2-28-2014

Order on Dispositive Motions (Southern States Chemical Inc. et al.)

Alice D. Bonner
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SOUTHERN STATES CHEMICAL, INC., and SOUTHERN STATES PHOSPHATE AND FERTILIZER COMPANY,	)	
Plaintiffs,	)	
v.	)	**Civil Action File No. 2012CV210002**
TAMPA TANK & WELDING, INC. f/k/a TAMPA TANK, INC. and CORROSION CONTROL, INC.,	)	
Defendants.	)	

ORDER ON DISPOSITIVE MOTIONS

On January 24, 2014, counsel appeared before the Court to present oral argument on Plaintiffs' Motion for Partial Summary Judgment, Defendant Tampa Tank & Welding, Inc.'s Motion for Summary Judgment, Defendant Corrosion Control, Inc.'s Motion for Summary Judgment and Motion for Sanctions for Spoliation of Evidence. Upon consideration of the argument of counsel, the briefs submitted on the motions and the record of the case, this Court finds as follows:

In 2000 and 2001, Plaintiff Southern States Chemical, Inc. ("Southern States"), a company that manufactures and stores bulk quantities of sulfuric acid, consulted with Defendant Tampa Tank & Welding, Inc. ("Tampa Tank") to refit one of its storage tanks (the "Duval Tank") to safely hold sulfuric acid. The parties signed a letter proposal on April 24, 2000, and Aug. 21, 2000, respectively, and the terms of the project were subsequently supplemented by written change orders. The letter proposal contained a one-year warranty provision that provided: ""All material and workmanship are

guaranteed for a period of twelve months from the date of completion of this work." Plaintiff contends that the provision was later modified by the oral promise of one of Tampa Tank's representatives that the Duval Tank was guaranteed for at least 40 years.

The project required Tampa Tank to weld a new steel floor above the old existing floor of the Duval Tank. To protect the old floor, Tampa Tank installed a liner made of impervious plastic on top of the original floor. A 19-inch layer of sand filled the gap between the liner and the new steel floor. To prevent corrosion of the new steel floor, Tampa Tank placed a cathodic corrosion protection system in the sand layer. Tampa Tank contracted with Defendant Corrosion Control, Inc. ("Corrosion Control") to design and assist with that aspect of the tank project. Work on the Duval Tank was substantially complete by January 2002. Corrosion Control performed an inspection of the cathodic protection system in Jan. 2002, and found that it was working as intended.

On July 3, 2011, a security guard discovered sulfuric acid leaking from the base of the Duval Tank. Plaintiff contends that Tampa Tank misplaced magnesium ribbons, a key component of the cathodic system, drove a Bobcat bulldozer over the sand layer after the ribbons were installed, which tampered with the integrity of the system, and failed to seal the new floor, which left it open to "corrosive" rainwater. Plaintiff also contends there were issues with the welding of the floor.

Plaintiff accuses Corrosion Control of failing to properly test the corrosion protection system by neglecting to confirm that Tampa Tank kept the floor dry, failing to verify that Tampa Tank had not driven a Bobcat over the floor, and conducting an inspection when the tank was empty, which only put the corrosion protection system to

limited use. Plaintiff also faults Corrosion Control for not having an on-site engineer present to ensure Tampa Tank properly installed the corrosion protection system.

Southern States hired an outside consultant to determine whether the Duval Tank was repairable and to complete a report detailing why it failed. According to Defendants, the consultant determined that the Duval Tank was repairable. Nevertheless, Plaintiff dismantled the Duval Tank and used the floor plates in a new construction project. The Defendants contend that Plaintiff failed to preserve the floor plates most closely located to the location of the leak. Of the floor plates that were preserved, Defendants complain that Plaintiff left the plates in the elements to further corrode. As a result, Defendants contends that the floor plates are not reliable evidence.

1. Application of the Statute of Repose Under O.C.G.A. § 9-3-51

In each of their motions, Defendants move for summary judgment as to all claims, arguing that Plaintiffs' claims are barred by the statute of repose set forth in O.C.G.A. § 9-3-51.

> O.C.G.A. § 9-3-51 provides: "[n]o action to recover damages for any deficiency in the … planning, design, specifications, supervision or observation of construction or construction of an improvement to real property; for injury to property real or personal, arising out of any such deficiency… shall be brought against any person performing or furnishing the … design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement."

The parties do not dispute that the Duval Tank is considered "realty" for purposes of O.C.G.A. § 9-3-51. Moreover, it is undisputed that Defendants' work on the Duval Tank was complete by January 2002, making January 2010 the deadline by which

Plaintiffs could advance claims against Defendants based on defects associated with the Duval Tank.

