

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

EVELYN MATTOX,	:	CONSOLIDATED UNDER
	:	MDL 875
	:	
Plaintiff,	:	
	:	Transferred from the Western
	:	District of North Carolina
v.	:	(Case No. 07-00314)
	:	
	:	
AMERICAN STANDARD, INC.	:	
ET AL.,	:	
	:	E.D. PA CIVIL ACTION NO.
	:	2:07-73489
Defendants.	:	

FILED

JUL 11 2011

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this 11th day of **July, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Georgia Pacific Corp. (doc. no. 86) is **GRANTED**.¹

¹ In February of 2007, Plaintiff filed a complaint in North Carolina state court alleging that William Mattox was exposed to Georgia-Pacific asbestos-containing joint compound when he worked as an electrician at Bryant-Durham Electric in and around 1973 after receiving an honorable discharge from the Navy. Mr. Mattox worked as an electrician at Evans & Eller and then as a construction contractor at Modern Electric until 1978.

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. The alleged exposures which are relevant to this motion occurred in North Carolina. Therefore, this Court will apply North Carolina law in deciding Defendant's Motion for Summary Judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

In Jones v. Owens-Corning Fiberglas Corp., the United States Court of Appeals for the Fourth Circuit, applying North Carolina law, cited to Lohrmann v. Pittsburgh Corning Corp. in finding that "the plaintiff in a personal injury asbestos case 'must prove more than a casual or minimum contact with products' containing asbestos in order to hold the manufacturer of that product liable." 69 F.3d 712, 716 (4th Cir. 1995) (quoting 782 F.2d 1156, 1162 (4th Cir. 1986)). The plaintiff must present "'evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.'" Id. The court noted that Lohrmann was decided under Maryland law, but that nothing indicated that there was any conflict between North Carolina and Maryland laws on these issues. 69 F.3d at 716 n. 2 (citing Wilder v. Amatex Corp., 336 S.E.2d 66, 68 (N.C. 1985)). The United States District Court for the Western District of North Carolina cited Jones and the Lohrmann test in Agner v. Daniel International Corp. where the court noted that "in any asbestos case, a plaintiff must '(1) identify an asbestos-containing product for which a defendant is responsible, (2) prove that he has suffered damages, and (3) prove that defendant's asbestos-containing product was a substantial factor in causing his damages.'" No. 3:98CV220, 2007

WL 57769 at *4-5 (W.D.N.C. 2007) (quoting Lohrmann v. AC Prods. Liab. Trust, 264 F. Supp. 2d 583, 587 (N.D. Oh. 2003), aff'd, 424 F.3d 488 (6th Cir. 2005); see also Mills v. ACANDS, Inc., No. 1:00CV33, 2005 WL 2989639

II. MOTION FOR SUMMARY JUDGMENT OF GEORGIA PACIFIC CORP.

Mr. Mattox' first deposition was taken on April 19, 2001. Mr. Mattox did not identify Georgia Pacific at this deposition. Mr. Mattox testified that he worked around Durabond joint compound and indicated this as the brand of joint compound he worked around on his work history sheet. Mr. Mattox testified that Durabond was "the only one I remember seeing." Mr. Mattox was asked,

Q: All right. I believe it's your testimony that you only saw a Durabond joint compound at some of the sites that you worked at. Is that correct?

A: I'm not sure what you're asking there.

Q: All right. Let me rephrase. As to - strike that. The line of questioning that the last lawyer did, he was talking about joint compound -

A: Right.

Q: - and sheetrock work, correct?

A: Right.

Q: During the time that you were around joint compound or sheetrock work, do you believe that any of that material contained asbestos?

A: I don't know. I don't know.

Q: Okay. Your testimony about the Durabond joint compound, wherever you may have seen it used, is it your testimony that that's the only brand that you saw of joint compound?

A: That's all I saw that I know of.

(Mattox Dep., April 19, 2001 at 81-82) (objections omitted.)

In his September 21, 2006 deposition, Mr. Mattox testified that at various jobsites for Bryant-Durham Electric, he worked around sheetrock installers and that the installers would sand joint compound creating dust. (Mattox Dep. at 45-46.) Mr. Mattox testified that the installers used Georgia Pacific and Durabond joint compound. (Id. at 46, 48.) Mr. Mattox testified that he worked around others sanding joint compound when he worked at Evans & Eller and Modern Electric after leaving Bryant-Durham Electric. (Id. at 50.) These installers were working with Georgia Pacific and Durabond joint compound. (Id. at 51.) Mr. Mattox breathed in dust from the joint compounds at these sites. (Id. at

46.) Plaintiff cites to Defendant's answers to interrogatories where Defendant admitted that it manufactured asbestos-containing joint compounds during the relevant time frame. (Id. at 3-4.)

Defendant points to later testimony in Mr. Mattox's September 21, 2006 deposition where Mr. Mattox testified that he knew that either Georgia Pacific or Durabond sheetrock was used on jobsites for Bryant Durham Electric, but he was not sure which brand was used. (Mattox Dep., Sept. 21, 2006 at 96.) Mr. Mattox testified that he believed that Durabond manufactured the sheetrock used at Modern Electric. (Id. at 101.)

In a deposition taken on September 22, 2006, Mr. Mattox testified that when he said that he worked with Durabond sheetrock at Evans & Eller and Modern Electric, he was really referring to joint compound. (Mattox, Sept. 22, 2006 at 36-37.) On cross-examination, he testified that he worked with Durabond sheetrock at Evans & Eller and Modern Electric and that he was not sure whether he worked with Georgia Pacific joint compound at Bryant-Durham Electric. (Id. at 37.)

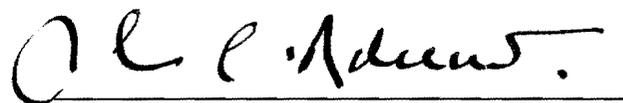
There are three depositions at issue in this case. In Mr. Mattox's April 19, 2001 deposition, he only recalled Durabond as the manufacturer of joint compounds that he worked with. In his September 21, 2006 deposition, Mr. Mattox recalled that both Durabond and Georgia-Pacific joint compounds were used at the jobsites where he worked. Later in his September 21, 2006 deposition, Mr. Mattox testified that he could not recall whether Durabond or Georgia-Pacific sheetrock was used at Bryant-Durham Electric and that he believed Durabond was used Modern Electric. In his September 22, 2006 deposition, Mr. Mattox testified that when he referred to sheetrock, he was really referring to joint compound. He recalled working with Durabond sheetrock at Evans & Eller and Modern Electric and that he was not sure whether he worked with Georgia Pacific joint compound at Bryant-Durham Electric.

Although in his September 21, 2006 deposition, Mr. Mattox identified Georgia Pacific joint compound as being used at his jobsites, he later recanted these statements by testifying that he was not sure whether Georgia Pacific joint compound was used at Bryant-Durham Electric and that he believed that Durabond joint compound was used at Evans & Eller and Modern Electric. Plaintiff cannot raise a genuine issue of material fact by pointing to inconsistencies in Mr. Mattox's own deposition testimony. A jury would have to speculate in order to determine whether Mr. Mattox was in fact exposed to Georgia Pacific joint

compound. Accordingly, as Plaintiff can only point to inconsistencies in Mr. Mattox's own testimony, Plaintiff has failed to raise a genuine issue of material fact as to whether Mr. Mattox was exposed to asbestos from Georgia Pacific joint compound and Defendant's Motion for Summary Judgment is granted.

E.D. PA CIVIL ACTION NO. 2:07-73489

AND IT IS SO ORDERED.

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

EDUARDO C. ROBRENO, J.