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

BROWN, et al.,

Plaintiffs,

v.

KAISER GYPSUM CO., INC., et al.

Defendants.

CONSOLIDATED UNDER MDL 875

Transferred from the Northern District of California (Case No. 10-00406-SI)

E.D. PA CIVIL ACTION NO. 2:11-cv-60063

O R D E R

AND NOW, this **12th** day of **December, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Carrier Corporation (doc. no. 44) is **DENIED**.[1] It is further **ORDERED** that

[1] This case was transferred from the Western District of Washington to the Eastern District of Pennsylvania on January 20, 2011 as part of MDL-875. Plaintiffs allege that Mr. James Allen Brown ("Decedent") developed lung cancer and subsequently passed away as a result of exposure to asbestos attributable to Defendant Carrier Corporation ("Defendant") during his service in the United States Navy aboard the USS Independence.

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

1. Product Identification and Exposure under Maritime Law

Maritime law applies to "claims involving plaintiffs who were sea-based Navy workers where the allegedly defective product was produced for use on a vessel." Conner v. Alfa Laval, Inc., --- F. Supp. 2d ----, 2011 WL 3101810 (E.D. Pa. July 22, 2011) (Robreno, J.). Maritime law is made up of an amalgam of federal and state law. E. River S.S. Corp., 476 U.S. at 864. Substantive admiralty law applies to products liability claims. Id. In order to establish product identification and causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 Fed. App'x 371, 375 (6th Cir. 2001). Substantial factor causation is determined with respect to each defendant separately. Stark, 21 Fed. Appx. at 375.

Accordingly, a mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" Id. (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of

U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F. App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988) (citing Restatement (Second) of Torts, § 402A (1965)).

2. 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 Techs. Corp., 487 U.S. 500, 512 (1988).

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 issue of material fact as to whether it is entitled to the government contractor defense. Compare Willis v. BW IP Int'l Inc., --- F. Supp. 2d ----, 2011 WL 3818515 at *1 (E.D. Pa. Aug. 26, 2011) (Robreno, J.) (addressing defendant's burden at the summary judgment stage), with Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770 (E.D. Pa. 2010) (Robreno, J.) (addressing defendant's burden when Plaintiff has moved to remand).

In Willis, the MDL Court found that defendants had not shown the absence of a genuine issue of 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. Id. at 7. Plaintiff also submitted evidence, such as inconsistent deposition testimony, that called into question the credibility of the Defense witnesses. Id.

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's Motion for Summary Judgment

Both Plaintiffs and Defendant agree that maritime law applies for purposes of the Court's deciding this motion.

It should be here noted that Defendant argues that the following claims of Plaintiffs against Defendant fail here: conspiracy, premises liability, enterprise liability, and/or market share liability. As Plaintiffs fail to refute this argument in their Response, summary judgment is granted in Defendant's favor on these claims.

1. Product Identification and Exposure Under Maritime Law

Decedent joined the Navy in 1964 and served for four (4) years, all of which he spent on board the USS Independence, an aircraft carrier. (Pl.'s Resp. at 2, doc. no. 52). He was assigned to maintain the refrigeration / air conditioning equipment on the ship, and he testified that the refrigeration compressors and air conditioner were manufactured by Carrier. (Dep. of James Allan Brown, Jan. 13, 2011, at 14, Pl.'s Ex. 1).

In approximately 1967, the ship was placed into dry dock for an overhaul. During this time the Carrier air conditioner compressor needed to be replaced, and Decedent specifically recalled that Carrier employees carried out the replacement. (Id. at 34-35). This was a dusty process that took place in the auxiliary room, and Decedent testified that "during that period I was in and out of [the auxiliary room] probably three or four times a day." (Id.) Decedent's relevant testimony about these events is as follows.

Q: Okay. What did you observe the Carrier employees doing first when they arrived on the ship?

A: They had to remove the -- the centrifugal compressor was insulated, and they had to remove the insulation.

Q: And how did they remove that insulation?

A: Basically, cut at it and scraped at it to break it loose.

Q: Okay. Was that a dusty process?

A: Yes.

. . .

Q: Now, when they broke off and scraped off this insulation, what

did they do with the insulation? Where did they put it?

A: Normally, they would have a pile that they would put it in.

Q: So right there on the floor?

A: On the floor or on the deck.

. . .

Q: And then I assume a new compressor was brought down?

A: Correct, a new compressor.

Q: Can you tell me about that process?

A: And the same process, going down. And to get it all bolted in place and everything, and recharge it with refrigerant, and then go ahead and re-insulate the compressor.

Q: Okay. And this was -- And was this the same manufacturer of compressor? This was a Carrier replacement?

A: It was also Carrier, yes.

Q: And tell me about the re-insulation process. What did you see the Carrier employees do?

. . .

A: Basically doing a form type insulation where -- you can call it mud, to build it all up. And then after it was built up [in] a certain area, whatever was required, then they would -- it was covered with a cloth.

(Id. at 34-38).

Decedent believed the insulation on these Carrier products to be composed of asbestos, based on "my experience that I had working with different types of insulation aboard the ship." (Id. at 50-51).

Furthermore, Decedent testified that he personally had to remove and replace gaskets that were part of the Carrier air conditioning unit "20 [to] 30 times," and that the work was dusty when "the gaskets were [stuck] onto the flanges," and then "you'd have to scrape them and wire brush them." (Dep. of James Allan Brown, Jan. 12, 2011, at 135-37, Pl.'s Ex. 3).

Additionally, Decedent recalled that the replacement gaskets he used on Carrier compressors were Carrier brand. The relevant testimony is as follows.

Q: And where did you get the replacement gasket?

A: Normally you would get your parts from -- one of your superiors would draw from engineering supply.

