IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LADERRICK SPURLOCK, as the sole Heir-at-Law of JOE MARTIN **PLAINTIFF**

VS. **CIVIL ACTION NO. 3:12-cv-515-WHB-RHW**

CENTERPOINT ENERGY RESOURCES CORP. d/b/a CENTERPOINT ENERGY MISSISSIPPI GAS and JOHN DOES 1-5 **DEFENDANTS**[1]

OPINION AND ORDER

This cause is before the Court on two Motions of Defendant. Having considered the pleadings, the attachments thereto, as well as supporting and opposing authorities, the Court finds:

The Motion of Defendant for Summary Judgment is well taken and should be granted because Plaintiff has failed to show that there exists a genuine issue of material fact with regard to whether Defendant breached any duties it owed under Mississippi law.

The Motion of Defendant to Exclude the Expert Testimony of A.K. Rosenhan should be dismissed as moot.

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[1] The lawsuit was originally filed against CenterPoint Energy Field Services, Inc., and CenterPoint Energy Gas Services, Inc. By Order, CenterPoint Energy Services Corp. d/b/a CenterPoint Energy Mississippi Gas was substituted for these erroneously named defendants. See Order [Docket No. 5].

I. Factual Background and Procedural History

CenterPoint Energy Services Corp. d/b/a CenterPoint Energy Mississippi Gas ("CenterPoint") had supplied natural gas to the residence of Joe Martin ("Martin"), which was located at 1121 28th Street, McComb, Mississippi. In early 2009, Martin, Laderrick Spurlock ("Spurlock"), and several of Martin's neighbors allegedly smelled a "strong scent of gas" around Martin's home. According to the Complaint, Martin notified CenterPoint of the natural gas leak, and requested that it be repaired. CenterPoint allegedly did not repair the leak. On July 29, 2009, Martin was killed when his home ignited and allegedly exploded, because of the natural gas leak.

On July 23, 2012, Spurlock, as Martin's heir-at-law, filed a Complaint in this Court seeking to recover damages for Martin's alleged wrongful death. Through his Complaint, Spurlock seeks both compensatory and punitive damages on claims that CenterPoint allegedly (1) failed to properly maintain the natural gas delivery equipment to Martin's home, although it knew that the equipment was in a dangerous condition, and (2) failed to warn of the dangerous condition of the gas delivery equipment See Compl. at ¶ 9(a) and (b). Martin also alleges claims of negligence and respondeat superior.

CenterPoint has now moved for summary judgment on Martin's claims. In support of its claim for summary judgment, CenterPoint argues there is no evidence that it breached any duties owed to

Martin under Mississippi law because it did not have notice of the alleged natural gas leak. CenterPoint also argues there is no evidence that a natural gas leak proximately caused the fire that resulted in Martin's death. As to this argument, CenterPoint has moved to strike the opinions of Spurlock's expert witness, A.K. Rosenhan ("Rosenhan"), on the grounds that those opinions do not satisfy the rigors of Daubert.

II. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also, Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. Id. at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, ... since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

III. Legal Analysis

In his Complaint, Spurlock claims that CenterPoint was negligent in failing to properly maintain its natural gas delivery equipment and/or to warn of the dangerous condition of that equipment. See Compl. at ¶ 9(a) and (b). To prevail on his negligence claims, Spurlock must prove (1) the existence of a duty or standard of care, (2) CenterPoint breached the duty or standard, (3) the breach proximately caused his complained of injuries, and (4) he was indeed injured. See e.g. Huynh v. Phillips, 95 So.3d 1259, 1262 (Miss. 2012).

