2006 WL 3359429
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

ESTATE OF Lois MANCINI and George Mancini,
Plaintiff-Appellants,
v.
LEXINGTON INSURANCE COMPANY, Aig Technical Services, Inc., McAllister Company t/a McAllister Fuels, Mcallister Fuels and Demaio's, Inc., Defendants-Respondents,
and
DeMaio's, Inc., Lexington Insurance Company and Aig Technical Services, Inc., Defendants/Third-Party Plaintiffs,
v.
Kroll Associates, Inc., and Kroll Environmental Enterprises, Inc., Third-Party Defendants.

Argued Oct. 5, 2006.
|
Decided Nov. 21, 2006.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, No. L-2228-03.

Attorneys and Law Firms

Louis Giansante argued the cause for appellants (Giansante & Cobb, attorneys; Mr. Giansante, of counsel and on the brief).

Charles E. Powers, Jr. argued the cause for defendants-respondents/third-party plaintiffs American International Group, Inc. t/a AIG Technical Services, Inc., and Lexington Insurance Company (Harwood Lloyd, attorneys; Mr. Powers, of counsel and on the brief).

John R. Gonzo argued the cause for respondents McAllister Company t/a McAllister Fuels (Kaufman, Dolowich, Schneider, Bianco & Voluck, attorneys; Mr. Gonzo, of counsel and on the brief; Alexander G. Pappas, on the brief).

Peter J. Herzberg argued the cause for defendant-respondent/third-party plaintiff DeMaio's, Inc. (Wolf Block Brach Eichler, attorneys; Mr. Herzberg, on the brief).

Brian Chebli argued the cause for third-party defendants Kroll Associates, Inc. and Kroll Environmental Enterprises, Inc. (Cadwalader, Wickersham & Taft, attorneys; Andrew J. Perel and Mr. Chebli, of counsel and on the brief).

Before Judges WEFING and PARKER.

Opinion

PER CURIAM.

***1** On November 3, 2005, the trial court entered an order dismissing plaintiff's complaint with prejudice. Plaintiff has appealed. After reviewing the record in light of the contentions advanced on appeal, we reverse.

Plaintiff Lois Mancini and her husband, George Mancini, resided in Mount Holly in a home that used oil heat. At some point, their underground oil storage tank developed a leak and contaminated the soil around and underneath their home. Cleanup efforts were both protracted and extensive. Eventually, more than five hundred tons of contaminated soil had to be removed from the premises. Lois Mancini was concerned about her exposure over such an extended period of time to heating oil. Her concern was heightened by the fact that she had developed a form of cancer known as myelofibrosis. On August 1, 2003, she commenced suit, joining as defendants those who had been involved in servicing and maintaining her home's oil heating system and in the attempts to rectify the situation once the leak occurred and the oil had spread throughout the premises. Answers were filed in due course, and the matter was assigned to a designated judge for case management.

The first case management conference was held on May 12, 2004, and during the conference defense counsel raised the threshold issue whether a causal link existed between # 2 home heating oil and myelofibrosis. An extensive colloquy occurred among the trial court and all counsel on the question whether plaintiff should be required to demonstrate such a causal link in order for the case to proceed to the extensive discovery a case such as this requires. Plaintiff indicated that while he favored a

more traditional sequencing of discovery, he could request his expert

> [T]o produce some limited report that would-that would address the issue of causation as to whether or not a component of home heating oil can cause myelofibrosis. I think that's a very different issue than a full blown liability report which we would, of course, prefer at the end of discovery.

The trial court responded that a report along the lines indicated would be sufficient, and plaintiff's counsel said that he could provide such a limited report within forty-five days. The trial court considered that satisfactory.

The topic arose again toward the end of that case management conference, when plaintiff's counsel restated that he was being called upon to produce a report within forty-five days that a causal link could exist between myelofibrosis and exposure to # 2 home heating oil. At this juncture, one defense counsel interjected that such a report would be merely theoretical and that he had been assured by his expert "definitively" that # 2 home heating oil did not cause myelofibrosis. This exchange concluded with the trial court telling plaintiff's counsel, "We're still, you know, in the beginning of litigation so, do what you can."

The case management order that was subsequently entered, however, was not as nuanced as the colloquy that had taken place. It provided in pertinent part:

> ***2** Plaintiff will provide an expert report on this issue of causal relationship between the Plaintiff's alleged exposure to # 2 home fuel heating oil and her diagnosis of myelofibrosis no later than June 28, 2004.

On June 7, 2004, in advance of the deadline contained in that initial case management order, plaintiff served a report prepared by George Thompson, Ph.D., a toxicologist. Dr. Thompson's report stated the following:

> This letter represents my preliminary expert opinion that exposure of Mrs. Lois Mancini to heating oil could have caused her current medical condition. This opinion is based upon nearly 40 years of training and experience as a toxicologist. My review of the documents in this case enables me to conclude that Mrs. Mancini's compromised health conditions could have been caused by her exposure to benzene in her home heating oil.
>
> I will be happy to provide detailed documentation to substantiate this preliminary assessment upon request.

