

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

April 27, 2010

RE: Constantinides v. Alfa Laval, Inc., et al
CA No. 09-70613

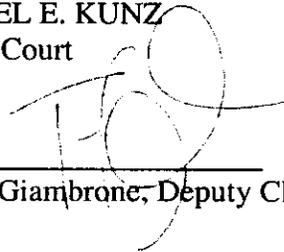
NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Hey, United States Magistrate Judge Rueter, and United States Magistrate Judge Strawbridge on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

MICHAEL E. KUNZ
Clerk of Court

By: 
Thomas Giambrone, Deputy Clerk

cc: Judge Hey
Judge Rueter
Judge Strawbridge
Judge Robreno
E-mailed to counsel
mailed to counsel

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

IN RE: ASBESTOS PRODUCTS :
LIABILITY LITIGATION (No. VI) : MDL DOCKET NO. 875

This document relates to:

PETER CONSTANTINIDES and ELPIS : EDPA No. 09-70613
CONSTANTINIDES, his wife :
v. : *Transferred from:*
 : *U.S. District Court for the*
 : *So. Distr. of Florida, Miami Div.,*
 : *Civ. Action No. 08-22522*
ALFA LAVAL, INC., et al. :

REPORT AND RECOMMENDATION
ON DEFENDANT ELLIOTT TURBOMACHINERY, INC.’S
MOTION FOR SUMMARY JUDGMENT

BEFORE:
THOMAS J. RUETER, CHIEF UNITED STATES MAGISTRATE JUDGE
DAVID R. STRAWBRIDGE, UNITED STATES MAGISTRATE JUDGE
ELIZABETH T. HEY, UNITED STATES MAGISTRATE JUDGE

BY: HEY, M.J. April 26, 2010

Plaintiffs Peter Constantinides and his wife, Elpis Constantinides (“Plaintiffs”), filed the present asbestos action on August 11, 2008, alleging negligence and strict liability claims against several defendants based on their failure to warn of the dangers associated with exposure to asbestos incorporated into their products and to which Mr. Constantinides was exposed while serving in the United States Navy aboard the USS Iowa (BB-61) from 1954 until 1956.¹ Presently before the court is a summary judgment

¹The matter was originally filed in the Southern District of Florida, Miami Division, but was transferred to the Eastern District of Pennsylvania as part of MDL 875 and docketed on June 17, 2009, in accordance with the terms of this court’s

motion filed by Defendant, Elliott Turbomachinery, Inc. (“Elliott”) (Doc. 107), Plaintiffs’ response thereto (Doc. 126), and Elliott’s reply (Doc. 133). We recommend that the motion be granted.²

I. FACTUAL BACKGROUND

Mr. Constantinides was diagnosed with asbestos-attributable mesothelioma in 2007. His only lifetime exposure to asbestos occurred during fifteen months he served on the USS Iowa from 1954 until 1956. Mr. Constantinides worked as a fireman’s apprentice and then fireman on the Iowa, and his main assignment was to one of the boiler rooms. The boiler room contained numerous pipes and machinery encased in external asbestos insulation and/or containing gaskets and other internal parts which were encased in asbestos. Although the precise dimensions of the boiler room are unknown, there is no question that the room was significant in size, that it was densely packed with asbestos-insulated equipment and pipes, and that it was hot and dusty.

Mr. Constantinides performed daily work in the boiler room such as cleaning and maintenance of the pumps, valves and other machinery. This activity created airborne dust, which Mr. Constantinides inhaled without the benefit of a mask or respirator to protect himself. Pl. Video Dep. Vol. I at 20-26. He identified the pipes and lines in the boiler room as a source of the dust. Id. at 21. Mr. Constantinides occasionally repaired

Administrative Order No. 11. See Doc. 1.

