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NO. 55055-1-1

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

EDWIN HERRING, for himself and as Personal Representative of the
Estate of ROGER HERRING,

Appellant,

v.

TODD SHIPYARDS CORPORATION,

Respondent.

APPELLANT'S BRIEF

WILLIAM RUTZICK, WSBA #11533
JANET L. RICE, WSBA #9386
Schroeter, Goldmark & Bender
810 Third Avenue, Ste. 500
Seattle, WA 98104
206/622-8000

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I. ASSIGNMENTS OF ERROR

1. The King County Superior Court in Edwin Herring for himself and as personal representative of the estate of Roger Herring v. Texaco, Inc. et al. (Cause No. 02-2-28063-3 SEA) erred in granting defendant Todd Shipyards Corporation's motion for summary judgment against plaintiff.

2. The trial court erred in concluding that there were not material disputed issues of fact in connection with Todd Shipyards Corporation's motion for summary judgment.

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the materials submitted by plaintiff in opposition to summary judgment create material disputed issues of fact whether, in connection with its bankruptcy proceeding, defendant Todd Shipyards Corporation made reasonably diligent efforts to locate all of its potential creditors, including Roger Herring?

2. Whether Roger Herring was a known claimant at the time of the confirmation of Todd's Plan of Reorganization?

3. If Roger Herring had a claim that could have been discharged in bankruptcy, whether it was discharged when due process protections were not afforded to him?

III. STATEMENT OF THE CASE

A. Facts of the Case

Roger Herring was an insulator and a member of the insulation workers union, Local 7, which was based in Seattle. CP 339. His career as an insulator began in 1959 when he joined the union and began working his way up in the trade. CP 348. As is customary, he was sent out to different construction sites to insulate pipes, particularly steam pipes, at shipyards and at land-based construction jobs. CP 339. One of the places where he was dispatched to insulate pipes was Todd Shipyards (hereafter “Todd”), where, during the 1960s and 1970s, he worked aboard ships. Id. During the time period he was at Todd in the mid-1960s, he was exposed to asbestos both from his own handling and manipulation of asbestos-containing insulation materials and that of other employees of Todd. CP 339, 348¹, and 582.

¹ 3. I worked for Owens-Coming Fiberglas in 1958 and again during the years 1962 to 1966. I recall doing insulation work on board ships at Todd and Lockheed shipyards in Seattle from

Insulation workers had worked at Todd yards in the Seattle area since at least the early 1940's and Todd was well aware of both the fact that they were exposed to asbestos and that asbestos was dangerous. This is first documented in an "Industrial Health Survey" conducted by the U.S. Maritime Commission in 1942 at one of the Todd Shipyards, called the "Sea-Tac" yard (short for Seattle Tacoma Shipbuilding Corporation), on Harbor Island. CP 404. In that survey, there was a section that discussed the asbestos exposure experienced by the insulation workers, as well as its consequences:

Asbestos Insulation:

time-to-time while employed with Owens-Corning Fiberglas during the 1960s. I recall that my brother, Ed Herring, entered the union as a helper in 1965 and sometimes worked with me as my helper at Todd and Lockheed shipyards. I left Owens-Corning Fiberglas in or around August of 1966.

4. In late 1966 I began working for the Brower Company, where I worked steadily until 1979. I recall doing insulation work on board ships at Todd and Lockheed shipyards in Seattle from time-to-time during 1960s through the early 1970s while employed with Brower.

5. I had never been notified of the Todd Shipyards bankruptcy by anyone from Todd, through the union or anyone else, until I heard about it through my attorneys today.

CP 348.

. . . On one ship, four men were applying the insulation, and no means of protection against the inhalation of microscopic asbestos fibres was provided for them.

The breathing of quantities of fine asbestos dust over a period of months or years is likely to produce the occupational disease, asbestosis. The affliction is somewhat similar in its effects to silicosis and is equally disabling.

Id. (emphasis added). See also CP 405, 418, 425, 439 (setting forth government surveys and requirements regarding asbestos and Todd's lack of compliance).

Todd's methods for handling asbestos did not improve significantly from then through the 1960s, when Mr. Herring worked there. Wayne Nettekoven, also an insulator who worked at Todd during the 1960s, has testified about "blow-downs" (which involved using air hoses) that were used throughout the 1960's to blow around the asbestos dust left by the insulation work being done on ships. CP 317. An expert in industrial hygiene, Dr. Nicholas Heyer, has testified that this practice would have resulted in enormously high concentrations of asbestos in the air. CP 376-378.

In 1986, Mr. Herring was diagnosed with pleural thickening caused by asbestos exposure. CP 113. In 1989, he filed a lawsuit against

the manufacturers of asbestos-containing products. CP 112. This lawsuit was “inactivated,” or put on hold, because he had no actual impairment as a result of his condition. It was re-activated in 1992, when Mr. Herring developed asbestosis, a scarring of his lung. That case was settled. In 2002, he was diagnosed with mesothelioma, an always fatal cancer caused by asbestos exposure. CP 633. A lawsuit based on his diagnosis of mesothelioma was filed on October 1, 2002 and amended on December 4, 2003. CP 7. The defendant Todd Shipyards Corporation was one of the defendants sued in the case. Roger Herring died on August 24, 2004. After his death, the complaint was amended to substitute Edwin Herring, Roger Herring’s brother, as the personal representative of the estate. CP 643. In the time between Roger Herring’s diagnosis with pleural plaques and his death from mesothelioma, Todd filed for bankruptcy and was allowed to re-organize, emerging from bankruptcy in 1989.

