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

MELINDA FULOP SOWIZRAL, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	Transferred from the Southern District of Ohio (Case No. 06-C0494)
v.	:	
TRIPLE A IN THE USA, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:09-74696
Defendants.	:	

FILED
FEB 28 2011
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this **25th** day of **February, 2011**, it is hereby **ORDERED** that the Joint Motion for Summary Judgment of Defendants Triple A in the USA, Inc. and Salvatore Fasciana, filed on December 23, 2010 (doc. no. 21), is **GRANTED**.[1]

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[1] Melinda Fulop Sowizral worked as a seamstress at Triple A from 1993 to 1997. (Pl.'s Dep. at 12.) Triple A was a garment factory, which closed in the summer of 1998. (Def.'s Mot. Summ. J., doc. no. 21 at 7.) Mrs. Sowizral heard rumors that there was asbestos in the Triple A factory. (Id. at 8-9.) She was diagnosed with mesothelioma in 2004. (Id. at 9.)

Mrs. Sowizral has already collected workers' compensation benefits and thus Plaintiffs are alleging that Defendants Triple A and Salvatore Fasciana, a Triple A employee, committed an intentional tort by continuing to place Mrs. Sowizral in a dangerous environment and that they knew with substantial certainty that she would suffer injuries as a result of asbestos exposure at the Triple A plant.

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).

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. Therefore, this Court will apply Ohio substantive law in deciding Defendants' 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).

Pursuant to the intentional tort doctrine, an injured employee is able to recover for job-related injuries despite the fact that the employee is collecting or has already collected workers' compensation benefits. Cantrell v. GAF Corp., 999 F.2d 1007, 1015 (6th Cir. 1993). The employee must show:

> (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the

> employer, under such circumstances, with such knowledge did act to require the employee to continue to perform the dangerous task.

Id. (citing Fyffe v. Jeno's, Inc., 570 N.E.2d 1108, 1109 (Oh. 1991) (other internal citations omitted)). To establish an intentional tort by an employer, the plaintiff must show recklessness on the part of the employer. Cantrell, 999 F.2d at 1016 (citing Fyffe, 570 N.E.2d at 1110).

Plaintiff testified that she was exposed to asbestos while working at Triple A. (Pl.'s Dep. at 35-36.) She stated that the asbestos was brought to her attention by the mechanics removing it. (Id. at 36.) She stated, "[t]he mechanics were removing it - well, we're - they said fixing things in the ceiling. And that's - one of the mechanics or the janitor thought that it was, so it got out in the plant and then all - all the girls would just talk like, you know, wondering what was going on and we would go to the union meetings and ask questions and stuff." (Id.) Mrs. Sowizral testified that Mr. McCormick, the janitor, told her that there was asbestos in the ceiling. (Id. at 44.) She testified that she did not see any asbestos herself and would not know what asbestos looks like. (Id.) Mr. McCormick told the girls at the factory that he thought he was removing asbestos from the ceiling and the roof. (Id. at 46-47.) Mrs. Sowizral testified that Hope Lutz told her that Mr. McCormick "took a piece" out of the factory and sent it to OSHA. (Id. at 50.) He got a letter back saying that the piece contained asbestos. (Id.) Mrs. Sowizral testified that she was aware that the linoleum floor in the women's bathroom contained asbestos "[b]ecause it was being removed and that's what was being told to all the girls." (Id. at 61.) She testified that Mr. Fasciana "was having them remove the asbestos without professional people in there doing it and shutting the plant down. The plant should have been shut down." (Id. at 63.) When it was cold out, Mrs. Sowizral would smoke in the women's bathroom at the Triple A plant. (Id.)

Mr. McCormick, who removed insulation at Triple A, testified that he started thinking there was asbestos present as Triple A, "[w]hen they started tearing the insulation off, it just didn't look right. The way they was doing it to me was wrong." (McCormick Depo., doc. no. 21-2 at 17.) Mr. McCormick asked David Brant about the asbestos saying, "this is asbestos, isn't it. I said, that's not very safe. He said, so what, you're going to die anyhow. That was his words. He didn't give a damn." (Id. at 22.) Mr. McCormick testified that the union president, Sharon Porter, asked him to get a sample of insulation from the plant

and give it to her. Mr. McCormick did not know where Sharon Porter sent the insulation and testified that while he did not see the report, Sharon Porter told him that it came back positive. (Id. at 22-23.) Mr. McCormick testified that while he was not trained to recognize asbestos, he felt that he would know it when he saw it. (Id. at 29.)

Plaintiff presents the affidavit of Linda Sue Antigo, who was employed as a garment manufacturer at Triple A in the USA, Inc. from 1989 until 1998. (Pl.'s Ex. C., doc. no. 22-3.) Linda Sue Antigo averred that "[w]orkers and employees of Triple A in the USA, Inc. including Melinda Fulop were unsafely exposed to asbestos." (Id. ¶ 10.)

OSHA provided a report dated May 20, 1998 stating that "at the time of the inspection there was no asbestos being removed." (OSHA Report, May 20, 1998.) Professional Service Industries, Inc. (PSI) inspected the Triple A plant and submitted a report on February 20, 1998. (PSI Report, February 20, 1998.) PSI only found friable asbestos fibers in the pipe insulation in the ladies restroom. (Id.)

Plaintiff must show that Defendant had knowledge of the dangers of the asbestos present in its facility and that Defendant knew with substantial certainty that the Plaintiff would suffer harm as a result of these dangers. The PSI Report establishes that friable asbestos fibers were present in the pipe insulation in the ladies' restroom at the in the Triple A plant. This report was sent to Mr. Fasciano, an employee of the plant. The PSI Report establishes that as of 1998, Triple A was aware that asbestos was present at the plant. It is unclear whether Triple A knew of the dangers of this asbestos or whether this asbestos was present in sufficient quantities to present a danger to the employees. Mr. McCormick believed that Defendant Triple A had workers coming into remove the asbestos because Defendant Triple A knew of the dangers of asbestos.

Even if the Court accepts that the Defendants knew of the dangers of asbestos, there is no evidence that the Defendants knew with substantial certainty that Plaintiff would suffer injury as a result of exposure to this asbestos. Plaintiff points to Mr. McCormick's testimony where Mr. McCormick asked Mr. Brant, an upper-level employee, about the dangers of asbestos and Mr. Brant responded, "so what, you're going to die anyhow." Defendant argues that this statement is inadmissible hearsay. Even assuming that this statement is admissible, this testimony does not establish that Defendant knew with substantial certainty

It is further **ORDERED** that judgment is entered in favor of Defendants Triple A in the USA, Inc. and Salvatore Fasciana and against Plaintiffs.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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that Plaintiff was likely to suffer injuries as a result of asbestos exposure. As Plaintiffs have failed to prove intent on the part of Defendants, Defendants' Joint Motion for Summary Judgment is granted.