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

JILL FARRELL,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Southern District of New York (Case No. 11-06299)
v.	:	
AIR & LIQUID SYSTEMS, CORPORATION, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-67714-ER
Defendants.	:	

O R D E R

AND NOW, this **12th** day of **August, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Georgia-Pacific LLC** (Doc. No. 92) is **GRANTED**.[1]

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

Plaintiff Jill Farrell is the personal representative of the estate of Howard James Farrell ("Decedent" or "Mr. Farrell"). Defendant Georgia-Pacific LLC ("Georgia-Pacific") manufactured joint compound. Plaintiff alleges that Decedent was exposed to asbestos at various locations while doing various types of work, and also while performing personal home repair and automotive work. The alleged exposure pertinent to Defendant Georgia-Pacific occurred during the following periods of Decedent's renovation and remodeling work:

- Mother's home remodel - Michigan (1968-69)
- Store renovations - Wisconsin (1976)
- Various remodeling projects - ("throughout" Decedent's life, which was from 1939 to 2011)

Mr. Farrell was diagnosed with mesothelioma in January 2011. He was not deposed in this action. He died in March 2011.

Plaintiff brought claims against various defendants.

Defendant Georgia-Pacific has moved for summary judgment, arguing that there is insufficient product identification evidence to support a finding of causation with respect to its product(s). The parties agree that New York 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

When the parties to a case involving land-based exposure agree to application of a particular state's law, this Court has routinely applied that state's law. See, e.g., Brindowski v. Alco Valves, Inc., No. 10-64684, 2012 WL 975083, *1 n.1 (E.D. Pa. Jan 19, 2012) (Robreno, J.). The parties agree that New York substantive law applies. Therefore, this Court will apply New York law in deciding Defendant'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 New York Law

To establish proximate cause for an asbestos injury under New York law, a plaintiff must demonstrate that he was exposed to the defendant's product and that it is more likely than not that the exposure was a substantial factor in causing his injury. See Diel v. Flintkote Co., 611 N.Y.S.2d 519, 521 (N.Y. App. Div. 1994); Johnson v. Celotex Corp., 899 F.2d 1281, 1285-86 (2d Cir. 1990). Jurors are instructed that an act or omission is a "substantial factor ... if it had such an effect in producing the [injury] that reasonable men or women would regard it as a cause of the [injury]." Rubin v. Pecoraro, 141 A.D.2d 525, 527, 529 N.Y.S.2d 142 (N.Y. App. Div. 1988). A particular defendant's product need not be the sole cause of injury. However, a plaintiff "must produce evidence identifying each [defendant]'s product as being a factor in his injury." Johnson, 899 F.2d at 1286.

New York law requires a defendant seeking summary judgment in an asbestos case "to unequivocally establish that its product could not have contributed to the causation of the plaintiff's injury." Reid v. Georgia-Pacific Corp., 622 N.Y.S.2d 946, 947 (N.Y. App. Div. 1995)(citing Winegrad v. New York Univ. Med Ctr., 64 N.Y.2d 851 (N.Y. 1998)); see also In re New York City Asbestos Litig. ("Comeau"), 628 N.Y.S.2d 72, 73 (N.Y. App. Div. 1995); In re Eighth Judicial District Asbestos Litig. ("Takacs"), 679 N.Y.S.2d 777, 777 (N.Y. App. Div. 1998); Shuman v. Abex Corp. ("Shuman 1"), 700 N.Y.S.2d 783, 784 (N.Y. App. Div. 1999); Shuman v. Abex Corp. ("Shuman 2"), 698 N.Y.S.2d 207, 207 (N.Y. App. Div. 1999). Summary judgment in favor of a defendant is warranted when there is no evidence in the record to create a reasonable inference that the plaintiff inhaled asbestos fibers from the defendant's product. See Cawein v. Flintkote Co., 610 N.Y.S.2d 487, 487 (N.Y. App. Div. 1994)(summary judgment granted where the only evidence pertaining to defendant's product was testimony that the plaintiff saw an unopened package of the product); Diel, 611 N.Y.S.2d at 521 (same); see also Lustenring v. AC&S, Inc., 786 N.Y.S.2d 20, 21 (N.Y. App. Div. 2004); Penn v. Amchem Products, 925 N.Y.S.2d 28, 29 (N.Y. App. Div. 2011).

