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

CAROL DECOURCEY, Executrix of Estate of Thomas DeCourcey,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
v.	:	
ABB Inc., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:14-06337-ER
Defendants.	:	

O R D E R

And now, this **8th** day of **September, 2017**, upon consideration of the Motion for Summary Judgment filed by Defendant CBS Corporation (ECF No. 93), as well as the response and reply thereto (ECF Nos. 96 & 101), it is hereby **ORDERED** that the motion is **GRANTED** and CBS Corporation is **DISMISSED with prejudice**.[1]

[1] This case was removed in November of 2014 from the Court of Common Pleas of Philadelphia to this Court as part of MDL-875. Plaintiff asserts that her deceased husband, Thomas DeCourcey ("DeCourcey"), contracted mesothelioma after being exposed to the Defendants' asbestos containing products while working as an electrician between 1954 and 1984.

Regarding CBS Corporation, a successor by merger to Westinghouse Electric Corporation ("Westinghouse"), Plaintiff alleges that between 1958 and 1960, during the construction of the USS Kitty Hawk at the New York Shipyard ("the Shipyard"), DeCourcey worked primarily in the vessel's engine rooms as an electrician. She further alleges that Westinghouse employees cut and installed asbestos containing insulation on steam pipes

above where DeCourcey was working, and that debris from the insulation fell onto him. She argues that this asbestos exposure was a cause of DeCourcey's mesothelioma. Although Westinghouse turbines were installed on the USS Kitty Hawk, Plaintiff does not allege that they directly contributed to DeCourcey's injury. Her case rests solely on the allegation that DeCourcey was exposed to asbestos insulation installed by Westinghouse employees.

In its motion for summary judgment, Westinghouse contends that Plaintiff cannot establish that products for which it was responsible caused DeCourcey's injury. Specifically, Westinghouse asserts that its employees did not install any insulation on the USS Kitty Hawk and that it delivered the turbines without insulation. Instead, Westinghouse contends that the Shipyard subcontracted all insulation work to the Philadelphia Asbestos Corporation ("PACOR"), and that PACOR used Shipyard employees to perform the work.

I. STANDARDS

In that DeCourcey's exposure occurred while aboard a docked Navy vessel, Plaintiff's action is governed by maritime law since both the locality and connection tests are met. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455, 463-469 (E.D. Pa. 2011) (Robreno, J.).

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; see Scott v. Harris, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). "The mere existence of a scintilla of evidence in

support of the plaintiff's position will be insufficient" to overcome a motion for summary judgment. Anderson, 477 U.S. at 252. In undertaking this analysis, the court must view all facts in the light most favorable to the non-moving party. Scott, 550 U.S. at 380.

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. The plurality opinion in Celotex Corp. v. Catrett, 477 U.S. 317 (1986) explained that the initial "burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case."). Id. at 325. "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" and "[t]he moving party is 'entitled to a judgment as a matter of law.'" Id. at 322-23.

II. ANALYSIS

The Court concludes that, based on the admissible evidence, and viewing the facts in the light most favorable to the Plaintiff, no reasonable jury could find that Westinghouse installed insulation on the USS Kitty Hawk.

Westinghouse has produced a variety of testimony and documents that meet its initial burden of proof. Fed. R. Civ. P. 56(a).

For example, Westinghouse proffers the deposition testimony of Willie Lowe who was an employee of the Shipyard and president of the International Brotherhood of Boilermakers for ten years. Lowe provided that: (1) from 1953 onward, the Shipyard subcontracted all pipe insulation work to PACOR; (2) PACOR hired Shipyard employees to perform the insulation work; and (3) he personally delivered PACOR's insulation from the Shipyard storerooms to the ships.

Westinghouse also submits the deposition testimony of George Berkemeier who was a PACOR employee and, from 1955 to 1961, the assistant to the head of the insulation department at the Shipyard. Berkemeier testified that: (1) PACOR managed the

pipe covering department for the Shipyard; (2) his department installed the pipe coverings on the ships and that he supervised the installation; (3) the pipe insulators he supervised were employees of the Shipyard; and (4) the only union allowed at the Shipyard was the boilermaker's union and, as a result, all pipe insulators were members of the that union.

Westinghouse further submits the deposition testimony of George Berglund, Jr., who indicated that: (1) he worked for the Shipyard as a pipe insulator aboard the USS Kitty Hawk from 1960 to 1961; (2) the Shipyard had its own union of which he was a member; and (3) the shipyard insulators covered "whatever needed to be covered."

Westinghouse also submits the deposition testimony of its corporate representative, Roy Belanger. Belanger indicated that: (1) Westinghouse supplied only the ten turbine generators to the USS Kitty Hawk; (2) he never saw any indication that Westinghouse ever handled or installed insulation on ships; and (3) he worked directly in shipyards for over 25 years and never experienced or heard of a situation such as the one described by Decourcey.

Finally, documents submitted by both parties indicate that Westinghouse did not provide insulation for the USS Kitty Hawk or install it. Attached as Exhibit 8 to Plaintiff's response is a series of specifications, proposals, and drawings related to the turbines Westinghouse provided for use on the USS Kitty Hawk. These documents indicate uniformly that while Westinghouse was required to furnish the turbines with a means for attaching insulation, the insulation itself was to be provided by the purchaser. This arrangement was confirmed by Belanger. On this record, the burden of showing the absence of a genuine dispute as to any material fact has been satisfied.

The evidence that supports Plaintiff's claim comes from DeCourcey's deposition testimony and affidavit. Specifically, DeCourcey asserted that he often ate lunch with the insulation installers and that: (1) it was common knowledge that they were employed by Westinghouse; (2) the insulators told him they worked for Westinghouse and that their union hall was in Essignton, Pennsylvania; and (3) no other unions other than the Westinghouse steam division union were present at the Shipyard.

AND IT IS SO ORDERED.

/s/ Eduardo Robreno
EDUARDO C. ROBRENO, J.

Plaintiff's main evidence, that the insulators told DeCourcey they worked for Westinghouse, is inadmissible hearsay as it consists of out-of-court statements offered to prove the truth of the matter. Fed. R. Evid. 801(c); U.S. v. Console, 13 F.3d 641, 656 (3d Cir. 1993). These statements are not rendered admissible under Rule 801(d)(2)(D) as statements by Westinghouse's agents, because the alleged declarants are unidentified. Statements from unnamed declarants are inadmissible as an admission by party-opponent. Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1002-03 (3d Cir. 1988).

In that the evidence proffered by Plaintiff is inadmissible, he has failed to carry his burden of showing the existence of a genuine dispute as to a material fact. See Fed. R. Civ. P. 56(e); Scott, 550 U.S. at 380.

III. CONCLUSION

Viewing the evidence in the light most favorable to Plaintiff, it is clear that no reasonable jury could conclude that Westinghouse provided or installed insulation on the USS Kitty Hawk. Thus, Westinghouse's motion for summary judgment must be granted.