STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: November 2, 2012)

EVELYN BURDICK AND RONALD BURDICK, AS CO-ADMINISTRATORS OF THE ESTATE OF WALTER BURDICK and EVELYN BURDICK, INDIVIDUALLY RECOGNIZED AS SURVIVING SPOUSE	:	
	:	**C.A. No. PC 11-3431**
v.	:	
AIR & LIQUID SYSTEMS CORPORATION, ET AL	:	

DECISION

GIBNEY, P.J. Before this Court is a Motion to Dismiss, pursuant to Super. R. Civ. P. 12(b)(6), arising out of asbestos litigation brought by Evelyn Burdick, individually, and Evelyn and Ronald Burdick as Co-Representatives of the Estate of Walter Burdick (collectively, "Plaintiffs"), against numerous Defendants, among them The Hartford Steam Boiler Inspection and Insurance Company and HSB Group, Inc. (collectively, "Defendants"). Defendants seek dismissal of Plaintiffs' Fifth Amended Complaint (the "Complaint") as it applies to Defendants because it fails to state a claim upon which relief can be granted under the laws of the State of Pennsylvania.

I

Facts and Travel

Plaintiffs allege that Walter Burdick ("Burdick"), now deceased,[1] was exposed to asbestos and asbestos-containing products beginning in the mid-1940s and through his career as a laborer, maintenance worker, mechanic, welder, machinist, pipe fitter and boiler operator at various steam plant and construction site locations in Pennsylvania and New Jersey. Two of these locations, Plaintiffs state, were the Scranton Steam Heat Company ("Scranton") and the Wilkes-Barre Steam Heat Company ("Wilkes-Barre").

Plaintiffs claim that at Scranton and Wilkes-Barre, Defendants undertook safety inspections of the plants to discover and inform the operators about potential and actual safety hazards. According to Plaintiffs, Defendants regularly disturbed asbestos and asbestos-containing products while conducting these inspections, thus releasing breathable asbestos fibers and residue into the air. Concurrently, Plaintiffs also allege that Defendants regularly ordered repairs and improvements to the various on-site boiler systems during these inspections, also disturbing breathable asbestos fibers as well.

Plaintiffs allege that throughout the period in which Defendants undertook safety inspections and repairs at Scranton and Wilkes-Barre, Defendants knew about the dangerous toxicity of asbestos and asbestos-containing products, and knew that their inspection and repair activities would release breathable asbestos fibers into the air. Because Defendants affirmatively undertook inspection and repair services at Scranton and Wilkes-Barre, Plaintiffs state, Defendants assumed a duty to the operators and

[1] Burdick died on September 8, 2011. This Court granted leave for Plaintiffs to amend their Complaint to add a claim for Burdick's wrongful death and to substitute the Estate's Co-Representatives as Plaintiffs on January 4, 2012.

employees of those plants (including Burdick) to warn them about the known hazards of asbestos and asbestos-related exposure. Plaintiffs contend that Defendants breached this duty by failing to warn Burdick of the dangers or institute safety protocols to avoid exposure. As a result of Defendants' negligence, Plaintiffs allege, Burdick was exposed to toxic airborne asbestos fibers throughout his time at Scranton and Wilkes-Barre and eventually developed mesothelioma.

Plaintiffs additionally allege that Defendants created the "Hartford Specifications," a detailed series of plans and directives for boiler design, manufacture, and maintenance that became the industry standard over time. Plaintiffs claim that, because the "Hartford Specifications" called for the use of asbestos in steam boilers, Burdick was exposed to asbestos and asbestos-containing products from the boilers at Scranton and Wilkes-Barre. Plaintiffs contend that such exposure contributed to Burdick's contraction of mesothelioma and caused his death.

Plaintiffs filed the Complaint on August 10, 2012. Defendants responded with the instant Motion to Dismiss pursuant to Super. R. Civ. P. 12(b)(6) on August 27, 2012. In support of their motion, Defendants essentially argue that Pennsylvania law applies to this case and bars Plaintiffs' claims. Specifically, Defendants contend that a Pennsylvania statute grants them immunity from liability for any negligent conduct when they undertook inspection and repair services at Scranton and Wilkes-Barre. Moreover, Defendants state, even absent immunity, they did not undertake asbestos-related inspections at Scranton and Wilkes-Barre in the first instance. Defendants also assert that they owed Burdick no duty to inform him of the dangers of asbestos exposure under Pennsylvania law. Finally, Defendants argue that they cannot be liable under any strict

products liability theory in Pennsylvania because they are not product sellers, suppliers, or manufacturers.

