IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MARILYN A. COPPE,)
)
Plaintiff,)
vs.)
)
MICHAEL A. BLEICHER, M.D.,)
)
Defendant.)
) Case No. 3AN- 05-6006 Civil

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CAUSATION

I. INTRODUCTION

Plaintiff alleges her broad spectrum medical complaints were caused either by exposure to bio-medical hazards or by sick building syndrome. Defendant employer and building owner moves for summary judgment. He asserts the bar of workers' compensation exclusivity as to the bio-hazard claim. He argues a lack of evidence establishing that an identified condition of the building caused a specific injury, and provides expert opinions negating causation. Plaintiff opposes, arguing that a prior denial of summary judgment is the law of the case.

II. FACTS AND PROCEEDINGS

Count I of Plaintiff's Third Amended Complaint alleges harm to plaintiff Marilyn Coppe from negligent exposure to toxins, bio-hazards,

and airborne contaminants at her place of employment. She alleges that her employer, Dr. Michael Bleicher, violated a duty to provide her with a safe workplace because he obliged her to clean up surgical scenes without adequate equipment, gear, and training. She also alleges that an exterior air intake vent "may be drawing air from a pile of decaying bushes and foliage".[1]

On January 28, 2008, Judge Spaan denied Dr. Bleicher's previous Motion for Summary Judgment that Ms. Coppe's Count I claims were barred by workers' compensation exclusivity. He found that Dr. Bleicher acted in a dual capacity as landlord and employer. Judge Spaan found that fact issues remained as to whether the claimed injuries resulted from landlord or from employer activity, and whether the two were "inextricably intertwined". Specifically, his order reads:

> The court concludes that a genuine issue of material fact remains as to whether the injuries claimed by plaintiff result from Bleicher failing to cure environmental problems with the building as an owner as opposed to as an employer, or whether those duties were "inextricably intertwined...."[2]

In contrast to the earlier Motion for Partial Summary Judgment, Dr. Bleicher's current motion acknowledges his dual duties, and addresses each separately. As to the bio-hazard claim for employer

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[1] Pl.'s Third Amend. Compl. Ct. I, ¶¶ 18-22.
[2] Order Denying Summ. J. (Jan. 28, 2008).

failure to train, equip, and follow procedures, he asserts the exclusivity bar. But he no longer contends that his employer status also shields him from liability relating to physical conditions of the building ascribable to the landlord. Instead, he asserts that Ms. Coppe cannot produce proof of an essential element of the tort, i.e. a condition of the building which proximately caused medical injury.

Dr. Bleicher cited the deposition testimony of five defense experts who negate a causal relationship between Ms. Coppe's illness and any condition of the building. Anthony Barnard, an environmental specialist, performed air testing in the building and found no evidence of mold or other deficiencies implicating sick building syndrome. Dr. Emil Bardana, an expert in immunology and allergy, negated any tie between the building and plaintiff's symptoms. Water quality expert Jane Whitsett ruled out the water supply. Toxicologist Dr. Brian Burton concurred with Dr. Bardana. Psychiatrist Dr. Eric Goranson opined that Ms. Coppe's illness was consistent with a psychiatric somatization disorder.[3]

Ms. Coppe not only failed to produce admissible expert testimony raising an issue of fact, she did not address the building condition at all.[4] She instead limited her opposition to an issue not raised in Dr. Bleicher's

[3] Def.'s Mot. Partial Summ. J. 10-14.

[4] Plaintiff's Exhibit 1 is a report by an environmental consultant, but it cannot be considered by the court because it is not sworn. Alaska R. Civ. P. 56(c). Even if it were considered, it merely raises the theoretical possibility that a branch pile outside the building could conceivably alter the interior air quality, but it does nothing to establish medical causation. Opp. Mot. Summ. J. Ex. 1.

motion, the existence in fact of a bio-medical hazard. She did not deny the alleged bio-medical hazard exposure was employment-related. Instead, she relied on Judge Spaan's earlier ruling denying complete summary judgment on Count I of the complaint as establishing a law of the case precluding any future summary judgment based on different grounds.

By putting all of her eggs in the law-of-the-case basket, Ms. Coppe left unanswered Dr. Bleicher's no-causation challenge to landlord-based liability. She in fact has retained an expert regarding her sick-building claim, but does not argue that his opinions raise fact issues regarding causation.[5]

III. ISSUES

As to any bio-medical hazard from surgical cleanups only, Dr. Bleicher pleads the bar of workers' compensation exclusivity. He files expert affidavits negating sick building syndrome causation of injury, putting Ms. Coppe to her proof.

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[5] Ms. Coppe submitted the expert report of James J. Pizzadili as Exhibit 8 to her opposition. The court cannot consider unsworn submissions in opposition to summary judgment motions. The court has *sua sponte* reviewed the Pizzadili deposition, not referenced in Ms. Coppe's opposition, and finds no competent testimony therein that a condition of the building caused a specific medical condition, to a reasonable degree of medical certainty. The unsworn tentative opinion of Dr. Heuser attached as Exhibit 6 is not admissible evidence that the court can consider.

Ms. Coppe argues that Judge's Spaan's earlier ruling denying summary judgment is the law of the case. She offers no evidence or argument that the building itself somehow caused injury.

