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.	:	

FILED
MICHAEL E. KUNZ, Clerk
By_____ Dep. Clerk

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 **FMC Corporation** (Doc. No. 172) is **GRANTED**.[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 FMC Corporation("FMC" or "FMC Corporation") manufactured pumps, including pumps under the names Northern and Peerless. The alleged exposure pertinent to Defendant FMC Corporation occurred during Decedent's work at the following:

- USS Cassin Young (January 1955 - April 1958)
- Shoreham Nuclear Power Station - Shoreham, NY (1976 to 1983)

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 FMC Corporation 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 assert 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 assert that New York law applies. However, where a case sounds in admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). This is because, where a case sounds in admiralty, whether maritime law applies is not an issue of choice-of-law but is, instead, a jurisdictional issue. See id. Therefore, if the Court determines

that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. See Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009)(Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. Id. at 463-66 (discussing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. Id. In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. See Sisson v. Ruby, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." See Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339, at *1 n.1 (E.D. Pa. Dec. 2, 2011)(Robreno, J.)(applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in Conner) is land-based work. The connection test requires that the incident could have "'a potentially disruptive impact on maritime commerce,'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel

on navigable waters." Conner, 799 F. Supp. 2d at 466; Deuber, 2011 WL 6415339, at *1 n.1. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69. But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. Id.

In instances where there are distinct periods of different types (e.g., sea-based versus land-based) of exposure, the Court may apply two different laws to the different types of exposure. See, e.g., Lewis v. Asbestos Corp., Ltd., No. 10-64625, 2011 WL 5881184, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.)(applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

(i) Exposure Arising During Navy Service

It is undisputed that the alleged exposure pertinent to Defendant FMC Corporation that occurred during Decedent's Navy service occurred during his work aboard a ship. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against FMC Corporation that arise from exposure that occurred during his Navy service. See id. at 462-63.

(ii) Exposure Arising During Non-Navy Work (Shoreham Nuclear Power Station in New York)

It is undisputed that the alleged exposure pertinent to Defendant that occurred during Decedent's post-Navy work at the Shoreham Nuclear Power facility in New York involved work exclusively on land (and not related to the Navy or the sea in any way). Therefore, this exposure was during land-based work. Accordingly, New York state law is applicable to Plaintiff's claims against FMC Corporation that arise from this alleged exposure. See Conner, 799 F. Supp. 2d 455.

C. Bare Metal Defense Under Maritime Law

This Court has held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by - and no duty to warn about hazards associated with - a product it did not manufacture or distribute. Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at *7 (E.D. Pa. Feb. 1, 2012)(Robreno, J.).

D. Product Identification/Causation Under Maritime Law

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 375 (6th Cir. 2001). This Court has also noted that, in light of its holding in Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012)(Robreno, J.), there is also a requirement (implicit in the test set forth in Lindstrom and Stark) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. Abbay v. Armstrong Int'l., Inc., No. 10-83248, 2012 WL 975837, at *1 n.1 (E.D. Pa. Feb. 29, 2012)(Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. Id. at 376 (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" Id. (quoting Harbour, 1991 WL 65201, at *4). The exposure must have been "actual" or "real",

but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F. App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988)(citing Restatement (Second) of Torts, § 402A (1965))).

E. 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 FMC Corporation'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.

With its reply brief, Defendant has objected to Plaintiff's reliance upon the deposition testimony of James Meehan. Defendant contends that Plaintiff failed to disclose Mr. Meehan as a product identification witness prior to the close of discovery and that it, therefore, did not have an opportunity to cross-examine him.

B. Plaintiff's Arguments

Bare Metal Defense

Plaintiff contends that New York law applies and that, under New York law, Defendant "had a duty to warn of all foreseeable uses of its equipment, including the removal and installation of asbestos-containing components it did not manufacture and sell." (Pl. Opp. at 1.)

Product Identification / Causation

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 stood watch in four (4)-hour-long shifts in each of the two (2) engine rooms aboard the USS Cassin Young. He testified that he was present when pumps were worked on by machinist mates, approximately once per month. He testified that he believes he was exposed to asbestos as a result of this work, and that it would result in "stuff flying around in the air." When asked if he knew the brand, trade or manufacturer name of any of the pumps being worked on in the engine room in his presence, Decedent answered, "No, I couldn't tell you that."

  Decedent testified that he worked at the Shoreham Nuclear Power facility and that he did wiring work involving pumps. He testified that this work area was dusty.

  (Pl. Ex. 1 at pp. 86-87, 93, 95-96, 105, 117; Pl. Ex. 2 at pp. 268-270, 274-276, 278-279.)

- Deposition Testimony of James Meehan
  Plaintiff points to deposition testimony of James Meehan, taken in another action in 2008. Mr. Meehan testified that he worked at

the Shoreham Nuclear Power Station for approximately six (6) months. He testified that he worked primarily with oil pumps and that he changed gaskets on ten (10) or twelve (12) pumps during that time. He testified that this process sometimes involved cutting new replacement gaskets from sheets that contained asbestos. He testified that he did this for Peerless pumps.

(Pl. Ex. 8.)