Plaintiffs counter Defendants' position by asserting that fraud on the part of Defendants prevents them from availing themselves of the eight-year statute of repose. See Eesner v. Kinsey, 240 Ga. App. 21 (1999) ("[I]f the evidence of defendant's fraud or other conduct on which the plaintiff reasonably relied in forbearing the bringing of a lawsuit is found by the jury to exist, then the defendant, under the doctrine of equitable estoppel, is estopped from raising the defense of the statue of ultimate repose.").

Specifically, Plaintiffs contend that the report generated by Corrosion Control when the project was completed contained various misrepresentations. For example, Corrosion Control failed to provide on-site technical assistance as stated in the report; the test of the Duval Tank was conducted when the tank was empty even though Corrosion Control knew that an empty tank would not produce accurate test results; and Corrosion Control falsely reported that the system met the criteria for effective corrosion control. Plaintiffs contend that Tampa Tank provided this report to Plaintiffs, knowing that it contained false statements concerning the nature of the cathodic system. Plaintiffs argue that Defendants' conduct prevented Plaintiffs from discovering the problems that existed with the cathodic system, and thus the injury they discovered after the expiration of the statute of repose.

The Court disagrees with Plaintiffs' interpretation of the fraud exception to the application of the statute of repose. In Rosenberg v. Falling Water, Inc., the Georgia Supreme Court explained that, in order to toll the statute of repose under O.C.G.A. § 9-3-51, a plaintiff must show that the injury occurred prior to the expiration of the eight-

year period. Id., 289 Ga. 57, 60 (2011). Where the injury does not occur "until years after the statute of repose time period expired… [the plaintiff] has never had a viable cause of action to pursue." Id.

Here, the Court finds that Plaintiffs' injuries were sustained when the sulfuric acid leak occurred on July 3, 2011, more than nine years after the undisputed evidence shows the completion of the Duval Tank in January 2002. Accordingly, even if Plaintiffs could show some kind of fraud of Defendants in making misrepresentations in or passing along a report prepared in 2002, the Court finds that such fraud would not have prevented Plaintiffs from missing the deadline for filing suit because such injuries did not occur until after the deadline had passed. Defendants' motions are **GRANTED**.

2. Spoliation of Evidence

Notwithstanding the Court's ruling above, the Court will address Defendants' arguments related to Plaintiffs' conduct in failing to preserve the steel plates associated with the Duval Tank.

Defendants move the Court to sanction Plaintiffs by dismissing Plaintiffs' claims or excluding evidence of the Duval Tank and its key components due to Plaintiffs' failure to adequately preserve the Duval Tank.

Shortly after the July 3, 2011 incident, Plaintiffs hired Applied Technical Services, Inc. ("ATS"), whom they have now retained as a testifying expert, to test the Duval Tank and to determine whether it could be repaired. In connection with the testing process, ATS instructed Plaintiffs to remove several samples from the floor of the Duval Tank, including the plate in which the "through-hole" was located. Following ATS's analysis, the sample containing the through-hole was lost. Plaintiffs also dismantled the Duval

Tank, using some of the floor plates to build a wall and leaving other plates exposed to the elements "to further corrode," according to Defendants. They contend that Plaintiffs' actions amount to spoliation, which warrants the sanction of dismissal or an order excluding evidence of the Duval Tank, the flooring plates, the through-hole, the through-hole sample, the cathodic protection system, the sand layer and the impermeable liner.

"Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation." Craig v. Bailey Brothers Realty, 304 Ga.App. 794, 796–797 (2010). "Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis." R&R Insulation Services, Inc. v. Royal Indem. Co., 307 Ga. App. 419, 436 (2010).

"The trial court should weigh five factors before exercising its discretion to impose sanctions: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party who destroyed the evidence acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded." Id.

Here, the Court concludes that critical evidence was spoliated by Plaintiffs or their experts, and that the spoliation has resulted in prejudice to Defendants. The only analysis performed on the key floor plate of the Duval Tank was exclusively performed by Plaintiffs' expert, who lost the plate before Defendants' experts had an opportunity to conduct an independent analysis. It is of no consequence that Plaintiffs' expert, and not

Plaintiffs, lost this evidence, as the actions of a party's agent can be imputed to the party in the context of spoliation. See Kitchens v. Brusman, 303 Ga. App. 703 (2010).

With regard to the subsequent use of the Duval Tank floor plates, the Court is mindful of the fact that Defendants had several months to request access to the Duval Tank for inspections, or time to seek a protective order limiting Plaintiffs' activities with respect to the Duval Tank, prior to Plaintiffs' efforts to dismantle the tank floor. In any event, the Court declines to award the sanctions sought by Defendants for Plaintiffs' conduct in connection with either category of evidence.

