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

MAHLON LANTZ,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
v.	:	Transferred from the District of North Dakota (Case No. 90-0025)
A.P.I., INC., ET AL.,	:	
Defendants.	:	E.D. PA CIVIL ACTION NO. 2:09-66690

O R D E R

AND NOW, this **22nd** day of **June, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant S.O.S. Products (doc. no. 18) is **GRANTED.**[1]

[1] According to Mr. Lantz's work history report submitted in this case, Mr. Lantz worked for Hopperts Plumbing & Heating from 1952 until 1957 at schools and on small residential jobs. (Pl.'s Work History Report, doc. no. 39-1.) Plaintiff also asserts that Mr. Lantz was exposed to Defendant's products while working for Whitcomb Plumbing & Heating from 1958 until 1961 on new apartment building and homes in Fargo, North Dakota and while working for Miller Plumbing & Heating from 1961 until 1968 on various projects throughout North Dakota. Defendant's answers to interrogatories indicate that from 1946 until the early 1970s, Defendant mixed and compounded S.O.S. furnace cement which was comprised of approximately 9% chrysotile asbestos. (Pl.'s Resp. at 1-2.)

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

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. The alleged exposures which are relevant to this motion occurred in North Dakota. Therefore, this Court will apply North Dakota 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).

The Supreme Court of North Dakota has not addressed what evidence a Plaintiff must present in order to survive summary judgment in the asbestos context. Under North Dakota law, "a proximate cause is a cause which had a substantial part in bringing about the harm or injury either immediately or through happenings which follow one another." Andrews v. J.W. O'Hearn, 387 N.W.2d 716, 726 (N.D. 1986) (internal citations omitted). There must be a causal link between the defendant's conduct and the injury. Andrews, 387 N.W. 2d at 727 (citing Moum v. Maercklein, 201 N.W.2d 399, 402 (N.D. 1972)). "'Proximate cause [is] 'that cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury, and without which it would not have occurred.'" Andrews, 387 N.W.2d at 727 (quoting Johnson v. Minneapolis, St. P. & S.S.M. Ry. Co., 209 N.W. 786, 789 (N.D. 1926); Knorr v. K-Mart Corp., 300 N.W.2d 47 (N.D. 1980)).

Magistrate Judge Karen K. Klein of the United States District Court for the District of North Dakota applied a liberal product identification standard in recommending that defendants' motions for summary judgment be denied in Adolph v. A.P.I., Inc. (D.N.D. 1991). Magistrate Judge Klein concluded that coworker testimony or evidence that a plaintiff was employed by a company at the same time that the company was using defendant's asbestos-containing products could be sufficient to survive summary judgment and that a plaintiff need not specifically describe exposure to the defendant's products. Id. at 3. Magistrate Judge Klein also recognized that, even if the defendants were entitled to summary judgment as to product identification, since they had not moved for summary judgment as to plaintiff's conspiracy claims, "no useful purpose would be served by the piecemeal granting of partial summary judgments on exposure when a defendant must nonetheless remain in the case because of the conspiracy claims." Id. at 4. Magistrate Judge Klein did not consider any of the evidence presented against the defendants and noted that "[t]he motions may be renewed as to particular plaintiffs at trial." Id.

In an unpublished opinion, the United States Court of Appeals for the Eighth Circuit addressed product identification and causation in the asbestos context. Bossert v. Keene Corp., 19 F.3d 1437, 1994 WL 108844 (8th Cir. 1994). The United States District Court for the District of North Dakota denied defendant MacArthur Corp.'s motion for judgment as a matter of law and MacArthur appealed this decision. Id. at *1. The court noted that,

> [a] cause is proximate if it 'had a substantial part in bringing about the harm or injury either immediately or through happenings which follow one another.' Andrews, 387 N.W.2d at 727. North Dakota courts have not addressed the standard for proving causation in the specific context of an asbestos personal injury case, and MacArthur urges us to use the 'frequency, regularity, and proximity' test used in other states. See, e.g., Jackson v. Anchor Packing Co., 994 F.2d 1295, 1301-03 (8th Cir. 1993) (applying Arkansas law); Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-63 (4th Cir. 1986) (applying Maryland law).

Plaintiff's proof of exposure consisted of Mr. Bossert's testimony that he worked at the Amoco refinery for a total of approximately eight months and the testimony of Robert Clooten, a former insulation tradesperson at the Amoco refinery who

testified that about half of the cements installed in the Amoco refinery from 1954 until 1965 were manufactured by MacArthur and that about half of this pipe covering was still in place. 1994 WL 108844, at *2. The court concluded that the plaintiff's proof of exposure was "entirely circumstantial" and that "[b]ecause Bossert failed to produce substantial evidence of exposure to MacArthur's products . . . Bossert cannot satisfy any proximate cause standard." Id. at *1-2. Accordingly, the court reversed the district court and granted MacArthur's motion for judgment as a matter of law. Id. at *2.