Todd has claimed, through a declaration from its in-house counsel, Michael Marsh, that, in connection with bankruptcy proceedings, it made “diligent efforts” to search for all of its potential creditors, including

“notifying all unions whose members had worked at Todd Shipyards.”²

However, three members of the insulators’ union local from that time, including both of the business agents who headed Local 7 during the period 1987-89, have submitted declarations stating that they were unaware of Todd’s bankruptcy until recently. As stated by Robert Larson, one of those business agents:

4. Prior to June 3, 1999, I had never been notified of the Todd Shipyards bankruptcy through the union or anyone else.

....

6. It is my belief that had the union been notified of the Todd Shipyards bankruptcy, it would have notified its members by publication and/or during union meetings, which to my knowledge, was never done.

CP 589, 590.

² 12. Todd made diligent efforts to identify and notify potential creditors of its bankruptcy. Such efforts included notifying individuals on its accounts receivable and accounts payable registers, notifying everyone who conducted business with Todd, and notifying all unions whose members had worked at Todd Shipyards.

CP 456 (emphasis added).

B. Procedure Relating To This Appeal.

On March 18, 2004, defendant Todd filed a motion for summary judgment arguing that the claims of Roger Herring against it should be dismissed. CP 21-44. Plaintiff opposed the motion. CP 593-611. On July 6, 2004, oral argument was heard in the case. CP 646. On July 4, 2004, the Court granted the motion for summary judgment. CP 646. The appeal in this case was filed on October 8, 2004.³

IV. ARGUMENT

A. Summary of Argument

Plaintiff's argument on this issue can be summarized as follows:

1. In a bankruptcy proceeding, termination of the claim of a claimant whose identity was reasonably ascertainable, without providing the claimant with actual notice of his or her right to file a claim in bankruptcy, violates due process.

2. Roger Herring (a) was a claimant whose identity was reasonably ascertainable by Todd in connection with its bankruptcy

³ The Court originally noted that the appeal was not filed within 30 days of the court's ruling. The plaintiff responded that at the time of the court's ruling the case was still proceeding against other defendants in the case. The appeal was filed within 30 days of the last settlement in the case.

proceeding, (b) but was not provided actual notice of his right to file a claim in connection with Todd's bankruptcy.

3. Termination of Mr. Herring's claim against Todd would therefore violate due process.

B. Termination Of Mr. Herring's Claims Violates Due Process.

The United States Supreme Court has held that termination of a claim of a claimant whose identity is reasonably ascertainable violates due process. In Tulsa Collection Serv. v. Pope, 485 U.S. 478, 491 (1988), the court held:

We therefore must remand the case for further proceedings to determine whether "reasonably diligent efforts," *Mennonite, supra*, at 798, n. 4, would have identified appellant and uncovered its claim. If appellant's identity was known or "reasonably ascertainable," then termination of appellant's claim without actual notice violated due process.

This principle applies in bankruptcy proceedings. New York v. New York, N.H and H.R. Co., 344 U.S. 293, 296 (1953) which also explains that:

Notice by publication is a poor and sometimes a hopeless substitute for actual service or notice. Its justification is difficult at best. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 94 L ed 865, 70 S. Ct. 652.

Defendant admitted as much in its motion to the trial court:

A “known” creditor is someone whose identity is either actually known or “reasonably ascertainable by the debtor.” Due process requires actual notice only to known creditors. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 476, 489-90, 108 S.Ct. 1340, 1347 (1988).

CP 30.

From the evidence presented at summary judgment and giving plaintiffs, as non-moving parties, the benefit of the inferences,⁴ a trier of fact could find that Mr. Herring’s identity was reasonably ascertainable by Todd. Notably, Todd would have ascertained Mr. Herring’s identity if Todd had actually done what it has said it had done to track down potential creditors. The record contains the sworn statement by Mr. Marsh that Todd contacted all of the unions whose members worked at Todd Shipyards. CP 456. Local 7 of the Insulators Union was one of the unions whose members worked at Todd. CP 350, 591. Mr. Marsh swore the same thing to a Texas federal court according to an opinion Todd submitted to the trial court in this case. The opinion states:

However, Todd has produced competent summary judgment evidence, in the form of an affidavit by counsel Michael March (“Marsh”), that it conducted a “diligent search to discover possible claimants Todd notified

⁴ Vasquez v. Hawthorne, 145 Wn.2d 103, 106, 33 P.2d 735 (2001).

individuals on its accounts receivable and accounts payable registers, notified everyone with whom Todd had done business and notified all unions whose members had worked at Todd.

