

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-13-21

NAOMI B. McKINNON, Individually and)
as Personal Representative for the)
ESTATE OF CHARLES L. McKINNON,)
Plaintiff,)
v.)
AIR & LIQUID SYSTEMS CORP. et al.,)
Defendants)

DECISION AND ORDER
(Flowserve US Inc.)

Defendant Flowserve US Inc. moves, pursuant to M.R. Civ. P. 12(b)(6), to dismiss the three-count complaint filed by Plaintiff Naomi B. McKinnon, individually and on behalf of the Estate of Charles L. McKinnon, on ground that the action is barred by the statute of limitations. Plaintiff has not filed an opposition to the motion.

Plaintiff filed her Complaint on April 12, 2013, in Cumberland County Superior Court, alleging three causes of action against all named Defendants: negligence (Count I); strict products liability pursuant to 14 M.R.S. § 221 (2012) (Count II); and wrongful death pursuant to Maine’s Wrongful Death Statute, 18-A M.R.S. § 2-804 (2012), (Count III). The Complaint asserts that while working in various positions for various employers from the late 1940s until 1993, Charles L. McKinnon (the Decedent) was exposed to asbestos and contracted lung cancer and asbestos-related diseases. (Compl. § II, ¶¶ 2, 5-6, 15.) Although the Complaint identifies Mr. McKinnon as “the Decedent” and is brought in the name of his estate, the Complaint does not identify the date of his death or the discovery date of any asbestos-related diseases. *See*

Bernier v. Raymark Indus. Inc., 516 A.2d 534, 542-43 (Me. 1986) (declaring that the actionable event in asbestos exposure cases is the date of the manifestation of asbestos related disease, not the date of exposure). The matter was approved for transfer to the Business and Consumer Court on May 24, 2013.

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) “tests the legal sufficiency of the complaint and, on such a challenge, the material allegations of the complaint must be taken as admitted.” *Shaw v. S. Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quotation marks omitted). When reviewing a motion to dismiss, this court examines “the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* Although pure motion to dismiss practice is generally limited to a consideration of the pleadings, “official public documents, documents that are central to the plaintiff’s claim, and documents referred to in the complaint may be properly considered on a motion to dismiss . . . when the authenticity of such documents is not challenged.” *Moody v. State Liquor Comm’n*, 2004 ME 20, ¶ 20, 843 A.2d 43.

Defendant asserts that the date of the Decedent’s death is April 13, 2007. The record in this case supports that Mr. McKinnon died on April 13, 2007, from metastatic lung cancer, the onset of which was 10 months before his death.¹ Defendant asserts, and the Court agrees, that the date of death and the onset of Mr. McKinnon’s disease forecloses this action regardless of whether the court applies the general six-year statute of limitations, *see* 14 M.R.S. § 752 (2012) (“All civil actions shall be commenced within 6 years after the cause of action accrues and not

¹ Defendants Ingersoll-Rand Company and The Fairbanks Company attached a certified copy of Mr. McKinnon’s North Carolina death certificate to their motion to dismiss. Because the death certificate confirms the date of death as asserted by Flowserve US Inc., and because Plaintiff has not opposed or countered that date of death, the Court considers the death certificate in the present motion as an official public record. *See Moody v. State Liquor Comm’n*, 2004 ME 20, ¶ 20, 843 A.2d 43.

afterwards”), or the two-year statute of limitations of the Wrongful Death Statute, *see* 18-A M.R.S. § 2-804(b) (“An action under this section must be commenced within 2 years after the decedent’s death.”).

Accordingly, because there is no set of facts that would entitle Plaintiff to relief, *see Shaw*, 683 A.2d at 503, and in light of the fact that Plaintiff has not filed any opposition to the motion, the Court GRANTS Defendant’s Motion to Dismiss all counts of Plaintiff’s Complaint. The Court, therefore, dismisses Plaintiff’s Complaint against Defendant.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 7/12/13



Justice, Maine Business & Consumer Court

Entered on the Docket: 7/15/13
Copies sent via Mail Electronically