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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (No. VI)	:	Consolidated Under MDL 875
JESSIE MARLENE ODOM WARD	:	Case No. 09-80030
v.	:	Transferred from the Northern District of Florida
ALLIS-CHALMERS PUMPS, INC.	:	

O R D E R

AND NOW, this **22nd** day of **December, 2010**, it is hereby **ORDERED** that Defendant U.S. Fidelity and Guaranty Company, Inc.'s Motion to Dismiss (doc. no. 12) filed on April 2, 2010 is **GRANTED**.[1]

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[1] Plaintiff, Jessie Marlene Odom-Ward, Personal Representative of the Estate of Everette Odom, alleges that Everette Odom was exposed to various asbestos-containing products while working at the Chemstran/Monsanto Chemical Plant in Pensacola, Florida. (Def.'s Response, doc. no. 92 at 1.) Plaintiff filed this action in the First Judicial Circuit Court in Escambia County, Florida on April 1, 2009. (Def.'s Mot. Summ. J., doc. no. 67 at 2.) This case was removed to the United States District Court for the Northern District of Florida on June 10, 2009. (Id.) This case was transferred to the Eastern District of Pennsylvania as part of MDL 875 on August 6, 2009. (See doc no. 1.)

Plaintiff alleges that Everette Odom ("Mr. Odom") worked at the Monsanto facility from about 1954 until 1983. (Pl.'s Reply Br., doc. no. 87 at 1.) Mr. Odom primarily worked as an insulator, but also performed work as a pipefitter, millwright, and welder. (Id.) During shutdowns at the plant, Mr. Odom's unit

would take on additional responsibilities, including tearing insulation off of pipes and equipment and then replacing the insulation. (Id. at 1-2.) Mr. Odom worked throughout the plant, including the powerhouse, fire box, and boiler room. (Id. at 2.) He worked with various asbestos-containing products and around tradesmen working with asbestos-containing products. (Id.) Mr. Odom passed away before he could be deposed for this case.

Defendant, United States Fidelity and Guaranty Company, filed the instant Motion to Dismiss, asserting that, under Federal Rule of Civil Procedure 12(b)(6), Plaintiff has failed to state a claim on which relief can be granted. Plaintiff's Complaint alleges that Defendant United States Fidelity and Guaranty Company ("USF&G") provided workers' compensation and general liability insurance to Daniel Construction Company ("Daniel"), one of the independent contractors that performed services at Monsanto. (Def.'s Mot. to Dismiss, doc. no. 12-1, at 3.) Plaintiff also alleges that USF&G contracted to "provide information and warnings to Daniels' management, employees and others on the jobsite regarding hazardous and/or dangerous conditions, inappropriate safety measures and programs observed by USF&G inspectors." (First Amended Compl. ¶ 89)(cited in Pl.'s Resp., doc. no. 14 at 6.)

Based on these facts, Plaintiff has alleged two grounds of recovery against USF&G. First, Plaintiff seeks recovery against USF&G on breach of contract grounds, alleging that USF&G breached its safety services contract with Daniel, and that Mr. Odom was a third party beneficiary to that contract. (Id.) Alternatively, Plaintiff asserts that, under the Second Restatement of Torts, USF&G voluntarily undertook a duty to provide for Mr. Odom's and that USF&G was negligent in failing to inform Mr. Odom about the harms of asbestos. (Id.)

In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party," however, the Court need not credit bald assertions and legal conclusions. DeBenedictis v. Merrill Lynch & Co., Inc., 492 F.3d 209, 215 (3d Cir. 2007)(quotation omitted); Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008)(stating that the complaint's "'[f]actual allegations must be enough to raise the right to relief above the

speculative level.'")(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 & n.3 (2007)).

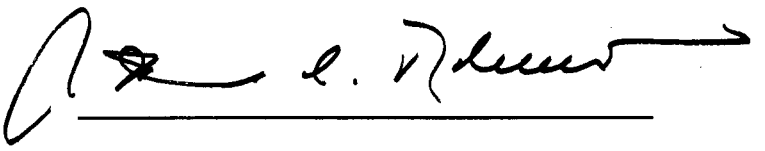
The Supreme Court recently expounded on the standard for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) in Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937 (2009). Iqbal established that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. at 1949 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

As to Plaintiff's first asserted grounds for relief, there is nothing to support Plaintiff's claim that Mr. Odom was an intended third-party beneficiary of the insurance contract between Defendant and Daniel. To establish third-party beneficiary status under Florida law, one must show that it is the "clear or manifest intent of the [original] contracting parties that the contract primarily and directly benefit the third party." Found. Health v. Westside EKG Assocs., 944 So.2d 188, 195 (Fla. 2006). The contract in the instant case was for the primary and direct benefit of Daniel, the insured, not for the benefit of individuals who may have temporarily worked alongside Daniel's employees, such as Mr. Odom. Upon examination of the pleadings, and after oral argument as to Plaintiff's breach of contract theory, there is nothing to support a claim that Mr. Odom was an intentional third party beneficiary of the contract between Defendant and Daniel.

As to Plaintiff's negligence theory, the Court finds that Florida law does not impose liability on insurers under these circumstances presented. Plaintiff's only support for a negligence action against Defendant is Hill v. United States Fidelity and Guaranty Company, 428 F.2d 112 (5th Cir. 1970). In Hill, the Fifth Circuit Court of Appeals, applying Florida law, allowed Plaintiff's negligence claim against the insurer of the hotel where she and her husband were injured to proceed. Plaintiff's theory of recovery was that, by conducting "safety engineering inspections of the hotel," Defendant undertook the duty to provide a safe premises for guests, and negligently failed to do so, under the Second Restatement of Torts Section 324A. Id. at 114.

However, Hill is readily distinguishable from the instant case. In Hill, Defendant was a premises insurer, and the Court found that Plaintiff had successfully alleged that the hotel's

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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reliance on Defendant's safety inspections caused the harm. In the instant case, Defendant is not the insurer of the premises, but rather, is the insurer of one of many independent contractors that performed services on the premises at issue, a large chemical plant. Plaintiff has failed to assert a plausible claim that Defendant undertook to insure the safety of the premises for all employees of the premises. The relationship between Defendant and Mr. Odom is too attenuated to support an allegation of undertaking by Defendant.

Additionally, while Hill may have once been an accurate prediction of Florida law, it has ceased to be relied on by Florida courts. There is no Florida court that has held an insurer liable under the circumstances of the instant case. Further, it is well-settled under Florida law that, for public policy reasons, safety and service providers should be protected from suit. See Fla. Stat. § 440.11(3) (barring suits by employees against an employer's safety consultant); Allen v. Employers Service Corporation, 243 So. 2d 454 (Fl. 2d. Dist. App. Ct. 1971)(same). In the instant case, Mr. Odom's claim is not barred, as he is not suing his employer's consultant. However, Florida's broad grant of immunity for safety consultants makes the Court reluctant to extend liability to an independent contractor's insurer in the absence of clear Florida authority on point.

Therefore, under these circumstances, Plaintiff has failed to assert a plausible claim for relief.