In moving for summary judgment, CenterPoint first argues there is no evidence that a natural gas leak was present in its lines, i.e. those preceding Martin's gas meter. In support of this claim, CenterPoint cites to expert witness Rosenhan's deposition during which he testified:

> Q. And you don't have any evidence that there was any kind of leak in the gas piping leading up to or at the meter?
>
> A. No, sir. And as previously indicated, that would not have put gas in the house.
>
> Q. So your hunch is if ... there was a leak, the leak of gas was somewhere inside the house or the utility room?
>
> A. Well, not a hunch, it's just a conclusion because I know of no other mechanism for an amount of gas to enter into a confined space in that location...
>
> Q. So it's your opinion to a reasonable degree of scientific certainty that the gas leak that caused the explosion was inside the utility room or inside the house?

> A. That would be my conclusion, yes, sir, based on the facts I have.

See Mot. for Sum. J. [Docket No. 53], Ex. 1 (Rosenhan Dep.), 133-34 (alterations in original). CenterPoint has also submitted a declaration from one of its service technicians, Kenneth Brent ("Brent"), who performed tests on the gas lines preceding Martin's gas meter immediately after the fire was brought under control. See id., Ex. 8 (Brent Dec.), ¶¶ 3-4. Brent declares that the bar hole testing he performed showed "gas was not leaking on CenterPoint's side of the gas meter" at the time of the fire at Martin's home. Id., Ex. 8 at ¶ 5. Spurlock does not dispute this evidence, and has not submitted any contrary evidence showing that the alleged natural gas leak existed in the gas lines preceding Martin's gas meter. Accordingly, the Court finds Spurlock has not shown that there exists a genuine issue of material fact as to this issue.

As regards natural gas leaks that occur on a consumer's side of the gas meter, i.e. inside the premises, the parties agree as to the following standard of care:

> When a gas company has notice that gas is escaping in the premises of a patron, the company must either shut off the gas or remedy the defect, and one or the other must be done as quickly as practicably possible. Natural gas is an extraordinarily dangerous element, and those who are authorized to furnish it for use among the public are charged with a degree of care and skill commensurate with that danger; and in such cases as in all cases of known danger, the sacredness of life and limb is the declared basis upon which the law imposes a duty of care.

Mississippi Valley Gas Co. v. Goudelock, 79 So. 2d 718, 722 (Miss.

1955)(citing Mississippi Power & Light Co. v. McCormick, 166 So. 534, 535 (Miss. 1936)).

CenterPoint has moved for summary judgment arguing there is no evidence that it had received notice of a natural gas leak at the Martin residence prior to the date of the subject fire. See Mem. in Supp. of Mot. for Summ. J. [Docket No. 54], 7 ("Plaintiff has no admissible evidence that CenterPoint ever received notice of the alleged leak and had a reasonable opportunity to repair it."). In support of this argument, CenterPoint submitted a Declaration from Vanessa Williams ("Williams"), its Call Center Manager, who declares:

> All calls received reporting the smell of natural gas are documented by CenterPoint. When such a call is received the call center promptly inputs the data during the call and an electronic order is created and immediately sent to dispatch, which in turn creates a work order that is sent to the service technician on duty at the time for the location at which the smell was reported.
>
> I have performed a diligent search of CenterPoint records to ascertain whether a call was ever received at CenterPoint reporting the smell of natural gas at 1121 28th Street, McComb, Mississippi, prior to the July 29, 2009 fire that is the subject of the lawsuit in the above-captioned case. CenterPoint has no records documenting a call was ever received reporting the smell of natural gas at 1121 28th Street, McComb, Mississipp, prior to the July 29, 2009 fire.
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> The only service orders that exist for 1121 28th Street, McComb, Mississippi, prior to the July 29, 2009 fire are for the disconnection and reconnection of gas service to Mr. Martin's residence for his failure to pay his gas bill.

Mot. for Sum. J., Ex. 6 (Williams Decl.), at ¶¶ 3-6.