"Dismissal is usually reserved for cases involving malicious destruction of evidence, which does not appear to be the case here." R&R Insulation Services, Inc. v. Royal Indem. Co., 307 Ga. App. 419, 438 (2010). The Court is not convinced that Plaintiffs' conduct was motivated by bad faith, especially the mishap chargeable to its agent. Moreover, without a showing that Defendants' ability to present a defense is "so diminished as to be impossible or improbable," the Court likewise declines, at this time, to categorically exclude any of Plaintiffs' evidence or to charge the jury that any lost or dismantled evidence favors Defendants' case. Id. However, if this case were proceeding to trial, the Court would reserve the right to revisit the issue in context, if it became clear to the Court at that time that Defendants' position was prejudiced due to the inability to advance or defend a specific issue because of the lost opportunity to directly inspect the lost or dismantled floor plates. Accordingly, the request sought in Defendants' motion is **DENIED** for now, but the Court will entertain specific spoliation objections at trial.

3. Plaintiffs' Motion for Partial Summary Judgment

Finally, the Court will address Plaintiffs' Motion for Partial Summary Judgment, in order to perfect the record, despite its conclusion above that Plaintiffs' claims are barred by the statute of repose.

O.C.G.A. § 43-15-24 provides:

> It shall be unlawful . . . for any private or commercial entity to engage in the construction of any work or structures involving professional engineering which by the nature of their function or existence could adversely affect or jeopardize the health, safety, or welfare of the public unless the plans and specifications have been prepared under the direct supervision or review of and bear the seal of, and the construction is executed under the direct supervision of or review by, a registered professional engineer or architect.

Plaintiffs argue that Defendants violated this provision by failing to prepare the plans for the Duval Tank under the supervision of an engineer or architect and failing to construct the Duval Tank under the supervision of an engineer or architect. Plaintiffs contend that such violations should amount to negligence per se, although Plaintiffs concede that the issue of causation is better reserved for trial.

> It is well-settled that Georgia law allows the adoption of a statute as a standard of conduct so that its violation becomes negligence per se. The standard of review to determine whether the violation of a statute is negligence per se is two-fold: It is necessary to examine the purposes of the legislation and decide (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm it was intended to guard against. For a violation of the statute to be negligence per se, the violation 'must be capable of having a causal connection between it and the damage or injury inflicted upon the other person.' This refers not to the proximate cause element of the negligence action, which Plaintiff must still prove by a preponderance of the evidence, but rather to the character of the legal duty involved. Is this statutory duty one which, if breached, is capable of producing injury to [an individual in the same class as the instant plaintiff].

Rockefeller v. Kaiser Foundation Health Plan of Georgia, 251 Ga.App. 699 (2001).

In response, Defendants contend that their work should not be characterized as "construction" to fall within this scope of this statute, as they were merely hired to refurbish the Duval Tank, which was originally constructed in 1966. In Gadd v. Wilson & Co. Engineers, 193 Ga. App. 713 (1989), the Court of Appeals failed to find error in the trial court's refusal to instruct the jury on the statute at issue here in a case very similar to the instant facts. In Gadd, a waste water treatment technician was injured when sulfuric acid leaked from a tank stored in a facility that defendants had been hired to refurbish. Upholding the trial court's refusal to issue the charge based on O.C.G.A. § 43-15-24, the Court of Appeals noted that the charge was not adjusted to the evidence as the charge "did not involve original construction, but only refurbishment pursuant to the original plans and specifications prepared when [the facility] was constructed in 1967." Id. at 715.

The Court finds the Gadd opinion controlling. Because the Court of Appeals has drawn a distinction here between "construction" and "refurbishment," this Court is required to do the same, and it is undisputed that the work performed by Defendants was to refurbish a fixture previously constructed in 1966. Accordingly, Plaintiffs' motion is **DENIED**.

SO ORDERED this 28 day of February, 2014.

ALICE D. BONNER, SENIOR JUDGE
Fulton County Superior Court – Business Case Division
Atlanta Judicial Circuit

Copies to:

Jeffrey Y. Lewis
J. Tucker Barr
Arnall Golden Gregory LLP
171 17th Street NW
Suite 2100
Atlanta, Georgia 30363

Carl A. Gebo
Gordon & Rees, LLP
3455 Peachtree Road, Suite 1500
Atlanta, Georgia 30326

Michael O. Crawford
Stephen M. Schatz
Swift, Currie, McGhee & Hiers
1355 Peachtree Street, NE
Atlanta, Georgia 30309-3238