II

Discussion

A

The Motion to Dismiss Pursuant to Rule 12(b)(6)

In Rhode Island, Super. R. Civ. P. 12(b)(6) provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted."

Rule 12(b)(6). Accordingly, "the sole function of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint." McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)) (internal quotations omitted). (Emphasis added.) A Superior Court justice considering such a motion "must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor." Watson v. Fox, 44 A.3d 130, 134-35 (R.I. 2012) (quoting McKenna, 874 A.2d at 225). (Emphasis added.) However, "[i]f it appears beyond a reasonable doubt that the plaintiff would not be entitled to relief, under any facts that could be established" a Superior Court justice will grant a motion to dismiss. Id. at 135 (quoting McKenna, 874 A.2d at 225).

Moreover, a motion to dismiss "that relies on evidence outside of the pleadings" will be treated "as a motion for summary judgment under Rule 56 of the Superior Court Rules of Civil Procedure," Strynar v. Rahill, 793 A.2d 206, 209 (R.I. 2002), but only "when a trial justice considers [the] evidence not incorporated in the final pleadings" in his or her decision. St. James Condominium Assoc. v. Lokey, 676 A.2d 1343, 1345 (R.I. 1996). Our Supreme Court has counseled that "the better practice when ruling on [a 12(b)(6) motion] is for the trial court to state expressly on the motion whether it has excluded any extraneous matters from its consideration." Lokey, 676 A.2d at 1346. When a Superior Court justice considers "extraneous" evidence and converts the motion into one for summary judgment, "the clear mandate of Rule 12(b)(6) requires that . . . 'all parties shall be given reasonable opportunity to present all material pertinent to such motion by Rule 56.'" Id. at 1345 (quoting Super. R. Civ. P. 12(b)(6)).

In the instant matter, Defendants titled their motion "Motion to Dismiss Pursuant to Rule 12(b)(6)." (Def.'s Mot. To Dismiss at 1.) However, Defendants attached two exhibits, including an affidavit, to their accompanying "Memorandum of Law Supporting Motion to Dismiss Pursuant to Rule 12(b)(6)." (Defs.' Mem. In Supp. of Mot. To Dismiss, Exs. A & B.) Plaintiffs did not attach these exhibits to their Complaint, nor did Plaintiffs incorporate the exhibits into the Complaint by reference. See Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 725-26 (R.I. 2003) (finding that, while "[i]t is certainly true that documents attached to a complaint will be deemed incorporated therein by reference" and, as such, "a motion justice may properly consider and refer to such documents in deciding a Rule 12(b)(6) motion," a motion justice may properly exclude such evidence in considering a Rule 12(b)(6) motion when the documents come

from outside the complaint). Thus, Defendants seek to introduce "extraneous" material into this Court's consideration of their motion. See id. at 726; Rahill, 793 A.2d at 209.

This Court declines to examine Defendants' "extraneous" materials, and will consider their motion to be a Motion to Dismiss pursuant to Rule 12(b)(6), not a motion for summary judgment pursuant to Super. R. Civ. P. 56. See Lokey, 676 A.2d at 1346. Accordingly, this Court will analyze Plaintiffs' Complaint, "assume that all allegations in the complaint are true, and resolve any doubts in [the] plaintiff's favor." Fox, 44 A.3d at 134-35 (quoting McKenna, 874 A.2d at 225).

Plaintiffs enumerate their claims against Defendants in paragraph eighteen (18) of the Complaint. (Complaint at ¶ 18.) Their claims allege two separate causes of action, both sounding in tort. The first is negligent undertaking arising out of Defendants' inspection and repair services at Scranton and Wilkes-Barre. Id. at ¶¶ 18a-18g. The second cause of action is strict products liability arising from Defendants' development and subsequent promotion of the "Hartford Specifications." Id. at ¶ 18h.

