IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GERALDSTINE MILLER, et al	*	
	*	
Appellant,	*	
	*	
vs.	*	CV NO. 2008-CA-02148
	*	
AMERICAN OPTICAL COMPANY.	*	
	*	
Appellee.	*	

ON APPEAL FROM THE CIRCUIT COURT
OF COPIAH COUNTY, MISSISSIPPI

BRIEF OF APPELLANT
GERALDSTINE MILLER

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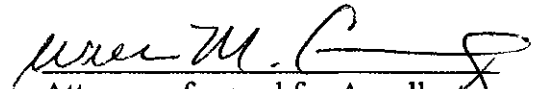
No. 2008-CA-02148

GERALDSTINE MILLER v. AMERICAN OPTICAL COMPANY

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. William M. Cunningham, Jr. - counsel for Plaintiff/Appellant, Geraldstine Miller
2. Mike Espy - counsel for Plaintiff/Appellant, Geraldstine Miller
3. Jack W. Harang - counsel for Plaintiff/Appellant, Geraldstine Miller
4. Edwin S. Gault - counsel for Defendant/Appellee, Englehard and Mearle Corp.
5. Chase Bryan - counsel for Defendant/Appellee, Englehard and Mearle Corp
6. Colleen Welch - counsel for Defendant/Appellee, Englehard and Mearle Corp
7. Spence Flatgard - counsel for Defendant/Appellee, Continental Mineral Processing
8. The Honorable Lamar Pickard
9. Geraldstine Miller - Plaintiff/Appellant
10. Merredythe Eiland, Daugher of Appellant, Geraldstine Miller
11. Nikia Glenn, Son of Appellant, Geraldstine Miller
12. Monica Lonette Miller, Daughter of Appellant, Geraldstine Miller
13. Menittia Monique Miller, Daughter of Appellant, Geraldstine Miller
14. Metina Miller, Daughter of Appellant, Geraldstine Miller



Attorney of record for Appellant, Geraldstine Miller

STATEMENT REGARDING ORAL ARGUMENT

The appellant herein, Geraldstine Miller, respectfully submits that oral argument will not aid the Court in the resolution of this appeal.

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STATEMENT OF THE ISSUES

I. Whether the trial court erred in granting a summary judgment where there is evidence in the record that the Plaintiff's Amending Complaint complied with M.R.C.P. Rule 9(h) and Rule 15.

II. Whether the trial court erred in granting a summary judgment where there is evidence in the record that the Statute of Limitations had not run against the moving defendants.

STATEMENT OF THE CASE

This lawsuit was filed by Geraldstine, Individually and on behalf of the heirs in the Estate of Grover D. Miller, and on behalf of the wrongful death beneficiaries on December 30, 2002, against approximately one hundred fifty-nine (159) defendants alleging that the plaintiff's decedent, Grover D. Miller, was exposed to Silica-containing dust and suffered serious permanent and bodily injuries as a result of that exposure to Silica and Silica dust. (R-079-146) This original complaint further named, in addition to the identified defendants certain "John Doe" the defendants who were presently unknown to the plaintiff and these "John Doe" defendants were joined specifically pursuant to Rule 9(h) of the Mississippi Rules of Civil Procedure. On January 26, 2003, the Plaintiff filed her First Amended Complaint specifically alleging that the plaintiff's decedent, Grover D. Miller, was employed by Cataphote, Incorporated, in its Flowood, Mississippi plant from the Spring of 1993 until June 1996 and that while employed by Cataphote, Mr. Miller was exposed to thick clouds of fine dust materials including Silica and other harmful substances. (R-189-245) This first amended complaint identified one hundred fifty-eight (158) defendants and in addition carried forth the allegation in the original complaint that there are defendants whose identities are presently unknown to the plaintiff and that these defendants are identified as "John Doe", defendants pursuant to Rule 9(h) to Mississippi Rules of Civil Procedure. On July 19, 2005, the Plaintiff, Geraldstine Miller, et al, filed her Second Amended Complaint identifying thirty (30) defendants whose identity had previously been unknown to the Plaintiff with specific allegations that were made as to the defendants that the hazardous materials identified as to each and that they were used at the Cataphote plant where the Plaintiff's decedent worked. (R-245-300) On February 22, 2006, the plaintiff, Geraldstine Miller, et al., in accordance with the trial court's directions at a hearing held on January 9, 2006, filed a Third Amended Complaint, motion for summary judgment and order.(R-342-381)

Thereafter the Defendants filed responsive pleadings and in due course many Defendants were dismissed by agreement. The moving defendants filed their Motion for Summary Judgment on April 19, 2007 and an opposition was timely field by the Appellant on May 14, 2007. Oral argument on the Defendant's Motion for Summary Judgment was heard by the Trial Court and on November 24, 2008, an order was entered granting the Defendant's Motion for Summary Judgment.

