CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2004-4743 SECTION "15" DIVISION "B"

FRAZIER BRADSHAW, ET AL.

VERSUS

A. O. SMITH CORPORATION, ET AL

This Pleading Applies to D. Ratcliff

FILED: _____ _____
DEPUTY CLERK

REPLY BRIEF IN SUPPORT FOR MOTION FOR SUMMARY JUDGMENT ON BEHALF OF A.O. SMITH CORPORATION, CBS CORPORATION, THE ESAB GROUP, INC., EUTECTIC CORPORATION, HOBART BROTHERS COMPANY, THE LINCOLN ELECTRIC COMPANY, LINDE, INC., A DELAWARE CORPORATION, F/K/A THE BOC GROUP, INC., F/K/A AIRCO INC., PRAXAIR, INC., SANDVIK, INC., AND TDY INDUSTRIES, INC.

Plaintiff's opposition concedes that he filed this case five years ago based on nothing more than a "suspicion," and that to this day, he has no evidence that he suffers from an injury caused by overexposure to manganese. The summary judgment evidence presented by defendants – *i.e.*, Mr. Ratcliff's own medical records, in which his own treating neurologist ***rules out*** a diagnosis of manganese toxicity – confirms that Mr. Ratcliff has a condition that is caused by inflammation of the spinal cord and has nothing to do with manganese exposure. Faced with this insurmountable evidence, plaintiff resorts to an unsupported claim of prematurity. Specifically, Mr. Ratcliff asserts that defendants' motion is premature and that, because the Court imposed a brief stay ***on depositions*** (which is now over), he should be excused from producing any evidence in response to a proper motion for summary judgment. Mr. Ratcliff is wrong on both counts.

First, a bald assertion of prematurity is not a proper ground for avoiding summary judgment. Under Louisiana Code of Civil Procedure article 967, if a party opposing summary judgment cannot "set forth [through affidavits or other sworn evidence] specific facts showing there was a genuine issue for trial, [he] ***must*** submit affidavits in opposition stating reasons why [he] could not present by affidavit facts essential to justify [his] opposition." La. Code Civ. Pro. art. 967(C). "[A]rgument alone" is insufficient to withstand a motion for summary judgment. *Lacure v. Brookshire's Stores*, 38,627 at *5-6 (La. App. 2 Cir. 6/23/04), 877 So. 2d 264, 268.

Mr. Ratcliff has not presented an affidavit as required by article 967. Nor has he stated the "reasons why he could not present by affidavit facts essential to justify [his] opposition," *see* La. Code Civ. Pro. art. 967(C), because no such reason exists. This is not a situation where defendants' motion is based on facts within defendants' control or within the control of third parties. The facts surrounding Mr. Ratcliff's medical condition are exclusively within Mr. Ratcliff's control.

Mr. Ratcliff's claims of prematurity are, in any event, unavailing. Mr. Ratcliff filed this lawsuit five years ago based on a "suspicion" that he had manganism – a rare neurological condition caused by excessive overexposure to manganese. Under Louisiana Code of Civil Procedure article 863, he arguably had a duty to confirm his suspicion ***before he even filed this lawsuit***. *See* La. Code of Civ. Pro. art. 863. And he certainly cannot rest on this "suspicion" for five years without seeking and obtaining confirmation of his suspicion. Over the last five years, defendants propounded interrogatories and requests for production of documents, made numerous requests for medical records spanning thirty years, and reviewed those records. That discovery leads to one undisputed conclusion – Mr. Ratcliff cannot support his claim that he suffers from manganism, a dispositive issue in this case. Defendants should not be forced to incur additional time and expense in discovery of a case based on a "suspicion" that the plaintiff himself has never confirmed.

Plaintiff does not cite a single case in support of his argument – and with good reason. Louisiana court decisions, including those of the Louisiana Supreme Court, confirm that defendants are entitled to summary judgment now. For example, in *Simoneaux v. E.I. du Pont de Nemours & Co., Inc.*, 483 So. 2d 908, 913 (La. 1986), the Louisiana Supreme Court ***reversed*** the appellate court and reinstated a trial court's grant of summary judgment for a defendant, rejecting plaintiffs' request for additional time to conduct discovery. In so holding, the Court explained that "[t]here is no absolute right to delay action on a motion for summary judgment until discovery is completed." "Unless plaintiff shows a probable injustice a suit should not be delayed pending discovery." *Id.* at 912-913; La. Code Civ. Pro. art. 966(A) (summary judgment may be awarded "at any time").

As the Second Circuit held in *Berzas v. OXY USA, Inc.*, 29,835 (La. App. 2 Cir. 9/24/97), 699 So. 2d 1149, 1150, there is no injustice in granting summary judgment for a defendant where a plaintiff fails to come forward with evidence to confirm that he suffers from the injury he

claims.[1] As in this case, the *Berzas* plaintiffs claimed injury from exposure to chemicals – in that case chemicals emitted from the defendants' refinery. Defendants filed a motion for summary judgment, noting that "plaintiffs had undertaken no discovery in the more than five years since the suit has been pending" and had failed to produce any evidence, including any physician or medical expert testimony, that established "whether the plaintiffs have been exposed to dangerous chemicals for which OXY is responsible [and] whether the plaintiffs have sustained damage due to the presence of chemicals." *Id.* at *8-9, 699 So. 2d at 1154. Under these circumstances, the court held, plaintiffs had no grounds to complain that the motion was premature. *See id.* at *10-11; 699 So. 2d at 1155.

