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

GERI GRABENSTEIN,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Western District of
v.	:	Pennsylvania (Case No. 11-00467)
	:	
A.O. SMITH CORPORATION, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-CV-63929-ER
Defendants.	:	

O R D E R

AND NOW, this **29th** day of **March, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Dezurik, Inc. (Doc. No. 43) is **GRANTED**; the Cross-Motion for Default Judgment by Plaintiff is **DENIED**.[1]

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[1] This case was transferred in April of 2011 from the United States District Court for the Western District of Pennsylvania to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Geri Grabenstein ("Plaintiff") is the executrix of the estate of Charles A. Malloy ("Decedent"). Plaintiff filed the instant action in the Court of Common Pleas of Allegheny County in March of 2010, alleging that Decedent's mesothelioma was caused by exposure to asbestos products. The case was removed to federal court (to the United States District Court for the Western District of Pennsylvania) on April 6, 2011 and was transferred to the MDL on April 20, 2011. Prior to removal of the case, counsel for Defendant Dezurik, Inc. ("Dezurik") entered an appearance in the state court action. On February 21, 2012 - the same day it filed its reply brief - Dezurik filed an Answer in this action.

Defendant Dezurik has moved for summary judgment, arguing that there is insufficient product identification evidence to support a finding of causation with respect to its product(s). Plaintiff does not respond to the substance of

Dezurik's motion. Rather, she asserts that Dezurik failed to file an Answer in this action and that the Court should therefore deem the allegations of the Complaint admitted as to Defendant Dezurik - in essence, cross-moving for a default judgment as to Defendant Dezurik.

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

In multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.). Therefore, in addressing the procedural matters herein, the Court will apply federal law as interpreted by the Third Circuit Court of Appeals. Id.

II. Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Default Judgment

A. Defendant's Arguments

Dezurik argues that it is entitled to summary judgment because there is no evidence that Decedent was exposed to any asbestos from any Dezurik product.

In its reply brief, Dezurik argues that the Court should not deem Plaintiff's allegations admitted because it (1) entered an appearance in the state court action in this case on April 8, 2010, which it contends constitutes a denial of all allegations in the Complaint, pursuant to Pa. R.C.P. 1041.1, and (2) recently filed an Answer with Affirmative defenses on February 21, 2012, with its opposition to Defendant's motion. Dezurik cites to Fed. R. Civ. P. 81(c)(2) for the proposition that it is not required to file a second answer after a case is removed from state court to federal court.

B. Plaintiff's Arguments

Plaintiff contends that the Court should disregard Defendant's summary judgment motion and should, instead, deem the allegations of the Complaint admitted (in essence, seeking a default judgment). Plaintiff has cited to an earlier decision of this Court, which she contends makes clear that a Defendant must file an answer in the MDL federal action (after removal of a case from state court) and cannot rely upon its entry of appearance in state court pursuant to Pa. R. Civ. P. 1041.1. Specifically, Plaintiff points to In re Asbestos Products Liability Litigation (No. VI), No. 07-63080, 2010 WL 4140588 at *4 (E.D. Pa. Oct. 19, 2010)(Robreno, J.).

Plaintiff asserts that Dezurik did not file an answer in this action, and that it is therefore not entitled to move for summary judgment or to obtain a judgment in its favor. However, Plaintiff notes that if a default judgment in her favor is not deemed appropriate, then Dezurik is entitled to summary judgment, as Plaintiff has not produced any evidence to support a finding of causation with respect to Dezurik's product(s).

C. Analysis

Pennsylvania Rule of Civil Procedure 1041.1(c) provides that, in an asbestos action in Pennsylvania state court, the

filing of an appearance by a defendant constitutes (1) a denial of all averments of fact in the complaint, (2) an allegation of all affirmative defenses, and (3) a claim for indemnification and contribution from any other party. Pa. R. Civ. P. 1041.1(c). This Court has previously held that 1041.1(c) does not relieve a Defendant in the MDL from its obligation to file an answer after a case is removed from state court to federal court. In re Asbestos Products Liability Litigation (No. VI), No. 07-63080, 2010 WL 4140588 at *4 (E.D. Pa. Oct. 19, 2010)(Robreno, J.). However, in doing so, it appears that the Court overlooked Federal Rule of Civil Procedure 81(c), to which another defendant in this action has cited. Rule 81(c) provides:

> Rule 81. Applicability of the Rules in General; Removed Actions
>
> (c) Removed Actions.
>
> (1) Applicability. These rules apply to a civil action after it is removed from a state court.
>
> (2) Further Pleading. **After removal, repleading is unnecessary unless the court orders it.** A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:
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> (A) 21 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief;
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> (B) 21 days after being served with the summons for an initial pleading on file at the time of service; or
>
> (C) 7 days after the notice of removal is filed.