STATEMENT OF FACTS

The Plaintiff's deceased, Grover D. Miller, was born on September 4, 1953 and died on October 21, 2002. He was employed by Cataphote, Inc., at its Flowood, Mississippi plant from the Spring of 1993 until June 1996. While employed by Cataphote Inc., Cataphote Inc., was in the business of producing glass beads from a fine glass dust mixture which contained Silica and other harmful substances including but not limited to benzines, toxic chlorides, dioxides, lead and other substances. Mr. Miller worked as a patletizer operator, rotex operator, hopper operator, and also assisted with maintenance duties in the shipping and receiving department. While employed, Mr. Miller was exposed to thick clouds of fine dust materials containing Silica and other harmful substances. As a proximate result of the exposure to Silica and other harmful substances in the dust plaintiff's deceased, Grover D. Miller suffered serious physical injuries and died. (R-191)

During sandblasting, foundry operations and/or other manufacturing processes, such as those conducted at the Cataphote Plant where Silica or Silica containing products and other harmful substances are utilized, dust is created which includes particles that are invisible to the human eye, but which particles are inhaled by workers in a very large area surrounding these operations. This dust does not fall to the ground, but in fact, is suspended in the air and travels over a long distance, subjecting many workers in the area to an unreasonable risk of harm. Dangers of Silica containing dust and industrial dust containing other harmful substances have been reported in medical literature for hundreds of years and began to appear in medical literature in the United States in, at least, the last quarter of the nineteenth century related to sandblasting, and/or foundry Silica exposure. The defendants who sold Silica containing products or other harmful substances knew that their products were to used in sandblasting, foundry operations and/or other manufacturing processes which would create respirable-sized particles of dust that would cause disabling and crippling disease.(R-245-300)

The warnings supplied with these substances failed to warn the user of dangers which were reasonably foreseeable or scientifically discoverable at the time of the exposure and failed to inform the exposed workers of the nature and extent of the danger inherent in the use of Silica containing abrasives, and other harmful substances. In Plaintiff's Original Complaint which was filed on December 31, 2002, Cataphote, Inc., was also named as a defendant in the original complaint. Cataphote Inc., made an appearance and filed its answer on July 14, 2003. Immediately thereafter, counsel for plaintiff requested the deposition of the defendant, Cataphote, Inc., regarding the material used in the plant during the period of the decedent's employment. His deposition was essential to identify the parties whose products were utilized at the Cataphote Plant which may have been toxic to the decedent, Grover D. Miller. The deposition of Cataphote, Inc., was initially scheduled for February 16, 2004, but was rescheduled at the request of its counsel. On January 21, 2004, counsel for the plaintiff was assured by Cataphote's attorney that the deposition would be conducted in late 2004 to coincide with the requested walk through of the plant by the parties. Despite these assurances, the deposition was not conducted as scheduled. It was re-noticed by counsel for May 19, 2004. Throughout the remainder of 2004, counsel for the plaintiffs made a diligent effort to conduct this deposition and acquire the needed information concerning the unknown parties, but that was thwarted at every juncture with difficulties presented by the closing of the Cataphote plant, the inaccessible, but needed records and personal tragedies in the life of one of the Cataphote attorneys. This information was supplied to the Court through the affidavits of William M. Cunningham, Jr., and Roger Riddick which were attached to the Plaintiff's Opposition to the Motion for Summary Judgment. (R-516-520)

The requested documents, including the needed MSDS Sheets were not supplied to plaintiffs counsel until February 2005 and the second amended complaint was filed by the plaintiffs on July

19, 2005, when the additional parties were substituted as defendants. On April 19, 2007, the Defendants, Englehard Corporation, The Mearle Corporation, Cronus Inc., The Shepherd Color Company, Millennium Specialty Chemicals Inc., first known as SCM Glico Organics Corporation, d/b/a SCM Chemicals-Color and Silica and incorrectly named and/or served as SCM Chemicals and NYCO Minerals, filed their motion for summary judgment arguing that the plaintiff's statute of limitations began on March 16, 2001 and would have expired on March 16, 2004. (R-390-507) The moving defendants argued that since they were not named until July 19, 2005, that the plaintiff's claims were barred by the statute of limitations. On May 7, 2007, the plaintiff filed its opposition to the defendants motion for summary judgment. (R-510-750) On May 14, 2007, the Trial Court heard oral argument on the defendants motion for summary judgment based on the statute of limitations and on November 24, 2008 the Honorable Lamar Pickard, Circuit Court Judge signed an order granting the defendants' motion for summary judgment. In his order, Judge Pickard found that the plaintiff's complaint did not relate back to the original filing under M.R.C.P Rule 9(h) and Rule 15 because the statute of limitations for claims against the moving defendants had run. (R-999-1000) Thereafter, this appeal was perfected.