Likewise, there is no right to postpone summary judgment based on a plaintiff's representation that he intends to hire an expert. For example, in *Green v. State Farm General Insurance Co.*, 35,775 (La. App. 2 Cir. 4/23/02), 835 So. 2d 2, the court upheld summary judgment for a defendant alleged to have provided plaintiff a defective ladder, where the plaintiff opposed the motion by "simply indicating he would hire an expert [to inspect the ladder] and stated discovery was not complete and the matter did not have a trial date." *Id.* at *10-11; 835 So. 2d at 8. Noting that the case had been pending for three years, the appellate court stated that "[o]nce the defendants presented the properly supported motion for summary judgment showing no genuine of issue of material fact, the burden shifted to [plaintiff] to present evidence that genuine issues of material fact exist." *Id.* at *11, 8. It held that plaintiff had not met his burden by "simply [seeking] to delay the long pending matter by repeating again his intention to hire a scientific expert." *Id.*

The same is true here. Plaintiff has had five years to produce evidence supporting his claim of injury – as long as the plaintiffs in *Berzas* and longer than the plaintiffs in *Green, Kelley, Advance Products*, and *Monts* – but he has never done so. Moreover, like the plaintiffs in

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[1] *See also Kelley v. Hanover Ins. Co.*, 98-506 at *3 (La. App. 5 Cir. 11/25/98), 722 So. 2d 1133, 1136 (summary judgment not premature where plaintiff had "17 months from the time she filed suit until the summary judgment hearing to develop her case"); *Advance Products & Sys., Inc. v. Simon*, 06-209 at *5-6 (La. App. 3 Cir. 12/6/06), 944 So. 2d 788, 792 (upholding summary judgment for defendant when plaintiff had "more than a year to depose witnesses between the time it filed" its suit and the summary judgment hearing, which court considered "adequate time to conduct whatever discovery it needed"); *Monts v. Bd. of Supervisors of La. State Univ.*, 2001-1497 at *6-7 (La. App. 4 Cir. 2/27/02), 812 So. 2d 787, 790-91 (holding that trial court did not abuse its discretion in refusing to continue hearing on defendant's motion for summary judgment so that plaintiffs could conduct additional discovery, because the case "had been pending for almost four years when the motion for summary judgment was first heard, and extensive discovery had been undertaken").

Berzas, he is alleging injury relating to a toxic exposure, even though he has never been diagnosed with such an injury. To the contrary, when he recently asked his treating neurologist to evaluate whether his condition could have been caused by exposure to manganese, that neurologist expressly stated that his condition was not related to manganese exposure. (*See* Follow-Up Examination Notes, Dr. Janice Keating, Jan. 7, 2008, attached as Ex. "A".)

For all of these reasons, plaintiff's prematurity argument is unavailing, and defendants are entitled to summary judgment on his claims.

Second, plaintiff's argument that dismissal is inappropriate in light of the Court's limited stay order is also unavailing. By its express terms, the Court's stay applied only to the last eight months of the five-year-life of this case and was limited to a stay ***on depositions***. The Court specifically rejected the broader stay requested by plaintiffs. Certainly, the Court's stay did not prevent plaintiffs from obtaining a diagnosis to support Mr. Ratcliff's claims. Moreover, even if the stay had applied to the case generally – rather than just oral discovery – that would not explain why plaintiff has continued to prosecute a case for more than four years based merely on a suspicion of injury, without ever seeking to confirm whether he had a legitimate claim. Finally, as plaintiff himself concedes, the stay is now over. Nonetheless, Mr. Ratcliff ***still*** lacks a diagnosis. For this reason too, the motion should be granted.[2]

CONCLUSION

For the reasons set forth above and in defendants' initial brief, defendants request that the Court enter summary judgment in their favor on Mr. David Ratcliff's claims against them.

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[2] Notably, the MDL proceeding on which plaintiff relied in seeking a stay has entered an order designed to winnow claims like the one here – where plaintiffs have no medical support for their claims of injury. Under that order, each plaintiff alleging injury as a result of welding fume exposure must produce a "notice of diagnosis" certifying that a physician "has examined the Plaintiff and reached the conclusion that Plaintiff suffers from a neurological disorder caused by exposure to manganese." *See* Case Administration Order, *In re Welding Fume Prods. Liab. Litig.*, MDL Docket No. 1535, Mar. 31, 2006 at pp. 5-6, attached as Ex. "B". The claims of plaintiffs who do not comply with this requirement are subject to dismissal. *Id.*

Respectfully submitted,

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