Fed. R. Civ. P. 81(c)(emphasis added).

In order to apply Federal Rule 81(c), the Court must determine whether the entry of appearance by Defendant Dezurik in the state court action constitutes an "answer" as the term is used in 81(c)(2). Plaintiff contends that it does not. In order to make this determination, this Court looks to whether Pennsylvania courts deem that entry of appearance an "answer" in the state court action. Although there is no authority from any Pennsylvania court that explicitly answers this question, it appears from the language of Pa. R. Civ. P. 1041.1(c) - which states that an entry of appearance constitutes a denial of all averments of fact in the complaint, an allegation of all affirmative defenses, and a claim for indemnification and contribution from any other party -- that the appearance is deemed to constitute an "answer." See Pa. R. Civ. P. 1029 (requiring a responsive pleading to admit or deny each averment of fact in the complaint); Pa. R. Civ. P. 1030 (requiring all affirmative defenses to be set forth in a responsive pleading); Pa. R. Civ. P. 1031 (allowing for assertion of counterclaims and cross-claims in an answer). Having addressed this issue, this Court notes that none of its orders in this action have required Defendant Dezurik to file an answer. Therefore, pursuant to Rule 81(c)(2), it appears that Defendant was not required to file an answer in this action after it was removed from state court. See Fed. R. Civ. P. 81(c)(2). (The Court notes that, to eliminate the possibility of confusion, scheduling orders in future MDL cases will require all defendants to file an answer in the federal action, regardless of whether or not an answer or entry of appearance has been filed in a state court action.)

Moreover, the Court notes that, even though Dezurik was not required to file an answer in this federal action, it has now done so, filing its Answer along with its reply brief. Therefore, for the sake of clarity, the Court notes that it would not have entered a default judgment against Dezurik even if it had determined that the entry of appearance by Dezurik's counsel in state court did not constitute an "answer" for purposes of Federal Rule 81(c) - and despite the fact that the recently filed Answer would have been untimely. The issue of handling untimely responses was recently addressed in Wilson v. King, where the court wrote:

> The precise issue in this case, which few courts, including the Third Circuit, have addressed is whether the untimely filing of a responsive pleading, particularly an answer to a complaint, is, on its own, a sufficient ground to strike the tardy pleading. In

answering this question, courts in other jurisdictions have balanced the degree of prejudice suffered by the moving party with the desire to resolve cases on the merits rather than by default. See e.g., Marfia v. T.C. Zirant Bankasi, 100 F.3d 243, 249 (2d Cir. 1996) (indicating the preference that "litigation disputes be resolved on the merits" as the reason to deny motion to strike pleading).

The most analagous case to this matter is Canady v. Erbe Elektromedizin GMBH, 307 F. Supp. 2d 2 (D.D.C. 2004). In Canady, the defendants served the plaintiffs with counterclaims on August 5, 1997. Id. at 7. The plaintiffs' response was due within twenty days pursuant to Rule 12(a)(2) of the Federal Rules of Civil Procedure, however, the plaintiffs did not respond until March 10, 1998, "more than six months after the 20-day period had elapsed, and after the defendants had filed their first motion for entry of default judgment on February 27, 1998." Id. In their defense, the plaintiffs claimed they had a mutual understanding with the defendants that no issue would be raised regarding the tardy filing; the defendants however, denied any such understanding existed. Id. at 8.

The Canady Court refused to strike the plaintiffs' response even after acknowledging that it would be within the proper exercise of the court's discretion to do so. Id. In reaching this decision, the Court first highlighted that the defendants had sought the motion to strike in an effort to obtain default judgment on their counterclaim against the plaintiffs. Id. The Court went on to explain that granting a motion to strike under such circumstances would "contravene the established policies disfavoring motions to strike ... and favoring the resolution of cases on their merits." Id. ("... if the court were to rule in favor of the defendants, where would that leave the court and the parties? The answer to this question provides the guiding force for the court's decision.").