Defendants seek to apply Pennsylvania law to the instant matter. Plaintiffs, however, do not aver in the Complaint which state's law they seek to apply to their claims against Defendants. The Complaint evinces that at least three states' laws are implicated in the instant matter—Rhode Island, Pennsylvania, and New Jersey. (Complaint at ¶¶ 1, 5, 18a.) The Summons served on Defendants identifies Defendants as Connecticut corporations. (Summons at 1.); see Bowen Court Assocs., 818 A.2d at 725-26 (finding that documents attached to the complaint, such as the summons, are incorporated into the complaint by reference). Therefore, this Court must determine which state's law applies to the instant matter before it can decide whether Plaintiffs have

properly pled causes of action against Defendants for negligent undertaking and strict products liability. See In re Hydrogen, L.L.C., 431 B.R. 337, 349-50 (Bankr. S.D.N.Y. 2010) (recognizing that a court cannot rule on a motion to dismiss without first determining choice of law where "the applicable body of law is not specified for [the plaintiff's] state law claim" and the parties dispute which state's law applies).

B

The Choice of Law Analysis in Rhode Island

In Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968), our Supreme Court "abandon[ed] the lex loci delicti rule and adopt[ed] the new interest-weighing approach" in choice of law cases, thereby allowing the "forum court . . . to apply the substantive laws of a state, other than the locus, when it finds that such state has the significant interest in the outcome of those issues." Woodward v. Stewart, 104 R.I. 290, 297-99, 243 A.2d 917, 922-23 (1968). Accordingly, "[i]n carrying out that approach, 'we look at the particular facts and determine therefrom the rights and liabilities of the parties in accordance with the law of the state that bears the most significant relationship to the event and the parties.'" Harodite Industries, Inc. v. Warren Electric Corp., 24 A.3d 514, 534 (R.I. 2011) (quoting Cribb v. Augustyn, 696 A.2d 285, 288 (R.I. 1997)). The Woodward Court set out the policy considerations that Rhode Island courts must take into account when making a choice of law determination:

> (1) Predictability of results;
> (2) Maintenance of interstate and international order;
> (3) Simplification of the judicial task;
> (4) Advancement of the forum's governmental interest;
> (5) The better rule of law.

Woodward, 104 R.I. at 300, 243 A.2d at 923; see also Najarian v. National Amusements, Inc., 768 A.2d 1253, 1255 (R.I. 2001). In Brown v. Church of the Holy Name of Jesus, 105 R.I. 322, 326-27, 252 A.2d 176, 179 (1969), the Court iterated additional factors to consider for cases sounding in tort:

> (a) the place where the injury occurred;
> (b) the place where the conduct causing the injury occurred;
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
> (d) the place where the relationship, if any, between the parties is centered.

Brown v. Church of the Holy Name of Jesus, 105 R.I. 322, 326-27, 252 A.2d 176, 179 (1969); Restatement (Second) Conflict of Laws § 145(2) (1971); see also Najarian, 768 A.2d at 1255. "[I]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship." Najarian, 768 A.2d at 1255 (quoting Blais v. Aetna Casualty & Surety Co., 526 A.2d 854, 856-57 (R.I. 1987)); Restatement (Second) Conflict of Laws § 146.

Although our Supreme Court has not affirmatively endorsed the principle of depecage[2] for choice of law in the tort context, this Court finds that our Supreme Court's decisions clearly evince adherence to the principle in practice. See, e.g., Putnam Resources v. Pateman, 958 F.2d 488, 465 (1st Cir. 1992) (finding same, where language in several of the Court's decisions—including Woodward, 104 R.I. at 300, 243 A.2d at 923-24 and Busby v. Perini Corp., 110 R.I. 49, 290 A.2d 210, 212 (1972)—and in the

[2] Depecage is a legal term referring to the practice of deciding, in a single case, different issues arising from a common nucleus of operative facts according to the substantive law of different states. Putnam Resources v. Pateman, 958 F.2d 488, 465 (1st Cir. 1992).

