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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5733-14T4

ADRIANNE BRANDECKER, individually and as Executrix and Executrix ad Prosequendum of the Estate of LORENZ BRANDECKER,

Plaintiff-Appellant,

v.

E&B MILL SUPPLY CO.; GENERAL ELECTRIC CO.; HOMASOTE COMPANY; LAIRD PLASTICS, INC., individually and as successor-in-interest to Almac Plastics, Inc.; ROHM AND HAAS CHEMICALS, LLC; UNION CARBIDE CORP.; UNIROYAL HOLDINGS, INC., f/k/a Uniroyal, Inc.; CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS Corporation, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORP.; and ROHM & HAAS COMPANY,

Defendants,

and

THE SCOTTS COMPANY, LLC,

Defendant-Respondent.

Argued September 13, 2017 – Decided February 26, 2018

Before Judges Fuentes, Koblitz, and Suter.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4662-12.

Jeffrey P. Blumstein argued the cause for appellant (Szaferman, Lakind, Blumstein & Blader, PC, and Levy Konigsberg, LLP, attorneys; Mr. Blumstein, of counsel and on the brief).

Lori Elliott Jarvis (Hunton & Williams, LLP) of the Virginia Bar, admitted pro hac vice, argued the cause for respondent (McCarter & English, LLP, and Lori Elliott Jarvis, attorneys; Lori Elliott Jarvis and Thomas R. Waskom (Hunton & Williams, LLP) of the Virginia Bar, admitted pro hac vice, of counsel; John C. Garde, of counsel and on the brief; Elizabeth Monahan, on the brief).

PER CURIAM

Adrianne Brandecker, individually and as Executrix and Executrix ad Prosequendum of the Estate of Lorenz Brandecker, appeals the July 10, 2015 Order of Disposition that dismissed the case. She and the estate also appeal the August 21, 2015 order[1] that denied their motion under Rule 4:50-1 to vacate orders that were entered on January 10, 2014. The January 2014 orders excluded

[1] The Notice of Appeal shows the date of July 10, 2015 and the handwritten insertion of "8/21/15." The word "Judgment" is underlined and that box is checked. We consider plaintiffs to have appealed both the August 21, 2015 and July 10, 2015 orders.

or limited the "report, opinions and testimony" of four of plaintiffs' experts and then granted summary judgment to defendant, The Scotts Company, LLC (Scotts), dismissing the complaint, counterclaims, and cross-claims against Scotts.

We reverse the August 21, 2015 order as a misapplication of the court's discretion and vacate the final judgment under Rule 4:50-1(b), based on new evidence. We leave to the trial court's discretion to determine whether plaintiffs should be given additional time to file a motion addressing the effect of the new evidence on the January 2014 in limine and summary judgment orders.

We relate only such facts from the record as are necessary for our determination.

I

Decedent Lorenz Brandecker, a cabinetmaker by trade, was diagnosed with mesothelioma in March 2012 and died on October 20, 2012. Twice a year, from 1967 to 1980, he used a spreader to apply two bags of Scotts Turf Builder (Turf Builder), a lawn fertilizer, to the lawn of his property in Wayne Township. Plaintiffs' theory of the case against Turf Builder is that its fertilizer contained asbestos; decedent was exposed to this carcinogen when opening the bags of that fertilizer or after its

application to the lawn. He developed mesothelioma based on these interactions with the product.

Turf Builder was manufactured by Scotts from vermiculite ore. Until 1980, Scotts purchased ore from a mine in Libby, Montana. No one disputes that the ore mined in Libby contained amphibole asbestos. Two-thirds of the vermiculite ore used by Scotts from 1966 to 1980 came from the Libby mine.

Turf Builder was produced by heating the raw vermiculite ore, causing it to "exfoliate," meaning that the non-vermiculite materials would separate from the vermiculite. Then, the vermiculite was "trionized" by coating it with a polymer resin called urea. Plaintiffs contended that Turf Builder contained asbestos which remained after the exfoliation process. Scotts disputes this. Scotts contends that even if some asbestos remained after exfoliation, the process of trionization coated the vermiculite.

