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

DONALD SILVER Plaintiff, v. FOSTER WHEELER LLC, ET AL., Defendants.	FILED JAN 25 2012 MICHAEL E. KUNZ, Clerk By_____Dep. Clerk	CONSOLIDATED UNDER MDL 875 Transferred from the Northern District of California (Case No. 11-00749) E.D. PA CIVIL ACTION NO. 2:11-CV-64218-ER

O R D E R

AND NOW, this **25th** day of **January, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Northrop Grumman (Doc. No. 10) is **GRANTED.**[1]

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[1] This case was originally filed in the United States District Court for the Northern District of California. It was thereafter transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Donald Silver, who worked as a machinist mate during his service in the Navy, has been diagnosed with lung cancer. He alleges exposure to asbestos from products manufactured by Defendant Northrop Grumman ("Northrop Grumman") aboard the USS Coral Sea during the years 1967 to 1969.

Plaintiff has brought claims against two (2) defendants. Defendant Northrop Grumman has moved for summary judgment, arguing that (1) it is immune from liability because the Navy was a sophisticated user of asbestos products, (2) Plaintiff has failed to provide product identification evidence sufficient to establish causation because there is no evidence that any asbestos to which he was exposed was originally installed by Northrop Grumman, (3) it is immune from liability by way of the government contractor defense, and (4) Plaintiff's claims arise out of secondary exposure and therefore fail as a matter of law. Northrop Grumman further contends (in a set of objections accompanying its reply) that much of Plaintiff's evidence is inadmissible and should be stricken. Defendant Northrop Grumman has asserted that maritime law applies.

In addition to contesting each of Defendant's arguments, Plaintiff contends (in a set of objections filed with his opposition) that the expert declarations of Captain Wesley C. Hewitt and John E. Graham are inadmissible and should not be considered by this Court in connection with Defendant's motion. Plaintiff asserts that California law applies.

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 (Maritime versus California Law)

Defendant Northrop Grumman has asserted that maritime law is applicable. 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 In re Asbestos Prods. Liab. Litig. (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., - F. Supp. 2d -, 2011 WL 3101810 (E.D. Pa. July 22, 2011)(Robreno, J.). A party seeking application of maritime law must establish that maritime jurisdiction is properly invoked. Id. at *5.

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 *5-8 (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, 497 U.S. 358 (1990). 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), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 2011 WL 3101810 at *9. 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. Id. at 9-10. 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., 10-64625, doc. no. 81 (Aug. 2, 2011 E.D. Pa.)(Robreno, J.)(applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

It is undisputed that the alleged exposure to Defendant Northrop Grumman's products occurred exclusively during the Plaintiff's work aboard a naval ship. Thus, Plaintiff's alleged exposure was during sea-based work. See Sisson, 497 U.S. 358. Therefore, Northrop Grumman has satisfied its burden in establishing that maritime law is applicable to the claims against it, and thus to its motion. See Conner, 2011 WL 3101810, at *5.

C. 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). Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F.App'x. at 375.

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 v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)). 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))).

D. Sophisticated User Defense Under Maritime Law

This Court has previously held that it will not grant summary judgment on grounds of the sophisticated user defense when maritime law applies because maritime law has not recognized this defense. Prange v. Alfa Laval, Inc., No. 09-91848, 2011 WL 4912828, at *1 (E.D. Pa. July 22, 2011)(Robreno, J.).

E. Unsworn Declaration at the Summary Judgment Stage

Federal Rule of Civil Procedure 56(c)(1)(A) provides that a party asserting that a fact is genuinely disputed must support that assertion with particular parts of material in the record, such as an affidavit or declaration. The United States Court of Appeals for the Third Circuit has found that unsworn testimony "is not competent to be considered on a motion for summary judgment." Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1980)); see also Bock v. CVS Pharmacy, Inc., No. 07-CV-412, 2008 WL 3834266, at *3 (E.D. Pa. 2008)(refusing to consider an expert report when no sworn affidavit was provided with the report); Jackson v. Egyptian Navigation Co., 222 F. Supp. 2d 700, 709 (E.D. Pa. 2002)(finding that an unsworn expert report cannot be considered as evidence for a motion for summary judgment).