IV. PRINCIPLES OF LAW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[6] Where the parties dispute the facts, all reasonable factual inferences must be drawn in favor of the non-moving party.[7] The moving party has the initial burden of showing that there is no genuine issue of material fact.[8] Once the moving party has made a prima facie case demonstrating that it is entitled to judgment as a matter of law on the established facts, the non-moving party must set forth specific facts demonstrating that a genuine issue of material fact exists.[9] The non-moving party must present or identify admissible evidence in order to meet its burden of showing the existence of a material fact.[10] Sources of relevant facts for purposes of deciding a Motion for Summary Judgment include those found in verified pleadings and affidavits.[11]

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[6] Alaska R. Civ. P. 56; *Lincoln v. Interior Reg'l Hous. Auth.*, 30 P.3d 582, 585-86 (Alaska 2001).
[7] *Lincoln*, 30 P.3d at 586.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Bennet v. Weimar*, 975 P.2d 691, 695 (Alaska 1999).

Employers in Alaska may not be sued for employees' injuries arising in the course of employment.[12] There is an exception for intentional employer torts. But even if employer conduct goes beyond aggravated negligence to knowingly permitting a hazardous work condition to exist, ordering a claimant to perform an extremely hazardous job, wilfully failing to provide a safe place to work, or even wilfully violating a safety statute, such actions do not amount to an intentional tort overcoming the exclusivity bar.[13]

Expert testimony is required to establish medical causation when the nature and character of a person's injuries require the special skill of an expert to render the evidence comprehensible.[14] Many matters of health and body soundness are not exclusively within the domain of medical science, and are subject to proof based upon ordinary life experience.[15] Expert testimony is only required when there is no readily apparent causal connection between a demonstrated event and an alleged result.[16] The governing factors are the probative value of the available lay evidence, and the complexity of the medical facts involved.[17]

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[12] AS 23.30.055.
[13] *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315, 318-19 (Alaska 1989).
[14] *Choi v. Anvil,* 32 P.3d 1, 3 (Alaska 2001).
[15] *Houger v. Houger*, 449 P.2d 766, 769 (Alaska 1969) (citing 2 John H. Wigmore, *Evidence* § 568(1), 660 (3d ed. 1940)).
[16] *Jakoski v. Holland,* 520 P.2d 569, 575 (Alaska 1974).
[17] *Veco, Inc. v. Wolfer,* 693 P.2d 865, 871 (Alaska 1985).

When a defendant operates under dual capacities as both landlord and employer, he has separate duties under each role. He is immune from suit in his employment capacity due to workers' compensation exclusivity, but not from suit based on independent landlord-based duties. But if his duties as a landlord are "inextricably intertwined" with correlative duties as an employer, the workers' compensation exclusivity bar extends to his non-employer landlord duties and he is not subject to suit as a landlord.[18]

V. DISCUSSION

Dr. Bleicher acknowledges his dual burdens as employer and landlord. He asserts the exclusivity bar only as to the employment related bio-hazard claim. He makes no argument that the bio-hazard claim is inextricably related to the building air quality claims in a manner that would entitle him to extend the bar to both claims. Rather he treats the claims separately. As to the air quality claim only, he argues a failure of proof on the issue of causation of harm.

Since Ms. Coppe presents no evidence from which rational minds could conclude that Dr. Bleicher has committed an intentional tort, her claim arising from any failure to train and equip her to safely dispose of surgical detritus arises out of her employment and is barred by workers' compensation exclusivity.

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[18] *Sauve v. Winfree*, 985 P.2d 997, 1002 (Alaska 1999).

The claim that a sick building caused medical injury to Ms. Coppe is beyond the range of lay experience, and can only be proven through expert testimony. Chiropractor Pizzadili does not provide competent expert opinion that a feature of the building caused specific medical injury to a reasonable degree of medical certainty, for reasons set forth in the court's order on defendant's Motion to Preclude Expert Testimony of James Pizzadilli, D.C. Since Ms. Coppe fails to provide expert testimony on the issue of causation, she raises no issue of material fact that a feature of the building injured Ms. Coppe, and summary judgment on the sick building claim is appropriate.

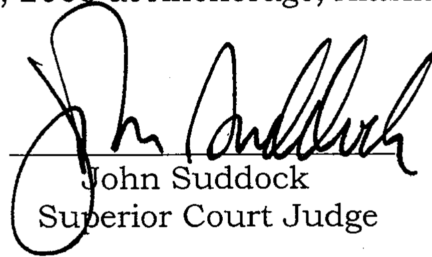
Judge Spaan's order responding to a prior motion seeking to extend the exclusivity bar to the landlord claim is not controlling. Dr. Bleicher here argues the absence of causation by a condition of the sick building for the first time. No principle of judicial restraint precludes the court from ruling on that new ground.

VI. ORDER

Defendant's Motion for Partial Summary Judgment on Causation is granted. The bio-hazard claim in Count I of plaintiff's complaint is dismissed because an employee cannot sue his employer in tort. The sick-building claim in Count I is dismissed because Ms. Coppe has failed to raise an issue of material fact in support of her contention that a

condition of the building caused injury to her. Count I is accordingly dismissed in its totality.

Dated this 29th day of August, 2008 at Anchorage, Alaska.



John Suddock
Superior Court Judge

I certify that on ________________a copy
of this order was mailed to counsel
at their address of record.
David Schlerf
Linda Johnson

____
M. Brault
Judicial Assistant