Frequently relying on the reasoning in Canady, other courts have also denied motions to strike late pleadings in favor of deciding cases on their merits. See e.g., Khadka v. Rajamani, No. 1:08cv1320, 2009 WL 910849, at *2 (E.D. Va. Apr. 1, 2009) ("[T]he

Answer was only one day late and its tardiness did not prejudice [the plaintiff] in the least. Moreover, granting the motion to strike would allow the plaintiff to avoid resolving his case on the merits. The Court will not sanction such an outcome."); Mitchell v. First Cent. Bank, Inc., No. 2:08CV6, 2008 WL 4145449, at *2 (N.D. W. Va. Sept. 8, 2008) ("[D]efendants have not shown that they have been prejudiced in any way by [plaintiff's] late ... answer to the counterclaim. Furthermore, ... defendants are seemingly seeking to strike ... so that they can then proceed toward a default judgment. Disposing of cases on the merits, however, is favored in this Court."); Azikiwe v. Nig. Airways Ltd., No. CV-03-6387, 2006 WL 2224450, at *[1] (E.D.N.Y. July 31, 2006) (refusing to grant the plaintiff's motion to strike the defendants' answer that was filed one month late because of the disfavored status of motions to strike and the Second Circuit's "preference that litigation disputes be resolved on the merits, [and] not by default").

Additionally, courts note that "[e]ven if a motion to strike is 'technically appropriate and well-founded,' motions to strike defenses as insufficient are often denied in absence of a showing of prejudice to the moving party." See e.g., Mitchell, 2008 WL 4145449, at *2 (internal citation omitted).

Here, the facts supporting Plaintiff's Motion to Strike appear stronger than Canady; Defendants filed their Answer ten months late versus the six month tardiness in Canady. Nonetheless, the Court still finds that granting the motion is inappropriate under the present circumstances. Similar to the defendants in Canady, Plaintiff's attempt to strike Defendant's Answer would leave the Court faced with the drastic remedy of default judgment. This Court finds that such an outcome would undermine the strong interest the Court has in resolving disputes on the merits. See Hill v. Williamsport Police Dep't, 69 F.App'x 49, 51 (3d Cir. 2003) ("Our Court 'does not favor entry of defaults or default judgments', ... as it prefers adjudications on the merits."); United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 194-95 (3d Cir. 1984) (stating the court's preference for deciding cases on the merits over default judgment); Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 2004)("[W]e

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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have repeatedly stated our preference that cases be disposed of on the merits whenever practicable."). Furthermore, Plaintiff has failed to demonstrate what prejudice, if any, he has suffered as a result of Defendants' late filing. For these reasons, the Court finds that the prejudicial effect on Plaintiff does not outweigh the significant interest the Court has in deciding the case on the merits. As such, the Court denies Plaintiff's motion to strike.

No. 06-2608, 2010 WL 678102, at *3-4 (E.D. Pa. Feb. 24, 2010).

Significantly, the Court notes that Plaintiff has not identified any prejudice that she would suffer as a result of the Court's acceptance of an untimely Answer from Defendant Dezurik - either in her opposition brief or at oral argument. Moreover, Plaintiff has conceded that she has no evidence that Dezurik's product was a cause of the Decedent's injury. The Court also notes that, despite the fact that this case had been pending in federal court for over eight (8) months prior to Dezurik's filing of the present motion for summary judgment, Plaintiff never sought a default judgment. Furthermore, On September 9, 2011, Plaintiff requested and was granted a 60-day extension of the discovery deadline such that she could have sought additional discovery had she chosen to do so. Therefore, in light of the lack of prejudice to Plaintiff and the Court's significant interest in deciding cases on the merits, Plaintiff's motion for a default judgment would be denied even if Dezurik's filing of an entry of appearance did not constitute an "answer." See id.; Hill, 69 F.App'x at 51; $55,518.05 in U.S. Currency, 728 F.2d at 194-95; Hritz, 732 F.2d at 1181; Marfia, 100 F.3d at 249.

In light of this ruling, and because Plaintiff has not identified any evidence in response to the substance of Defendant Dezurik's motion, summary judgment in favor of Dezurik is warranted. See Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 250.