This Court has previously held that an unsworn declaration cannot be relied upon to defeat a motion for summary judgment. Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *6 (E.D. Pa. Oct. 20, 2010) (Robreno, J.)(citing Woloszyn v. County of Lawrence, 396 F.3d 314, 323 (3d Cir. 2005)(refusing to consider unsworn declaration of a lay witness). It is true that Federal Rule of Civil Procedure 56 was amended effective December of 2010 to provide that a declaration, that is an unsworn statement subscribed to under penalty of perjury, can substitute for an affidavit. See Fed. R. Civ. P. 56 advisory committee's note; see also Ray v. Pinnacle Health Hosps., Inc., F.App'x, at 164 n.8 (3d Cir. 2010) (noting that "unsworn declarations may substitute for sworn affidavits where they are made under penalty of perjury and otherwise comply with the requirements of 28 U.S.C § 1746"). However, a declaration that

is not sworn to under penalty of perjury or accompanied by an affidavit is not proper support in disputing a fact in connection with a motion for summary judgment. Burrell v. Minnesota Mining Manufacturing Co., No. 2:08-87293, 2011 WL 5458324 (E.D. Pa. June 9, 2011)(Robreno, J.)(refusing to consider expert reports when no timely sworn affidavits were provided with the reports and the reports were not sworn to under penalty of perjury).

II. Defendant Northrop Grumman's Motion for Summary Judgment

Sophisticated User Defense

Northrop Grumman asserts that it is entitled to summary judgment on the basis of the sophisticated user defense because the Navy was a sophisticated user, possessing the most advanced information regarding asbestos hazards. This Court has previously addressed the sophisticated user defense in the context of failure-to-warn claims (of both the common law negligence and strict products liability varieties) brought under California law, applying Johnson v. American Standard, Inc., 43 Cal.4th 56, 65 (2008). See, e.g., Aikin v. General Electric Co., No. 10-64595, 2011 WL 6415124, at *1 n.1; Gottschall v. General Electric Co., No. 11-60035, 2011 WL 6424983, at *1 n.1. Defendant urges the Court to apply the same principles here. However, given that it has been determined that maritime law applies to this case, the Court's previous ruling is inapplicable here. Because maritime law has not recognized the sophisticated user defense, Defendant's motion for summary judgment on the grounds of this defense is denied. See Prange, 2011 WL 4912828, at *1 n.1.

Product Identification/Causation

As a preliminary matter, the Court will address the parties' challenges to the admissibility of evidence relevant to product identification. In connection with its reply brief, Northrop Grumman objected to the declaration of Plaintiff Donald Silver, contending that it is inadmissible and should be stricken because it is incomplete and is not signed under penalty of perjury. This Court has previously held that an unsworn declaration that is not accompanied by a sworn affidavit or signed under penalty of perjury cannot be relied upon to defeat a motion for summary judgment. Faddish, 2010 WL 4146108 at *6; see also Fowle, 868 F.2d at 67; Ray, F.App'x, at 164 n.8; Burrell, 2011 WL 5458324, at *1 n.1.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

In light of this determination, for reasons set forth below, the Court need not reach the parties' other objections to the evidence but will, for purposes of this determination, proceed on the basis that the balance of Plaintiff's proofs is admissible. The Court turns now to the merits of the parties' arguments regarding the sufficiency of Plaintiff's product identification evidence.

Northrop Grumman argues that summary judgment is appropriate because there is no evidence that Plaintiff was ever exposed to an asbestos-containing product that was originally installed by Northrop Grumman aboard any of the ships at issue and it is not liable for replacement parts later installed. It argues that it would have been impossible to identify originally-installed asbestos products at the time of Plaintiff's alleged exposure (twenty (20) years after the ship was built), given the frequent replacement of these materials. Northrop Grumman points to the declaration and report of expert John Graham, who discusses the ship at issue and the reasons to believe Plaintiff would not have been exposed to originally-installed asbestos products aboard it (e.g., intervening overhaul, etc.).

Plaintiff asserts that there is sufficient product identification evidence with respect to Defendant Northrop Grumman to establish causation based on the declarations of Plaintiff, expert Charles Ay, and expert David Schwartz, M.D. However, Plaintiff's declaration is the only evidence in this case that Plaintiff was on the ship at issue and/or that he was exposed to thermal insulation while working on the ship. Because the Court has determined that Plaintiff's unsigned, unsworn declaration cannot be relied upon by Plaintiff in opposing Defendant's motion, there is no evidence that Plaintiff was exposed to any product of Defendant's. Accordingly, summary judgment in favor of Northrop Grumman is granted on grounds of insufficient product identification evidence. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376.

Because summary judgment on grounds of insufficient product identification evidence is warranted, the Court need not reach the issue of whether the ship is a "product" or whether the government contractor defense is available to Defendant in this case.