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

LARRY BRIGGS AND MARSHA BRIGGS,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	
v.	:	Transferred from the District of Connecticut (Case No. 10-01988)
AIR & LIQUID SYSTEMS CORPORATION, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-CV-63521-ER
Defendants.	:	

O R D E R

AND NOW, this **13th** day of **February, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant General Electric Company (Doc. No. 32) is **GRANTED** and the Motion to Add Defendant CBS Corporation (f/k/a Westinghouse Electric Corporation) of Plaintiffs (Doc No. 30) is **DENIED.**[1]

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[1] This case was originally filed in state court in Connecticut. Shortly thereafter, it was removed by Defendants to the United States District Court for the District of Connecticut and then transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Larry Briggs (who has brought suit along with Plaintiff Marsha Briggs) has alleged exposure to asbestos while working aboard various Navy submarines throughout his period of service in the Navy (1960 to 1972). Defendant General Electric Company ("GE") manufactured turbines that were used on Navy vessels, including submarines. The alleged exposure pertinent to Defendant GE occurred during the following period of Mr. Briggs's work:

- Ballston Spa (Navy training aboard a simulated submarine)(Approx. 1963)
- USS Seawolf (1963 to 1967)

Mr. Briggs was diagnosed with mesothelioma in October of 2010. He was deposed in this action in March of 2011.

Plaintiffs brought claims against various defendants. Defendant GE has moved for summary judgment, arguing that (1) it is immune from liability by way of the government contractor defense, and (2) it is entitled to the bare metal defense.

Plaintiffs do not directly respond to either of Defendant GE's arguments. Instead, they contend that summary judgment is not warranted because there are numerous factual issues and sufficient circumstantial evidence from which a reasonable jury could conclude that Mr. Briggs's mesothelioma was caused by exposure to GE's product(s).

By motion filed October 21, 2011, Plaintiffs have sought to join in this action CBS Corporation (f/k/a Westinghouse Electric Corporation).

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.).

C. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) it warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010) (Robreno, J.) (citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 539 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., No. 09-91449, 2011 WL 3818515, at *5 (E.D. Pa. Aug. 29, 2011) (Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881179, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is

not controlling law in this case because it applied Pennsylvania law. Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

D. Government Contractor Defense at the Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine issue of material fact as to whether it is entitled to the government contractor defense. Compare Willis, 2011 WL 3818515, at *1 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine issue of material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably precise specifications as to warnings which were to be placed on defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108, at *8-9 (E.D. Pa. Oct. 20, 2010) (Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

II. Defendant GE's Motion for Summary Judgment

A. Defendant's Argument

Government Contractor Defense

GE argues that summary judgment is appropriate because it is immune from any liability on Plaintiffs' claims by way of the government contractor defense. GE cites to the same evidence it cited in Faddish (which also involved GE's assertion of the government contractor defense): affidavits of Admiral Ben J. Lehman, former GE engineer David Hobson, and Captain Lawrence Stilwell Betts, along with a set of Military Specifications purported to have been issued by the Navy and applicable to the GE turbines at issue.

Bare Metal Defense

GE asserts the bare metal defense, arguing that it is immune from liability in this case under the defense as a matter of law and that it is, therefore, entitled to summary judgment.

Product Identification / Causation

GE does not dispute that it supplied turbines for installation aboard each of the two vessels (or simulated vessels) at issue. GE argues, however, that there is no evidence that it supplied any asbestos-containing product (i.e., insulation) to which Plaintiff may have been exposed in connection with his work on or around these turbines.

B. Plaintiffs' Arguments

Government Contractor Defense

Plaintiffs have not responded to Defendant's assertion of the government contractor defense and have not provided any evidence to contradict Defendant's evidence pertaining to the defense.

Bare Metal Defense

Plaintiffs have not responded to Defendant's assertion of the bare metal defense.

Product Identification / Causation

Plaintiffs argue that the "frequency, regularity, and proximity" test is not applicable to this case. Plaintiffs contend generally that asbestos cases are too complex to warrant summary judgment and that there are numerous factual questions that require a jury's resolution. Plaintiffs assert that there is circumstantial evidence from which a reasonable jury could conclude that Mr. Briggs was exposed to GE's products and that this exposure caused his illness. Specifically, Plaintiffs contend that the type of work performed by Mr. Briggs and his presence during an overhaul of the USS Seawolf provide significant circumstantial evidence relevant for establishing causation with respect to Defendant GE's products.

C. Analysis

Defendant has provided evidence (affidavits of Admiral Lehman, Captain Betts, and Mr. Hobson, along with military specifications and other documents) that this Court has previously ruled sufficient to establish the availability to GE of the defense. See Faddish, 2010 WL 4146108, at *7-9. Plaintiffs have not provided any evidence to contradict Defendant GE's evidence as to this defense. During oral argument Plaintiffs' counsel requested an opportunity to supplement its opposition with evidence pertaining to the government contractor defense. However, no good cause was shown for Plaintiffs' counsel's failure to timely submit such evidence. Rather, Plaintiffs' counsel stated only that it had failed to take notice of Defendant's evidence filed in support of the government contractor defense. Because no good cause was shown for Plaintiffs' failure to timely file their evidence, their request to supplement their opposition to Defendant's motion is therefore denied. See Fed. R. Civ. P. 6(b). Because Plaintiffs have presented no evidence to contradict that of Defendant, they have failed to raise a genuine issue of material fact regarding the availability to Defendant of the government contractor defense. See id. Accordingly, summary judgment in favor of Defendant GE is warranted. See id.

