IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3745
(Summary Calendar)

JOSEPH MARTIN STEPHENS,

Plaintiff-Appellant,

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY and UNIDENTIFIED PARTY,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-275-M)

(May 30, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Joseph Martin Stephens appeals the district court's grant of summary judgment in favor of Defendant-

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellee Southern Pacific Transportation Company (Southern) on a determination that Stephens' Federal Employer's Liability Act[1] (FELA) suit was filed after prescription had accrued, i.e., after the limitation period of the statute of limitations had expired. Finding in our de novo review that Stephens failed to present summary judgment evidence sufficient to demonstrate the existence of a genuine issue of material fact concerning the accrual of his cause of action and thus the running of prescription, we affirm.

I

FACTS AND PROCEEDINGS

Stephens filed suit on January 25, 1993, under the FELA, seeking damages against his employer for hearing loss resulting from an unprotected work hazard. Southern answered the complaint asserting, inter alia, that Stephens' suit was barred by the FELA's three-year statute of limitations. See 45 U.S.C. § 56 (1988). Southern subsequently conducted discovery and, after receiving answers to interrogatories, moved for summary judgment on the basis of prescription. Stephens responded to Southern's motion for summary judgment, arguing against the limitations bar. As Stephens supported his reply with only a statement of facts that he considered to be undisputed, however, the district court granted Southern's motion for summary judgment.

Stephens never provided evidence controverting Southern's prescription evidence until he filed his motion for reconsideration, which was denied. Stephens now appeals the

[1] 45 U.S.C. §§ 51, 53.

district court's grant of summary judgment.

Southern employed Stephens for approximately 28 years, during which time he experienced exposure to occupational noise. Stephens' first recorded treatment for hearing loss occurred on November 29, 1988, when he was examined by Dr. Thomas Irwin. After this examination, Dr. Irwin wrote a letter to Southern prescribing a hearing aid for Stephens' left ear and recommending use of hearing protection when he worked in areas with a high noise level. In this letter Dr. Irwin speculated as to the cause of Stephens' hearing loss, indicating that "[t]here is no objective method for determining the exact nature of the sudden reduction in hearing . . . though one would have to be suspicious of a cardiovascular origin in an individual who has already experienced significant cardiac disease." Whether this letter was even sent to Southern or Stephens is not reflected in the record and appears to be unknown. That Stephens did not receive treatment beyond the examination at that time, however, is known.

The next recorded incident relating to Stephens' condition arose on April 4, 1989, when he signed and filed an "Employe's [sic] Report of Accident" indicating hearing loss in his left ear due to "working on locomotives for a period of years. (27 years)." As a result of this report, Southern again sent Stephens to Dr. Irwin, this time in the summer of 1989. On this occasion Southern paid for a hearing aid fitted to Stephens' left ear. Stephens now alleges that Dr. Irwin did not inform himSQand that he was unaware until the spring of 1990SQthat his condition resulted from

occupational exposure to loud noise.

The district court granted summary judgment in favor of Southern, finding that it had carried its burden of proof that no fact issue existed concerning the time when Stephens discovered the relation between his work conditions and his injury. In its findings the district court relied on two items of documentary evidence submitted by Southern: the accident report dated 4/25/89, which was signed by Stephens, indicating that he knew his injury resulted from his work conditions; and Stephens' answer to interrogatory # 1, as follows:[2]

> During the summer of 1989 hearing loss became noticeable in the left ear and [Stephens] was sent by Southern Pacific to Dr. Thomas Irwin, who prescribed a hearing aid for the left ear which was paid for by Southern Pacific Transportation Company and applied to plaintiff's ear. Plaintiff was informed by Dr. Irwin that the hearing loss was due to being exposed to loud noises during his employment with Southern Pacific. (emphasis added).

The district court found that Stephens did not offer any evidence to rebut Southern's proof, and that he failed to offer any evidence to support his allegation that he first discovered the relation between his hearing loss and his work conditions during a telephone discussion with Dr. Irwin in the spring of 1990.

To support his motion for reconsideration, Stephens submitted an affidavit admitting that he signed the accident report, but denying that he completed it. Stephens averred that he was in a hospital intensive care unit on the date that the accident report

---

[2] Interrogatory # 1 requested detail of "all injuries, complaints, or symptoms resulting therefrom which you allege in your complaint."

reflected being signed, so that he could not have signed it or filled it out on that date. This affidavit failed to address Stephens' contention that he did not know the origin of his hearing condition until the spring of 1990. Additionally, Stephens neither disputed the facts contained in the accident report nor denied sending the report to Southern's claims representative. Stephens seems to assent to the facts contained in the accident report in his statement of uncontested material facts supporting his opposition to the motion for summary judgment, in which he states: "Stephens signed an employee accident report, dated April 30, 1989, in which he asserts that he sustained a hearing loss in his left ear, and partial hearing loss in his right ear."

In this appeal Stephens insists that his complaint was filed within the period specified in the statute of limitations. He also asserts that his answer to the interrogatory is poorly phrased, but that it does not actually indicate the time or date that Dr. Irwin informed him that his injury was work related.