Upon receipt of this letter, defense counsel inquired as to the documents Dr. Thompson had reviewed. Plaintiff's attorney responded by letter that Dr. Thompson had reviewed Mrs. Mancini's medical records, all the documents that had been provided to date in discovery as well as certain additional material. The attorney supplied a copy of that material, a leaflet prepared by the State of Wisconsin entitled "Information on Toxic Chemicals." The leaflet contained a section discussing whether exposure to fuel oil can result in harmful health effects. This section contains the following statement:

> **Cancer:** Exposure to fuel oil is not known to cause cancer in humans. However, long-term exposure to benzene, the most toxic component of fuel oil, is known to cause leukemia.

Defendants made no immediate objection to Dr. Thompson's letter or the material forwarded by plaintiff's counsel. Shortly after that submission, Mrs. Mancini passed away and the complaint was amended to assert a claim for wrongful death. According to the record before us, Mrs. Mancini's death was attributed to acute leukemia.

An additional case management conference was held on February 2, 2005. No objection was voiced by defendants at that conference to Dr. Thompson's letter report or the documentation forwarded by plaintiff's attorney.

The next case management conference was held on March 28, 2005. Although there was an extensive colloquy about delays that had occurred in the production of discovery related to plaintiff's damages, defense counsel again made no objection during the course of that conference to Dr. Thompson's report. As a result of that conference, the

trial court extended for one hundred eighty days the deadline for the completion of factual discovery. It declined to set a deadline at that point for the production of expert reports. An appropriate case management order was entered.

The next case management conference was held on May 19, 2005, at which, for the first time, defendants raised with the court the sufficiency of Dr. Thompson's report. After extensive colloquy about the delays that both sides alleged they had experienced in the phase of discovery related to factual issues (depositions had not yet been taken, for example), defense counsel took up the question of causation for the first time since the initial case management conference nearly a year earlier. Plaintiff's counsel continued to stress that factual discovery had not been completed and that he did not possess all of the information required for his experts to express an opinion that Mrs. Mancini's exposure to the benzene in # 2 home heating oil caused her myelofibrosis and resulted in her death. Plaintiff noted the significant distinction between being required to produce a report stating that # 2 heating oil can produce myelofibrosis and a report stating that it did produce myelofibrosis in Mrs. Mancini. The trial court, nonetheless, directed defendants to file a motion by June 3, 2005, "regarding the sufficiency of Plaintiff's expert opinion and compliance with the Court's prior order."

***3** In response to that directive, defendants moved to dismiss plaintiff's complaint with prejudice for failure to supply an expert's report. The trial court concluded that the earlier report of Dr. Thompson was insufficient. It dismissed plaintiff's complaint without prejudice and provided that if plaintiff did not submit a revised expert's report within ten days, the complaint would be dismissed with prejudice. When plaintiff did not produce such a report within that ten-day deadline, the trial court entered an order dismissing the matter with prejudice.

On appeal, appellant contests not only the appropriateness of the order of dismissal in the context of this case but also challenges the use of what the parties refer to as "*Lone Pine* " orders as a case management device in a case such as this. The name comes from an unpublished trial court opinion, *Lore v. Lone Pine Corp.,* No. L-03306-85 (Law Div. Nov. 18, 1986), pursuant to which the trial court dismissed plaintiffs' case with prejudice for failure to provide sufficient information to demonstrate the existence of a prima facie case. Although we note the significant distinctions between this matter and the *Lone Pine* suit (plaintiffs in that case sought damages from more than four hundred defendants for personal injuries and property depreciation alleged to be due to the operation of a landfill known as Lone Pine; more than one hundred twenty attorneys were involved in that litigation), we do not find it necessary to address the question whether a "*Lone Pine* " order may ever be an appropriate case management technique in the far more limited context presented by this litigation.

We set forth above in detail the chronology of the court's management of this litigation to make clear that by the time the court entered its order dismissing this case with prejudice for failure to supply an expert's report, the parties had not even completed factual discovery. Indeed, the court had not set a final deadline for production of experts' reports and had only the hearsay statement of one defense counsel that he had been assured by his expert that no causal connection existed. In our judgment, that was clearly an insufficient basis for the court to place such a burden on plaintiff at this juncture of the litigation.

We have not reproduced in this opinion the extensive colloquy at several of the case management conferences as to who was responsible for the delays that had been experienced in completing the document production portion of discovery. We note merely that in our judgment, there is fault on both sides.

The order under review is reversed, and the matter is remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in A.2d, 2006 WL 3359429