Erickson v Air & Liquid Sys. Corp.
2015 NY Slip Op 32111(U)
February 3, 2015
Supreme Court, New York County
Docket Number: 190333/11
Judge: Sherry Klein Heitler
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EFA 2/6/15 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

ERICKSON, LORETTA

-v-

AIR + LIQUID SYSTEMS CORPORATION, (GENERAL ELECTRIC) ET AL.

INDEX NO. 190333/11

MOTION DATE

MOTION SEQ. NO. 10

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the memorandum decision dated 2-3-15.

FILED
FEB 06 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
FEB 6 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 2-3-15

HON. SHERRY KLEIN HEITLER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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LORETTA ERICKSON, Individually and as Personal Representative of the Heirs and Estate of DUANE ERICKSON,

Plaintiffs,

-against-

AIR & LIQUID SYSTEMS CORP., as Successor-by-Merger to Buffalo Pumps, et al.,

Defendants.

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Index No. 190195/12
Motion Seq. 009, 010

DECISION & ORDER

SHERRY KLEIN HEITLER, J:

Motion Sequence Nos. 009 and 010 are consolidated for disposition herein.

In this asbestos personal injury and wrongful death action, defendants CBS Corporation[1] (009) ("Westinghouse") and General Electric Corporation (010) ("GE") move for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against them, respectively, on the ground that plaintiffs' claims are barred by Montana's statute of repose.[2] For the reasons set forth below, both motions are denied.

New York law provides that a motion for summary judgment shall be granted if "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212[b]). The moving papers "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of

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1 CBS Corporation is sued herein as "CBS Corporation, fka Viacom Inc., successor by merger to CBS Corporation fka Westinghouse Electric Corporation".

2 Mont Code § 27-2-208, *infra*.

action or defense has no merit." *Id.*

In deciding a summary judgment motion the court's role is to determine whether any triable issues exist, not the merits of any such issues. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Santelises v Town of Huntington,* 2015 NY App. Div. LEXIS 745, at *5 (2d Dept Jan 28, 2015). Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012).

Plaintiffs' decedent Duane Erickson was born in Bemidji, Minnesota in 1932. He moved to Libby, Montana in 1954 where the J. Neils Lumber Company ("Neils Lumber") employed him as a laborer, foreman, electrician and maintenance man until 1993. Mr. Erickson was diagnosed with mesothelioma many years later in August of 2011. Under CPLR 214-c[3] he timely commenced this action on September 6, 2011. He was deposed over the course of five days in February of 2012.[4]

During the 1970s and 1980s Mr. Erickson's responsibilities with Neils Lumber were performed in three of its powerhouses which were operated by a total of five turbines. All of the turbines were manufactured by GE until one "blew up" and was replaced by a Westinghouse turbine.[5] The turbines' exteriors were insulated with asbestos-containing blankets. Mr. Erickson testified that he periodically observed other trades remove these blankets so that the turbines could

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3 CPLR 214-c sets forth a three year statute of limitation within which to bring an action from the date of discovery of the latent effects of exposure to toxic substances.

4 Copies of Mr. Erickson's deposition transcripts are submitted as defendants' exhibits C, D, & E ("Deposition").

5 Deposition p. 515.

be maintained. This process generated asbestos-containing dust that Mr. Erickson inhaled.[6]

Plaintiffs do not dispute that any causes of action they may have against GE and Westinghouse accrued in Montana. Under CPLR 202,[7] New York's borrowing statute, when a non-resident sues on a cause of action accruing outside New York, "the cause of action [must] be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 (1999). Thus, "when a cause of action accrues outside New York and the plaintiff is a nonresident, CPLR 202 'borrows' the statute of limitations of the jurisdiction where the claim arose, if shorter than New York's, to measure the lawsuit's timeliness." *Norex Petroleum Ltd. v Blavatnik*, 23 NY3d 665, 668 (2014).[8]

In general, Montana law provides that plaintiffs have three years to commence an action based upon death or personal injury. Mont Code § 27-2-204. In the case of a latent injury, such as mesothelioma, Montana's statute of limitations begins to run when the injured party either discovers or with due diligence should have discovered the facts giving rise to the claim. Mont Code § 27-2-102; *Kaeding v W.R. Grace & Co.*, 289 Mont 343, 348 (1998). These statutes are commensurate with New York's statute of limitations (*see* CPLR 214, 214-c). In this regard, the defendants argue instead that plaintiffs' claims are barred by Mont Code § 27-2-208, entitled "Actions for damages arising out of work on improvements to real property or land surveying", which provides in relevant

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6 Deposition, pp. 514-519.

7 CPLR 202, entitled "Cause of action accruing without the state" provides that "[a]n 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."