Q: Okay. Did that gasket come in any particular kind of packaging?

A: The gaskets like that came in envelopes.

Q: And was there any marking on the envelope?

A: I recall it saying Carrier and having a part numbers.

(Dep. of James Allan Brown, Jan. 13, 2011, at 16-18, Pl.'s Ex. 1).

While it is true that Decedent's work experience alone may not be sufficient to carry the day on the issue of Product Identification, Plaintiffs also have produced other evidence that Carrier products contained asbestos. For example, Plaintiffs produce Carrier interoffice memoranda from 1987 stating that "asbestos has become a major industrial concern," and that as such, "[e]ngineering would like to eliminate the asbestos gasket material as it may become unavailable in the short term future." (1987 Carrier Memos, Pl.'s Ex.s 4, 5).

The above evidence is sufficient for a reasonable jury to find that Decedent was exposed to the Defendant's products, and that the products were a substantial factor in causing the injury he suffered. See Redland Soccer Club, Inc, 55 F.3d at 851 ("The exposure must have been 'actual' or 'real,' but the question of 'substantiality' is one of degree normally best left to the fact-finder").

2. Government Contractor Defense

At the outset, it is noted that, in their Response, Plaintiffs move to strike Admiral Roger B. Horne's Declaration because Defendant failed to disclose him as an expert. Defendant fails to address this issue at all in its Reply. Additionally, in its Reply, Defendant moves to strike Captain Lowell's Declaration because Plaintiffs failed to disclose him as an expert. (The Court further notes that Plaintiffs failed to

provide the Court with a copy of Captain Lowell's Declaration, though Plaintiffs cite to it.) The Court finds that both Declarations are stricken, and the Court declines to consider either in deciding this motion for summary judgment.

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, 487 U.S. at 512.

In the present case, Defendant presents the declaration of Commander Thomas McCaffrey, who wrote that Carrier air conditioning and refrigeration equipment was produced specially for the Navy pursuant to precise Navy specifications. (See Decl. of Thomas McCaffrey, Def.'s Ex. E). For example, Comm. McCaffrey cites to and includes a copy of military specification MIL-R-16743, which contained precise requirements for air conditioning and refrigeration equipment, including design, construction, material components, labels, testing, etc. (See Decl. of Thomas McCaffrey, Def.'s Ex. E, at ¶ 10).

Additionally, Comm. McCaffrey wrote that the Navy put Carrier's refrigeration and air conditioning equipment through rigorous testing, and that if any of the parts failed the testing, then the parts would have been rejected and would have had to have been replaced. Comm. McCaffrey testified that if a Carrier air conditioning or refrigeration product was installed aboard a Navy vessel, then it conformed to the applicable Navy specifications. (Id. at ¶ 14).

Further, Defendant presents evidence that the Navy knew more about the dangers of asbestos than did Defendant, and therefore the Navy's superior knowledge extinguished Defendant's duty to warn. Comm. McCaffrey wrote that as early as 1950, the Navy instituted safety procedures for handling asbestos insulation in its shipyards. (Id. at ¶ 21).

Plaintiffs argue in their Response that Defendant has not met its burden of showing an absence of a genuine issue of material fact as to whether it is entitled to the government contractor defense. For example, Comm. McCaffrey's declaration cites to a military specification (MIL-M-15071C) which appears to require warnings in situations where "personal injury or loss of life" could occur if a product were used incorrectly. See Willis, 2011 WL 3813515 at *8 (noting that Defendants' experts "cited to

Plaintiffs' Motion to Continue (doc. no. 46) is **DENIED** as moot.

It is further **ORDERED** that Defendant's Motion to Exclude (doc. no. 61) is **GRANTED**.

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military specifications, which required that warnings be utilized on products which could cause serious injury or death.") Additionally, Plaintiffs cite to prior deposition testimony of Comm. McCaffrey that raises a question as to his credibility. During the deposition, Comm. McCaffrey was asked whether he was aware of any military specifications that prohibited warning labels on asbestos-containing products. He replied, "I'm not aware of any that prohibited, nor am I aware of any that said [defendants] had to [warn]." (Pl.'s Ex. 12, doc. no. 52). That testimony arguably means that Comm. McCaffrey previously testified to being uncertain about whether the Navy required defendants to warn about their asbestos products, whereas in this case he takes the position that there were precise specifications and that Defendant's duty to warn was extinguished by the Navy's extensive knowledge.

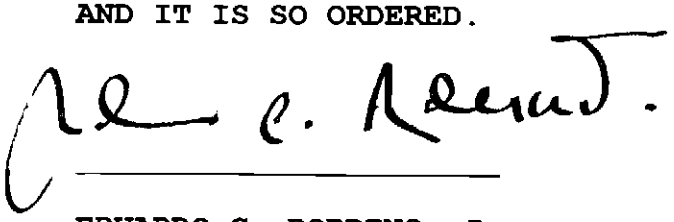
This situation is similar to the facts of this Court's decision in Willis. In that case, plaintiff presented evidence of inconsistent deposition testimony of defendants' witnesses, and pointed to the military specifications cited by such experts that required warnings in certain circumstances when death or personal injury could occur. Id. at 8-10.

Because Plaintiffs have presented evidence that casts doubt on the testimony of Defendant's expert witness and that raises an issue of fact as to how certain military specifications should be interpreted, summary judgment is denied regarding the government contractor defense.

III. Conclusion

Summary judgment is denied for Defendant. Plaintiffs have presented sufficient evidence for a reasonable jury to find that Decedent was exposed to asbestos attributable to Defendant and that it was a substantial factor in causing his disease. Additionally, Plaintiffs have presented sufficient evidence to raise a genuine issue of fact as to whether Defendant is entitled to the government contractor defense.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.