The Bossert court granted defendant's motion for summary judgment based on evidence that the plaintiff worked a refinery and coworker testimony that the defendant's product was present at the refinery. In Adolf, Magistrate Judge Klein denied defendants' motions for summary judgment in this scenario, but relied on the fact that the defendants would not be dismissed from the cases even if the motions were granted and noted that the defendants would have the opportunity to renew these motions. This Court will not attempt to predict the law of North Dakota when the Supreme Court of North Dakota has not yet addressed product identification in the asbestos context. Rather, in keeping with the general products liability standard, Plaintiff must merely raise a genuine issue of material fact as to whehter exposure to the Defendant's product proximately caused the Plaintiff's injury. Andrews, 387 N.W.2d at 727.

II. MOTION FOR SUMMARY JUDGMENT OF S.O.S. PRODUCTS

According to Mr. Lantz's work history report submitted in this case, Mr. Lantz worked for Hopperts Plumbing & Heating from 1952 until 1957 at schools and on small residential jobs. (Pl.'s Work History Report, doc. no. 39-1.) On his work history report, Mr. Lantz identified Arlo Huelsman as a coworker from 1952 until 1954. (Id.) Plaintiff cites to Mr. Huelsman's deposition taken in another asbestos case. (Pl.'s Ex. 5.) Mr. Huelsman testified that he used furnace cement while working at Hopperts Plumbing & Heating. (Huelsman Dep. at 109-12.) He testified that applying the furnace cement was not a dusty process. (Id. at 113.) He testified that Merle Hoppert, one of the owners of Hopperts Plumbing & Heating, did most of the ordering. (Id.)

Plaintiff then cites to Mr. Hoppert's deposition testimony taken in another case. (Pl.'s Ex. 6.) Mr. Hoppert testified that his company used a lot of furnace cement. (Hoppert Dep. at 112.) He was asked,

Q: And you don't recall any other manufacturers at this time of furnace cement?
A: Boy. Well, I used S.O.S. That was another one.

(Id. at 115.)

Plaintiff also asserts that Mr. Lantz was exposed to S.O.S. furnace cement while working for Whitcomb Plumbing & Heating and Miller Plumbing & Heating. On his work history report, Mr. Paschke indicated that Mr. Lantz was one of his coworkers from 1959 until 1962 while he worked for Whitcomb at St. Lukes Hospital. (Pl.'s Ex. 8.) He also indicated that Mr. Lantz was one of his coworkers when he worked for Miller from 1962 until 1968. (Id.) In his deposition, Mr. Paschke testified that he worked alongside Mr. Lantz when he worked for Whitcomb. (Paschke Dep., May 21, 1991 at 223.) He also testified that Mr. Lantz was one of his coworkers when he worked at the Fine Arts Building for Miller. (Id. at 236-40.) Plaintiff then cites to a portion of Mr. Paschke's deposition where he testified that he worked with S.O.S. furnace cement while working for Herb Berry, a company which Mr. Lantz did not work for. (Id. at 129-32.) Mr. Paschke was asked,

Q: Okay. When did you first start working with or using an S.O.S. furnace cement?
A: I don't recall.
Q: You can't give me a decade? How about the name of an employer?
A: No.
Q: You can't give me the name of an employer or the decade; is that right?
A: Well, the decade I would - I would guess would be in the '60s.
Q: And is that a guess or -
A: That's.
Q: - an estimate?
A: That's a guess. I can't keep track of all this stuff.
Q: Would it have been when you were working for Miller Sheet Metal, Laney's Plumbing, Robert Gibb or Whitcomb & Sons Plumbing?
A: I don't recall.

(Id. at 133-34.)

As to Mr. Lantz's work for Hopperts Plumbing & Heating from 1952 until 1957, Plaintiff has presented evidence that Mr. Lantz worked with Mr. Huelsman while working for Hopperts. Mr. Huelsman testified that Mr. Hoppert ordered products for Hopperts. Mr. Hoppert testified that Hopperts ordered furnace

cement from S.O.S. Mr. Hoppert did not identify Mr. Lantz in his deposition. Moreover, there is no evidence that S.O.S. was Hopperts' sole supplier for furnace cement. Even if Hopperts only ordered S.O.S. furnace cement, there is no evidence that Mr. Lantz ever worked with this cement.

As to Mr. Lantz's work for Whitcomb from 1958 until 1961 and Miller from 1961 until 1968, Plaintiff has presented the testimony of Mr. Paschke who testified that he worked with Mr. Lantz for Whitcomb from 1959 until 1962 and for Miller from 1962 until 1968. Mr. Paschke testified that he used S.O.S. furnace cement while he worked for Herb Berry. According to Mr. Paschke's work history report, he worked for Herb Berry Plumbing & Heating from 1949 until 1951. Mr. Paschke guessed that he worked with the furnace cement in the 1960s, but he could not testify as to which project he was working on when he worked with S.O.S. furnace cement. Since Mr. Paschke could not testify as to whether S.O.S. furnace cement was used on the jobs that he worked on with Mr. Lantz, there is insufficient evidence from which a jury could conclude that exposure to S.O.S. furnace cement contributed to Mr. Lantz's development of an asbestos-related disease.

Accordingly, since Plaintiff has failed to raise a genuine issue of material fact as to whether exposure to S.O.S. furnace cement was a proximate cause of Mr. Lantz's development of an asbestos-related disease, Defendant's Motion for Summary Judgment is granted.

E.D. PA NO. 2:09-cv-66690

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.