

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE: ASBESTOS LITIGATION:)
)
LILLIAN GRAY, Individually and as)
Executrix of the Estate of Melton Gray,)
) C.A. No. 06C-04-230 ASB
Plaintiff,)
)
v.)
)
GEORGIA PACIFIC CORPORATION,)
et al.,)
)
Defendants)

Submitted: October 27, 2008
Decided: December 19, 2008

On Representative Defendant FMC Corporation's Motion for Summary Judgment
GRANTED

OPINION

Robert Jacobs, Esquire (argued), Jacobs and Crumplar, Wilmington, DE,
Attorneys for Plaintiff

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Corporation

JOHNSTON, J.

FMC Corporation filed this motion for summary judgment as a representative for fourteen asbestos matters. Each case has been filed in at least one jurisdiction prior to being filed in Delaware. All plaintiffs are non-Delaware residents with causes of action that arose outside Delaware. Defendants assert that they are entitled to summary judgment because plaintiffs' claims are barred by the applicable statute of limitations. The parties have agreed that the Court's decision on FMC's motion will control all similar motions.

SUMMARY JUDGMENT STANDARD

This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the non-existence of material issues of fact.¹ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.² Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.³ If, after discovery, the non-

¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Id.* at 681.

³ Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.⁴

A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.⁵ The court must evaluate the facts in the light most favorable to the non-moving party.⁶ Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.⁷

For purposes of this motion, the parties have agreed that the relevant facts are not in dispute.

ANALYSIS

Delaware's Borrowing Statute

When a non-resident plaintiff pursues a cause of action that arises outside of Delaware, the shorter statute of limitations (between Delaware and the jurisdiction

⁴ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. at 322-23.

⁵ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

⁶ *Id.*

⁷ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

in which the cause of action arose) applies.⁸ The borrowing statute was enacted to prevent non-resident plaintiffs from shopping for the forum with the longest statute of limitations. The statute protects Delaware courts from adjudicating stale foreign claims.⁹

Delaware's borrowing statute applies in each of the named plaintiffs' cases because they are non-Delaware residents and their causes of action arose outside of Delaware.

⁸10 *Del. C.* § 8121 provides:

Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such a cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or country where the cause of action arose, for bringing an action upon such cause of action.

Youell v. Maddox, 692 F.Supp. 343, 355 (D.Del. 1988); *Glassberg v. Boyd*, 116 A.2d 711, 718 (Del. Ch. 1955).

⁹*Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 58 (Del. 1957) (borrowing statute “designed to prevent shopping for the most favorable forum, and hence to shorten the time limit – not to extend it.”); *Glassberg*, 116 A.2d at 718 (statute “intended to protect the courts of Delaware from the necessity of adjudicating stale out of state claims through the creating of a statutory limitation against foreign causes of action barred by either the appropriate Delaware statute of limitations or in the case of a non-resident plaintiff any applicable shorter statute in force where the cause accrued”).

Delaware's Savings Statute

In certain circumstances, Delaware's savings statute¹⁰ grants plaintiffs one year from the abatement of the original action to file another action that otherwise would be barred by the statute of limitations. The disposition of the first-filed action cannot be on the merits. Where both the savings statute and borrowing statute are implicated, the borrowing statute will prevail.¹¹

When the borrowing statute applies, it not only borrows the foreign statute of limitations, but also the foreign statute's accoutrements.¹² Such accoutrements include rules governing the time when causes of action accrue,¹³ and any savings

¹⁰10 *Del. C.* § 8118(a) provides:

If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.

¹¹*Frombach v. Gilbert Assocs.*, 236 A.2d 363, 365 (Del. 1967), *cert. denied*, 391 U.S. 906 (1968).

¹²*Frombach*, 236 A.2d at 366.

¹³*Plumb v. Cottle*, 429 F.Supp. 1330, 1336 (D.Del. 1980)

statutes.¹⁴ When a foreign action arises in a jurisdiction that has no applicable savings statute, the Delaware savings statute will not apply to save the action.¹⁵

The savings statute is triggered only after the original action is abated. If an action is filed in Delaware while the same action is still pending in another jurisdiction, the savings statute will not apply.¹⁶

Rule 41(a) Voluntary Dismissal

Superior Court Civil Rule 41(a) provides in part: “Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.”

When a plaintiff has voluntarily dismissed a case twice, the savings statute does not give plaintiff an additional year in which to file an action in Delaware. The second voluntary dismissal operates as an adjudication on the merits; and an action barred by the statute of limitations of the original jurisdiction cannot be saved.

¹⁴*Frombach*, 236 A.2d at 366 (“[W]e do not understand how we can determine the ‘time limited by the law’ of the foreign state without including any exception which exists to the limitation rule of the state.”)

¹⁵*See Hatcher v. Hobbs*, 1990 WL 18335, at *2 (Del. Super).

¹⁶*Parker v. Gadow*, 2005 WL 1952938, at *1 (Del. Super.).

Thomas Helton

Thomas Helton died on August 31, 2001, after having been diagnosed with mesothelioma on August 14, 2001. All alleged asbestos exposure occurred in Alabama. The Alabama statute of limitations for wrongful death is 2 years.

Helton's executor brought the following actions:

1 st Mississippi Action Filed	December 30, 2002
1 st Mississippi Action Voluntarily Dismissed	June 17, 2003
2 nd Mississippi Action Filed	December 19, 2003
2 nd Mississippi Action Dismissed by Agreement	May 23, 2005
U.S. District Court of N.D. of Alabama Action Filed	April 14, 2005
Delaware Action Filed	May 25, 2006.

