

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY D. BURRELL,

: CONSOLIDATED UNDER
: MDL 875
:

Plaintiff,

FILED

: Transferred from the Northern
: District of Mississippi
: (Case No. 03-00391)

v.

JUN - 9 2011:

MINNESOTA MINING
MANUFACTURING
CO., ET AL.,

MICHAEL B. KONZ, Clerk
By _____ Dep. Clerk

:
: E.D. PA CIVIL ACTION NO.
: 2:08-87293
:

Defendants.

O R D E R

AND NOW, this **9th** day of **June, 2011**, it is hereby **ORDERED** that the Motions for Summary Judgment of Defendants General Electric Co. (doc. no. 174), Ford Motor Co. (doc. no. 212), Foster Wheeler LLC (doc. nos. 178 & 189), FMC Corp. (doc. nos. 182 & 215), Sterling Fluid Systems (USA), LLC (doc. nos. 185 & 213), and Crane Co. (doc. no. 177) are **GRANTED**.¹

¹ Plaintiff Harry Burrell filed his original complaint on August 30, 2002 in the Circuit Court of Washington County in Mississippi alleging that Plaintiff developed asbestosis as a result of exposure to Defendants' asbestos-containing products. On November 29, 2003, this case was removed to the United States District Court for the Northern District of Mississippi. This case was subsequently transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff served in the National Guard as a wheeled vehicle maintenance person from approximately 1970 until 1994. Plaintiff worked at a Douglas & Lomason plant in Mississippi from 1973 until 1979 manufacturing aluminum trim for automobiles. Plaintiff worked at various power plants owned or operated by Entergy through Mississippi from approximately 1979 until 2009.

Plaintiff has presented the expert reports of Dr. Haber and Mr. Garza in support of his opposition to Defendant's Motion for Summary Judgment. Dr. Haber diagnosed Mr. Burrell with mild pulmonary asbestosis.

Presently before the Court are the Motions for Summary Judgment of Defendants General Electric Co., Ford Motor Co., Foster Wheeler LLC, FMC Corp., Sterling Fluid Systems (USA), LLC, and Crane Co. Defendants seek summary judgment on the grounds of product identification, the bare metal defense, and Mississippi's statute of repose. Defendants also assert that they are entitled to summary judgment because the expert reports of Dr. Haber and Mr. Garza were signed, but were not accompanied by affidavits or declarations. The issue in this case is whether the expert reports are competent to be considered as evidence in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment since the expert reports were merely signed, but were not accompanied by affidavits or declarations as required by Federal Rule of Civil Procedure 56(c)(1)(A).

I. LEGAL STANDARD

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific

facts showing that there is a genuine issue for trial.”
Anderson, 477 U.S. at 250.

B. The Applicable Law

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. As to procedural issues, the MDL transferee court applies the federal law of the circuit where it sits, which in this case is the law of the United States Court of Appeals for the Third Circuit. In re Asbestos Prods. Liab. Litig. (No. VI), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (citing In re Diet Drugs Liab. Litig., 294 F. Supp. 2d 667, 672 (E.D. Pa. 2003); In re Korean Air Lines Disaster, 829 F.2d 1171, 1178 (D.C. Cir. 1987)).

C. Admission of Expert Reports

Federal Rule of Civil Procedure 56(c)(1)(A) provides that a party asserting that a fact is genuinely disputed must support that assertion with an affidavit or declaration. The United States Court of Appeals for the Third Circuit has found that an unsworn expert report “is not competent to be considered on a motion for summary judgment.” Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n. 17 (1980); see also; Bock v. CVS Pharmacy, Inc., No. 07-CV-412, 2008 WL 3834266, at *3 (E.D. Pa. 2008) (refusing to consider an expert report when no sworn affidavit was provided with the report); Jackson v. Egyptian Navigation Co., 222 F. Supp. 2d 700, 709 (E.D. Pa. 2002) (finding that an unsworn expert report cannot be considered as evidence for a motion for summary judgment). Given that the expert reports submitted in this case disputing facts were merely signed and not supported by affidavits or declarations, the reports are “not competent to be considered” in support of Plaintiff’s Opposition to Defendants’ Motions for Summary Judgment. Id.

This Court recognizes that Federal Rule of Civil Procedure 56 was amended effective December of 2010 to provide that a declaration, that is an unsworn statement subscribed to under penalty of perjury, can substitute for an affidavit. See Fed. R. Civ. P. 56 advisory committee’s note; see also Ray v. Pinnacle Health Hosps., Inc., Nos. 09-4508, 10-3571, 2010 WL 4704455, at *8 n. 8 (3d Cir. Nov. 22, 2010) (noting that “unsworn declarations may substitute for sworn affidavits where they are made under penalty of perjury and otherwise comply with the

requirements of 28 U.S.C § 1746"). Because the expert reports submitted by Plaintiff in this case were not sworn to under penalty of perjury, see 28 U.S.C. § 1746, the amendment to Federal Rule of Civil Procedure 56 does not save Plaintiff's expert reports.

The Court further notes that on May 31, 2011, after oral argument, Plaintiff submitted affidavits to accompany the expert reports. (Doc. nos. 240-1 & 240-2.) Plaintiff did not seek leave of the Court to submit the affidavits late or to amend the scheduling order nunc pro tunc under Federal Rule of Civil Procedure 16. Moreover, such a motion, even if made, would have been denied for failure to demonstrate good cause as required by Federal Rule of Civil Procedure 16(b)(4). See Race Tires America, Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 84 (3d Cir. 2010) (noting that modification of a date set in the district court's scheduling order was governed by the good cause standard of Federal Rule of Civil Procedure 16(b)(4) and that the moving party had the burden of demonstrating due diligence in seeking modification of the scheduling order). Plaintiff received numerous extensions in this case and has failed to offer any justification for the failure to comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A). Accordingly, since Plaintiff did not comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A), the expert reports of Dr. Haber and Mr. Garza are "not competent" to be considered in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

Without the expert reports of Dr. Haber and Mr. Garza, Plaintiff has no evidence that Mr. Burrell was diagnosed with any asbestos-related disease. Accordingly, as there is no evidence of any injury, Defendant's Motions for Summary Judgment are granted.

E.D. PA NO. 2:08-cv-87293

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Eduardo C. Robreno, J.", written over a horizontal line.

EDUARDO C. ROBRENO, J.