II

ANALYSIS

We review a grant of summary judgment de novo. Fed. R. Civ. P. 56(c). Summary judgment is appropriate when, drawing all inferences in the light most favorable to the non-moving party, and considering all facts in the pleadings, depositions, admissions, answers to interrogatories, and affidavits, no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-

24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex, 477 U.S. at 324; Fed. R. Civ. P. 56(e). Once this burden is met by the movant, the burden shifts to the non-movant to set forth specific facts showing a material issue exists. Celotex, 477 U.S. at 324; Fed. R. Civ. P. 56(e). The party opposing a motion for summary judgment may not rely on mere allegations or denials set out in its pleadings, but must provide competent evidence of specific facts demonstrating that there is a genuine issue for trial. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992); Fed. R. Civ. P. 56(e).

No action shall be maintained under the FELA unless commenced within three years from the date the cause of action accrued. 45 U.S.C. § 56 (1988). A plaintiff's FELA cause of action accrues at the time the employee first knows, or reasonably should know, that his condition arose out of his employment. Bealer v. Missouri Pac. R.R. Co., 951 F.2d 38, 39 (5th Cir. 1991).

Southern established that no material issue of fact existed for trial by presenting (1) Stephens' answer to its interrogatory # 1, and (2) the accident report dated 4/25/89 and signed by Stephens. Both documents reflect that Stephens knew early in 1989 that his hearing loss resulted from work conditions. His claim therefore arose more than three years before his suit was filed, barring his actions as untimely under the statute of limitations.

As for the propriety of summary judgment under the foregoing

facts, Stephens failed to present any specific evidence rebutting Southern's summary judgment proof so as to present a material trial issue. He never offered any evidence supporting his allegation that he did not know and should not have known, until the spring of 1990, that his condition arose out of his employment. Stephens' answer to interrogatory # 1 does not appear ambiguous or poorly phrased. He asserts that he intended to answer the interrogatory to reflect that he first experienced hearing loss during the summer of 1989, but that he did not discover its relation to his work condition until the spring of 1990, when so informed by Dr. Irwin. Stephens asserts that in his answer he merely neglected to distinguish the sentences by clarifying the time frame within which each event occurred.

Nevertheless, Stephens' answer is clear and unambiguous when given Southern's interpretation, and a logical reading. Stephens never attempted to amend his answer to the subject interrogatory, or to depose Dr. Irwin concerning any information he related to Stephens about the origin of Stephens' condition. Additionally, Stephens never offered any affidavit evidence attesting to this error, relying only on the argument set out in his pleadings to refute Southern's summary judgment evidence. As such, Stephens' argument fails adequately to challenge Southern's summary judgment evidence. See Campbell, 979 F.2d at 1119.

Stephens now argues that he must be allowed to depose Dr. Irwin to clarify the answer to interrogatory # 1 and to present evidence supporting his opposition to the summary judgment. In his

motion for reconsideration, Stephens asserts only a generalized need for "depositions . . . to be taken on the issue of when the plaintiff learned that his hearing loss was related to employment" and for "discovery . . . of . . . when the plaintiff learned that his hearing loss was employment related."

Southern raised the prescription issue in its initial answer to Stephens' complaint. In a May 26, 1993, preliminary pretrial conference, the district court established a deadline of October 3, 1993, for depositions and discovery, unless it granted an extension. Southern filed its motion for summary judgment on August 10, 1993, several weeks before the discovery deadline.

To obtain a continuance of motion for summary judgment so as to obtain further discovery, a party must indicate to the court by some statement, preferably in writing, why additional time and discovery is needed and how it will create a genuine issue of material fact. Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993). Stephens never attempted to depose Dr. Irwin and never sought a continuance to do so before the discovery deadline or at any time prior to summary judgment; rather, he raises the need to depose Dr. Irwin for the first time on this appeal. All things considered, we conclude that the district court did not abuse its discretion in denying reconsideration based on only vague assertions of Stephens' need for further discovery.

Even if Stephens' next contentionsQthat he did not write the accident reportsQis taken as correct, it does not raise a material fact issue as to the report's contents. Stephens offered an

affidavit contesting the report's authenticity only in support of his motion for reconsideration. Southern submitted an affidavit from Charles Spell, a claims representative with Southern, stating that he received the accident report on May 3, 1989. This affidavit proves that the report was written and filed outside the limitations period. Stephens does not deny the facts contained in the report, or that he sent the report to Spell. He relies only on the argument that he did not actually write the contents of the report to rebut Southern's summary judgment evidence. Stephens' own statement of uncontested material facts implies that he was aware of the report's contents at the time he signed it.

To support his motion for reconsideration, Stephens also submitted a letter that Dr. Irwin allegedly sent to Southern after the initial examination. In this letter Dr. Irwin speculates that the origin of Stephens' condition could possibly be his pre-existing heart condition. This letter was addressed to Southern from Dr. Irwin; it is an unsworn document; and it was not authenticated by either its sender or its recipient as a business record. Therefore, the letter is hearsay and is inadmissible as summary judgment evidence. Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Evid. 801.

Stephens offered no other evidence that he received the information contained in the Irwin letter at the time it was written, or that Dr. Irwin informed him of this possible non-work related origin of his condition. Therefore, the letter report is

insufficient evidence that Stephens had reason to believe or actually believed that his hearing loss resulted from his heart condition.

As Stephens failed to present specific evidence to establish the existence of a material fact question as to when his cause of action arose, the district court's grant of summary judgment in favor of Southern was appropriate. For the foregoing reason, the judgment of the district court is

AFFIRMED.