²The Honorable Eduardo C. Robreno referred the motion to this panel for a Report and Recommendation. We heard oral argument on March 24, 2010.

pumps and motors by removing and replacing gaskets and bearings, and he was assigned for two to three weeks to learn to operate the ship's generators and breathed in dust from the generators. Pl. Video Disc. Dep. at 56-59, 62-64, 66-68; Pl. Video Dep. Vol I at 29-32. According to a co-worker, Robert Harris, Mr. Constantinides also spent about ten days cleaning and scraping the packing from valves and then repacking them, and breathed in the dust this work created. Harris Dep. at 11-15.

Plaintiffs have retained Arnold P. Moore, PE, a retired naval captain and professional engineer with experience in the repair and overhaul of Navy ships. See Moore Report at 1. Mr. Moore explained that each boiler room on the Iowa "included two boilers, six forced draft blowers, a deaerating feed water tank, numerous steam driven and electric motor driven pumps as well as pump governors, steam traps and valves." Id. at 4, 9. With respect to Elliott, the parties agree that the boiler room contained one, large deaerator tank manufactured by Elliott. The tank was covered by external asbestos insulation. See Moore Dep. at 176-78. Elliott maintains that the tank has no internal moving parts, however Elliott's instruction book "documents the use of a number of compressed asbestos sheet gaskets and asbestos packing for valves, gage glasses and vacuum breakers provided by Elliott with their deaerating feed water tanks." Id. at 8 (Navy specifications omitted). Except for wiping dust from all equipment in the boiler room, there is no testimony that Mr. Constantinides worked on the de-aerator tank. Plaintiffs have admitted that they have no expert report which shows the release of

asbestos fibers from an Elliott product aboard the Iowa. See Requests for Admission attached to Doc. 107 at Exs. A-3 and A-4.

Finally, Plaintiffs rely on medical expert Jerrold L. Abraham, M.D., who opined in a one-page report that asbestos exposure caused Mr. Constantinides' mesothelioma. See Abraham Report at 1.

II. LEGAL STANDARDS

A. Standard for Summary Judgment

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has met its initial burden, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Techs., Inc., 78 F. Supp.2d 402, 408 (E.D. Pa. 2000).

The evidence presented must be viewed in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255; Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

B. Applicable Florida Law

The present motion challenges the sufficiency of the evidence on the causation element of Plaintiffs' cause of action. To establish an asbestos claim under Florida law, a plaintiff must show that asbestos exposure from the defendant's product at issue was a substantial contributing factor to plaintiff's physical impairment. See Fla. Stat. § 774.204(1) (2009); Reaves v. Armstrong World Indus., Inc., 569 So. 2d 1307, 1308-09 (Fla. 4th DCA 1990). On an appeal from a directed verdict in the defendants' favor, the court in Reaves analyzed whether there was sufficient evidence adduced at trial upon which the jury could properly rely in finding a verdict for the plaintiff. After reviewing the evidence presented by plaintiff, the court concluded that the proof of whose asbestos dust and who manufactured those products was speculative at best. Reaves, 569 So. 2d at 1309. The court instructed that the plaintiff must establish that he was exposed to the asbestos products of each defendant and that this exposure contributed substantially to producing the injury of which plaintiff complained. Id.

Testimony of an expert witness on causation can be sufficient to raise a genuine issue of material fact, defeating a motion for summary judgment. Brown v. Glade and Grove Supply, Inc., 647 So. 2d 1033, 1036 (Fl. 4th DCA 1994); see also Ward v. Celotex

Corp., 479 So. 2d 294, 296 (Fla. 1st DCA 1985) (testimony of co-workers that placed plaintiff near activities where asbestos was used and identification of defendant as manufacturer sufficiently raised genuine issue of material fact precluding summary judgment in favor of manufacturer).

III. DISCUSSION

Elliott argues that it is entitled to summary judgment because Plaintiffs have failed to raise a genuine issue of material fact on the question of causation. Specifically, Elliott argues that Plaintiffs have presented no direct or circumstantial evidence that Mr. Constantinides' mesothelioma can be attributed to asbestos exposure originating from the Elliott de-aerator located in the boiler room where Mr. Constantinides worked. We agree.