In response, Spurlock has submitted several exhibits that he claims create a genuine issue of material fact on the issue of whether CenterPoint had notice of the natural gas leak at Martin's home. First, Spurlock cites his own deposition[2] in which he testified:

> Q. Either time [you smelled natural gas] did you call the gas company or notify anybody about the gas leak other than the first time talking to your dad about it?
>
> A. No, my dad called.
>
> Q. That was after the first time or the second?
>
> A. He told me he called one time, but I think it was before the second time I smelled it, but I know he called after the second time I smelled it.
>
> Q. Did you ever witness him calling someone to notify those people, whoever it was, about the smell of gas?
>
> A. No, sir.
>
> Q. You personally never saw your dad call the gas company, CenterPoint, to report the smell of gas, is that what I'm understanding correctly?

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[2] In his Memorandum of Authorities, Spurlock argues he "testified that his father called CenterPoint several times to report that gas was leaking in the home." See Mem. in Supp. of Resp. [Docket No. 57], 7. Spurlock, however, has not cited to any portion of his deposition testimony, and the Court is not required to find his testimony. See Ragas v. Tennessee Gas Pileline Co., 136 F.3d 455, 458 (5th Cir. 1998)(explaining that "the party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim" and that "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.")(citations omitted). Accordingly, the Court discusses Spurlock's deposition testimony that was cited by CenterPoint. See Mem. in Supp. of Mot. at 10.

A. Yes, sir.

Q. He told you he had done it?

A. Yeah.

See Mot. [Docket No. 53] Ex. 9, 59-60 (alterations in original). As to this testimony, CenterPoint argues it cannot be considered when deciding its Motion for Summary Judgment because it constitutes inadmissible hearsay. The Court agrees.

As regards motions for summary judgment, the United States Court of Appeals for the Fifth Circuit has held:

> Rule 56(e) requires the adversary to set forth facts that would be admissible in evidence at trial. Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless.

Duplantis v. Shell Offshore, Inc., 948 F.2d 187 (5th Cir. 1991)(quoting Geiserman v. MacDonald, 893 F.2d 787, 793 (5th Cir. 1990)). The Federal Rules of Evidence define "hearsay" as "a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). Here, Spurlock's testimony regarding the conversations Martin allegedly had with CenterPoint is a textbook example of hearsay as he is attempting to use his testimony to introduce a statement made by an out-of-court declarant (i.e. Martin) to prove the truth of the matter asserted in that statement (i.e. that

Martin notified CenterPoint of the alleged natural gas leak). The Court finds that because Spurlock is trying to admit evidence of his own recollection of what Martin told him, and is further trying to use his testimony to show that Martin placed CenterPoint on notice of the alleged natural gas leak, his testimony constitutes hearsay. See e.g. Bellard v. Gautreaux, 675 F.3d 454, 461 (5th Cir. 2012)(finding the plaintiff's attempt "to admit evidence of his own recollection of what someone else said in a conversation with him" was inadmissible hearsay, and that the district court had not erred by refusing to consider the evidence when ruling on a motion for summary judgment). The Court additionally finds that none of the exceptions to hearsay enumerated in Rule 803 of the Federal Rules of Evidence are applicable to Spurlock's testimony regarding Martin's purported telephone calls to CenterPoint. For these reasons, the Court finds it cannot consider Spurlock's testimony regarding Martin's purported telephone calls to CenterPoint when ruling on the Motion for Summary Judgment.

Next, Spurlock cites to three affidavits from Martin's neighbors Tareen Belton ("Belton"), Queenie Ward ("Ward), and Patricia Martin, each of who avers: (1) she heard an explosion on the night of July 29, 2009; (2) thereafter, she saw Martin's home engulfed in flames; and (3) she had smelled natural gas in the area of Martin's home approximately two weeks before the explosion. See Resp. [Docket No. 59], Ex. 9 (Belton Aff.), ¶¶ 3-4; Id. Ex. 10