Before his death, Brandecker filed a complaint on July 6, 2012, against Scotts and other defendants.[2] The complaint alleged that he contracted mesothelioma from his exposure to asbestos-containing products in his employment and from his exposure to asbestos in Turf Builder. The complaint alleged liability for

[2] The other defendants are not part of this appeal.

breach of warranties, marketing of an ultra-hazardous product, breach of a non-delegable duty to warn, and civil conspiracy. The complaint also included a per quod claim by plaintiff Adrianne Brandecker, decedent's wife. Scotts answered and discovery commenced. Brandecker's trial testimony was preserved in a videotaped de bene esse deposition. He also provided discovery depositions. Following his death, an amended complaint was filed in January 2013, naming Adrianne Brandecker individually and in her capacity as executrix of the Estate of Lorenz Brandecker and adding claims for wrongful death and pain and suffering.

Plaintiffs served discovery on Scotts, including requests for admissions, supplemental interrogatories, and the production of documents. Of relevance here, plaintiffs' admissions asked if Scotts "possesses . . . samples of Turf Builder containing vermiculite sourced from Libby, Montana." Scotts responded that "it has in its possession a small sample of Turf Builder containing vermiculite. However, Scotts is not able to determine the date of manufacture of the Turf Builder or the source of the exfoliated vermiculite in the Turf Builder." Plaintiffs also asked Scotts to admit that it no longer possessed the samples referenced, to which it responded that the "Request for Admission is admitted." Plaintiffs sent follow-up supplemental interrogatories and

requests for the production of documents about the samples. Scotts responded by incorporating its responses and objections to plaintiffs' requests for admissions. The discovery requests included an instruction to supplement answers as a continuing obligation.

Plaintiffs served reports from four expert witnesses. Sean Fitzgerald, a geologist, mineralogist, and asbestos analyst, opined about the presence of asbestos in Turf Builder even after the exfoliation process and that the resin coating did not remove the asbestos or prevent release. James Webber, Ph.D., an environmental health scientist, opined that the vermiculite from the Libby, Montana region was an asbestos-containing product and that "use, disturbance, and/or manipulation" of these products can result in "significant exposure to asbestos fibers." In addition, exposure is "known to cause asbestos-related diseases including mesothelioma." Tracey Carrillo, Ph.D., an agronomist, opined about the decomposition of the polymer resin coating, which would "decompose over time . . . exposing any asbestos fibers present." Jacqueline Moline, M.D., whose report purported to link decedent's level of exposure to the cause of the mesothelioma, concluded that decedent's "exposures to . . . insulating boards and to the Scotts fertilizer products were substantial contributing factors to the

development of his mesothelioma." She relied on the opinions of Fitzgerald and Carrillo.

Scotts' initial summary judgment motion in May 2013, was withdrawn while discovery continued. However, Scotts again filed for summary judgment in October 2013. Scotts argued that Brandecker was not "regularly, frequently or proximately" exposed to asbestos from Turf Builder and even if he were, he admitted that he would not have heeded the package warnings. Scotts relied, in part, on the testing of their products by outside laboratories. Scotts was critical of both Fitzgerald and Webber because "[n]either ha[d] identified a positive test for amphibole asbestos fibers in Scotts Turf Builder. Both instead rel[ied] on testing [of] vermiculite insulation manufactured by W.R. Grace, not Scotts." Scotts criticized the reliance by plaintiffs' experts on an EPA draft document regarding the "toxicological review" of the conditions in Libby because the document "says nothing about the purported contamination of the Scotts Turf Builder final product." In November 2013, plaintiffs filed opposition to the summary judgment motion, including reports and certifications from their experts.

While the summary judgment motion was pending, Scotts filed in limine motions to bar all or portions of plaintiffs' four expert reports. The in limine motions were opposed by plaintiffs.

The trial court heard the summary judgment and in limine motions on December 19, 2013. Scotts' in limine motions were granted on January 10, 2014. The trial judge excluded Fitzgerald's opinions, finding he unreasonably relied on a preliminary draft of an EPA document that was "not intended to be a comprehensive treatise on the agent or toxicological nature of Libby [a]mphibole asbestos." The document did not constitute a learned treatise that could reasonably be relied on by an expert witness. The trial court concluded that Fitzgerald could not "establish a proper factual basis or conclusion for his opinions." However, the deposition of Drew Van Orden, Scott's expert, did allow the court to make a reasonable inference that "expanded vermiculite ore could contain asbestos fibers."