A defendant is not entitled to summary judgment merely because there are inconsistencies in a plaintiff's evidence regarding exposure to the defendant's product. Taylor v. A.C.S., Inc., 762 N.Y.S.2d 73, 74 (N.Y. App. Div. 2003). Nor is summary judgment in favor of a defendant warranted based on evidence

presented by the defendant that its product could not have caused the plaintiff's injury, so long as there is conflicting evidence presented by the plaintiff. In re New York City Asbestos Litig. ("Ronsini"), 683 N.Y.S.2d 39 (N.Y. App. Div. 1998).

In Ronsini, a plaintiff pipe-fitter testified that he saw a 50- to 60-pound bag of the defendant's product onboard a Navy ship (with the company name "Atlas" on it) and that the defendant's cement insulation was the only such product that he recalled seeing onboard the ship. Defendant Atlas Turner presented testimony that it did not sell its insulating cement in the United States and was prohibited by statute from doing so. The Appellate Division (First Department) upheld a jury verdict imposing liability upon the defendant, stating that "the jury merely acted within its province in resolving conflicting testimony on this issue." 683 N.Y.S.2d 39 (N.Y. App. Div. 1998). In doing so, the court distinguished Cawein and Diel, noting that, in those cases, "the person identifying the product did not see an open bag of the subject product or know that its contents had actually been used." 683 N.Y.S.2d at 40.

II. Defendant Georgia-Pacific's Motion for Summary Judgment

A. Defendant's Arguments

Admissibility of Decedent's Affidavit

Defendant contends that Decedent's affidavit is inadmissible hearsay that may not be relied upon by Plaintiff.

Product Identification / Causation

Defendant contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Decedent's illness.

B. Plaintiff's Arguments

Admissibility of Decedent's Affidavit

Plaintiff contends that Decedent's affidavit is admissible under the "deathbed declaration" exception to the hearsay rule, as set forth in Rule 804(b)(2) of the Federal Rules of Evidence.

Product Identification / Causation

In support of her assertion that she has identified sufficient evidence of product identification/causation to survive summary judgment, Plaintiff cites to the following evidence:

- Affidavit of Decedent
  Decedent's affidavit (executed three days before his death) states that he was exposed to asbestos while doing renovation and remodeling work, which involved applying and sanding joint compound in a way that released respirable dust, which he breathed. He identifies the following projects: (1) work on his mother home in 1968 or 1969; (2) work renovating his store in 1976; and (3) approximately ten renovations jobs on the homes of family and friends "throughout" his lifetime (which was from 1939 to 2011).

  Plaintiff states that he recalls using the following joint compounds during this work: Georgia-Pacific, Bondex, Bestwall, Kaiser Gypsum, and USG.

  (Pl. Ex. 2 at ¶¶ 17-20, Doc. No. 110-2.)

- Discovery Responses of Defendant
  Plaintiff cites to discovery responses of Defendant, which she contends indicate that Georgia-Pacific (1) manufactured and distributed asbestos-containing joint compound from 1965 to 1977, (2) manufactured at least three specific types of joint compound that each contained asbestos (All Purpose Joint Compound, Bedding Compound, and Triple Duty Joint Compound), (3) first introduced asbestos-free All Purpose Joint Compound in 1973, and (4) described its compound as a dry white powder used in wallboard and ceiling jobs.

  (Pl. Ex. 3, Doc. No. 110-3.)