(Ward Aff.), ¶¶ 3-5; Id. Ex. 11 (Patricia Martin Aff.), ¶¶ 3-5. CenterPoint argues that the Court cannot considered these affidavits when deciding the Motion for Summary Judgment because there is no indication they are based on the affiant's personal knowledge as required under Rule 56(c)(4) of the Federal Rules of Civil Procedure.[3] While it is true that the subject affidavits do not expressly provide that they are based on personal knowledge and/or that the affiants are competent to testify, the Fifth Circuit has held that affidavits need not contain these "magic words." See Direct TV, Inc. v. Budden, 420 F.3d 521, 530 (5th Cir. 2005). Thus, an affiant need not specifically aver that she has personal knowledge and/or is competent to testify if it appears to the court that the affiant has personal knowledge of the relevant subject matter and is competent to testify thereto. Id. at (citing, *inter alia*, in Barthelemy v. Air Line Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1990) for the proposition that, in the summary judgment context, district courts may "rely on affidavits where the affiants' personal knowledge and competence to testify are reasonably inferred from their positions and the nature of their participation in the matters to which they swore.").

[3] Rule 56(c)(4) provides: "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

Here, Belton's, Ward's and Patricia Martin's affidavits discuss events they personally heard (an explosion), saw (Martin's home engulfed in flames following the explosion), and/or smelled (the odor of natural gas in the area of Martin's home). The Court finds that because Belton's, Ward's and Patricia Martin's averments are based on their own auditory, visual, and olfactory perceptions, it logically follows that they have personal knowledge with respect to the subject matter of those statements. Additionally, Belton, Ward, and Patricia Martin each aver that the statements in her affidavit are "true and correct", and there is no indication that any of them would be incompetent to testify as to the matters contained in their respective affidavits. Accordingly, the Court finds Belton's, Ward's, and Patricia Martin's affidavits may be considered despite the absence of an express recital regarding personal knowledge and/or competency.

Although the subject affidavits may be considered when deciding the Motion for Summary Judgment, the Court finds they do not create a genuine issue of material fact with regard to whether CenterPoint had received notice of the alleged natural gas leak in Martin's home. As to this issue, while Belton, Ward, and Patricia Martin each averred that they smelled natural gas in the area of Martin's home weeks before the fire occurred, there are no averments that any of them reported the smell to CenterPoint. As such, the Court finds the subject affidavits do not establish a

genuine issue of material fact with regard to whether CenterPoint "ha[d] notice that gas [was] escaping in [Martin's] premises" as required to give rise to the duty to "either shut off the gas or remedy the defect." See Goudelock, 79 So. 2d at 722; McCormick, 166 So. at 535.

In her affidavit, Patricia Martin also avers that CenterPoint had repaired a gas leak in her kitchen approximately two weeks before the Martin fire. See Resp., Ex. 11, ¶ 4. According to Patricia Martin, her niece, Tina Cockerham ("Cockerham"), told the repairman "that you could smell gas at Mr. Joe Martin's home, as well." Id., Ex. 11 at ¶ 4. The Court finds this averment cannot be considered when deciding the Motion for Summary Judgment because it constitutes hearsay. Specifically, Spurlock is attempting to use Patricia Martin's averments to introduce a statement made by an out-of-court declarant (i.e. Cockerham) to prove the truth of the matter asserted in that statement (i.e. that Cockerham notified the CenterPoint repairman of the alleged natural gas leak at Martin's home). The Court finds that because Spurlock is trying to admit evidence of Patricia Martin's recollection of what Cockerham said to the CenterPoint repairman, and is further trying to use Patricia Martin's averments to show that Cockerham placed CenterPoint on notice of the alleged natural gas leak, Patricia Martin's averments regarding Cockerham's statements constitutes hearsay. See e.g. Bellard v. Gautreaux, 675 F.3d at 461. For these reasons, the

Court finds it cannot consider Patricia Martin's averments regarding the statements Cockerham purportedly made to the CenterPoint repairman when ruling on the Motion for Summary Judgment.

