

2007 Mass. Super. LEXIS 143,*

Corporate Claims Management, Inc. et al. v. Sid Harvey
Industries, Inc.

Opinion No.: 98117, Docket Number: 07-23B

SUPERIOR COURT OF MASSACHUSETTS, AT HAMPDEN

May 9, 2007, Filed

JUDGES: [*1] Cornelius J. Moriarty II, Justice of the
Superior Court.

OPINION BY: Cornelius J. Moriarty II

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The plaintiffs have filed this action seeking contribution for a loss which occurred on May 5, 2000 when a bolt allegedly supplied by the defendant broke causing heating oil to be released into the basement of one Francis Frank. The defendant has filed a motion to dismiss alleging that the action is time-barred. For the reasons stated below the motion must be allowed.

FACTUAL BACKGROUND

Francis Frank (hereafter "Frank") suffered damage to his home when a bolt broke on his oil tank resulting in a spill when Punderson Oil (hereinafter "Punderson") was pumping oil into Frank's tank on May 5, 2000. Punderson's insurer, Corporate Claims Management, Inc., (hereinafter "Corporate") paid more than \$60,000 in accordance with the policy issued to Punderson. Corporate originally filed suit as subrogee of the Estate of Frank (who had since died), against Star Fasteners, Inc., (hereinafter "Star") the manufacturer of the bolt, and Sid Harvey Industries, Inc., (hereinafter "Harvey") the distributor of the bolt, on May 2, 2003. The action [*2] alleged various negligence and breach of implied warranty of merchantability claims against Star and Harvey. An amended judgment entered on May 3, 2005 dismissing the plaintiff's claims without prejudice because the Court found the action could not be brought as a subrogation action in the name of the Estate of Frank.

This present action brought by Corporate and Valero Claims Management, Inc., as subrogee of Punderson Oil, was commenced on January 5, 2007 against Harvey. Star is not named as a defendant in this action, which again alleges negligence and breach of the implied warranty of merchantability. Harvey now moves to dismiss the action, claiming it is time-barred.

DISCUSSION

A claim for negligence has a three-year statute of limitations. G.L.c. 260, § 2A. The statute of limitations for a claim of breach of implied warranty of merchantability is three years when the claim is personal or property injury, as opposed to an "economic loss" where the plaintiff seeks to recover the cost of the allegedly defective item itself. *Fine v. Huygens, DiMella, Shaffer & Associates*, 57 Mass.App.Ct. 397, 400, 783 N.E.2d 842 (2003); G.L.c. 106, § 2-314 [*3] and § 2-318. It is undisputed that the injury occurred on May 5, 2000. Therefore, the statute of limitations expired on May 5, 2003. This action, filed in 2007, is barred by the statute of limitations. Even if, *arguendo*, the statute of limitations started to run when payment was made by Corporate, the action is still time-barred. At oral argument the plaintiff conceded that payment was made on June 13, 2002. If the payment triggered the statute of limitations, then the limitations period expired by June 2005 and, thus, the action filed on January 5, 2007 is time-barred.

The "savings" statute, G.L.c. 260, § 32 is also of no avail. This provides that where a timely action is dismissed "for any matter of form," the plaintiff "may commence a new action for the same cause within one year after the dismissal." There has been no argument that the original action was untimely. Hence, assuming that Corporate's error of bringing this original suit as a subrogee of Frank's estate was one of "form," the current action could have been brought, pursuant to G.L.c. 260, § 32 no later than May 2, 2006, one year after [*4] the May 3, 2005, dismissal without prejudice. Therefore, this "savings" statute does not save the plaintiffs' action and, thus, it is time-barred. The Court knows of no authority it has to extend the statute of limitations under these circumstances. Accordingly, the defendant's motion to dismiss is ALLOWED.

Cornelius J. Moriarty II

Justice of the Superior Court

Dated: May 2007