Helton's two Mississippi actions voluntarily were dismissed before Helton brought the Delaware action. Pursuant to Rule 41(a), two voluntary dismissals are deemed an adjudication on the merits. Therefore, Delaware's savings statute does not apply to give Helton an additional year, following dismissal, to file in Delaware.

Helton died on August 31, 2001. Pursuant to Alabama's statute of limitations, any wrongful death action must have been filed within 2 years.¹⁷

¹⁷*Ala. Code* § 6-5-410(d).

Delaware's applicable statute of limitations also is 2 years from the time the cause of action accrues.¹⁸ The borrowing statute is irrelevant because the limitations periods are the same. The savings statute does not apply under Rule 41(a).

Helton's Delaware action, having been filed almost 5 years after his death, is time-barred.

Melton Gray

On March 14, 2001, Melton Gray was diagnosed with mesothelioma. Gray died on May 23, 2001. Gray was an Alabama resident at all relevant times. The Alabama statute of limitations for wrongful death is 2 years. The following actions were filed on behalf of Gray's estate:

Mississippi Wrongful Death Action Filed	May 24, 2001
Georgia Action Filed	April 5, 2005
Mississippi Action Dismissed (<i>Forum Non Conveniens</i>)	May 5, 2005
Delaware Action Filed	April 26, 2006
Illinois Action Filed	April 27, 2006
Georgia Action Voluntarily Dismissed	April 28, 2006
Illinois Action Voluntarily Dismissed	October 17, 2006.

¹⁸10 *Del. C.* § 8119.

As with plaintiff Helton, the statutes of limitation in both Alabama and Delaware are 2 years. Thus, the Court need not engage in a borrowing statute analysis. The issue is whether the savings statute applies.

Gray's first action in Mississippi was timely filed one day following his death. The Mississippi action was dismissed on May 5, 2005 on grounds unrelated to the merits. The Delaware action was filed on April 26, 2006, less than one year following dismissal. If Delaware's savings statute applies, the Delaware action was timely filed.

However, Gray has voluntarily dismissed two actions - Georgia and Illinois. These two dismissals are deemed dismissal on the merits under Rule 41(a), thus preventing application of the savings statute. The fact that the Georgia and Illinois dismissals occurred after the Delaware action was filed, is irrelevant.

Rule 41(a) does not limit the determination of dismissal on the merits to dismissals prior to commencement of a Delaware action. Regardless of when they take place, two voluntary dismissals become an adjudication on the merits. Under the principle of *res judicata*, the Gray Delaware action must be dismissed.¹⁹ The Delaware action was filed more than two years after the cause of action arose. The savings statute cannot resuscitate the Mississippi action.

¹⁹*M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999) (*res judicata* bars any subsequent suit involving the same parties and based on the same cause of action.).

Mary Plaxico

Mary Plaxico was diagnosed with mesothelioma on February 26, 1997. By affidavit, Plaxico alleges that despite her diagnosis, she was unaware that her disease was asbestos-related until June 2001. Plaxico argues that she was officially diagnosed with asbestos-related mesothelioma on January 25, 2002. Plaxico is a Mississippi resident and all alleges asbestos exposures were in Mississippi. The following actions were filed by Plaxico:

Mississippi Action Filed	April 3, 2002
Mississippi Action Dismissed	January 31, 2005
Delaware Action Filed	June 6, 2005.

The Mississippi statute of limitations is 3 years from diagnosis.²⁰ The Delaware statute of limitations is 2 years from the time the cause of action accrues.²¹ Mississippi has a one-year savings statute.²²

²⁰*Miss. Code Ann.* §15-1-49

²¹10 *Del. C.* § 8119.

²²*Miss. Code Ann.* §15-1-69.

Delaware has a shorter statute of limitations. However, the foreign statute of limitations and the savings statute must be accepted with all accoutrements.²³ The cause of action accrues at different times in Mississippi and Delaware.

Under Mississippi law, the statutory period begins to run at the time a plaintiff is diagnosed with the disease that gives rise to a claim of action.²⁴ The Mississippi Supreme Court has held that causative knowledge is not an applicable factor. If Mississippi law applies, Plaxico had to file within three years from February 26, 1997, the date of diagnosis. The three-year period expired February 26, 2000.

Delaware's statutory period is subject to the discovery rule, which states that the statutory period begins to run when the date of the medical condition was connected to asbestos.²⁵ Plaintiff's latest alleged date of connection is January 25, 2002. Consequently, Delaware's two-year statutory period would extend the period Plaintiff had to file her claim until January 25, 2004.

Applying the borrowing statute, the shorter period is Mississippi. Because Plaintiff's claim was filed more than five years after her diagnosis with

²³*Frombach*, 236 A.2d at 366.

²⁴*Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss. 1990).

²⁵*See Brown, et al. v. E.I. duPont de Nemours & Co.*, 820 A.2d 362 (Del. 2003).

mesothelioma, the claim was untimely as of the first filing in Mississippi. The Delaware savings statute is not implicated.²⁶

CONCLUSION

The Court, having considered Delaware's borrowing and savings statutes as they apply to representative plaintiffs' claims, finds that all claims are time-barred. Representative Defendant FMC Corporation's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

²⁶*See May v. Remington Arms Co., Inc.*, 2005 WL 2155229, at *2 (Del. Super.); *Hatcher*, 1990 WL 18335, at *1-2.