Restatement (Second) Conflict of Laws § 145 demonstrates commitment to depecage); Najarian, 768 A.2d at 1255 (recognizing, in the personal injury context, that "the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue . . ."). (Emphasis added.) Thus, the choice of law analysis for tort cases is a fact- and context-specific inquiry in Rhode Island. See Najarian, 768 A.2d at 1255; Woodward, 104 R.I. at 300, 243 A.2d at 923-24.

C

Motions to Dismiss and Choice of Law: Can Courts Decide One Without the Other?

Courts have followed two approaches to ruling on Rule 12(b)(6) motions to dismiss, the successful disposition of which rests upon choice of law determinations. On the one hand, some courts have conducted choice-of-law analyses at the motion to dismiss stage based solely on the respective complaints; however, they have done so only in particular circumstances inapplicable to the majority of cases. See, e.g., In re Hydrogen, L.L.C., 431 B.R. at 349-50 (finding, in federal bankruptcy cases alleging aiding and abetting breaches of fiduciary duty as a cause of action, that "a choice-of-law analysis [must] be performed at the [motion to dismiss stage] due to significant differences among potentially applicable bodies of law governing such claims"); Terrill v. Electrolux Home Products, Inc., 753 F. Supp. 2d 1272, 1280 n.2 (S.D. Ga. 2010) (determining that in Georgia, which still follows the lex loci delicti approach, courts will perform the choice of law analysis at the motion to dismiss stage whenever the "analysis does not turn on disputed factual issues, and deciding which state's laws apply will help advance the litigation."); Snyder v. Farnam Co., Inc., 792 F. Supp. 2d 712, 718 (D.N.J. 2011) (recognizing, in the putative class action context, that "some choice of law issues

may not require a full factual record and may be amenable to resolution on a motion to dismiss").

On the other hand, in the majority of cases courts require parties to fully brief and argue choice of law issues in separate filings before ruling on motions to dismiss because the complaints lack adequate facts to engage in the proper analysis. See, e.g., Speedmark Transportation, Inc. v. Mui, 778 F. Supp. 2d 439, 444 (S.D.N.Y. 2011) (holding that "a choice-of-law determination is premature on this motion to dismiss, since the record lacks facts necessary to conduct the context-specific . . . analysis required by New York's choice-of-law principles"); Harper v. LG Electronics USA, Inc., 595 F. Supp. 2d 486, 490-91 (D.N.J. 2009) (determining that "[t]he Court is unable to make the fact-intensive choice-of-law determination on the record before it," thus "defer[ring] its choice-of-law decision until the parties present a factual record full enough to permit the Court to undertake [the proper analysis]); Smith v. Carnival Corp., 584 F. Supp. 2d 1343, 1349 (S.D. Fla. 2008) (finding, in the fact-specific maritime context, that "[w]ithout the benefit of discovery or briefing on the [choice of law] issue by the Parties (sic), it is premature to rule on the controlling law of the case").

The Vermont Supreme Court aptly discussed the propriety of performing a choice of law analysis at the motion to dismiss stage in Amoit v. Ames, 693 A.2d 675 (Vt. 1997). In that case, a Canadian plaintiff sued a Vermont defendant in a Vermont trial court for injuries sustained in an automobile accident occurring in Canada just across the Quebec–Vermont border. The defendant filed a motion to dismiss pursuant to Vermont's

Rule 12(b)(6),[3] seeking to apply Canadian law to the case based upon Vermont's lex loci delicti approach to the choice of law analysis in the tort context. The trial court denied the motion because it predicted that the Vermont Supreme Court would abandon lex loci delicti in favor of the significant relationship approach. Accordingly, it applied Vermont law because it found that Vermont had the requisite significant contacts with the case.

In affirming, the Vermont Supreme Court formally adopted the significant relationship approach for tort cases as codified in the Restatement (Second) Conflict of Laws § 145, and set out the numerous policy and context-specific factors that Vermont courts should apply in future actions. Amoit v. Ames, 693 A.2d 675, 677-78 (Vt. 1997). When it reached the choice of law issue specific to Ames, the Court determined that "[t]he sparsity of the record prevents us from deciding which law should apply" because "the parties dispute . . . [some] factual issues, such as the location of the conduct that led to the injury." Id. at 678. As such, the Court recognized that the significant relationship approach is too fact-specific to allow a court to determine choice of law from pleadings alone. Therefore, the Court remanded the case to the trial court for it to conduct a choice of law hearing before ruling on the motion to dismiss. Id. at 679.

