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

FRANK J. WILLIAMS, JR.	:	CONSOLIDATED UNDER MDL 875
Plaintiff,		
	:	Transferred from the Eastern District of
v.		Louisiana
	:	(Case No. 12-02318)
LOCKHEED MARTIN CORPORATION, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:09-70101-ER
Defendants.	:	

O R D E R

AND NOW, this **23rd** day of **June, 2014**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Lockheed Martin Corporation** (Doc. No. 301) is **GRANTED**.[1]

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[1] This case was transferred in November of 2011 from the United States District Court for the District of Connecticut to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiffs allege that Frank Williams, Jr. ("Decedent" or "Mr. Williams") was exposed to asbestos from various products during his work as an engineer for Lockheed Martin in Louisiana (including at the NASA Michoud Assembly Facility) during the period 1974 to 1993. Mr. Williams developed an asbestos-related illness and died from that illness.

Plaintiffs have brought claims against various defendants. Defendant Lockheed Martin (who removed this case to federal court on grounds of the government contractor defense) asserts that it is entitled to summary judgment because (1) Plaintiffs' wrongful death claims are barred by Louisiana's statute of limitations, (2) there is insufficient evidence to support a finding of causation with respect to any product(s) or conduct for which it is liable, (3) the Louisiana Workers' Compensation Act (LWCA) bars both Plaintiffs' survival claims and wrongful death claims, (4) it is entitled to derivative sovereign immunity, and (5) it is entitled to the government contractor defense.

Plaintiffs' opposition contends that the Court does not have subject matter jurisdiction over this case and that removal pursuant to the government contractor defense was not proper. However, at the hearing on Defendant's motion, Plaintiffs conceded that they are no longer challenging jurisdiction, in light of this Court's January 2014 ruling on the matter.

The parties agree that Louisiana law applies.

II. 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

The parties agree that Louisiana substantive law applies. Therefore, this Court will apply Louisiana law in deciding each 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).

III. Defendant's Motion for Summary Judgment

A. Defendant's Arguments

Wrongful Death Claims Are Time-Barred (Statute of Limitations)

Defendant Lockheed Martin asserts that the statute of limitations bars Plaintiffs' wrongful death claims. It relies upon: (1) Guidry v. Theriot, 377 So.2d 319, 322 (La. 1979); (2) Walls v. American Optical Corp., No. 98-0455, 740 So.2d 1262, 1270 (La. Sept. 9, 1999); (3) Ducre v. Afine Safety Appliances Co., 634 F. Supp. 696, 699 (E.D. La. 1986); and (4) La. Civ. Code Art. 2315.2(B).

Louisiana Workers' Comp (LWCA)- Exclusive Remedy

Defendant Lockheed Martin asserts that, under Louisiana law, it is well established that the survival action and wrongful death action are two different causes of action that arise at different times. It contends that, whereas asbestos-related survival claims accrue upon the date of Decedent's asbestos exposure (and are therefore governed by the LWCA in effect at the time of the exposure), wrongful death claims are governed by the LWCA in effect at the time of the Decedent's death.

Defendant asserts that Plaintiff's survival claims are barred because the Louisiana Workers' Compensation Act provides the exclusive remedy for these claims and the version of the statute in effect at the time of the alleged exposure (1974 to 1993) permits only claims arising from exposure that occurred on or before September 1, 1975 and that was so "significant" that the disease would have progressed on its own after that date. Defendant asserts that because Plaintiffs cannot present evidence of such exposure prior to 1975, their survival claims are barred. It contends that the applicable version of the statute is that enacted on September 1, 1975, when the Louisiana legislature broadened the scope of diseases covered by the LWCA to include "mesothelioma and other asbestos-related diseases." In support of this position, Defendant Lockheed Martin relies upon (1) La. Acts 1975, No. 583, § 2 (eff. Sept. 1, 1975); (2) Calloway v. Anco Insulation, 714 So.2d 730, 733 (La. App. Ct. 1998); (3) Chustz v. R.J. Reynolds Tobacco Co., 72 Fed. Appx. 152, 153 (5th Cir. 2003); and (4) Kemp v. Armstrong World Indus., 855 So.2d 774, 778 (La. Ct. App. 2003).

