ER

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

OLGA PAVLICK,

Plaintiff,

v.

ADVANCE STORES COMPANY, et al.,

Defendants.

FILED
FEB 21 2013
MICHAEL E. KUNZ, Clerk
By_____Dep. Clerk

CONSOLIDATED UNDER MDL 875

Transferred from the District of Delaware (Case No. 10-00174)

E.D. PA CIVIL ACTION NO. 2:10-67147-ER

O R D E R

AND NOW, this **21st** day of **February, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Carlisle Corporation (Doc. No. 246) is **GRANTED**.[1]

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[1] This case was transferred in May of 2010 from the United States District Court for the District of Delaware to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Olga Pavlick alleges that her husband, John Pavlick ("Decedent" or "Mr. Pavlick"), was exposed to asbestos during his work (1) in the army (in Germany), (2) in an auto parts-related job in New Jersey, and (3) while performing home remodeling. Mr. Pavlick developed mesothelioma and died from that illness.

Plaintiff has brought claims against various defendants. Defendant Carlisle Corporation ("Carlisle"), a successor to the liabilities of Motion Control Industries (hereinafter referred to as "Motion Control") has moved for summary judgment arguing, inter alia, that there is insufficient evidence to support a finding of causation with respect to any product for which it is liable.

Defendant Carlisle contends that Pennsylvania law applies to the claims against it (although the alleged exposure at issue occurred exclusively in Germany). Plaintiff asserts that New Jersey law applies to the claims at issue.

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 Carlisle contends that Pennsylvania law applies to the claims against it (although the alleged exposure at issue occurred exclusively in Germany) because Decedent was a resident of - and domiciled in - Pennsylvania when deployed to Germany. Plaintiff contends that New Jersey law applies to all claims at issue in this case because all of the alleged exposures occurred either in New Jersey or in Germany - and because Decedent was domiciled in New Jersey prior to his deployment to Germany, New Jersey law applies even to exposures that occurred in Germany.

In deciding what law governs a claim based in state law, a federal transferee court applies the choice of law rules

of the state in which the action was initiated. Van Dusen v. Barrack, 376 U.S. 612, 637-40 (1964)(applying the *Erie* doctrine rationale to case held in diversity jurisdiction and transferred from one federal district court to another as a result of defendant's initiation of transfer); Commissioner v. Estate of Bosch, 387 U.S. 456, 474-77 (1967)(confirming applicability of *Erie* doctrine rationale to cases held in federal question jurisdiction). Therefore, because this case was initiated in Delaware and transferred from the district court there, Delaware choice of law rules must be applied in determining what substantive law to apply to this case.

Delaware's choice of law approach entails a two-pronged inquiry. First, it is necessary to compare the laws of the competing jurisdictions to determine whether the laws actually conflict on a relevant point. While no reported Delaware cases establish that an actual conflict must exist, the Third Circuit, as well as other federal and state courts within Delaware, have concluded that Delaware's choice of law rules require that an actual conflict exist prior to engaging in a complete conflict of laws analysis. See In re Teleglobe Commc'ns Corp., 493 F.3d 345, 358 (3d Cir. 2007) (noting the absence of controlling precedent on this point but predicting that "Delaware would follow the practice of the federal system and most states, and decide a choice-of-law dispute only when the proffered legal regimes actually conflict on a relevant point"); Underhill Inv. Corp. v. Fixed Income Discount Advisory Co., 319 F. App'x. 137, 140-41 (3d Cir. 2009) (non-precedential opinion) (applying Delaware choice of law rules and noting that where the laws of the two jurisdictions would produce an identical result, a "false conflict" exists and a court should eschew a conflict analysis); Pig Imp. Co., Inc. v. Middle States Holding Co., 943 F. Supp. 392, 396 (D. Del. 1996) (Robinson, J.) (finding that where the laws of the relevant forums do not conflict, the court need not undergo a choice of law analysis) (citing Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 813 (3d Cir. 1994)); Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC, No. 3718, 2010 WL 338219, at *8 (Del. Ch. Jan. 29, 2010) ("Accordingly, because the laws of the several interested states relevant to the issues in this case all would produce the same decision no matter which state's law is applied, there is no real conflict and a choice of law analysis would be superfluous."); Parlin v. Dyncorp Intern., Inc., No. 08-01-136, 2009 WL 3636756, at *3 n.16 (Del. Super. Ct. Sept. 30, 2009) (citing Berg for the proposition that where a "false" conflict exists, a choice of law analysis is unnecessary); Lagrone v. Am. Mortell Corp., No.

04-10-116, 2008 WL 4152677, at *5 (Del. Super. Ct. Sept. 4, 2008) (same); Kronenberg v. Katz, No. 19964, 2004 WL 5366649, at *16 (Del. Ch. May 19, 2004) ("Where the choice of law would not influence the outcome, the court may avoid making a choice."); ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., No. 94-11-024, 1998 WL 437137, at *5 (Del. Super. Ct. June 10, 1998) ("When a choice of law analysis does not impact the outcome of the court's decision, no choice of law analysis need be made."), aff'd, 731 A.2d 811 (Del. 1999). Where no actual conflict exists between Delaware law and another potentially applicable law, Delaware law is applicable.