Although Plaintiffs' medical causation expert, Dr. Abraham, opined that Mr. Constantinides' mesothelioma was caused by asbestos exposure – and although it is undisputed that an Elliott de-aerator tank was located in the boiler room and that it was covered by asbestos-containing insulation – the doctor's report, without more, is insufficient for Plaintiff to survive summary judgment as to Defendant Elliott on the issue of causation. First, Dr. Abraham does not identify any Elliott product (nor for that matter any other product) as a source of the asbestos. Second, except for general statements that they wiped up dust on all equipment in the boiler room, neither Mr. Constantinides nor his co-worker, Mr. Harris, mentioned having worked on a de-aerator aboard the Iowa.

There is no evidence that any asbestos fibers on or within the de-aerator were released into the air in the boiler room while Mr. Constantinides was aboard.

In short, Plaintiffs have presented no evidence whatsoever that Mr. Constantinides ever performed work on the Elliott de-aerator other than perhaps basic dusting. Similarly, there is no evidence that the de-aerator released asbestos fiber into the boiler room. During oral argument, Plaintiffs' counsel repeatedly argued that the court should not expect Mr. Constantinides to specifically recall each piece of equipment in the boiler room or what work was performed on any such equipment, given the fact that he spent fifteen months working as a low-ranking crewman aboard a naval vessel more than five decades ago. See N.T. 3/24/10 at 50, 58. In light of the very large size of the tank, this argument is not particularly compelling. In any event, Plaintiffs are not relieved of their burden to present evidence of causation to overcome summary judgment.

Plaintiffs argue that the mere existence of the deaerator tank in the boiler room, and the fact that it contained external asbestos-containing insulation, is sufficient to raise an issue of fact as to causation. See Doc. 126 at 12-14; N.T. 3/24/10 at 134-38. However, in addition to the lack of evidence that Mr. Constantinides ever worked on the de-aerator tank, there is no other evidence to suggest that the tank was a source of asbestos dust. For example, there is no record evidence suggesting that the tank vibrated or shook while in operation, that it was damaged or malfunctioned in any way, or that it

was repaired at any time when Mr. Constantinides was present. See Moore Dep. at 147-48, 154-57.

Under the circumstances, Plaintiffs have failed to show that asbestos exposure from the single Elliott de-aerator tank in question was a substantial contributing factor to Mr. Constantinides' illness. See Fla. Stat. § 774.204(1) (2009); Reaves, 569 So. 2d at 1308-09. There being no genuine issue of material fact regarding the question of causation, we conclude that Defendant Elliott is entitled to summary judgment.³

³Elliott's alternative argument that it owed Plaintiff no duty to warn because it did not manufacture or supply any of the external asbestos on its equipment is outside the scope of Judge Robreno's referral.

Accordingly, we make the following:

RECOMMENDATION

AND NOW, this 26th day of April 2010, it is RESPECTFULLY RECOMMENDED that the summary judgment motion of Defendant Elliott Turbomachinery, Inc. be GRANTED with respect to the issues that are within the scope of Judge Robreno's referral order. The parties may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.⁴

BY THE COURT:



ELIZABETH T. HEY
UNITED STATES MAGISTRATE JUDGE

⁴Chief Magistrate Judge Rueter and Magistrate Judge Strawbridge join in this determination.

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ORDER

AND NOW, this day of , 2010, upon careful and independent consideration of Defendant Elliott Turbomachinery, Inc.'s motion for summary judgment (Doc. 107), Plaintiffs' response (Doc. 126), and Defendant's reply (Doc. 133), and after review of the Report and Recommendation authored by Magistrate Judge Elizabeth T. Hey on behalf of herself, Chief Magistrate Judge Thomas J. Rueter, and Magistrate Judge David R. Strawbridge, it is hereby ORDERED that:

1. The Report and Recommendation is approved and adopted;
2. Defendant Elliott Turbomachinery, Inc.'s motion for summary judgment (Doc. 107) is GRANTED as to those issues addressed in the Report and Recommendation; and
3. JUDGMENT is hereby ENTERED in favor of Defendant Elliott Turbomachinery, Inc., and against Plaintiffs.

BY THE COURT:

EDUARDO C. ROBRENO, J.