According to Defendant Lockheed Martin, under the LWCA in effect on the date of Decedent's death (January 1, 2009) (which is still the current version of the LWCA), the exclusive remedy for an employee's asbestos-related occupational disease are those rights and remedies provided under the LWCA. Defendant contends that, under this version of the LWCA, an employee's beneficiaries cannot maintain a wrongful death action against the employer for the decedent's alleged asbestos-related disease. In support of this position, Defendant Lockheed Martin relies upon (1) La. Rev. Stat. §§ 23.1031.1(A) and 23.1032; and (2) Calloway.

Derivative Sovereign Immunity

Defendant Lockheed Martin asserts that it is entitled to summary judgment on grounds of derivative sovereign immunity (which it contends is a defense separate and distinct from the government contractor defense). In support of this contention, it relies upon Yearsley v W.A. Ross Const. Co., 309 U.S. 18 (1940) and Ackerson and Bean Dredging LLC, 589 F.3d 196, 206 n.31 (5th Cir. (La.) 2009) (quoting Agredano v. U.S. Customs Service, 223 Fed. Appx. 556, 558 (9th Cir. 2007)). According to Lockheed Martin, it is entitled to derivative sovereign immunity because it satisfies the three (3) elements of the defense, as set out by the Supreme Court in Yearsley: (1) a party acting with validly conferred authority, (2) who has not taken actions beyond that authority, and (3) who has not independently caused harm beyond the scope of the contract. 309 U.S. at 20-21. Defendant relies upon the declaration of Bradley P. Cartwright (an employee of Lockheed Martin since 1977 who is currently the Director of Contracts and Estimating there and has been since 2000).

Defendant does not address this defense in its reply.

Government Contractor Defense

Defendant Lockheed Martin asserts the government contractor defense, which this court has addressed many times. In this case, however, there is a slightly different factual/ evidentiary record because Defendant is not a contractor for the Navy (as is common in cases pending in MDL-875), but a contractor for NASA who manufactured and supplied fuel tanks for NASA. In support of this defense, Defendant again relies upon the declaration of Bradley P. Cartwright, who addresses NASA-issued specifications upon which Defendant relied in producing the fuel tanks at issue. As legal authority, it relies upon: (1) Boyle v. United Technologies Corp., 487 U.S. 500 (1988), (2) In re Agent

Orange Product Liability Litigation, 517 F.3d 76, 87 (2d Cir. 2008) (quoting Boyle), (3) Getz v. Boeing Co., 654 F.3d 852, 861 (9th Cir. 2011), (4) Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 400 (5th Cir. 1988); (5) Miller v. Diamond Shamrock Co., 275 F.3d 414, 420 (5th Cir. 2007); (6) Blackman v. Asbestos Defendant, 1997 WL 703773, *3 (N.D. Cal. 1997); (7) Emory v. McDonnell Douglas Corp., 148 F.3d 347, 351 (4th Cir. 1998); (8) Tate v. Boeing Helicopters, 55 F.3d 1150, 1157 (6th Cir. 1995); and (9) Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 (E.D. Pa. Oct. 20, 2010) (Robreno, J.).

Defendant contends that this defense, as set forth in Boyle and quoted in In re Agent Orange, is independent of the derivative sovereign immunity defense because Boyle expanded on the public policy interests underlying derivative sovereign immunity and "concluded that the 'uniquely federal interest' of 'getting the Government's work done' requires that, under some circumstances, independent contractors be protected from tort liability associated with their performance of government procurement contracts." 517 F.3d at 87. As such, it contends that the government contractor defense displaces state tort law (which creates a significant conflict with "the government's contracting interest").

Defendant does not address this defense in its reply.

B. Plaintiffs' Arguments

Wrongful Death Claims Are Time-Barred (Statute of Limitations)

Plaintiffs contend that, according to the Federal Rules of Civil Procedure (Rule 15) and Louisiana law, Plaintiffs' Second Amended Supplemental Petition relates back to the date of the initial filing of the petition in state court and, therefore, is not time-barred. Plaintiffs rely upon the following timeline of events in an effort to demonstrate their wrongful death claims are not time-barred:

- 11/12/2008 - Plaintiff (now Decedent) filed suit.
- 1/1/2009 - Plaintiff (now Decedent) died of mesothelioma
- 2/6/2009 - Plaintiffs filed first Motion to Remand in La. federal court (E.D. La.) - Pls say this advised court and defense of intent to amend
- 6/12/2009 - Case transferred to E.D. Pa.