Second, if it is determined that an actual conflict exists, Delaware employs the "most significant relationship" test, as set forth in the Restatement (Second) of Conflict of Laws (the "Restatement"), in order to determine which law should apply. Travelers Indemnity Co. v. Lake, 594 A.2d 38, 47 (Del. 1991) (adopting the most significant relationship test); see David B. Lilly Co., Inc. v. Fisher, 18 F.3d 1112, 1117 (3d Cir. 1994); In re W.R. Grace & Co., 418 B.R. 511, 518-19 (D. Del. 2009); Corning Inc. v. SRU Biosystems, LLC, 292 F. Supp. 2d 583, 584 (D. Del. 2003) ("Delaware courts apply the most significant relationship test.")(citation omitted).

In this case, Plaintiff, has cited to evidence that Decedent was domiciled in New Jersey during his period of Army service in Germany. Moreover, the Court notes that none of the alleged exposure in the case occurred in Pennsylvania, while much of the alleged exposure in the case occurred in New Jersey (albeit none of the exposure pertinent to this defendant). Because the exposure at issue occurred in Germany, there are two potential forums whose law could govern these claims: Germany (the location of the alleged exposure pertinent to this defendant) and New Jersey (the state in which Plaintiff was domiciled at the time of the alleged exposure and the location of much of the alleged exposure to products of other defendants in this case). As the law of Germany implicates considerations of international law unique to a separate sovereign, Federal Rule of Civil Procedure 44.1 must be addressed before proceeding. Mzamane v. Winfrey, 693 F. Supp. 2d 422, 468-69 (E.D. Pa. 2010)(Robreno, J.).

Rule 44.1 controls the application of foreign law in federal court. It provides:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1. While this rule empowers a district court with the authority to determine applicable foreign law, it imposes no obligation on the court to inquire into foreign law sua sponte. See Bel-Ray Co., Inc. v. Chemrite Ltd., 181 F.3d 435, 440 (3d Cir. 1999)(stating that Rule 44.1 "provides courts with broad authority to conduct their own independent research to determine foreign law but imposes no duty upon them to do so"); Integral Res. Ltd. v. Istil Group, Inc., 155 F. App'x 69, 73 (3d Cir. 2005)(non-precedential opinion)(finding that the district court was not required to consider Pakistan law sua sponte).

Under Rule 44.1, it is incumbent upon the parties to "carry both the burden of raising the issue that foreign law may apply in an action, and the burden of adequately proving foreign law to enable the court to apply it in a particular case." Bel-Ray, 181 F.3d at 440 (citing Whirlpool Fin. Corp. v. Sevaux, 96 F.3d 216, 221 (7th Cir. 1996)). Therefore, where the parties do not satisfy both of these burdens, the law of the forum will apply. See id. at 441 (finding that where a litigant failed to raise the issue of whether South African contract law applied and failed to provide any evidence as to the substance of that foreign law, it was appropriate to apply the law of the forum); Walter v. Neth. Mead N.V., 514 F.2d 1130, 1137 n.14 (3d Cir. 1975)(concluding that although the law of the Netherlands ostensibly applied, where a party did not conclusively establish the foreign law, the court should assume it is consistent with the law of the forum).

Neither party has suggested that the law of Germany might apply. Therefore, under Rule 44.1, the law of New Jersey (the only other potentially applicable law) applies, as German law is assumed to be the same as New Jersey law. See Bel-Ray, 181 F.3d at 441; Mzamane, 693 F. Supp. 2d at 468-69.

C. Product Identification / Causation Under New Jersey Law

This Court has previously considered the product identification/causation standard under New Jersey law. In Lewis v. Asbestos Corp, (No. 10-64625), this Court wrote:

> To maintain an asbestos action in New Jersey, a plaintiff must "provide sufficient direct or circumstantial evidence from which a jury could conclude that plaintiff was in close proximity to, and inhaled, defendant's asbestos-containing product on a frequent and regular basis." Kurak v. A.P. Green Refractories Co., 689 A.2d 757, 761 (N.J. Super. Ct. App. Div. 1997) (quoting Sholtis v. American Cyanamid Co., 568 A.2d 1196, 1208 (N.J. Super. Ct. App. Div. 1989)). In order to meet this "frequency, regularity and proximity test," plaintiff must do more than "demonstrate that a defendant's asbestos product was present in the workplace or that he had 'casual or minimal exposure' to it." Kurak, 689 A.2d at 761 (quoting Goss v. American Cyanamid Co., 650 A.2d 1001, 1005 (N.J. Super. Ct. App. Div. 1994)). In addition to meeting the "frequency, regularity, and proximity test," plaintiff must establish causation by presenting "competent evidence, usually supplied by expert proof" showing that there is a nexus between exposure to defendant's product and plaintiff's condition. Kurak, 689 A.2d at 761.

