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

DEON W. WRIGHT, Plaintiff, v. A.W. CHESTERTON COMPANY, ET AL., Defendants.	: : : : : : : : :	CONSOLIDATED UNDER MDL 875 Transferred from the Northern District of Illinois (Case No. 11-01954) E.D. PA CIVIL ACTION NO. 2:11-CV-66748-ER

FILED
APR - 6 2012
MICHAEL E. KUNZ, Clerk
By________Dep. Clerk

O R D E R

AND NOW, this **5th** day of **April, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant CBS Corporation (Doc. No. 156) is **DENIED**.[1]

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

Plaintiff Deon Wright ("Plaintiff") worked as a pipefitter at various jobsites, from 1965 until around 1998, when he retired. Defendant CBS Corporation, a successor corporation to Westinghouse Electric Corporation, ("Westinghouse") manufactured turbines. Plaintiff has alleged that he was exposed to asbestos from a Westinghouse turbine, at the following location:

- Zion Nuclear Power Plant - Champaign, IL

Plaintiff was diagnosed with lung cancer in April of 2009 and was also told he may have asbestosis. He was deposed in August of 2011.

Plaintiff has brought claims against various defendants. Defendant Westinghouse has moved for summary judgment, arguing that (1) there is insufficient product identification evidence to establish causation with respect to its product(s), and (2) Plaintiff's claims are barred by the statute of repose. The parties agree that Illinois law applies.

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

The parties have agreed that Illinois substantive law applies. Therefore, this Court will apply Illinois law in deciding Westinghouse'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).

C. Product Identification/Causation Under Illinois Law

In order to establish causation for an asbestos claim under Illinois law, a plaintiff must show that the defendant's asbestos was a "cause" of the illness. Thacker v. UNR Industries, Inc., 151 Ill.2d 343, 354 (Ill. 1992). In negligence actions and strict liability cases, causation requires proof of both "cause

in fact" and "legal cause." Id. "To prove causation in fact, the plaintiff must prove medical causation, i.e., that exposure to asbestos caused the injury, and that it was the defendant's asbestos-containing product which caused the injury." Zickhur v. Ericsson, Inc., 2011 WL 5578910, at *6 (Ill. App. (1st Dist.) 2011)(citing Thacker, 151 Ill.2d at 354).

Illinois courts employ the "substantial factor" test in deciding whether a defendant's conduct was a cause of a plaintiff's harm. Nolan v. Weil-McLain, 233 Ill.2d 416, 431 (Ill. 2009)(citing Thacker, 151 Ill.2d at 354-55). Proof may be made by either direct or circumstantial evidence. Thacker, 151 Ill.2d at 357. "While circumstantial evidence may be used to show causation, proof which relies upon mere conjecture or speculation is insufficient." Thacker, 151 Ill.2d at 354.

In applying the "substantial factor" test to cases based upon circumstantial evidence, Illinois courts utilize the "frequency, regularity, and proximity" test set out in cases decided by other courts, such as Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986). Thacker, 151 Ill.2d at 359. In order for a plaintiff relying on circumstantial evidence "to prevail on the causation issue, there must be some evidence that the defendant's asbestos was put to 'frequent' use in the [Plaintiff's workplace] in 'proximity' to where the [plaintiff] 'regularly' worked." Id. at 364. As part of the "proximity" prong, a plaintiff must be able to point to "sufficient evidence tending to show that [the defendant's] asbestos was actually inhaled by the [plaintiff]." This "proximity" prong can be established under Illinois law by evidence of "fiber drift," which need not be introduced by an expert. Id. at 363-66.

D. Statute of Repose (Under Illinois Law)

The Illinois construction statute of repose invoked by Defendant Westinghouse provides that:

> (b) No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have

> less than 4 years to bring an action as provided in subsection (a) of this Section.

735 ILCS 5/13-214(b).

The Supreme Court of Illinois has held that, whether an item constitutes an improvement to real property is a question of law, though its resolution is grounded in fact. St. Louis v. Rockwell Graphic Systems, Inc., 153 Ill.2d 1, 3 (Ill. 1992). It has vacated an appellate court's grant of summary judgment on grounds of the statute of repose where it determined that the record was not sufficiently developed to permit a determination as to whether a product (a printing press manufactured and installed by the defendant) was an "improvement to real property" within the meaning of the statute. Id. at 5-6.

Appellate courts in Illinois have held that the statute barred claims brought against installers of insulation where the evidence suggested that the sale of insulation was only incidental to its installation. King v. Paul J. Krez Co., 323 Ill. App.3d 532, 536-40 (Ill. App. (1st Dist.) 2001); Risch v. Paul J. Krez Co., 287 Ill. App.3d 194, 198-99 (Ill. App. (1st Dist.) 1997). At least one appellate court has held that the statute did not bar claims based on an asbestos manufacturer's sale of asbestos products, even though the manufacturer also installed the products. Krueger v. A.P. Green Refractories Co., 283 Ill. App. 3d 300, 304 (Ill. App. (3d Dist.) 1996). Neither the Supreme Court of Illinois nor any appellate court in Illinois has determined whether a turbine is an "improvement to real property" under the statute.

II. Defendant Westinghouse's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Westinghouse argues that there is insufficient product identification evidence to support a jury finding of causation with respect to its products. Westinghouse asserts that there is no evidence that (1) Plaintiff was exposed to asbestos from a Westinghouse product or that (2) any such exposure was significant enough in the context of his lifelong accumulation of asbestos exposures to be a "substantial factor" in causing his illness.

Statute of Repose

Defendant argues that Illinois's construction statute of repose ("CSOR") bars Plaintiff's claims pertaining to land-based turbine generator units such that summary judgment is warranted because any claim which arises out of an "act or omission" in the "design, planning, supervision, observation, or management of construction, or construction" of an "improvement to real property" must be brought within ten years of the act or omission.

B. Plaintiff's Arguments

Product Identification / Causation

As an initial point, Plaintiff argues that the "frequency, regularity, and proximity" test is not applicable because he is relying upon direct (rather than circumstantial) evidence. Plaintiff also argues that there is sufficient evidence regarding Westinghouse turbines. In support of this argument, he relies upon (1) deposition testimony of Plaintiff, (2) Westinghouse documents, and (3) two separate declarations of Mr. Parker. A summary of the relevant evidence is as follows:

- Deposition Testimony of Plaintiff
  Plaintiff testified that he worked at the Zion facility at the time that the Westinghouse turbine was being installed. He testified that he worked in the tunnels connecting to the room in which the turbine was located. He testified that, once or twice every week, he spent about two to three hours working within 100 to 200 feet of the turbine. During this time, he was working in the room with the turbine with other tradesmen who were performing maintenance work on it. He testified that pipe insulators mixed asbestos cement and cut and installed thermal block pipe insulation on the turbine.

  (Pl. Ex. 1, Doc. 202-3, Dep. of Deon Wright, Aug. 30, 2011.)

- Westinghouse Documents
  Plaintiff points to a group of documents which he contends indicate that Westinghouse supplied asbestos insulation with its turbine.

(Pl. Exs. 4-6, 9, Doc. Nos. 202-6 to 202-8, and 202-11.)

- Declaration Testimony of Expert Frank Parker
  Plaintiff points to the following opinion testimony from expert Parker:

  - "Mr. Wright was occupationally exposed to significant concentrations of airborne asbestos fibers from his and his co-workers disturbance of TSI."

  (Pl. Ex. 12, Doc. No. 202-14, Decl. of Frank Parker ¶ 2.)

Statute of Repose

Plaintiff argues that (1) this issue should be remanded for a court in Illinois to decide, (2) even if it is not remanded, the Court should deny summary judgment because (a) the statute does not apply to suppliers of asbestos, (b) there are genuine issues of fact as to whether the work giving rise to the asbestos exposure took place during "improvements" to the plant - as opposed to "maintenance" or "repair" (to which Plaintiff asserts the statute of repose does not apply), and (c) Defendant has the burden of proof in light of the fact that the statute of repose is an affirmative defense.

C. Analysis

Product Identification / Causation

Plaintiff alleges that he was exposed to asbestos from asbestos-containing insulation supplied by and used in connection with a Westinghouse turbine. There is evidence that Plaintiff worked around others who were applying and/or disturbing insulation on the Westinghouse turbine during its construction. Plaintiff is relying on direct evidence to establish causation. Therefore, he need not satisfy the "frequency, regularity, and proximity" test. See Thacker, 151 Ill.2d at 359. Plaintiff has identified documents which he contends indicate that Westinghouse supplied the insulation. Therefore, construing the evidence (specifically, these documents) in the light most favorable to Plaintiff, a reasonable jury could conclude that he was exposed to asbestos from insulation supplied by Westinghouse with its turbine such that this exposure was a "substantial factor" in the

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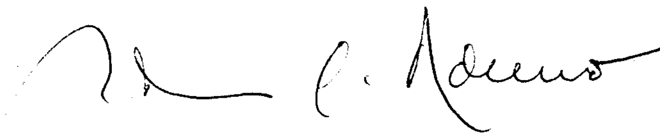
AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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development of his illness. Nolan, 233 Ill.2d at 431; Thacker, 151 Ill.2d at 354-55. Accordingly, summary judgment in favor of Defendant Westinghouse is not warranted on grounds of insufficient product identification evidence. See id.; Anderson, 477 U.S. at 248.

Statute of Repose

Defendant Westinghouse invokes the CSOR on grounds that its land-based turbines are improvements to real property. Plaintiff's claims, however, are based upon alleged exposure to insulation that Plaintiffs contend was supplied by Defendant Westinghouse (as opposed to the claims being based on the turbines themselves). At least one appellate court in Illinois has held that the statute did not bar claims based on an asbestos manufacturer's sale of asbestos products, even though the manufacturer also installed the products. Krueger v. A.P. Green Refractories Co., 283 Ill. App. 3d 300, 304 (Ill. App. (3d Dist.) 1996). Plaintiff has produced some evidence that Defendant supplied the insulation at issue. Defendant has not produced an affidavit or other evidence to establish that it did not supply the insulation. Therefore, there is at least a genuine dispute as to a material fact that precludes summary judgment on grounds of the statute of repose. See id.; St. Louis, 153 Ill.2d at 5-6. Accordingly, summary judgment in favor of Westinghouse is not warranted on grounds of the statute of repose.

D. Conclusion

Summary judgment in favor of Defendant Westinghouse is denied as to each basis asserted in its motion.