprints, and sold the proper size parts to Rapistan of Pennsylvania. See Ferricks v. Ryan Homes, Inc., 578 A.2d 441 (Pa. Super. 1991) (emphasizing the difference between the manufacturer of component plywood used in an improvement and the manufacturer of the actual improvement); see also Fleck, 981 F.2d at 111-12 (3d Cir. 1992); McCormick, 564 A.2d at 910.

B. Summary

The conveyor is an improvement to real property, its addition was completed more than twelve years ago, and Rapistan's actions are within the class protected by the statute. Therefore, the Pennsylvania statute of repose applies and Fisher has no cause of action. Because Rapistan has shown that there are no genuine issues of material fact, and that it is entitled to summary judgment as a matter of law, the court will grant its motion.

IV. CONCLUSION

For the above reasons, the court will grant Rapistan's motion for summary judgment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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| MARGARET FISHER | : | CIVIL ACTION |
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| v. | : | |
| | : | |
| RAPISTAN DEMAG CORPORATION | : | NO. 96-6319 |

ORDER

AND NOW, TO WIT, this day of September, 1997, upon consideration of Defendant's motion for summary judgment, and Plaintiff's response thereto, IT IS ORDERED that said motion is GRANTED.

Judgment is entered in favor of Defendant Rapistan Demag Corporation and against Plaintiff Margaret Fisher.

LOUIS C. BECHTLE, J.