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

ROBERTA CRATER,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Southern District of
v.	:	New York
	:	(Case No. 11-03588)
	:	
3M COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:11-66775-ER
Defendants.	:	

O R D E R

AND NOW, this **29th** day of **June, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Ericsson, Inc.** (Doc. No. 185) is **DENIED.**[1]

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[1] This case was transferred in July 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 Roberta Crater is the successor-in-interest to and executor of the estate of Donald Crater ("Decedent" or "Mr. Crater"). Plaintiff alleges that Decedent was exposed to asbestos while serving in the Navy during the period May of 1954 to May of 1958, and also during his post-Navy career as an electrician in New York from 1958 until 1993. Defendant Ericsson, Inc., a successor-in-interest to Anaconda Wire & Cable Co. ("Ericsson"), manufactured wire/cable under the name Anaconda. The alleged exposure pertinent to Defendant Ericsson occurred during at least the following period of Decedent's work:

- Lindenhurst Junior High School - NY (1959-60)
- West Hampton Beach High School - NY (1965-66)

Mr. Crater was diagnosed with mesothelioma in October 2010. He was deposed in June 2011. He died in September 2011.

Plaintiff brought claims against various defendants. Defendant Ericsson 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

The parties have agreed that New York law applies. Therefore, this Court will apply New York law in deciding Ericsson'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 v. Flintkote Co., 611 N.Y.S.2d 519, 521 (N.Y. App. Div. 1994)(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 Ericsson's Motion for Summary Judgment

A. Defendant's Arguments

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

Defendant points to its interrogatory responses as evidence that (1) Anaconda ceased manufacture of all asbestos-containing navy cables and varnished cambric cables in the 1950's, (2) Anaconda never manufactured any asbestos-containing wire and/or cables in the 60's, 70's and 80's timeframe, except for nuclear power station control cable, and (3) Anaconda manufactured very specific types of asbestos-containing cable during limited timeframes, namely (i) varnished cambric cable (manufactured until the early 1950's), (ii) Navy cable (manufactured from approximately 1941 to 1950's), and (iii) nuclear station control cable (in the 1970's).

During oral argument, Defendant contended that the facts and evidence pertaining to Decedent in this case are not distinguishable from those of the plaintiff in McCollum v. Allen-Bradley Co., No. 10-65924, in which summary judgment was granted in favor of Defendant Ericsson. (See Doc. No. 217 (Report and Recommendation ("R&R") issued by Magistrate Judge Hey (dated July 27, 2011)), available at 2011 WL 3925419, and Doc. No. 218 (Order adopting R&R) (Robreno, J.)).

With its reply brief, Defendant has filed objections to Plaintiff's evidence.

B. Plaintiff's Arguments

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

- Deposition Testimony of Decedent
  Decedent testified that he worked at Lindenhurst Junior High School in "maybe '59, '60" for "maybe a year or more" as an apprentice, doing new construction work, primarily putting conduits in the ground. He testified that he also did work "pulling wire, cable." He testified that this work resulted in asbestos exposure because it required "cutting" and "skinning" the insulation, which had asbestos. He testified that Anaconda was one of several brands of wire/cable that he recalled at the junior high school. He testified that all of the wire/cable contained asbestos.
  Decedent testified that he worked at the West Hampton Beach High School in West Hampton, New York in the fall of 1965 through the spring of 1966. He testified that he was exposed to asbestos there from "pulling cable." When asked if he knew who manufactured the cable that he encountered, he answered, "Could have been any of the ones that I mentioned yesterday, General, General Electric, Anaconda, any of those it could have been."

  When asked to identify manufacturer names that he associated with asbestos exposure throughout his life, he identified Anaconda as one of several wire/cable manufacturers. He testified that he worked with Anaconda (as well as the other brands) "throughout my career, throughout the 36 years that I worked commercial, as a commercial electrician."

(Pl. Ex. 1, Doc. No. 229-1, pp. 146-49, 152-54; Pl. Ex. 2., Doc. No. 229-2, pp. 236-37, 303, 334, 344, 347-48, 370.)

- Deposition Testimony of Regis Lageman (30b6)
  Mr. Lageman testified at a deposition taken in another action in 2007 that Continental products were marked as "Anaconda-Continental" after Anaconda bought Continental.

  (Pl. Ex. 12, Doc. No. 229-12, pp. 53-54.)

- Miscellaneous Documents
  Plaintiff points to various documents, including charts, materials lists, patents, OSHA violations, catalogs, and internal memoranda by Defendant, which indicate that as late as the 1970s, wire/cable products under the names Continental, Anaconda, and Anaconda-Continental contained asbestos.

  (Pl. Exs. 6-7, Doc. No. 234-6 and 234-7.)

- Expert Report of Albert Miller, M.D.
  Dr. Miller's report opines that the exposure to asbestos that Decedent experienced during his Navy service and his post-Navy career as an electrician are "to a reasonable degree of medical certainty" the "proximate cause of his mesothelioma and his pain and suffering."

  (Pl. Ex. 8, Doc. No. 234-8.)

C. Analysis

Admissibility of Plaintiff's Evidence

The Court notes that it has reviewed Defendant's objections to Plaintiff's evidence and has determined that they are without merit. Plaintiff's evidence will be considered in deciding Defendant's motion.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

Product Identification / Causation

Plaintiff alleges that Decedent was exposed to asbestos in connection with wire/cable manufactured by Defendant at various locations in New York. There is evidence that Decedent was exposed to asbestos from wire/cable manufactured by Defendant as a result of "cutting" and "skinning" it. There is evidence that he was exposed to asbestos from Defendant's wire/cable throughout the course of thirty-six (36) years, including at least two specific worksites in New York, where he worked in the late 1950's to mid-1960s.

Defendant argues that the facts and evidence of this case are virtually identical to those of McCollum. However, the facts of this case are distinguishable from those of McCollum because Decedent in the present case specifically testified that the Anaconda wire/cable to which he was exposed contained asbestos, whereas "Mr. McCollum was unable to say whether the cables he worked with contained asbestos." 2011 WL 3925419, at *4.

Defendant also argues that Decedent could not have been exposed to any asbestos from its wire/cable because it ceased including asbestos in the types to which Decedent could potentially have been exposed in the 1950s. However, even accepting Defendant's assertion as true, it does not foreclose the possibility that cable manufactured in the 1950s was used at the time of Decedent's alleged exposure, which occurred in the late 1950s to mid-1960s. Therefore, Defendant has not identified the absence of a genuine dispute of material fact.

Rather, a reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from a product of Defendant's such that it was "more likely than not" 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 Ericsson is not warranted. Anderson, 477 U.S. at 248.