- 6/2/2010 - AO12 - Pls say it advised court and defense counsel of intent to amend
- 2/11/2011 - MTD of Defendant Lockheed acknowledges notice of death
- 5/8/2012 - Court substitutes Plaintiffs for Decedent
- 1/25/2013 - First Amended Petition filed
- 2/4/2013 - Second Amended Petition filed (with leave)

In short, Plaintiffs contend that, under Louisiana's fact-pleading theory, their February 6, 2009 Motion to Remand and their January 25, 2013 First Amended Petition were more than sufficient to institute their wrongful death suits against Defendants. Specifically, they contend that they did not file a "survival action" to the exclusion of their wrongful death action - and, instead, claimed any and all damages owed them as a result of Decedent's death, which they contends is sufficient, as demonstrated by Biggs v. Hatter, 32 So.3d 355 (La. Ct. App. (2d Cir.) 2010).

They also contend that, under the Federal Rules of Civil Procedure (Rule 15(c)-(d)), the amendment related back to the date of the filing of the initial state-filed petition and is therefore not time-barred because (1) all claims arose out of Decedent's exposure to asbestos during his employment tenure at Lockheed and MAF, (2) all Defendants were on notice about Plaintiffs (who are the children of Decedent) in 2009 (before the filing of the First or Second Amended Petition) because Plaintiffs had already been substituted by the Court, and (3) there is no prejudice to Defendants because (a) Plaintiffs are not new or unrelated parties (merely substituted parties), (b) the Second Amended Petition was filed long before the end of discovery (such that each Defendant had ample time to prepare to fully defend itself against wrongful death claims), and (c) the facts pertaining to the wrongful death and survival claims are so related that the evidence Defendants will use for one is essentially identical to that for the other.

Louisiana Workers' Comp (LWCA) - Exclusive Remedy

Plaintiffs contend that their wrongful death claims fall outside of the LWCA because the injury that caused Decedent's death (mesothelioma) occurred before mesothelioma was included in the LWCA. Plaintiffs assert that the injury occurred at the time of exposure and that, because they contend to have evidence (from experts Frank Parker and Dr. K. Barton Farris)

that Decedent was exposed to asbestos for about a year prior to the 1975 broadening of the LWCA (beginning on his first day of work at the facility) that all of Plaintiffs' claims fall outside of the LWCA. The key cases Plaintiffs rely upon in reaching this conclusion are Austin v. Abney Mills, Inc., 824 So.2d 1137, 1153 (La. 2002), and Cole v. Celotex Corp., 599 So.2d 1058 (La. 1992).

They also assert that, because the claims are intentional tort claims, they are specifically excluded from coverage under the LWCA (La. Rev. Stat. §23:1032), as evidenced by Trupiano v. Swift & Co., 755 F.2d 442, 444-45 (5th Cir. (La.) 1985), which stated, "Having alleged an intentional tort under Louisiana law, regardless of when the cause of action arose, the appellants are entitled to pursue that claim in the survival action and the wrongful death action." (Emphasis added.) Plaintiffs rely upon Reeves v. Structural Preservation Sys., 731 So.2d 208 (La. Mar. 12, 1999)(involving an employee injured after employer asked him to move a large pot) to support their assertion that Defendant Lockheed's conduct rose to the level of an intentional tort. Reeves indicates that for a tort to be an intentional tort, the actor must (1) consciously desire the physical result of his act, or (2) know that the result is substantially certain to follow from his conduct.

Derivative Sovereign Immunity

Plaintiffs claim Defendant Lockheed Martin has not demonstrated that the government required use of asbestos in the fuel tanks manufactured by Defendant, or that asbestos was used in the construction of the fuel tanks (much less that Decedent was exposed to asbestos from the fuel tanks - as opposed to from the building and facilities at the NASA facility). Plaintiffs contend that Defendants' liability arises as premises owners of the NASA facility where Decedent worked (not product manufacturers) - and that their claims against these Defendants are not product liability claims but premises liability claims.

Government Contractor Defense

Plaintiffs claim Defendant Lockheed Martin has not shown that there were specifications issued by the government requiring use of asbestos in fuel tanks - and that, in any event, the exposure upon which their claims are based is from the building and facilities at the NASA facility (not from products manufactured by Defendant).