- Expert Testimony of Captain Arnold P. Moore
Captain Moore provides expert testimony that the Northern Pump Company manufactured two electric motor-driven fuel oil service pumps for port and cruising use for CASSIN YOUNG, and that one was installed in each fire room. He refers to Navy specifications that indicate that braided asbestos shaft packing was used in some Northern fuel oil pumps and opines that "it is likely that the materials used in all of these pumps were the same." He states that high temperature equipment would have been insulated. Captain Moore concludes that, "[b]ased on these factors, it is more likely than not that the pumps, valves, and other machinery and equipment installed on these ships during their construction and still present during Mr. Crater's service contained asbestos packing and gaskets and were insulated with asbestos insulation materials."

(Pl. Ex. 4 at pp. 3, 12, 14.)

- Deposition Testimony of Thomas Gifford
Plaintiff points to deposition testimony of company representative Thomas Gifford, taken in 2004, in which he testified that (1) braided asbestos packing was used in certain pumps manufactured by FMC's Northern Pumps division, specifically fuel-oil pumps, (2) this packing was put in the pumps at the factory and shipped out along with the pump to the end user, and (3) Northern also sold

asbestos-containing packing as a separate product that could be used with its pumps.

(Pl. Ex. 6.)

- Discovery Responses of Defendant
  Plaintiff points to discovery responses of Defendant from another action, which she contends indicate that (1) FMC admits that its former business, Northern Pump Company, manufactured pumps that incorporated asbestos-containing component parts including packing and gaskets, (2) FMC admits that its former business, Peerless Pump Company, manufactured pumps that incorporated asbestos-containing packing and gaskets.

  (Pl. Exs. 5 and 9.)

- Research Article of Dr. Irving Selikoff
  Plaintiff points to a research article from 1964, which she contends was available to Defendant long before Decedent's work with its pumps, and is proof that, as early as 1935, researchers were aware of certain hazards of asbestos.

  (Pl. Ex. 10.)

- 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. 11.)

C. Analysis

Admissibility of Plaintiff's Evidence

Defendant has objected to Plaintiff's reliance upon the testimony of James Meehan. As set forth below, Plaintiff has failed to identify sufficient product identification evidence

pertaining to FMC Corporation to survive summary judgment, even assuming that Mr. Meehan's testimony is admissible. Therefore, the Court need not decide whether the testimony of Mr. Meehan is admissible against FMC Corporation.

Product Identification / Causation / Bare Metal Defense

Plaintiff alleges that Decedent was exposed to asbestos from gaskets and packing in pumps manufactured by Defendant FMC Corporation, as well as external insulation used with those pumps. She alleges that this exposure occurred in two (2) separate locations during two (2) separate periods, which the Court has determined are governed by two (2) different laws. Therefore, the Court considers the evidence pertaining to each alleged period of exposure separately:

(i) Exposure Arising During Navy Service (Maritime Law)

There is evidence that Decedent stood watch in both engine rooms aboard the USS Cassin Young. There is evidence that he was exposed to asbestos as a result of work on pumps located in the engine rooms. There is evidence that Defendant's pumps were among the pumps in the engine room. There is evidence that Defendant supplied original asbestos-containing gaskets and packing with at least some of its pumps. There is evidence that asbestos-containing insulation may have been used with at least some of Defendant's pumps aboard the USS Cassin Young.

However, there is no evidence that Decedent was exposed to asbestos from (or used in connection with) a pump manufactured or supplied by Defendant FMC Corporation. Moreover, there is no evidence any asbestos to which he was exposed in connection with any pump in the engine room was from an original asbestos-containing component part supplied with the pump (as opposed to replacement parts later installed). Nor is there evidence that any asbestos-containing replacement part to which he may have been exposed was manufactured or supplied by FMC. There is also no evidence that FMC manufactured or supplied any of the insulation that may have been used with its pumps. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from any product manufactured or supplied by Defendant such that it was a "substantial factor" in the development of his illness. See Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

With respect to asbestos to which Decedent may have been exposed aboard the ship, but which was not manufactured or supplied by Defendant, the Court has held that, under maritime law, Defendant cannot be liable. Conner, 2012 WL 288364, at *7. Accordingly, summary judgment in favor of Defendant FMC Corporation is warranted with respect to this alleged exposure. Anderson, 477 U.S. at 248.

(ii) Exposure Arising During Non-Navy Work (Shoreham Nuclear Power Station in New York) (New York Law)

There is evidence that, at some point in time, there were Peerless pumps at the Shoreham Nuclear Power Station and that at least one of these pumps had an asbestos-containing replacement gasket installed in it. There is evidence that Decedent worked at the Shoreham facility.

However, there is no evidence that Decedent worked on or near a pump manufactured or supplied by Defendant. Moreover, there is no evidence that he was exposed to asbestos in connection with any pump there. Therefore, no reasonable jury could conclude that Decedent was exposed to asbestos from Defendant's pumps 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 FMC Corporation is warranted with respect to this alleged exposure. Anderson, 477 U.S. at 248.

In light of this determination, the Court need not reach the issue of the so-called "bare metal defense" under New York law.