8 *See also Barnett v Johnson*, 839 F Supp 236, 239 (SDNY 1993) (CPLR 202 is meant to "provide New York resident-defendants protection from a suit in New York that would have been barred by shorter statutory periods in other jurisdictions where nonresident plaintiffs could have sued.")

part that:

> [A]n action to recover damages (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) resulting from or arising out of the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property or resulting from or arising out of land surveying of real property may not be commenced more than 10 years after completion of the improvement or land surveying. *Id.*

Mont Code § 27-2-208 is actually a "statute of repose which prevents any cause of action relating to an improvement to real property from arising after a ten year period." *Association of Unit Owners of Deer Lodge Condominium v Big Sky*, 245 Mont 64, 80 (1990). While "any other applicable statutes of limitation still remains applicable . . . in no event shall any cause be commenced more than ten years after the completion of the improvement." *Id.*

The defendants do not dispute that they manufactured asbestos-containing turbines, nor does GE dispute that its turbines were in use by Neils Lumber. Westinghouse's counsel asserts that Westinghouse did not supply turbines to Neils Lumber. (See affirmation of Afigo I. Fadahunsi, Esq., dated September 24, 2014, ¶ 5). However, the record does not contain a factual basis for counsel's conclusion, such as an affidavit by a company representative or copies of corporate records from that time period. If anything, counsel's unsupported assertion raises a material question of fact requiring that its motion be denied on that ground alone (CPLR 3212[b]).

In this case, however, both GE and Westinghouse characterize their roles as having only provided design and engineering services. They allege that such services fall within the scope of the Montana statute of repose and that plaintiffs' claims are thereby barred. Plaintiffs respond that as product manufacturers who injected hazardous equipment into the stream of commerce, the defendants fall outside the scope of § 27-2-208 and their claims are therefore timely.

To determine whether the defendants are covered by Mont Code § 27-2-208, the court must look to the statute's plain meaning. *See* Mont Code §§ 1-2-101 and 1-2-102; *Westmoreland Res.*

Inc. v Dept of Revenue, 376 Mont 180, 183-84 (2014). Montana courts endeavor "to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used." *Mont. Trout Unlimited v Mont. Dept. of Nat. Res. & Conserv.*, 331 Mont 483, 489 (2006). Accordingly, Montana courts "interpret the expression of one thing in a statute to imply the exclusion of another." *Dukes v City of Missoula*, 328 Mont 155, 160 (2005). Bearing these principles in mind, I find that Montana's statute of repose is intended to shield architects, engineers, surveyors, and contractors from open-ended liability for defects in their workmanship, and that product manufacturers and suppliers are not covered by the statute or entitled to its protection.

With reference to a memorandum submitted during the Montana House Judiciary Committee's consideration of the bill that codified § 27-2-208, the Montana District Court explained the rationale behind Montana's statute of repose as follows (*Metully v Applebury*, 2005 Mont Dist. LEXIS 1514, at *9 [Mont Dist. Ct. 2005]):

> [T]he general rule was that an architect or engineer had no liability to third parties after completion of work since there was no privity of contract between the architect or engineer and the injured party. However, in 1957, a New York court refused to apply the rule, thus opening the door to widespread denial of the privity rule. Increased liberality of court decisions and consequent changes in the law which broadened liability resulted in a spectacular increase in the volume of litigation, a dramatic increase in the size of claims, and the skyrocketing cost of insurance along with a sharp decline in the number of insurance carriers. In the eight years prior to Montana's legislative consideration of Senate Bill 13, 37 states enacted statutes of limitation covering the design and construction of improvements of real property similar to Senate Bill 13 in order to address these litigation and insurance issues.

Kassler v City of Eureka, 1997 Mont Dist. LEXIS 898 (Mont Dist. Ct. Oct. 24 1997) provides a good example of the application of § 27-2-208 to design professionals. In *Kassler*, the City of Eureka hired the engineering firm of Morrison Maierle to design and provide engineering services in connection with the construction of a sewage treatment plant. The plant was completed in 1982. In 1995, a wastewater holding pond ruptured, flooding the adjacent property with raw

sewage. The property owners alleged that Morrison Maierle was negligent in the design and construction of the pond. The court held that the plaintiffs' direct action against the firm was barred by the statute of repose since it was brought more than ten years after the construction had been completed.