CP 199 (emphasis added).

Had Todd actually notified all unions whose members had worked at Todd including Local 7, the record shows that Mr. Herring's local (Local No. 7) would have notified its members including Mr. Herring of Todd's bankruptcy. CP 589-90. A reasonable inference is that if Todd had asked the Local to provide it with the names and addresses of its members who had worked at Todd or if Todd had asked the Local to ask its members who had worked at Todd to notify Todd of their names and addresses, the Local would have done so. Todd thus would have had Mr. Herring's name and address. But Todd, contrary to Mr. Marsh's declaration, never notified the Local. See Declaration of Mr. Larson and other declarations. CP 587, 589, 591.⁵ A trier of fact could therefore

⁵ After receiving the Declaration of Mr. Larson and others in earlier litigation, Mr. Marsh appeared in this motion to back away from his earlier declaration. His most recent declaration states:

13. Todd made diligent efforts to identify and notify potential creditors of its bankruptcy. Such efforts included notifying individuals on its accounts receivable and accounts payable registers, notifying everyone who

conclude that reasonably diligent activities include those activities which the party whose actions are being evaluated purport to have done as part of its reasonably diligent activities. Todd's failure to do what it said it had done, e.g., notify Mr. Herring's union, is a sufficient basis for finding that Todd did not utilize reasonable diligence.

This is particularly true because by 1987, Todd was well aware of asbestos claims relating to shipyard workers. The U.S. Maritime Commission documents described in Plaintiff's Statement of Facts (CP 594-598) going back to the 1940s indicated that Todd was aware of asbestos-related problems in the shipyards. Another way that Todd was aware prior to its bankruptcy that an asbestos problem existed at shipyards during the 1940s and 1950s was through the workers' compensation claims it received and paid for its own employees who contracted various diseases as a result

conducted business with Todd, and notifying all unions representing Todd's employees. In addition, I recall that Todd Shipyards identified its subcontractors as entities to whom it would send actual notice.

CP 48. However, for summary judgment purposes, the trier of fact is entitled to rely on Mr. Marsh's earlier declaration and the declaration(s) from Local 7 insulators, and conclude that Todd planned to notify all unions, whose members worked at Todd (including Local 7), but failed to carry out its plan, even though the information was reasonably ascertainable.

of their exposure to asbestos while at Todd. See Black v. Todd Shipyards, 717 F.2d 1280 (9th Cir. 1983); Lustig v. United States D.O.L., et al., 881 F.2d 593 (9th Cir. 1989) (Todd pipefitter employee filed claim for Longshore and Harbor Workers' Compensation Act for lung cancer caused, in part, by asbestos exposure at Todd in 1984); McDonald v. Director of OWCP, U.S. D.O.L., 897 F.2d 1510 (9th Cir. 1990) (Todd employee filed for disability benefits for pulmonary disease due to asbestos in 1978); Chong v. Director of OWCP, 961 F.2d 1409 (Todd employee filed for disability benefits due, in part, to asbestosis in 1980). CP 598. Additionally, as of 1987, Todd was aware of at least some asbestos-related employee claims which had been filed in New Orleans. CP 49.

In Wallin v. CIR, 744 F.2d 674 (9th Cir. 1984), the Ninth Circuit found that the Commissioner of Internal Revenue failed to exercise “reasonable diligence” in notifying a taxpayer. That analysis supports plaintiff’s position here since Todd did not even follow its own procedures

as outlined by Mr. Marsh. See also Powell v. CIR, 958 F.2d 53, 55 (4th Cir. 1992).⁶

No notice of the Todd's bankruptcy was ever provided to Mr. Herring before the beginning of 2004; nor did Mr. Herring become aware of the bankruptcy through any other means. CP 348. This trial court concluded that "[p]laintiff claims were discharged in bankruptcy." CP 642. Under the record before the trial court, that conclusion was in error

⁶ The record in this case also includes the analysis by a Commissioner of this Court in an earlier analogous case that:

Publication notice was not per se sufficient but acceptable because under all the circumstances it was "not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the notice practicable". Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 317.

Here the trial judge has determined that due process would not be satisfied without notice to the Union, presumably on the basis that the Union would be more likely to know the names and addresses of its members who might have been exposed to asbestos and would thus be more likely to apprise them of the pendency of Todd's bankruptcy. Although this is a debatable conclusion it is not obviously or probably an erroneous one.

CP 282.

because such a discharge of a known creditor without actual notice violates due process. Tulsa, supra; New York, supra.⁷

V. CONCLUSION

For the foregoing reasons, the trial court's granting of summary judgment in favor of Todd Shipyards Corporation should be reversed, and this case remanded for trial.

DATED this 14th day of **February, 2005.**

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER



WILLIAM RUTZICK, WSBA #11533

JANET L. RICE, WSBA #9386

Counsel for Appellant

810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

⁷ Much of defendant's argument is based on the sufficiency of notice by publication. However, as defendant acknowledged to the trial court, publication notice is only acceptable if the creditor is not known or knowable through reasonable diligence. CP 30.