

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

DONNA L. HAGEN,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	District of New Jersey
v.	:	(Case No. 06-4899)
	:	
BENJAMIN FOSTER COMPANY,	:	E.D. PA CIVIL ACTION NO.
et al.,	:	2:07-63346-ER
	:	
Defendants.	:	

FILED

OCT - 9 2012

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this **9th** day of **October**, **2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Foster Wheeler Corporation** (Doc. No. 159) is **DENIED**.¹

¹ This case was transferred in March of 2007 from the United States District Court for the District of New Jersey to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Donna L. Hagen, individually and as executor of the estate of Malcolm Hagen ("Decedent" or "Mr. Hagen"), alleges that Decedent was exposed to asbestos while working as a civilian employee as a helper to outside machinists at New York Shipbuilding Corporation in Camden, New Jersey. Defendant Foster Wheeler Corporation ("Foster Wheeler") manufactured boilers. The alleged exposure pertinent to Defendant Foster Wheeler occurred during Decedent's work aboard:

- USS Kitty Hawk (1958 - 1961)

Decedent was diagnosed with mesothelioma and died thereafter. Plaintiff brought claims against various defendants. Defendant Foster Wheeler has moved for summary judgment, arguing that it is immune from liability by way of the government contractor defense.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any 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

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009) (Robreno, J.).

C. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) it

warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010) (Robreno, J.) (citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 739 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146 (E.D. Pa. Aug. 29, 2011) (Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law. Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

D. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine dispute as to any material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably precise specifications as to warnings which were to be placed on

defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *8-9 (E.D. Pa. Oct. 20, 2010) (Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

II. Defendant Foster Wheeler's Motion for Summary Judgment

A. Defendant's Arguments

Foster Wheeler asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by Defendants for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy's knowledge about asbestos and its hazards was commensurate with the state-of-the-art in America. In asserting this defense, Foster Wheeler relies on various military specifications, and the affidavits of Dr. Lawrence Stilwell Betts, Admiral Ben J. Lehman, Commander Thomas F. McCaffery, and J. Thomas Schroppe (a company witness for Foster Wheeler).

With its reply brief, Foster Wheeler has submitted objections to Plaintiff's evidence pertaining to the government contractor defense.

B. Plaintiff's Arguments

Plaintiff argues that summary judgment in favor of Defendant Foster Wheeler on grounds of the government contractor defense is not warranted because there are genuine disputes of material fact regarding its availability to Foster Wheeler. To contradict the evidence relied upon by Foster Wheeler, Plaintiff points to, inter alia, various military specifications purported to have been issued by the Navy and applicable to the Foster Wheeler products at issue (boilers), which Plaintiff contends indicate that the Navy not only would have permitted manufacturers like Foster Wheeler to include warnings with their products but required them to do so (e.g., MIL-STD-129, MIL-M-15071D).

Plaintiff has also objected to the evidence presented by Foster Wheeler pertaining to the government contractor defense.



EDUARDO C. ROBRENO, J.

C. Analysis

As a preliminary matter, the Court notes that it has considered the parties' objections to the evidence and has determined that they are without merit. The Court next considers the merits of the parties' substantive arguments and evidence pertaining to the government contractor defense.

Plaintiff has pointed to evidence that contradicts (or at least appears to be inconsistent with) Foster Wheeler's evidence as to whether the Navy did or did not reflect considered judgment over whether warnings could be included with Foster Wheeler's products. Specifically, Plaintiff has pointed to MIL-STD-129 and MIL-M-15071D, which Plaintiff contends demonstrate that the Navy would have permitted Foster Wheeler to include warnings with its products. This is sufficient to raise genuine disputes of material fact as to whether the first and second prongs of the Boyle test are satisfied with respect to Foster Wheeler. See Willis, 811 F. Supp. 2d 1146. Accordingly, summary judgment on grounds of the government contractor defense is not warranted.