III. Plaintiffs' Motion to Join CBS Corporation as a Defendant

This case was transferred to the MDL on March 9, 2011. On June 15, 2011, the Court issued a scheduling order (Doc. No. 15) with a fact discovery cut-off date of July 29, 2011, which was later revised to September 29, 2011 by an amended scheduling order (Doc. No. 20). On October 21, 2011, Plaintiffs filed a motion seeking leave to join CBS Corporation (f/k/a Westinghouse Electric Corporation) as an additional defendant in this action. In their motion, Plaintiffs stated only that their request to add a new defendant had "resulted from [Defendants'] Motions to Remove." (Pl. Mot. at 1.) During oral argument, the Court inquired of Plaintiffs' counsel as to why this potential defendant was not initially named in the action and why Plaintiffs had not sought leave to join it sooner. Plaintiffs' counsel explained that CBS Corporation had been named as a defendant in a separate action filed simultaneously with this action in state court (with a group of defendants who were not expected by Plaintiffs to remove the case to federal court) and who later expressed to Plaintiffs an intention to remove that case to federal court. Plaintiffs' counsel gave no explanation

for failing to seek leave to join CBS Corporation during the first seven (7) months in which this action was pending in the MDL and did not contend that it had just recently learned of CBS Corporation's intention to remove the second, separate action to federal court.

Under Federal Rule of Civil Procedure 15(a)(2), "[t]he court should freely give leave [for a party to amend its pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2). "In the absence of substantial or undue prejudice, denial [of a motion to amend] must be grounded in bad faith or dilatory motives, truly undue or unexplained delay, repeated failure to cure deficiency by amendments previously allowed or futility of amendment." Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of V.I., Inc., 663 F.2d 419, 425 (3d Cir. 1981) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).

By contrast, where a party seeks to amend its pleadings after a deadline set by court order, the decision whether to allow the amendment is controlled by Rule 16(b). Under Rule 16(b), the party seeking the amendment is effectively asking the court not only for leave to amend its pleadings, but also the scheduling order. Because the party's request now implicates the effective administration of justice, the party must show good cause in order to procure the court's consent. Once the court files a pretrial scheduling order pursuant to Rule 16, which establishes a timetable for the action, that rule's standards control. See Fed. R. Civ. P. 16(d).

While the Third Circuit has not explicitly addressed how to reconcile the differences in the standards between Rules 15(a) and 16(b) ("prejudice" and "good cause"), this Court has held that "once the pretrial scheduling order's deadline for filing motions to amend the pleadings has passed, a party must, under Rule 16(b), demonstrate 'good cause' for its failure to comply with the scheduling order before the trial court can consider, under Rule 15(a), the party's motion to amend its pleading." Chancellor v. Pottsgrove Sch. Dist., 501 F. Supp. 2d 695, 701 (E.D. Pa. 2007) (Robreno, J.)(citing to seven Circuit courts in applying the "good cause" standard to a motion for leave to amend the pleadings after a scheduling order deadline had passed); see also Componentone, L.L.C. v. Componentart, Inc., No. 05-1122, 2007 WL 2580635, at *2 (W.D. Pa. Aug. 16, 2007) (same). Indeed, this Court has already concluded the Third Circuit would likely come to the same conclusion. Chancellor, 501 F. Supp. 2d at 701; see also E. Minerals & Chem. Co. v. Mahan,

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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225 F.3d 330, 340 (3d Cir. 2000) (affirming district court's denial of motion to amend complaint six months after amendment and joinder deadlines had expired); Dimensional Comm'ns, Inc. v. OZ Optics, Ltd., 148 F.App'x. 82, 85 (3d Cir. 2005) (non precedential). Although the scheduling order in this case did not contain a deadline for amending pleadings or joining parties, the deadline for completion of fact discovery passed several weeks prior to Plaintiffs' motion to add CBS Corporation as a defendant in this action. Under these circumstances, a showing of "good cause" by Plaintiff is required in this case.

"Good cause" under Rule 16(b) focuses on the diligence of the party seeking the modification of the scheduling order. See Fed. R. Civ. P. 16, Advisory Committee Note (1983)("the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension"); Chancellor, 501 F. Supp. 2d at 701 (citing Inge v. Rock Fin. Corp., 281 F.3d 613, 625 (6th Cir. 2002))(holding that Rule 16(b)'s "good cause" standard focuses on a party's diligence); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992)("Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment."). Thus, "if the party was not diligent, there is no 'good cause' for modifying the scheduling order and allowing the party to file a motion to amend its pleading." Chancellor, 501 F. Supp. 2d at 701 (citing Johnson, 975 F.2d at 609) ("If [a] party was not diligent, the inquiry should end.").

Plaintiffs offered no justification for their delay in moving to amend the Complaint to add a new defendant after the close of discovery and after this case has been pending in the MDL for over seven (7) months. Therefore, Plaintiffs have failed to show "good cause" to allow the amendment at this late stage of this action. Accordingly, Plaintiffs' motion to join CBS Corporation is denied.