CPLR 214-d,[9] New York's parallel statute to Mont Code § 27-2-208, has been similarly limited to architectural, engineering, and design professionals. *See Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.*, 58 AD3d 178, 182 (1st Dept 2008) (CPLR 214-d exists to protect "design professionals"); Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C214-d, at 456 ("The purpose of CPLR 214-d is to provide 'an expedited procedural device to quickly dispose of cases brought against a design professional more than ten years after completion that lack a substantial basis in evidence.'") (quoting Memorandum in Support, New York State Senate, Chapter 682, Laws of 1996, 2 McKinney's 1996 Session Laws, at 2614).[10]

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[9] CPLR 214-d(1) provides, in part, that "[a]ny person asserting a claim for personal injury, wrongful death or property damage, or a cross or third-party claim for contribution or indemnification arising out of an action for personal injury, wrongful death or property damage, against a licensed architect, engineer, land surveyor or landscape architect or against a partnership, professional corporation or limited liability company lawfully practicing architecture, engineering, land surveying or landscape architecture which is based upon the professional performance, conduct or omission by such licensed architect, engineer, land surveyor or landscape architect or such firm occurring more than ten years prior to the date of such claim, shall give written notice of such claim to each such architect, engineer, land surveyor or landscape architect or such firm at least ninety days before the commencement of any action or proceeding against such licensed architect, engineer, land surveyor or landscape architect or such firm . . . ."

CPLR 214-d differs from Mont Code § 27-2-208 in that it requires a plaintiff seeking damages for injuries based upon the negligence of an engineer, architect, or surveyor that occurred more than ten years prior to serve notice of its claim at least 90 days before commencing the action. Coupled with CPLR 3211(h) and CPLR 3212(i), New York law permits defendants covered by CPLR 214-d to seek early dismissal of claims that have no substantial basis. *See, e.g., Kenny v Turner Constr. Co.*, 107 AD3d 412 (1st Dept 2013).

[10] *See also Kretschmann v Bd. of Educ.*, 294 AD2d 39 (4th Dept 2002) (compliance with CPLR 214-d required by plaintiff who was injured in 1996 when she fell on a ramp designed and built by defendant in 1982); *Belunes v Minskoff Grant Realty & Mgmt. Corp.*, 278 AD2d 143, 144 (1st Dept 2000) (summary judgment denied where defendant hired to perform architectural work failed to show that contract was

The cases relied upon by the defendants show that Montana's statute of repose does not apply to product manufacturers, sellers, suppliers, and distributors. In *Reeves v Ille Electric Company*, 170 Mont 104 (1976), the representatives of a deceased college student who was electrocuted while taking a whirlpool bath in a university field house sued the whirlpool manufacturer, the electrical company that installed the whirlpool, and the architect who designed the field house. *Id.* at 107. Relying on an earlier version of § 27-2-208, the trial court dismissed the action in its entirety. On appeal, the Montana Supreme Court affirmed with respect to the architect and installation contractor. However, the Court reversed as to the manufacturer, holding that "materialmen" are excluded from statutory protection (*id.* at 114-115):

> Ille took no part in the construction of the field house or in the related phases of the whirlpool installation. It simply manufactured the whirlpool machine and shipped it to Montana State University. Plaintiff alleges negligence in failure to warn of inherent dangers, failure to notify and instruct as to proper installation, and negligence in design of the whirlpool machine by providing only a cable and plug rather than a direct wiring system. These allegations relate to design and manufacture of the Ille whirlpool machine. . . .

Similarly, in *Geist v Sequoia Ventures, Inc.*, 83 Cal 4th 300 (2000), the plaintiffs brought suit against the contractor that oversaw the construction of an addition to the Montana Power Company's plant for negligently exposing them to asbestos-containing materials throughout the construction process. Pursuant to Mont Code § 27-2-208 the trial court awarded the contractor summary judgment and the appellate court affirmed. In so doing the court cited with approval to *Blikre v A.C.&S, Inc.*, 1999 N.D. 96 (1999), in which several plaintiffs sued several product manufacturers for injuries caused by their exposure to asbestos products during construction, explaining that the North Dakota 10-year statute of repose, which is "similar in certain respects to

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completed more than ten years prior to plaintiff's injury); *Mugivan v City of New York*, 2013 NY Misc. LEXIS 1185 (Sup. Ct. Queens Co. Feb. 7, 2013, Kerrigan, J.) (CPLR 214-d required dismissal of a 2004 action against architectural firm which built school above contaminated land in 1994).

the Montana statute", did not "bar an action for injury allegedly caused by exposure, during construction, to a defective product, which is brought against a manufacturer or distributor of the product, even though the defendant installed the product as part of an improvement to real estate." *Geist, supra*, at 305; *Blikre, supra*, at 776-777. The *Geist* court also "point[ed] out the obvious: As severe as a statute of repose may seem, it has no bearing on a plaintiff's ability to sue the manufacturer or supplier of a defective product. It shields those engaged in designing, constructing and supervising improvements to real property, not those engaged in manufacturing, selling and supplying products and building materials used in any such improvement." *Geist, supra*, at 306-307.