In response to the Motion for Summary Judgment, Spurlock has also submitted two "Gas C&M Orders" evidencing that CenterPoint had (1) repaired a gas leak due to an unlit stove pilot light at Patricia Martin's home at 948 13th Street, on July 14, 2009, and (2) repaired a gas leak due to a disconnected range connector at Ward's home at 950 13th Street, on July 22, 2009. See Resp., Ex. 7 (Martin Gas C&M Order); id., Ex. 8 (Ward Gas C&M Order). According to Spurlock, the Gas C&M Orders evidence, that "CenterPoint, at the very least, drove by Joe Martin's home twice days before the explosion." See Mem. is Supp. of Resp., 7. Spurlock, however, has not submitted any evidence to show the route(s) that were actually taken the CenterPoint repairmen, or to show that the repairmen actually drove past Martin's house. Nor is there any evidence that a repairman, by merely driving by Martin's house, would have detected the odor of natural gas that was leaking inside of the house and, therefore, placed him on notice of a leak. As such, Spurlock's claim that employees of CenterPoint twice drove by Martin's home days before the explosion is unsubstantiated and, therefore, cannot be considered when deciding the Motion for Summary Judgment. See Ragas, 136 F.3d at 458 ("[U]nsubstantiated assertions are not competent summary judgment evidence.").

Finally, in response to the Motion for Summary Judgment, Spurlock argues that CenterPoint, in accordance with its Operations and Maintenance Manual, had a duty to go to Martin's house in conjunction with the repairs that were made at the homes of Patricia Martin and Ward.[4] The Operations and Maintenance Manual provides: "All Service and Construction personnel, while in the process of locating a hazardous 'outside leak', should check all buildings in the vicinity to determine if a hazard exists within the buildings." See Rebuttal [Docket No. 58], Ex. 5 (Operations Manual). The evidence presented by Spurlock with regard to the repairs at the homes of Ward and Patricia Martin, however, shows that both of the complained of leaks were inside their kitchens. See Resp., Ex. 7 (Gas C&M Order showing that CenterPoint had repaired a gas leak due to an unlit stove pilot light at Patricia Martin's home); Id. Ex. 8 (Gas C&M Order showing that CenterPoint had repaired a gas leak due a disconnected range connector at Ward's home). Spurlock has not presented any evidence to show that there was a near-by outside natural gas leak in the vicinity of Martin's home such as would give rise to the referenced inspection requirements of the Operations and Maintenance Manual. Accordingly, the Court finds that Spurlock has failed to show that

[4] Again, Spurlock does not cite to any specific provision in the Operations and Maintenance Manual, see Mem. in Supp. of Resp., 7-8, and the Court is not required to find the provisions to which he refers. Accordingly, the Court discusses the provision that was cited by CenterPoint. See Rebuttal [Docket No. 59], 9.

there exists a genuine issue of material fact with regard to whether an outside natural gas leak existed as is necessary to give rise to the inspection requirements in the Operations and Maintenance Manual. As such, the Court additionally finds that Spurlock has failed to show that there exists a genuine issue of material fact with regard to whether CenterPoint was negligent in failing to inspect Martin's home following the repairs that were made at Ward' and Patricia Martin's residences.

In sum, the Court finds Spurlock has failed to show that there exists a genuine issue of material fact with regard to whether CenterPoint had received notice of a natural gas leak in Martin's home as required by Mississippi law to give rise to the duty to "either shut off the gas or remedy the defect." See Goudelock, 79 So. 2d at 722; McCormick, 166 So. at 535. As such, the Court finds Spurlock has failed to show that there exists a genuine issue of material fact with regard to whether CenterPoint breached any duty it owned to Martin and, therefore, that the Motion of CenterPoint for Summary Judgment should be granted. As the Court need not consider whether a genuine issue of material fact exists with respect to the issue of proximate causation, it will dismiss the Daubert challenge as to Rosenhan's expert opinions on that issue as moot.

IV. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that the Motion of Defendant for Summary Judgment [Docket No. 53] is hereby granted.

IT IS FURTHER ORDERED that the Motion of Defendant to Exclude the Expert Testimony of A.K. Rosenhan [Docket No. 51] is hereby dismissed as moot.

A Final Judgment dismissing this case with prejudice shall be entered this day.

SO ORDERED this the 4th day of September, 2013.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE