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

RICHARD ANDERSON, ET AL.	:	
	:	CONSOLIDATED UNDER
Plaintiffs,	:	MDL 875
	:	
	:	Transferred from the Western
	:	District of Washington
v.	:	(Case No. 09-05801)
	:	
	:	
SABERHAGEN HOLDINGS, INC.,	:	
ET AL.	:	E.D. PA CIVIL ACTION NO.
	:	2:10-61118
Defendant.	:	

O R D E R

AND NOW, this **18th** day of **November, 2010**, it is hereby **ORDERED** that the Defendant Lockheed Shipbuilding Co.'s Motion for Summary Judgment, filed on August 18, 2010 (doc. no. 46) is **DENIED**.[1]

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[1] Plaintiffs, Richard and Lillian Anderson, filed this action against various defendants in Washington state court. (Def.'s Mot. Summ. J., doc. no. 48 at 5). Lockheed Shipbuilding "Lockheed" removed this action to the United States District Court for the Western District of Washington. (Id. at 5-6). On February 8, 2010, this case was transferred to the United States District Court for the Eastern District of Pennsylvania. (Transfer Order, doc. no. 1).

Richard Anderson and his wife, Lillian Anderson, contend that Lockheed breached a duty to protect Mr. Anderson from the dangers associated with his duties on Lockheed's premises. Lockheed contracted with various companies to provide Lockheed with speciality floor services. (Def.'s Mot. Summ. J. at 1). Two contractors hired by Lockheed were Plaintiff Mr. Anderson's employers: Fryer & Knowles and Mortrude Floor. (Id. at 2). Plaintiffs allege that Mr. Anderson was exposed to asbestos while

working at the Lockheed shipyard.

Plaintiff contends that from 1957 to 1966, Mr. Anderson worked as a cement mason at Lockheed and Todd Shipyards where he was exposed to asbestos on a daily basis. (Pl.'s Reply Br. at 2). Mr. Anderson testified that the biggest job he did at Lockheed was installing floors on the Alaska ferries. (Id. at 3). After the pipe insulators and plasterers sprayed insulation on the pipes, Mr. Anderson would be responsible for scrapping and sweeping the floor to get the spray off and would clean the floor. (Id. at 3-4). Plaintiff avers that "the materials the insulators sprayed onto the Alaska ferries and which Mr. Anderson repeatedly scraped up, was Limpet, containing 60 percent asbestos fibers." (Id. at 4; Pl.'s Ex. 18 & Ex. 28). When Mr. Anderson worked on other vessels at Lockheed, particularly Navy vessels, he was also exposed to asbestos from other workers and from cleaning up after the pipe insulators. (Pl.'s Reply Br. at 4-5).

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . ." Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479 F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001). Once the moving party has discharged its burden the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R.

Civ. P. 56(e)(2).

This is a diversity case and the parties have agreed the Washington state law is controlling. In Kalma v. Space Needle Corp., the Space Needle Corp., jobsite and landowner, hired Pyro to install a New Year's Eve fireworks display at the Space Needle. 52 P.3d 472, 474 (Wash. 2002). Mr. Kalma was injured while working for Pyro installing the display. (Id.). Space Needle Corp. moved for summary judgment alleging that Pyro was an independent contractor and that Space Needle Corp. did not retain control or supervision over the job. (Id.). The trial court dismissed plaintiff's claims that the jobsite owner owed him a common law duty of law or a statutory duty of care under the Washington Industrial Safety and Health Act (WISHA). (Id. at 473-74). The appellate court and Washington Supreme Court affirmed the trial court's decision on these issues. (Id. at 474).

The court noted the general rule of nonliability for the injuries of independent contractors, but that there was an exception in cases of "retained control." (Id.). "The common law has long distinguished between an employer's liability for work-related injuries suffered by independent contractors and an employer's liability for work-related injuries suffered by its employees. The scope of an employer's liability depends on whether the worker is an independent contractor or an employee." (Id.). The court held that the proper test for determining whether there is "retained control" is "whether there is retention of the right to direct the manner in which the work is performed, not simply whether there is an actual exercise of control over the manner in which the work is performed." (Id. at 475-76). The court determined that Space Needle Corp. did not retain the right to interfere with the manner in which Pyro completed its work. (Id. at 476).

On August 31, 2010, the Court of Appeals of Washington decided a case which is almost identical case to the case presently pending in this Court. Arnold v. Saberhagen Holdings, Inc., No. 39055-8-II (Wash. Ct. App. 2010). Plaintiff sued Lockheed for Mr. Arnold's exposure to asbestos at Lockheed's shipyard. (Id. at 3). Mr. Arnold worked as an insulator on Alaska ferries at the Lockheed Shipyard for approximately one year in the 1960s, but was employed by one of Lockheed's contractors. (Id. at 3).

The trial court granted Lockheed's motion for summary judgment. The Court of Appeals reversed finding that plaintiffs

had created a genuine issue of material fact as to whether Lockheed owed Mr. Arnold a duty both as a landlord and as a general contractor. (Id. at 11).

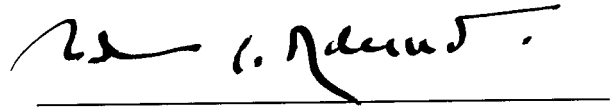
The court concluded that Lockheed was a general contractor for the Navy and for Washington State Ferries. (Id. at 13). Lockheed employed its own workers and constructed ships in accordance with the specifications given by the Navy and Washington State, despite the fact that Lockheed contracted out work to subcontractors. (Id.).

The court cited to Kelley v. Howard S. Wright Construction Co., a Washington Supreme Court opinion, which held that general contractors who maintain supervisory and coordinating authority over multiple contractors in common work areas are responsible for job safety in those common work areas. (Arnold at 14 (citing 582 P.2d 500 (Wash. 1978)). The court concluded that Lockheed retained control over the site since it "owned and controlled access to the work site, was the general contractor. . . monitored and coordinated the work of multiple subcontractor in close quarters below the deck, and retained safety oversight over all workers, including subcontractors, on the ships that it constructed at its Harbor Island shipyards." (Arnold at 16-17).

The court concluded that plaintiffs presented a genuine issue of material fact as to whether Lockheed owed Mr. Arnold a duty as an invitee. (Id. at 18). The court rejected Lockheed's argument that alleged hazards associated with construction activity are not conditions on land. (Id.).

In this case, Lockheed claims that was not a general contractor and thus owed no duty to independent contractors working in common work areas. In Kelley, the Washington Supreme Court applied the "retained control" analysis to determine whether an employer was a general contractor. Since Plaintiff has presented evidence that Lockheed played a role in determining where Mr. Anderson worked and inspected his final product, Plaintiff has at least raised a genuine issue of material fact on this issue. While Lockheed claims that Mr. Anderson could not have worked in common areas since he installed floors, Plaintiff presented evidence that Mr. Anderson worked around other tradesmen working with asbestos-containing insulation. Therefore, Plaintiff has raised a genuine issue of material fact as to whether Mr. Anderson worked in common areas and thus was owed some duty of care.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

Plaintiff has presented evidence that Mr. Anderson was a business invitee and that Lockheed had superior knowledge about the dangers of asbestos. Lockheed argues that construction projects are not conditions on land and thus it owed no duty to Mr. Anderson. The Arnold court rejected this argument noting that asbestos was a regular presence at the shipyard and thus can be considered a condition on land.

Defendant argues that Mr. Anderson's case is unlike Arnold since there is no evidence that Mr. Anderson was exposed to Limpet. Plaintiff presents testimony from Mr. Gann, Mr. Pashkowski, and Mr. Northup to establish that Limpet was sprayed on the Alaska ferries where Mr. Anderson worked. As Defendant was not a party to the cases or depositions when this testimony was taken, this testimony is inadmissible. See Federal Rule of Civil Procedure 32(a)(8). Plaintiff asserts that the testimony is admissible under Federal Rule of Evidence 804(b)(1); however, Rule 804(b)(1) only applies when the declarants are unavailable and Plaintiff has not presented any evidence showing that the declarants are unavailable. Even without this evidence, Plaintiff has shown evidence, through Mr. Anderson's own testimony, that Mr. Anderson was exposed to asbestos when cleaning up after pipe insulators.

Lockheed's motion for summary judgment is denied since Plaintiffs have raised genuine issues of material fact as to whether Lockheed owed Mr. Anderson a duty of care as a general contractor. Also, Plaintiffs have raised a genuine issue of material fact as to whether Mr. Anderson was a business invitee to whom Lockheed owed a duty of care.