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

BARBARA ANNE ANDERSON,	:	
	:	Consolidated Under
Plaintiff,	:	MDL DOCKET NO 875
	:	
v.	:	Civil Action
	:	No. 2:07-cv-63839-ER
ALFA LAVAL, INC., ET AL.,	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this **6th** day of **April 2010** it is hereby

ORDERED that Defendants Motion for Summary Judgment (doc. no. 67), filed on October 9, 2009, is **GRANTED.**[1]

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[1] Plaintiff was diagnosed with pleural mesothelioma on August 16, 2006. (Pl.'s Compl. ¶ 2). On Oct 26, 2006, she filed a complaint in Virginia State Court for asbestos exposure. (Mem. Op. 3). Her Complaint named approximately twenty Defendants and alleged a single source of exposure: "asbestos-laden work clothes" brought into the family home by her father when Plaintiff was a child. (Pl.'s Compl. ¶ 7). In the complaint, Plaintiff disclaimed any causes of action based on exposure occurring on federal enclaves.

However, through the discovery process, Defendants Bondex International, Inc., RPM, Inc. and RPM International, Georgia-Pacific, and Union Carbide (collectively "Defendants") ascertained that Plaintiff's claim against them did not arise out of products related to her childhood exposure from her father's work clothes. Rather, Plaintiff's claim against them arose out of exposure to joint compound products containing asbestos, which she was exposed to during construction in the federal buildings where she worked as an adult, from approximately 1961 to 1985. (Pl.'s Br. at 3). Defendants removed the case to federal court on the basis of federal enclave jurisdiction, which had been brought to light during Plaintiff's January 2007 deposition. Id. The case was removed to the United States District Court for the Eastern District of Virginia and transferred to the Eastern

District of Pennsylvania in April of 2007 as part of MDL 875. In June 2009, the case was referred to Magistrate Judge David R. Strawbridge for pretrial matters pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a).

On January 16, 2009, the Court entered an Order stating that Plaintiff was not proceeding with her claims against certain Defendants. This Order effectively left Defendants as the only parties against whom Plaintiff was maintaining a lawsuit. (Pl.'s Br. at 4). The only potential cause of action against Defendants stemmed from what Plaintiff called "Phase 2" exposure. Phase 2 exposure consisted solely of exposure to asbestos during Plaintiff's civil service career, while working in government buildings as an adult. On June 10, 2009, Plaintiff moved to amend her initial complaint to include Phase 2 adulthood asbestos exposure.

Magistrate Judge Strawbridge denied Plaintiff's Motion to Amend on the grounds that the proposed amendments were untimely, as they exceeded Virginia's two-year statute of limitations. Judge Strawbridge found that Plaintiff's argument that the amendments "related back" to her initial complaint under Fed. R. Civ. P. 15(c)(1)(B) unavailing. The Phase 2 exposure did not arise out of the same "conduct, transaction, or occurrence" as the Phase 1 exposure, and therefore did not relate back under Rule 15. The exposure alleged in the initial complaint differed from the exposure in the proposed amended complaint with respect to: the time of the injury, location of the injury, products at issue, and causation of the injury.

Defendants filed a motion for summary judgment in conjunction with their motion in opposition to plaintiff's leave to amend. On February 15, 2010, this Court denied Plaintiff's Objections to Judge Strawbridge's denial of her Motion for Leave to Amend. Defendants' motion for summary judgment is now properly before this Court. For the reasons set forth below, Defendant's motion for summary judgment is granted.

(1)

When evaluating a motion for summary judgment, a court must view the evidence presented by the parties in a light most favorable to the non-moving party. If, after examining "the pleadings, the discovery and disclosure materials on file, and any affidavits," the court finds there is "no genuine issue as to any material fact," then "the movant is entitled to a judgment as

a matter of law. Fed.R.Civ.P. 56(c). The moving party must carry the burden of showing that there is no genuine issue of material fact, entitling the defendants to summary judgment. Celotex Corp. v. Cartrett, 477 U.S. 317, 322-23 (1986). If the moving party meets this burden, the non-moving party must go beyond the pleadings to set forth "specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2).

(2)

Defendants' motion for summary judgment asserts that there are no material facts in dispute, as Plaintiff's Complaint does not allege a cause of action against them. Defendants argue that summary judgment is appropriate because, following the denial of a leave to amend the complaint, "[w]hat is left is a Complaint based on alleged asbestos exposure to products which Plaintiff admits Defendants did not manufacture, sell and/or distribute." (Def.'s Br. at 9).

Plaintiff seems to agree with Defendants on the fundamental points of their argument. Plaintiff notes that it was during the course of discovery that Defendants learned the "precise basis of Plaintiff's claims against them (i.e., her exposure to dust from Bondex, Georgia-Pacific and U.S. Gypsum joint compound products during her federal civil service career)." (Pl.'s Br. at 18). Plaintiff recognizes that these Defendants are not implicated in the un-amended Complaint. Indeed, Plaintiff's counsel previously stated that a denial of a leave to amend the Complaint, "effectively disposes of Plaintiff's entire case." (Pl.'s Objection, Doc. 61).

However, Plaintiff argues that summary judgment should be denied because Defendants were put on notice of Plaintiff's claims against them in the course of discovery. Defendants should be judicially estopped from arguing that there was no notice because Defendants removed the case to federal court on the basis of federal enclave jurisdiction, and were therefore aware of the substance of the Phase 2 claims asserted against them. See Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 319 (3d Cir. 2003) ("[A]bsent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory") (internal citation omitted).

AND IT IS SO ORDERED.

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EDUARDO C. ROBRENO, J.

Plaintiff's reliance on judicial estoppel is misplaced, and misapprehends the position that Defendants are taking. Defendants admit that they were put on notice of Plaintiff's claim against them in the course of discovery, and that they removed to federal court upon learning of the nature of the claims against them. However, Defendants assert that, under the Federal Rules of Civil Procedure, pleadings must "give notice of the claim that is being made." Rannels v. S.E. Nichols, Inc., 591 F.2d 242, 247 (3d Cir. 1979). Defendants point to this requirement to show that Plaintiff's Complaint, as it stands now, even after the conclusion of discovery in the case, asserts no claims against them. Since the complaint does not state a claim against Defendants and, further, it has been determined that any potential cause of action against Defendants for Phase 2 exposure is time-barred, summary judgment must be granted.