The judge excluded Webber's report and testimony because during his deposition, he "was unable to state within a reasonable degree of scientific certainty or whether it was more or less likely to occur that an individual consumer using [d]efendant's turf builder would be exposed to friable asbestos." The court noted that Scotts submitted deposition testimony from Richard

Martinez that Libby, Montana ore had been tested in 1977 and 1978, with both tests showing, according to the judge, "that a consumer is not exposed to asbestos fibers in the normal application of Turf Builder [to] lawns."

Carrillo's admissible testimony was limited by the court to "how a fertilizer affects plant life and how a fertilizer releases its nutrients into the soil" because Carrillo had stated in his deposition that he could not "give an opinion as to the release of asbestos fibers."

Moline's testimony was excluded because she relied on the opinions of Carrillo and Fitzgerald and that without that testimony, she "cannot provide the court with an adequate basis to establish [the deceased]'s exposure to friable asbestos."

Scotts' summary judgment motion was granted on January 10, 2014. Citing to the cases of Sholtis v. Am. Cyanamid Co., 238 N.J. Super. 8 (App. Div. 1989), and James v. Bessemer Processing Co., 155 N.J. 279 (1998), the court held that "no evidence is contained in the record that would allow a reasonable inference that following [Scotts'] coating process any asbestos fibers possibly contained in the vermiculite remained respirable." This was so even though Scotts did not dispute for purposes of the

motion that it used Libby, Montana mined vermiculite ore contaminated with asbestos.

The court found a reasonable inference could be made that "the fertilizer used by [the decedent] contained vermiculite ore mined from Libby, Montana," and also that "a reasonable inference could be made that expanded vermiculite ore could contain asbestos fibers." Finding that Dr. Carrillo could not "give an opinion on the breakdown of [Scotts'] product prior to it being applied to the ground or whether any asbestos fibers were present or released once applied," the court found that plaintiffs could not "establish that [the deceased] was exposed to friable asbestos on a regular and frequent basis when he opened the bag of Scotts Turf Builder or during the process of applying Scotts Turf Builder to his lawn."

The case proceeded against the remaining defendant, Homasote Company. After we denied leave to appeal the January 10, 2014 orders, plaintiffs and Homasote reached a settlement. All of the asbestos cases statewide, including this one, were consolidated before another judge. That judge entered the final judgment on July 10, 2015, that dismissed this case.

In May 2015, plaintiffs' counsel learned by their representation of another plaintiff[3] that Scotts had in its possession twenty-six pre-1980 "vintage" samples of its trionized product, one sample of which had been exfoliated, that Scotts believed were manufactured when the vermiculite was obtained from the Libby mine. In May 2015, Scotts served notice about these samples in the Fishbain case, but not in the Brandecker case where Scotts had been dismissed on summary judgement.

Scotts disclosed that the twenty-six samples came from Scotts' headquarters and had been there since 1979. In 2006, Scotts' attorneys "categorized and stored" these samples as part of a litigation sweep. Scotts rediscovered them in the Spring of 2014 and provided the samples to its expert, William Longo, but without notifying other parties or the court. Longo tested the samples and then the samples were lost or destroyed.

On July 19, 2015, plaintiffs filed a motion under Rule 4:50-1 to vacate the January 10, 2014 in limine and summary judgment orders, and requested to restore the case to the active docket. Plaintiffs alleged that the vintage samples constituted newly discovered evidence under Rule 4:50-1(b), and that Scotts' answers

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[3] The other case is Fishbain v. Colgate-Palmolive Co., Docket No. MID-L-56633-13AS.

to discovery and failure to disclose the samples constituted misrepresentations under Rule 4:50-1(c). Plaintiffs also relied on Rule 4:50-1(f). Plaintiffs alleged that Scotts' in limine motions were critical of plaintiffs for having failed to test samples of vermiculite from the pre-1980 timeframe. Plaintiffs argued that Fitzgerald's testimony was barred by the trial court on this basis. Fitzgerald certified in the Fishbain case that Longo did not perform testing on the samples that was adequate to determine whether asbestos was released into the environment by the product. Scotts opposed the motion.

On August 21, 2015, the trial court denied plaintiffs' motion to vacate. The court found it was undisputed that the vintage samples of the trionized product had been in Scotts' possession since 1979, had been collected by Scotts' counsel in 2006 as part of a "litigation sweep" and then "categorized." The court found that Scotts had a "duty" to provide the vintage samples under the discovery rules. Nonetheless, the court denied plaintiffs' motion on procedural grounds, finding that Rule 4:50-1 only applied to final orders and judgments, and not to the January 10, 2014 orders, which were interlocutory.

