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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 30

Index Number : 105768/2008

CROWDER, SHIRLEY ANN

VS.

AW CHESTERTON

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

CD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 8-5-09

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8-5-09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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SHIRLEY ANN CROWDER, on behalf of herself and as Proposed Administratrix of the Estate of JAMES ALFRED CROWDER,

Index No. 105768/08

Plaintiffs,

DECISION & ORDER

- against -

A.W. CHESTERTON COMPANY, et al.

Defendants.

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SHERRY KLEIN HEITLER, J.:

In this product liability action relating to alleged asbestos exposure, defendant Volkswagen Group of America, Inc. ("VWGoA") moves for summary judgement dismissing the complaint and all cross-claims against it on the ground that this action is time-barred pursuant to Indiana's "statute of repose". Plaintiff opposes this application.

Mr. Crowder was born in Williamsport, Indiana. Plaintiff alleges that Mr. Crowder was first exposed to asbestos while working in an aircraft carrier's boiler room at the Brooklyn Navy Yard in New York from 1958 to 1962. Thereafter, plaintiff claims that Mr. Crowder was exposed to asbestos while working for University Motors in Lafayette, Indiana from1968 to 1971. Initially he worked as a desk clerk and then he became a mechanic working with Volkswagen automobiles. One of his main duties was making repairs to brakes and clutches. Plaintiff does not claim that Mr. Crowder was exposed to asbestos after 1971. In November of 2007, Mr. Crowder was diagnosed with Mesothelioma and died sometime after his deposition on May 5, 2008.

VWGoA argues that summary judgement must be granted pursuant to CPLR 202 (New York's borrowing statute) and Section 34-20-3.1(b) of Indiana's 1978 Product Liability Act ("the

statute of repose") .

CPLR 202 provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

The statute of repose provides: "a product liability action must be commenced: (1) within two (2) years after the cause of action accrues; or (2) within ten (10) years after the delivery of the product to the initial user or consumer."

VWGoA contends that the cause of action accrued in Indiana because Mr. Crowder's only contact with Volkswagen automobiles and parts was while working as an auto mechanic in Indiana. Since the decedent last worked with Volkswagen automobiles in 1971, VWGoA argues that the case is time-barred pursuant to the Indiana statute of repose, as it is over ten years since VWGoA first delivered the product. Accordingly, defendant claims that under CPLR §202, New York must "borrow" Indiana's shorter limitation period. VWGoA further asserts, assuming *arguendo* that CPLR 202 does not apply to the statute of repose, that a choice of law analysis reveals that Indiana has a more significant relationship to the case.

To perform a choice of law analysis, VWGoA compares this case to Tanges v. Heidelberg North America, Inc., 93 N.Y.2d 48 (1999). In Tanges, after sustaining injuries from operating a printing press in Connecticut, a New York resident commenced an action against the printing press manufacturer. The Court of Appeals affirmed that, upon a choice of law analysis, Connecticut law governed. Therefore, Connecticut's statute of repose barred the action. In Tanges, Connecticut is only the locus state. Here, since Indiana is both the locus state and Mr. Crowder's state of residence,

defendant argues that its laws should govern.

Plaintiff contends that summary judgement should be denied because a question of fact exists as to whether the cause of action accrued in New York or Indiana. Specifically, plaintiff contends that because plaintiff's primary exposure occurred in New York while working in the Brooklyn Navy Yard, New York may be considered the state where the cause of action accrued.

In addition, plaintiff contends that CPLR 202 does not apply to statutes of repose, which are substantive law. Rather, a conflict of law analysis must be performed. See Tanges v. Heidelberg. Plaintiff weighs the respective interests of Indiana (the plaintiff's state of residency and the locus state), Michigan (the defendant's principal place of business)[1], and New York (the forum state). Plaintiff concludes that Michigan has the greatest interest, followed by New York. Both Michigan and New York law, plaintiff argues, dictate that this action is timely.

Finally, plaintiff claims that assuming *arguendo* that Indiana has the most substantial interest under a conflict of law analysis, the statute of repose nonetheless violates New York's public policy to provide justice to asbestos victims. Applying the statute of repose, plaintiff contends will cause a fundamental injustice and destroy the rule that allows victims of toxic torts three years from the date of discovery of the injury to commence an action.

For the reasons stated below, the court grants VWGoA summary judgment motion.

This motion requires the court to answer three main questions: (1) is there a question of fact as to where the cause of action accrued? (2) is a choice of law analysis necessary? and (3) upon a choice of law analysis, which state's law governs?

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[1] VWGoA contends that its principal place of business has been transferred to Virginia as of April of 2008.

(1) There is no question of fact that the cause of action accrued in Indiana.

When asserting that such a question of fact exists, plaintiff cites Caruolo v. John Crane Inc., 226 F.3d 46 (2nd Cir. 2000), another asbestos tort case. In this diversity jurisdiction case, the U.S. Court of Appeals for the Second Circuit affirmed a district court's finding that Rhode Island is the locus of the tort for a choice of law analysis; "even if Caruolo [plaintiff] was a New York domiciliary for the five to six years of his Navy service" during which he was exposed to Crane's asbestos products, "that period of asbestos exposure was substantially shorter than the period of his exposure to Crane's asbestos-containing products in Rhode Island." Id., 58. Rhode Island, as "the place of plaintiff's most 'regular and prolonged' exposure" is the situs of injury. Id., 58.