SUMMARY OF THE ARGUMENT

The propriety of the trial court's entry of a summary judgment in favor of the defendants is at issue on this appeal. In reviewing an appeal of a summary judgment, this Court conducts a *de novo* review of the evidence in the record. *Townsend v. Estate of Gilbert*, 616 So.2d 333, 335 (Miss. 1993). The evidence is viewed in the light most favorable to the non-moving party (Miller) and she is to be given the benefit of every reasonable doubt. (Id.)

In its order granting summary judgment, the trial court specifically found that the Plaintiff's complaint did not relate back to the original filing under M.R.C.P. Rule 9(h) and Rule 15 because the statute of limitations for claims against the moving defendants had run.

The statute of limitations was tolled by the filing of the original complaint on December 31, 2002. The Appellant submits that her Second Amended Complaint dated July 19, 2005, which substituted the moving parties in the motion for summary judgment relates back pursuant to M.R.C.P. Rule 15 (c)(2) and M.R.C.P. Rule 9(h).

ARGUMENT

On May 12, 2005, this trial court entered an order giving the appellant sixty (60) days to file an amended complaint which listed the specific manufacturers and products which the plaintiff contended caused or contributed to his/her injury. The Second Amended Complaint filed by the Plaintiff in conformity with this order specifically substituted defendant manufacturers and moving parties who were named in Exhibit "B" to the second amended complaint.

M.R.C.P. 9(h) provides:

> "When a party is ignorant of the name of an opposing party and so alleges in his pleadings, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the actions may be amended by substituting the true name and giving proper notice to the opposing party".

M.R.C.P. 15(c)(2) contains the additional language that:

> "An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading". (Emphasis supplied)

> The purpose of Rule 9(h) is "to provide a mechanism to bring in responsible parties known, but intended, who can only be ascertained through the use of judicial mechanisms such as discovery". *Doe v. Miss. Blood Services, Inc.*, 704 So.2d 1016 (Miss. 1997).

This is exactly what the Plaintiff, engaged in. The only means available to her to ascertain the true identity of the manufacturers that supplied the products to the Cataphote Plant was through discovery. The Mississippi Supreme Court has stated that "the relation back privilege provided for fictitious parties under Rule 15(c)(2) requires the plaintiff to actually exercise a reasonable diligent inquiry into the identity of the fictitious party". *Doe*, 704 S.2d at 1019.

The evidence shows that the Plaintiff, through her attorney, from the date of the filing of the Original Complaint exercised a reasonably diligent inquiry as to the identities of the unknown parties

that supplied products to the Cataphote Plant. In *Wombley v. Singing River Hospital*, 618 So. 2d 1252 (Miss. 1993), the Court fashioned a "reasonably diligence" test to determine the proper substitution of unknown parties. It is respectfully submitted that the appellant attached affidavits and exhibits to her opposition clearly supporting and finding that, in this instance, the Appellant through her counsel, was diligent in obtaining documents from the only source available to determine the identities of the parties which supplied products to the Cataphote Plant during the employment of her deceased husband. The evidence shows that the deposition of Cataphote Inc., was initially scheduled for February 16, 2004, but was rescheduled at the request of its counsel. On January 21, 2004, counsel for the Plaintiff was assured by Cataphote's attorney that the deposition would be conducted in late February 2004, to coincide with the requested walk through the plant by the parties. Despite these assurances, the deposition was not conducted as scheduled. It was re-noticed by counsel for May 19, 2004.

Throughout the remainder of 2004, counsel for the Plaintiff made a diligent effort to conduct the deposition and acquire the information needed concerning the unknown parties but was thwarted at every juncture with difficulties presented by the closing of the Cataphote Plant, the inaccessibility of the needed records and personal tragedies in the life in one of the Cataphote attorneys. It is respectfully submitted that the affidavits and exhibits attached to her opposition particularly, the affidavits of William M. Cunningham, Jr., and Roger C. Riddick clearly support a finding that, in this instance, the Plaintiff, through her counsel, was diligent in obtaining documents from the only source available to determine the identities of the parties which supplied products to the Cataphote Plant during the employment of her deceased husband.

To survive the summary judgment, the non-moving party must offer significant probative evidence demonstrating the existence of a triable issue of fact. *Byrne v. Walmart Stores, Inc.* 877

So.2d 462 (Miss.App. 2004). It is respectfully submitted that the Appellant herein has submitted such evidence.

CONCLUSION

Based on the facts and case law set forth above, it is clear that there were material issues of fact with regard to the statute of limitations and the propriety of the Appellant's second amended complaint and its relation back which would preclude the trial court's granting of summary judgment in favor of the moving defendants. Accordingly, Miller respectfully states that this Court should reverse the trial court's order granting the Defendants' Motion for Summary Judgment and remand this case back to the trial court for a trial on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of July, 2009, served a copy of the foregoing Appellant's Brief on the Supreme Court of Mississippi, by mailing a copy of the same by United States Mail properly addressed and first class postage prepaid, to wit:

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