The defendants' reliance on *Harder v A.C. & S*, 179 F.3d 609 (8th Cir. 1999) is misplaced as well. The *Harder* plaintiff alleged asbestos exposure from thermal blankets used to insulate GE turbines. However, his exposure occurred in Iowa. Unlike the Montana statute, Iowa's statute of repose does not exclude those engaged in the manufacture, sale and supply of products.[11]

Relying on *Pendzsu v Beazer East, Inc.*, 219 Mich App 405, 410 (1996), the defendants emphasize the fact that their products "improved" Neils Lumbers' real property as contemplated by § 27-2-208. But the fact in the first instance is that the defendants are the manufacturers and suppliers whose products are alleged to have caused the injuries complained, and as such their conduct falls outside the scope of the statute. Whether or not as a collateral matter their products

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[11] Iowa Code § 614.1(11), entitled "Improvements to real property", provides that "[i]n addition to limitations contained elsewhere in this section, an action arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death, shall not be brought more than fifteen years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death. However, this subsection does not bar an action against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property."

served to improve Neils Lumber's real property is inconsequential.

In *Pendzsu*, two Michigan residents appealed from a trial court order granting defendant Koppers Company, a contractor, summary judgment pursuant to Michigan's statute of repose.[12] Plaintiff Pendzsu worked as a truck driver delivering materials to buildings owned by Ford Motor Company and Great Lakes Steel. He alleged that his work brought him to locations where asbestos-containing materials were used in his presence. Plaintiff McGhee worked as a laborer at Ford's Rouge River plant near furnaces whose steam lines were covered with asbestos insulation. He alleged that he was exposed to asbestos fibers when the furnaces were rebuilt. The defendant, Koppers Company, was hired to install the furnaces during the early 1930's and to reline them during the 1960's and 1970's. The plaintiffs' injuries did not manifest until the early 1990's. The *Pendzsu* court determined that Koppers could not be deemed a "supplier" because plaintiffs could not identify "the exact building materials" for which they claimed Koppers was responsible, nor could plaintiffs dispute that Koppers was hired as a contractor only. *Id.* at 412. In this case, not only have plaintiffs demonstrated that the defendants were in the business of manufacturing and supplying the turbines at issue and that such turbines contained asbestos, but Mr. Erickson very precisely identified the turbines as the source of his alleged asbestos exposure.

Barile v 3M Company., 2013 NJ Super LEXIS 2190 (Sept. 4, 2013), relied upon by the

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12 Mich. Comp. Laws § 600.5839(1) provides that "[a] person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within either of the following periods: (a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. (b) If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement."

defendants, is also inapposite. In *Barile*, the plaintiff alleged that he was exposed to asbestos in 1961 at Exxon's Linden, New Jersey refinery while covering a Foster Wheeler boiler with insulation. After trial the jury found Foster Wheeler 100% liable for plaintiff's injuries, but on appeal the verdict was set aside in light of New Jersey's statute of repose.[13] The court explained that Foster Wheeler did not play any role in the decision to insulate its boilers with asbestos (*id.* at *6-7, 15, emphasis added):

> Foster Wheeler itself did not manufacture asbestos or non-asbestos insulation. It entered into a subcontract with Philip Carey Manufacturing Company to supply and install all the insulation on the boiler. Philip Carey manufactured and supplied asbestos insulation products and also had a contracting unit available to work on jobs like the Bayway boiler. Foster Wheeler gave Philip Carey the specifications it had prepared for the insulation work, and Philip Carey was free to choose from among the commercially-available insulation products on the market that met those specifications * * * * *Although manufacturers and distributors of products, including building materials, are not protected by the statute of repose*, Foster Wheeler was neither a manufacturer nor a distributor of asbestos building materials that were used to design and construct its boiler.[14]

Barile is distinguishable from this case in that, on this motion, GE and Westinghouse do not dispute plaintiffs' assertion that their turbines contained asbestos. This court also notes that the defendants have not submitted any evidence (e.g, invoices, installation reports, maintenance records, affidavits,

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13 NJ Stat § 2A:14-1.1 provides that "[n]o action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought."

14 In this regard, *Dziewiecki v Bakula*, 180 NJ 528 (2004) is instructive. In *Dziewiecki*, the New Jersey Supreme Court distinguished manufacturers and distributors that sell, design, or manufacture standardized products from those that merely install their products in accordance with specialized plans as part of an improvement to real property. *Id.* at 532-533. The court also held that if a defendant wears both of these "hats" and the injury is attributable to both functions, "the responsibility should be allocated between the two." *Id.* at 533-34.

expert reports) to indicate how their turbines came to be insulated.

In sum, on the evidence submitted herein, the defendants apparently were responsible for the manufacture and supply of the injury-causing product at issue. In that respect, they do not fall within the protection afforded to architects, engineers, designers, and contractors under Montana's statute of repose. This case is no different from any other case in which strict products liability suits have been permitted to proceed against product manufacturers, suppliers, and distributors.

Accordingly, it is hereby

ORDERED that CBS Corporation's motion for summary judgment is denied; and it is further

ORDERED that General Electric Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 2.3.15

SHERRY KLEIN HEITLER, J.S.C.