On appeal, plaintiffs claim that the court erred in denying their motion to vacate the January 10, 2014 orders under Rule

4:50-1. Because the motion was timely filed within days of the final judgment and before any appeal, plaintiffs contend it should have been decided based on the merits. Plaintiffs also allege the trial court erred in 2014 by granting the in limine and summary judgment motions. Those alleged errors include that the trial court failed to acknowledge evidence presented by plaintiffs, and that the court erred in excluding or limiting reports and testimony by Fitzgerald, Webber, Carrillo, and Moline.

II

"[A] motion for vacation of judgment is addressed to the sound discretion of the trial court, whose resolution of the motion will not be disturbed on appeal unless it results from a clear abuse of discretion." In re Adoption of Child of Indian Heritage, 111 N.J. 155 (1988). Rule 4:50-1 allows for vacation of a judgment for:

> (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer

> equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.
>
> [R. 4:50-1.]

Motions made under Rule 4:50-1 shall "be made within a reasonable time, and for reasons (a), (b) and (c) of R[ule] 4:50-1, not more than one year after the judgment, order or proceeding was entered or taken." R. 4:50-2. Plaintiffs sought relief under Rule 4:50-1, but did not ask to vacate the final judgment; they asked instead to vacate the January 2014 in limine and summary judgment orders.

The court's denial on procedural grounds of plaintiffs' Rule 4:50-1 motion was a misapplication of discretion. Although plaintiffs could have challenged the January 2014 interlocutory orders under Rule 4:49-2 at any time before entry of the final judgment, after its entry, plaintiffs were required to proceed under "the strict and exacting standards" of Rule 4:50-1. Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987); Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:50-1 (2018) ("This rule applies only to final orders and judgments."). Plaintiffs' failure to seek reconsideration of the trial court's 2014 interlocutory order pursuant to Rule 4:49-2

does not bar them from filing a timely motion to vacate a final judgment under Rule 4:50-1.

The trial court found that Scotts had a duty to disclose its possession of the vintage samples.[4] We agree. "[Rule] 4:17-7 provides that where a party who has furnished answers to interrogatories thereafter obtains information rendering the answers incomplete or inaccurate, 'amended answers shall be served not later than [twenty] days prior to the date first fixed for trial.'" Westphal v. Guarino, 163 N.J. Super. 139, 145 (App. Div. 1978) (quoting R. 4:17-7). Rule 4:18-1(b)(3) obligates a party who has furnished a written response to a request for production to thereafter produce "additional documents that are responsive to the request." It is not disputed that information about the vintage samples was not provided to plaintiffs in discovery.

We do not know what affect knowledge about the vintage samples would have had on the outcome of the in limine or summary judgment motions. We do know that the in limine motions criticized plaintiffs' experts, particularly Fitzgerald, for not having tested samples of vermiculate from the Libby Mine, by relying on a draft EPA report and by not testing Turf Builder from the applicable time frames.

[4] Scotts has not cross-appealed.

The effect of the trial court's order denying plaintiffs' motion to vacate under Rule 4:50-1 was to leave plaintiffs without a remedy before the trial court to address the discovery violation after it was revealed. It also left us without a record to determine whether the discovery violation would have altered the court's decision on the in limine or the summary judgment motions.

A final judgment can be vacated based on "newly discovered evidence which would probably alter the judgment or orders and whether by due diligence could not have been discovered in time to move for a new trial under Rule 4:49." R. 4:50-1(b). "To obtain relief from a judgment based on newly discovered evidence, the party seeking relief must demonstrate 'that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not merely cumulative.' All three requirements must be met." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 264 (2009) (quoting Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 445 (1980)).

Plaintiffs satisfied the intendment of Rule 4:50-1(b). Plaintiffs did not know about the samples before the orders were entered; the evidence was not cumulative, but something new. If plaintiffs had the ability to test the samples, they could have

refuted the criticism that it was inappropriately relying on draft reports and testing of materials other than Turf Builder.

We reverse the August 21, 2015 order as a misapplication of the court's discretion. We also vacate the final judgment of July 2015 under Rule 4:50-1(b) based on the new evidence related to vintage samples. We leave to the discretion of the trial court to determine whether plaintiffs should be given additional time to file a motion addressing the effect of the discovery violation on the in limine and summary judgment orders.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION