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

TERRY CARDARO and JO ANN CARDARO,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	Transferred from the Eastern District of Louisiana (Case No. 11-00876)
AEROJET GENERAL CORP. ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-66763-ER
Defendants.	:	

O R D E R

AND NOW, this **27th** day of **July, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **General Electric Company** (Doc. No. 54) is **DENIED**.[1]

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

Plaintiff Terry Cardaro alleges that he was exposed to asbestos while working at Louisiana Power & Light Company ("LP&L"). Defendant General Electric Company ("GE") manufactured, inter alia, turbine generators, which Plaintiff contends were used with asbestos gaskets, packing, and insulation. The alleged exposure pertinent to Defendant GE occurred during the following period of Plaintiff's work:

- Louisiana Power & Light Company (LP&L) (1977 to 1982)

Plaintiff was diagnosed with mesothelioma in May of 2004. He asserts that he developed this disease as a result of exposure to asbestos from insulation used in connection with a land-based turbine generator manufactured by Defendant GE.

Plaintiff brought claims against various defendants. Defendant GE has moved for summary judgment, arguing that (1) Plaintiff's claims are barred by the Louisiana statute of repose, and (2) it is entitled to summary judgment on grounds of the "sophisticated user/purchaser" defense. The parties agree that Louisiana 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 Louisiana substantive law applies. Therefore, this Court will apply Louisiana law in deciding GE'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. Statute of Repose (Louisiana)

The Louisiana statute of repose pertaining to construction was originally enacted in 1964. It was amended many times thereafter, including an amendment pertinent to the present motion, which occurred in 1990.

The statute as originally enacted in 1964 provided, in relevant part:

> A. No action, whether *ex contracto, ex delicto,* or otherwise, to recover on a contract or to recover damages shall be brought against any person . . . performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of an improvement to immovable property:
>
> (1) More than ten years after the date of registry in the mortgage office of acceptance of the work by owner; or
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> (2) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, more than ten years after the improvement has been thus occupied by the owner;
>
> B. The causes which are preempted within the time described above include any action . . .
>
> (3) For injury to the person or from wrongful death arising out of any such deficiency; and . . .
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> This peremptive period shall extend to every demand whether brought by direct action or for contribution or indemnity or by third party practice, and whether brought by the owner or by any other person.

La. R.S. 9:2772 (1964).

The statute as amended in 1990 provides, in relevant part:

> A. No action, whether *ex contracto, ex delicto,* or otherwise, **including but not limited to an action for failure to warn,** to recover on a contract or to recover damages shall be brought against any person . . . performing or furnishing the surveying, marking, and related services preparatory to construction, or against any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of an improvement to immovable property:
>
> (1) More than ten years after the date of registry in the mortgage office of acceptance of the work by owner; or
>
> (2) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, more than ten years after the improvement has been thus occupied by the owner;
>
> B. The causes which are preempted within the time described above include any action . . .
>
> (3) For injury to the person or from wrongful death arising out of any such deficiency; and . . .
>
> This peremptive period shall extend to every demand whether brought by direct action or for contribution or indemnity or by third party practice, and whether brought by the owner or by any other person.

La. R.S. 9:2772 (1990)(emphasis added).

The 1990 amendment was enacted in response to the decision of the Louisiana Supreme Court in Bunge v. GATX Corp., 557 So.2d 1376 (La. 1990). In Bunge, the Louisiana Supreme Court held, inter alia, that failure to warn claims are, in essence, claims of "fraud" and are, therefore, subject to an exception to

the statute for fraud claims, thus rendering the statute inapplicable to those claims. The 1990 amendment added language to the statute clarifying that the statute also applies to bar failure to warn claims.

II. Defendant GE's Motion for Summary Judgment

A. Defendant's Arguments

Louisiana Statute of Repose

GE argues that Plaintiff's claims are barred by either the 1964 version of the Louisiana construction statute of repose, or the 1990 amended version (whichever applies). GE contends that (1) it is the 1990 version that properly applies and (2) the amendment merely clarifies the substance, such that it is not necessary to consider whether the amendment is retroactive. GE relies primarily upon Claiborne v. Rheem Manufacturing Company, 579 So.2d 1199, 1200 (La. App. 5th Cir. 1991), in which an intermediate appellate court held that the statute barred failure to warn claims that had accrued prior to the 1990 amendments.

Sophisticated User/Purchaser Defense

GE asserts that Louisiana law recognizes a sophisticated user/purchaser defense and that it is entitled to this defense because Plaintiff's employer (LP&L) knew about the hazards of asbestos beginning at least as early as 1971 or 1972 (approximately 5 or 6 years prior to Plaintiff's alleged exposure). In support of this contention, GE relies primarily upon In re Asbestos v. Borden, Inc., 726 So.2d 926 (La. App. 4th Cir. 1998) and Mozeke v. International Paper Co., 933 F.2d 1293, 1297 (5th Cir. 1991), as well as the following evidence and pleadings:

- Deposition Testimony of Gustave Vonbodungen
  Plaintiff submits one page of deposition testimony from Mr. Vonbodungen, taken in 2009 in another action. Mr. Vonbodungen was deposed as the corporate representative of Entergy New Orleans, Inc. The pertinent testimony is as follows:

  Q: Do you know when Entergy made it a policy to stop using asbestos insulation in its power plants?

A: No, I don't.
Q: Do you have an idea of a decade?
A: About 1972.
Q: Somewhere around there?
A: Yeah, 1971, 1972.

(Pl. Ex. E, Doc. No. 54-8.)

- OSHA Standards Relative to Asbestos
  Defendant argues that the governing OSHA standards at the time of the alleged exposure confirm that Plaintiff's employer (LP&L) either knew or should have known of the hazards of asbestos at the time of the alleged exposure.

- Plaintiff's Petition
  Defendant contends that Plaintiff's own petition alleges that LP&L knew of asbestos at the time of Plaintiff's alleged exposure and that Plaintiff should be bound by this contention.

B. Plaintiff's Arguments

Louisiana Statute of Repose

Plaintiff contends that (1) the 1990 version of the statute of repose does not apply because the Louisiana Supreme Court ruled in Bunge v. GATX Corp., 557 So.2d 1376 (La. 1990), as explained in the asbestos case Curtis v. Branton Industries, 944 So.2d 716 (La. App. 3d Cir. 2006), that "the 1990 amendments are to be given prospective effect only" because they are "substantive," and that "plaintiffs may proceed against the defendants insofar as they allege a failure to warn of the dangers of asbestos," Curtis, 944 So.2d at 724, and (2) the 1964 (or pre-1990) version of the statute of repose does not bar Plaintiff's claims because the Louisiana Supreme Court ruled in Bunge that claims of "failure to warn" are, in essence, claims of "fraud" and are, therefore, subject to the exception to the statute for fraud claims.

Moreover, Plaintiff contends (quoting from Bunge) that there is a factual question as to whether GE kept Plaintiff (and/or LP&L) "ignorant of a known danger in its construction." (Pl. Opp. at 13 (quoting Bunge, 557 So.2d at 1387).)

Finally, Plaintiff challenges the "evidence" relied upon by GE to establish that Plaintiff's employer knew of the hazards of asbestos (such that the alleged failure to warn could not be deemed, in essence a fraud), contending that (1) the testimony of Gus VonBodungen that Plaintiff's employer knew of the hazards of asbestos in the early 1970s (prior to Plaintiff's exposure) is inadmissible, because it is not based on personal knowledge and the record is void of any basis for his testimony, and (2) statements/allegations in Plaintiff's Petition do not constitute "evidence" for purposes of deciding a summary judgment motion.

Sophisticated User/Purchaser Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the sophisticated user/purchaser defense is not warranted because (1) Louisiana courts have held that the sophisticated user defense has no place in a suit in which a plaintiff asserts that the product at issue is "unreasonably dangerous per se," (2) a defense of "no duty" is inappropriate in a suit based on negligence, and (3) there are, at the very least, genuine issues of material fact regarding whether Plaintiff and/or his employer was a "sophisticated" user/purchaser.

C. Analysis

Louisiana Statute of Repose

The Supreme Court of Louisiana ruled in 1990 (prior to the 1990 Amendments to the statute) that a "failure to warn" claim is, in essence, a fraud claim, such that the claim is subject to an exception to the statute that exists for fraud claims (i.e., is not barred by the statute). See Bunge, 557 So.2d 1376. In Claiborne, an intermediate appellate court held that the statute barred failure to warn claims that had accrued prior to the 1990 amendments. 579 So.2d at 1200. In setting forth this holding, it explained that, "it is not necessary to decide whether this [1990] amendment should be applied retroactively since it is clear the amendment merely articulated the substance of the act." Id. In Curtis, a different intermediate appellate court held that "the 1990 amendments are to be given prospective effect only," such that a failure to warn claim is barred by the statute only if it accrued after the 1990 amendments. 944 So.2d at 724. As such, it appears that Louisiana law is unsettled as to which version of the statute applies to Plaintiff's claims (i.e., whether his failure to warn claims are barred by Louisiana's

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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statute of repose). In fact, Defendant concedes that the law is not settled on this point. (Mem. at 9.) Because this is an unsettled area of state law, the Court will not rule on it, but rather will remand the issue to the transferor court to decide. See Faddish v. CBS Corp., No. 09-70626, 2010 WL 4159238 (E.D. Pa. Oct. 22, 2010) (Robreno, J.). Accordingly, Defendant GE's motion for summary judgment on this basis is denied without prejudice to refiling in the transferor court.

Sophisticated User/Purchaser Defense

The Court declines to decide whether Louisiana recognizes a sophisticated user and/or purchaser defense. The Court believes it is preferable to avoid reaching this issue of Louisiana law since it is not necessary to do so in order to determine whether Defendant may be eliminated from this case and, thus, whether it must continue to defend against this action upon remand to the transferor court in Louisiana.

Even assuming Louisiana recognizes a sophisticated user and/or purchaser defense, there is a genuine dispute of material fact as to whether LP&L and/or Plaintiff was a "sophisticated" user/purchaser at the relevant time. In fact, Defendant concedes in its reply brief that "[w]hether LP&L is a sophisticated user is disputed." (Reply at 1.) Therefore, summary judgment in favor of GE is not warranted on this basis.