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

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

O R D E R

AND NOW, this **19th** day of **October, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Elliott Co. (doc. no. 204) is **GRANTED**.[1]

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[1] Mr. 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.

Plaintiff alleges that he was exposed to asbestos from Defendant's turbine-driven forced draft blowers on board several Navy vessels.

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., No. 09-67099,842 F. Supp. 2d 791, 799 (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. Sham Affidavit Doctrine

The "sham affidavit doctrine" is recognized pursuant to Federal Rule of Civil Procedure 56 as a way of showing that there is no genuine issue of material fact. Given that the "sham affidavit doctrine" is an issue of federal law, the MDL transferee court applies the federal law of the circuit where it sits, which in this case is the law of the United States Court of Appeals for the Third Circuit. In re Asbestos Prods. Liability Litig. (No. VI), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (citing In re Diet Drugs Liability Litig., 294 F. Supp. 2d 667, 672 (E.D. Pa. 2003)).

In Baer v. Chase, the United States Court of Appeals for the Third Circuit described the "sham affidavit" doctrine noting that, "we have held that a party may not create a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." Id. at 624 (citing Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991)). Although the "sham affidavit doctrine" has traditionally been applied to strike affidavits filed after depositions have been taken, it applies with equal force to affidavits filed prior to the taking of a deposition. In re: Citx Corp., 448 F.3d 672, 679 (3d Cir. 2006). The United States Court of Appeals for the Third Circuit noted, [w]e perceive no principle that cabins sham affidavits to a particular sequence." Id. (internal citations omitted). Testimony taken in a deposition, rather than sworn to in an affidavit, is considered more favorable for summary judgment purposes since testimony sworn to in an affidavit is not subject to cross-examination. 448 F.3d at 680 (citing 10B Charles Alan Wright & Mary Kay Kane, Federal Practice and Procedure § 2722 at 373, 379).

II. MOTION FOR SUMMARY JUDGMENT BY DEFENDANT ELLIOTT CO.

A. Maritime Law Applies

Maritime law governs Plaintiff's claims against Defendant, as Plaintiff was a sea-based Navy worker, and the allegedly defective product -- turbine-driven forced draft blowers -- was produced for use on a vessel. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455, 469 (E.D. Pa. 2011) (Robreno, J.).

B. Product Identification & the Sham Affidavit Doctrine

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 Fed. App'x 371, 375 (6th Cir. 2001). Substantial factor causation is determined with respect to each defendant separately. Stark, 21 Fed. Appx. at 375.

Plaintiff does not once mention Defendant's name or products in his deposition. Rather, he merely describes generally his work in and around engine rooms of ships. See Dep. of William T. Nelson at 74, Pl.'s Ex. 6 (discussing the time he spent in the engine room of the USS Compton).

However, one month after Plaintiff's deposition, Defendant submitted interrogatories to Plaintiff, and in Plaintiff's responses, he details his alleged work with and around Elliott branded DA tanks on the ships on which he worked. See Elliott Interrogatory Responses, Def.'s Ex. 15. These responses include detailed descriptions of Plaintiff's alleged work with and around asbestos on or in Defendant's products, including the dates on which he worked with such asbestos.

Defendant argues that the interrogatory responses should be barred under the "sham affidavit" doctrine. However, this argument fails. In Baer v. Chase, the United States Court of Appeals for the Third Circuit described the "sham affidavit" doctrine, noting that, "we have held that a party may not create a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." Id. at 624 (citing Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991)). Although a party may not file an affidavit (or interrogatory responses) **disputing** his deposition testimony

without a plausible explanation, a party may file a sworn document **supplementing** his deposition testimony. Here, if Plaintiff had, in his deposition, denied ever seeing Defendant's products or working with them, and then tried to assert the opposite in subsequent interrogatory responses, then those responses would be barred. However, that is not the case here. Rather, Plaintiff did not mention Defendant's products at all in his deposition, but, in responding to interrogatories that Defendant itself served on Plaintiff, described what he remembered about Defendant's products. This did not constitute a change in his earlier testimony; rather, the interrogatory responses supplemented Plaintiff's deposition testimony.

Here, the detailed descriptions that Plaintiff provided of Defendant's products and the asbestos therein, as well as the work that Plaintiff performed on such products and the dust to which he was exposed, is sufficient to raise a genuine issue of material fact as to whether asbestos attributable to Defendant was a substantial factor in causing his mesothelioma.

C. Bare Metal Defense

Plaintiff alleges that he was exposed to asbestos from dearrating feed tanks manufactured and/or supplied by Defendant Elliott Co. There is evidence that Plaintiff served aboard vessels built with tanks manufactured by Defendant. Furthermore, Defendant does not dispute that component parts used in conjunction with its tanks contained asbestos.

However, there is no evidence that Defendant manufactured or supplied any component parts containing asbestos, nor is there evidence that Defendants tanks independently contained asbestos. The mere foreseeability of the use of asbestos containing component parts is insufficient to rebut the bare metal defense. Therefore, no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from any product manufactured or supplied by Elliott Co. such that it was a "substantial factor" in the development of his illness. See Conner, 2012 WL 288364, at *7; Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1. Accordingly, summary judgment in favor of Defendant Elliot Co. is warranted.

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AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.