C. Analysis

Admissibility of Defendant's Affidavit

Defendant has objected to Plaintiff's reliance upon the affidavit of Decedent, who was not deposed in this action, claiming that it is inadmissible hearsay. Plaintiff contends that the affidavit is subject to an exception to the hearsay rule and is admissible as a "deathbed declaration" because the affidavit was executed three days prior to Decedent's death, while he was in the Intensive Care Unit (ICU) at the hospital.

The undisputed timeline of pertinent events is as follows:

- January 2011 - Mr. Farrell was diagnosed with mesothelioma
- March 10, 2011 - Mr. Farrell executed an affidavit while in the ICU; the affidavit identified asbestos-containing Borg Warner clutches as a source of asbestos exposure (and the only clutch from which he claimed asbestos exposure)
- March 13, 2011 - Mr. Farrell died of mesothelioma
- September 9, 2011 - Plaintiff filed this action in the transferor court

Rule 804(b)(2) of the Federal Rules of Evidence allows an exception to the general rule excluding hearsay for "statement[s] under the belief of imminent death." Fed. R. Evid. 804(b)(2). Specifically, the rule deems admissible "[i]n a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances." Fed. R. Evid. 804(b)(2). In order for such a "dying declaration" to be admissible, the declarant "must have spoken with the consciousness of a swift and certain doom." U.S. v. Lawrence, 349 F.3d 109, 116 (3d Cir. (V.I.) 2003) (quoting Shepard v. U.S., 290 U.S. 96, 100, 54 S. Ct. 22, 78 L. Ed. 196 (1933)). The proponent of the declaration must establish that the declarant spoke with the consciousness of a swift and certain doom. Lawrence, 349 F.3d at 116-17.

Decedent's affidavit states that he is confined to the intensive care unit, receiving constant medical care, and supported continuously by oxygen machines. While the Court is aware that the life expectancy following a mesothelioma diagnosis is generally quite short, and is sympathetic to the Plaintiff's plight in attempting to compile the necessary evidence to establish liability during such a short and difficult time period, the Court cannot conclude that the declaration satisfies the requirements of a "dying declaration." See id. Nothing in the affidavit indicates that Mr. Farrell believed his death was imminent, or that his statement was spoken with "consciousness of a swift and certain doom." See

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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id. To permit Plaintiff to rely upon the declaration absent these stringent criteria, would be to disregard the concerns underlying the general rule against hearsay. As such, the Court finds it necessary to exclude Decedent's affidavit as inadmissible hearsay.

Product Identification / Causation

Plaintiff alleges that Decedent was exposed to asbestos from joint compound manufactured by Defendant Georgia-Pacific. For purposes of this analysis, the Court will assume that Decedent's affidavit is admissible against Georgia-Pacific. There is evidence that Decedent breathed in respirable dust from five types of joint compound during throughout his life, with one specific period occurring in 1968-1969 and another specific period occurring in 1976. There is evidence that Defendant manufactured asbestos-containing joint compound from at least 1965 to 1977. There is evidence that Decedent was exposed to Georgia-Pacific joint compound at some unspecified point during his life, and that he was also exposed during his lifetime to at least four other brands of joint compound for which he does not contend Defendant is liable.

Importantly, however, there is no evidence that Decedent was exposed to asbestos in connection with Georgia-Pacific joint compound because there is no evidence that the Georgia-Pacific joint compound to which he was exposed contained asbestos (or even that the exposure occurred during or shortly after the years in which Georgia-Pacific manufactured asbestos-containing joint compound). Therefore, no reasonable jury could conclude that Decedent was exposed to asbestos from Defendant's joint compound such that it was a "substantial factor" in the development of his illness. See Diel, 611 N.Y.S.2d at 521; Rubin, 529 N.Y.S.2d 142; Johnson, 899 F.2d at 1285-86. Accordingly, summary judgment in favor of Defendant Georgia-Pacific is warranted. Anderson, 477 U.S. at 248.