In contrast to the facts in Caruolo v. John Crane Inc., supra, where plaintiff used Crane's products in both New York and Rhode Island, Mr. Crowder worked with the defendant's products only in Indiana. As such, there is no question of fact that Indiana is the place of decedent's "most regular and prolonged exposure" to VWGoA's products and would be the locus state for a choice of law analysis.

(2) A choice of law analysis is necessary to determine which state's law shall govern.

The law of the forum normally determines whether a given question is one of substance or procedure (see, Tanges v. Heidelberg, 93 N.Y.2d, at 54-55). Statutes of limitation are generally considered procedural. However, statutes of repose are not statutes of limitation and thus require a conflict of law analysis. In Tanges, the Court of Appeals held that the Connecticut statute of repose which, like the Indiana statute of repose at bar, prohibits an action from being brought against any party "later than ten years from the date the party last parted with possession or control of the product" constituted a substantive law (see, Connecticut General Statute §52-577[a]) .

In Blatz v. Westinghouse Electric Corp., 274 A.D.2d 491 (2nd Dept., 2000), the Court affirmed the application of a New Jersey statute of repose which barred actions based on unsafe conditions of improvements to real property more than ten years after construction or the finishing of improvements. In doing so, the court determined that the statute was substantive and, after the choice of law analysis, determined that the New Jersey statute was applicable. Therefore, in deciding whether to apply a foreign statute of repose, the court should not automatically apply CPLR 202; a conflict of law analysis must be performed (see, Kniery v. Cottrell, 59 A.D.3d 1060 [4th Dept., 2009]).

(3) A choice of law analysis reveals that Indiana law should govern.

In considering the question of whether to apply the Indiana statute of repose, which conflicts with New York's statute of limitations, the court will determine which jurisdiction has the greatest concern regarding the legal issue. The court has to consider whether the law at issue is one that regulates conduct such as a speed limit or one that refers to loss allocation such as a charitable immunity law (see, Schultz v. Boy Scouts of America, 65 N.Y.2d 189 [1985]). If the law relates to conduct, then the law of jurisdiction where the tort occurred will generally apply as that jurisdiction would necessarily have the greatest interest. However, in the case at bar, the statute of repose is one of loss allocation and, as such, the court will look at the interest of each jurisdiction in deciding which law to apply. The Neumeier v. Keuhner, 31 N.Y.2d 121 [1972] case is dispositive with regard to this analysis. Neumeier holds that:

1. When plaintiff and defendant share a domicile, that state's law should control.

2. When the locus state is the defendant's domicile and its law is favorable to the defendant, or when the locus state is the plaintiff's domicile and its law is favorable to the plaintiff, the locus

state's law applies.

3. In other cases, the locus state's law applies unless "it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for its litigants." Id., 132. Accord, Cooney v. Osgood, 81 N.Y.2d 66 (1993).

In this case, the locus state and Mr. Crowder's domicile are Indiana. Whether VWGoA's domicile is Michigan or Virginia, the first and second Neumeier rules do not apply.[2] Therefore, this court must apply the third Neumeier rule and apply the law of the locus state, Indiana. The locus state tips the balance as it is the place with which both parties have voluntarily associated themselves (see, Cooney v. Osgood, 81 N.Y.2d 66 [1993]). Plaintiff does not show that doing so will "[impair] the smooth working of the multi-state system or [produce] great uncertainty for its litigants." To the contrary, applying Indiana's statute of repose strengthens New York's commitment to discourage forum shopping, as embodied in CPLR 202, and promotes the application of even-handed justice for Indiana plaintiffs.

Although applying the Indiana statute of repose bars the estate of Mr. Crowder from obtaining recovery in New York, it does not violate New York public policy. As Judge Cardozo observed: "Our own scheme of legislation may be different... That is not enough to show that public policy forbids us to enforce the foreign right... We are not so provincial as to say that every solution

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[2] There exists a question as to whether Michigan or Virginia is VWGoA's domiciliary state for the purpose of a choice of law analysis. VWGoA's principal place of business was Michigan at the time of Mr. Crowder's asbestos exposure, but its current principal place of business is Virginia. However, regardless of whether the court considers VWGoA to be domiciled in either Michigan or Virginia, a choice of law analysis results in applying Indiana law.

of a problem is wrong because we deal with it otherwise at home." (See, Cooney v. Osgood, at 60 citing Loucks v. Standard Oil, 224 N.Y.99, at 110-111 [1918].)

Therefore, the court grants summary judgement dismissing the complaint and all cross-claims against VWGoA that Shirley Ann Crowder ("plaintiff") makes on behalf of herself and as Proposed Administratrix of the Estate of James Alfred Crowder ("Mr. Crowder"), deceased, and it is hereby

ORDERED that VWGoA's motion for summary judgment is granted and this action against VWGoA, and any counter-claims, are severed and dismissed; and is further

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: AUGUST 5th, 2009

SHERRY KLEIN HEITLER
J.S.C.