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[3] The language of Vermont's Rule 12(b)(6) is virtually identical to that of its Rhode Island counterpart. It provides in pertinent part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, [but if] matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

This Court finds the reasoning of the Vermont Supreme Court in Ames, supra, persuasive. As in Vermont, Rhode Island courts "must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor" when ruling on a motion to dismiss pursuant to Rule 12(b)(6). Fox, 44 A.3d at 134-35 (quoting McKenna, 874 A.2d at 225); see Ames, 693 A.2d at 677.

Concurrently, courts in both Vermont and Rhode Island apply the significant relationship approach to resolve choice of law issues in tort cases. See Woodward, 104 R.I. at 297-99, 243 A.2d at 922-23; Church of the Holy Name of Jesus, 105 R.I. at 326-27, 252 A.2d at 179; Najarian, 768 A.2d at 1255; Ames, 693 A.2d at 677-78. This approach requires courts to engage in a fact-intensive inquiry to determine "the law of the state that bears the most significant relationship to the event and the parties.'" Harodite Industries, Inc., 24 A.3d at 534 (quoting Augustyn, 696 A.2d at 288); see Ames, 693 A.2d at 676-79.

This Court finds that the Complaint contains insufficient facts to determine at the motion to dismiss stage which state's law applies to the instant matter. See Mui, 778 F. Supp. 2d at 444; Harper, 595 F. Supp. 2d at 490-91; Smith, 584 F. Supp. 2d at 1349; Ames, 693 A.2d at 677-78. As this Court has already determined, the Complaint implicates at least three states' laws—Rhode Island, Pennsylvania, and New Jersey. Furthermore, the Summons identifies Defendants as Connecticut corporations. However, Plaintiffs aver few facts to demonstrate which state has the most significant relationship to this case. First, Plaintiffs state that "[e]ach of the Defendants named in the caption above has conducted business in the State of Rhode Island . . . ." (Complaint at ¶ 1.) Second, Plaintiffs claim that Burdick was exposed to asbestos "through his work at

multiple locations both in Pennsylvania and New Jersey . . . ." Id. at ¶ 5. Third, Plaintiffs allege, specific to Defendants, that "the above listed Defendants under took (sic) safety inspections on the premises at Scranton Stream (sic) Heat Company and Wilkes-Barre Steam Heat Company . . . ," both of which are located in Pennsylvania. Id. at ¶ 18a. Finally, Plaintiffs claim that Defendants are "responsible for the 'Hartford Specifications' . . . ," but do not state the specific location of this conduct. Id. at ¶ 18h.

Beyond these bald assertions, however, the Complaint does not contain any other information pertinent to determining which state's law applies here. Concurrently, because Defendants' motion is a Rule 12(b)(6) motion to dismiss, this Court cannot look beyond the Complaint to consider extraneous documents to fill in the missing pieces. See Lokey, 676 A.2d at 1346. Without more facts, this Court cannot resolve any of the relevant choice of law factors outlined by our Supreme Court in Woodward and its progeny. Therefore, this Court will not undertake a choice of law determination at the motion to dismiss stage in the instant matter. Instead, the parties are invited to fully brief and argue choice of law before this Court rules on Defendants' Motion to Dismiss. See Mui, 778 F. Supp. 2d at 444; Harper, 595 F. Supp. 2d at 490-91; Smith, 584 F. Supp. 2d at 1349; Ames, 693 A.2d at 677-78.

III

Conclusion

This Court finds that it cannot rule on Defendants' Motion to Dismiss at this time because the Complaint avers insufficient facts to conduct a proper choice of law analysis under Rhode Island's significant relationship approach. As such, it is premature to determine choice of law at this stage of the litigation. The parties are invited to submit briefs on the choice of law issues in the instant matter to develop the factual record necessary for this Court to properly determine which law applies. Until that time, this Court will stay its ruling on Defendants' Motion to Dismiss.