C. Analysis

Defendant contends that Plaintiffs have no evidence of exposure prior to the 1975 broadening of the coverage of the LWCA and that, therefore, under the 1975 version of the LWCA, their claims (both survival and wrongful death) are barred because the LWCA is their exclusive remedy for asbestos exposure claims. Defendant asserts that survival claims are governed by the LWCA in effect at the time of exposure (for which the evidence only supports alleged exposure after 1975), and that wrongful death claims are governed by the LWCA in effect at time of death (2009). Defendants rely upon Calloway v. Anco Insulation, 714 So.2d 730, 733 (La. App. Ct. 1998); Chustz v. R.J. Reynolds Tobacco Co., 72 Fed. Appx. 152, 153 (5th Cir. 2003); and Kemp v. Armstrong World Indus., 855 So.2d 774, 778 (La. Ct. App. 2003).

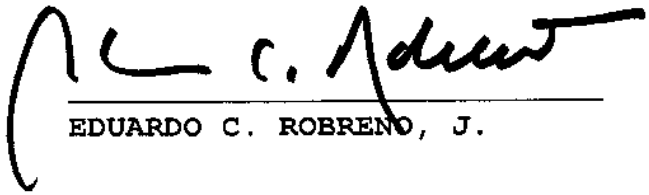
Plaintiffs contend that their wrongful death claims fall outside of the LWCA because all claims arose from - and accrued/vested at - the time of Decedent's exposure. They contend that evidence from experts Frank Parker and Dr. Farris establishes that Decedent was exposed to asbestos for about a year prior to the 1975 broadening of the LWCA (since he first began employment there in 1974).

Plaintiffs' arguments fail. First, there is no admissible evidence that Decedent was exposed to asbestos prior to the 1975 broadening of the statute. This is because Plaintiffs' only purported evidence comes from experts Frank Parker and Dr. K. Barton Farris, whose reports assert that Decedent was exposed to asbestos for about a year prior to the 1975 broadening of the LWCA (beginning on his first day of work at the facility). Importantly, however, experts Frank Parker and Dr. Farris base their opinions on the factual assumption (and, to some extent speculation) that Decedent was exposed to asbestos during this time period without identifying any actual evidence underlying their opinion(s). Their assumptions are based on the evidence that (1) there was asbestos in the structure of the building at the time it was built, (2) normal activities such as maintenance and housekeeping would have released asbestos dust, and (3) no asbestos control measures were put into place at the facility until the late 1980s. However, this evidence is not sufficient because no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos because any such conclusion would be impermissibly speculative. In short, Plaintiffs have failed to identify evidence that Decedent was exposed to asbestos prior to the 1975 broadening of the act.

Plaintiffs' reliance upon the 1985 decision of Trupiano to argue that because their complaint alleges an intentional tort, their claims fall outside the purview of the LWCA also fails. Trupiano is not applicable to the present case as now postured. First, Trupiano was decided in the context of a 12(b)(6) motion to dismiss where the ability of the claim to survive at that point was dependent on the sufficiency of the allegations in the complaint (as opposed to the evidence in the record) - such that the Court's decision turned merely on the fact that the plaintiffs had alleged an intentional tort. At the summary judgment stage, however, Plaintiffs would need to have evidence of intentional tort. Plaintiffs rely upon Reeves v. Structural Preservation Sys., 731 So.2d 208 (La. Mar. 12, 1999) to support their assertion that Defendant Lockheed's conduct rose to the level of an intentional tort. Reeves indicates that for a tort to be an intentional tort, the actor must (1) consciously desire the physical result of his act, or (2) know that the result is substantially certain to follow from his conduct. Even under Plaintiffs' own cited caselaw, their evidence is insufficient to establish that Defendant's conduct, under Louisiana law constituted an "intentional tort," such that Plaintiffs' claims fall outside the LWCA because they do not even purport to have evidence that Defendant consciously intended to harm or kill Decedent. Second, Trupiano did not involve asbestos exposure, but a different type of toxic substance exposure, which did not involve the same latency period between exposure to the substance and development of the disease. In contrast, the cases relied upon by Defendants (Callaway and Kemp) each involve asbestos, thus providing clear precedent under Louisiana law that is applicable to the case at hand - and each also supports the conclusion that Plaintiffs' claims are barred by the LWCA.

In sum, Because Plaintiffs' evidence of exposure only exists for the period after the 1975 broadening of the LWCA, the LWCA is Plaintiffs' exclusive remedy for wrongful death and survival claims. Plaintiffs' complaint in this action asserts claims arising outside of the LWCA and Plaintiffs have therefore failed to utilize their only mechanism for relief. Accordingly, Defendant Lockheed Martin is entitled to summary judgment in its entirety.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

In light of this determination, the Court need not reach any of Defendants' other arguments.