2011 WL 5881183, * 1 n.1 (E.D. Pa. Aug. 2, 2011)(Robreno, J.).

D. Presumption Re: Warning Defect Under New Jersey Law

This Court has previously addressed the presumption regarding warning defect claims that exists under New Jersey law. In Lewis v. Asbestos Corp, (No. 10-64625), this Court wrote:

> In Coffman v. Keene Corp., the plaintiff claimed that an asbestos manufacturer's failure to place warnings on its asbestos-related products was a proximate cause of the plaintiff's development of asbestosis. 628 A.2d 710, 715 (N.J. 1993). The court recognized that, "[c]ausation is a fundamental requisite for establishing any product-liability action. The plaintiff must demonstrate so-called product-defect causation-that the defect in the product was

a proximate cause of the injury." Id. at 716 (citing Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179 (N.J. 1982); Vallillo v. Mushkin Corp., 514 A.2d 528 (N.J. App. Div. 1986)). "When the alleged defect is the failure to provide warnings, a plaintiff is required to prove that the absence of a warning was a proximate cause of his harm." 628 A.2d at 715 (citing Campos v. Firestone Tire & Rubber Co., 485 A.2d 305 (N.J. 1984)). The court adopted a "heeding presumption" in products liability failure to warn cases that the plaintiff "would have followed an adequate warning had one been provided, and that the defendant in order to rebut that presumption must produce evidence that such a warning would not have been heeded." 628 A.2d at 720. Evidence that the plaintiff was aware of the dangers associated with the defendant's product or that the plaintiff would have disregarded the warnings had they been provided may rebut this heeding presumption. Id. at 721. The court held that "to overcome the heeding presumption in a failure-to-warn case involving a product used in the workplace, the manufacturer must prove that had an adequate warning been provided, the plaintiff-employee with meaningful choice would not have heeded the warning." Id. at 724.

2011 WL 5881181, * 1 n.1 (E.D. Pa. Aug. 2, 2011)(Robreno, J.).

II. Defendant Carlisle's Motion for Summary Judgment

A. Defendant's Arguments

Defendant Carlisle argues, inter alia, that there is insufficient product identification evidence to support a finding of causation with respect to any product(s) for which it is liable.

B. Plaintiff's Arguments

In response to Defendant's assertion that there is insufficient product identification evidence to establish causation with respect to its product(s), Plaintiff has identified the following evidence:

- Testimony re: Motion Control
  Plaintiff cites testimony from various sources, which she contends indicates that Motion Control designed and manufactured asbestos-containing

brake linings used with Rockwell's brake assemblies, which were placed on AM General's 2 1/2 ton and 5 ton vehicles.

(Pl. Ex. 80 at 30-33, 72-73; Doc. No. 267-109.)

- Evidence re: Rockwell Brake Assemblies
  Plaintiff cites evidence that AM General was Rockwell's major and only customer for axles and brake assemblies for 2 1/2 and 5 ton trucks from 1965 to 1975, and that it also sold replacement friction material for the brake assemblies it manufactured for the military. She cites evidence that all of the brake assemblies during the relevant time period contained asbestos.

  (Pl. Ex. 58, Doc. No. 267-84.)

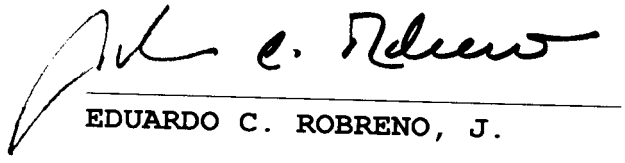
- Evidence re: Motion Control Knowledge
  Plaintiff cites evidence regarding Rockwell's alleged knowledge of asbestos hazards.

  (Pl. Ex. 79; Doc. Nos. 267-107 to 267-108.)

C. Analysis

Plaintiff contends that Defendant Carlisle, the successor to liabilities of Motion Control, is liable for asbestos-containing brake linings used with AM General vehicles. Plaintiff has identified no evidence that the brake linings to which Decedent was exposed in connection with his work on or around AM General vehicles were manufactured or supplied by Motion Control, or even that Rockwell was an exclusive supplier of brakes for those vehicles. While Plaintiff has provided evidence that AM General was the sole customer of Rockwell's, it does not follow that AM General only used Rockwell brake assemblies. Moreover, the evidence in the record indicates that Rockwell obtained brake linings from numerous manufacturer-suppliers. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from brake linings manufactured or supplied by Rockwell such that it was a substantial factor in the development of his mesothelioma because any such finding would be based on speculation. See Kurak, 689 A.2d at 761. Accordingly, summary judgment in favor of Defendant Carlisle is granted. Anderson, 477 U.S. at 248-50.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

In light of this determination, the Court need not address any of Defendant's other arguments.