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

FILED
OCT 19 2012
MICHAEL E. KUNZ, Clerk
By_____ Dep. Clerk

WILLIAM T. NELSON Plaintiff, v. A.W. CHESTERTON CO., et al., Defendants.	:	CONSOLIDATED UNDER MDL 875 Transferred from the District of Rhode Island (Case No. 10-00065) E.D. PA CIVIL ACTION NO. 2:10-cv-69365

O R D E R

AND NOW, this **18th** day of **October, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Crane Co. (ECF No. 241) is **GRANTED.**[1]

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[1] Plaintiff William T. Nelson alleges that his asbestos-related injuries were caused by the inhalation of fibers emitted from products which were designed, manufactured, distributed, installed, and/or sold by various defendants. Plaintiff was a member of the United States Navy from approximately 1958 through 1976, where he worked as a boiler technician aboard the USS Compton, USS Diamond Head, USS Annapolis, USS Ingraham, USS Laffray, and USS Savannah. Plaintiff was deposed in this matter.

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

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).

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.). 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, 314 F.3d at 131-32. 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.

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" (that is, 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.

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., 842 F. Supp. 2d 791, 801 (E.D. Pa. 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., 842 F. Supp. 2d 791 (E.D. Pa. 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. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) it warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Tech.s Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010) (Robreno, J.) (citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 739 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146 (E.D. Pa. Aug. 29, 2011)(Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law. Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

F. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine dispute as to any material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably precise specifications as to warnings which were to be placed on defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *8-9 (E.D. Pa. Oct. 20, 2010) (Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

II. MOTION FOR SUMMARY JUDGMENT BY DEFENDANT CRANE CO.

A. Product Identification

As Plaintiff was a Navy worker who primarily worked on board vessels at sea, maritime law applies here. As for product identification under maritime law, Plaintiff unequivocally identified Defendant's products as ones to which he was exposed on a regular basis. He remembered the colors and appearance of Defendant's products, and he testified regarding his use of "sheet asbestos" or "blankets" associated with Defendant's products and the dust that came off of such products. See Dep. of William T. Nelson ("Nelson Dep. I"), September 21, 2010, at 87-89, Def.'s Ex. B; Dep. of William T. Nelson ("Nelson Dep. III"), November 4, 2010, at 520-522, Def.'s Ex. C. Plaintiff's co-worker also was deposed in this matter, and testified that he and Plaintiff moved and unpacked "Crane" valves about "three or four times" during a ship rebuild. Dep. of Harold Smith, January 17, 2011 at 48-49, 75-79, Def.'s Ex. E. The above evidence would be sufficient to create an issue of fact as to whether Plaintiff was exposed to the Defendant's product, and whether it was a substantial factor in causing his disease. Lindstrom v. A-C Prod.

Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005).

B. Government Contractor Defense

Defendant has failed to show sufficient evidence to support its assertion that it is entitled to the government contractor defense. Defendant presents an affidavit and report from Admiral Sargent, who testified as to the government's involvement in the design and manufacture of products for shipboard use. (See Sargent Aff. at 46). Crane Co. also presents a corporate witness who affirmed that Crane Co. complied with applicable government specifications in providing products to the government. (See Aff. of Anthony Pantaleoni). Defendant presents examples of military specifications applicable to valves supplied to the Navy for use aboard ships. (See, e.g., Mil-V-22052D (providing specifications for certain types of valves, including information that had to be included on valve label plates)).

Defendant further presents an expert affidavit and report concluding that the government had an "historical knowledge" of the breadth of the dangers of asbestos. (Forman Aff.)

Plaintiff, however, has presented evidence that naval specifications provided to defendant required state law warnings and relevant guidelines to be incorporated into warning labels. (See MIL-STD-129, Pl.'s Ex. 16). Plaintiff has rebutted defendant's evidence that the government "knew as much or more than the defendant contractor about the hazards" of the product, or "issued reasonably precise specifications covering warnings." See Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989).

Additionally, Plaintiff argues that there is disputed evidence as to how much the Navy knew about the dangers of asbestos, and when it knew them. For example, Plaintiff presents testimony of an expert witness who testified that the Navy did not know the dangers of grinding and scraping asbestos gaskets and packing until as late as the 1960s. (See Dep. of Samuel Forman, January 7, 2008, at 42-43, 46, Pl.'s Ex. 18). The above evidence would be sufficient to raise an issue of fact as to whether the government contractor defense should apply.

C. Bare Metal Defense

Defendant makes a "bare metal" argument that Crane Co. did not manufacture any packing material used in valves, blankets, or

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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packing to which Plaintiff was allegedly exposed. Defendant's corporate representative testified that the Navy would have obtained replacement parts for valves directly from the manufacturer of asbestos products, and not from Crane Co., the valve manufacturer. (Dep. of Anthony Pantaleoni, September 3, 2008, at 91-92, Def.'s Ex. L).

Plaintiff counters with evidence that Crane Co. not only manufactured its own asbestos products for sale, but also instructed buyers that its valves had to be used with asbestos gaskets and packing that could also be purchased from other manufacturers. (See Crane Co. Catalog No. 53 at 00201-202, 204, Pl.'s Ex. 3; Various Catalogs, Pl.'s Ex.s 4, 5). Crane also published maintenance manuals for users of its products, in which Crane Co. claimed to be "the world's largest source of dependable valves and fittings for every service, [and] also the source of the most reliable data regarding their use." ("Piping Pointers" manual at 000810, Pl.'s Ex. 6). This manual did not include warnings about health hazards of asbestos, even though Crane Co. allegedly knew that valve maintenance included removing packing and gaskets that contained asbestos. (See id.; Instruction Manual for the Installation, Operation and Maintenance of Various Crane Co. Valves at 0018732, Pl.'s Ex. 7).

Although Plaintiff's evidence shows that Defendant's products were used in conjunction with products containing asbestos, to overcome the bare metal defense, a plaintiff must show that the defendant actually manufactured or distributed the asbestos containing products alleged to have caused injury. Plaintiff has not presented evidence sufficient to create an issue of fact as to whether Defendant manufactured or supplied asbestos products. Therefore summary judgment regarding the bare metal defense is granted.

III. CONCLUSION

Summary judgment is granted. Though Plaintiff succeeds in identifying asbestos-containing products used in conjunction with Defendant's products, he has not raised a genuine issue of fact as to whether Defendant manufactured or supplied asbestos products to which he was exposed. As such, Defendant succeeds upon the bare metal defense.