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Charles E. Dorkey III / *by D*
Charles E. Dorkey III

Richards, O'Neil & Allegaert
660 Madison Avenue
New York, NY 10021
(212) 207-1200

Attorneys for Defendant
Turner & Newall PLC

September 5, 1984

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Notice of Filing in Support of Motion of Defendant T&N to Dismiss For Lack of Personal Jurisdiction" was served this 5th day of September 1984, by delivering true and correct copies thereof by first-class mail, postage prepaid, to James F. Green, Esquire and Peter T. Enslein, Esquire, Ashcraft & Gerel, 2000 L Street, N.W., Washington, D.C. 20036, attorneys for Plaintiffs, and to:

Michael P. Chervenak, Esquire
Ford & O'Neil
17 West Jefferson Street
Rockville, MD 20850
Attorney for Armstrong World Industries

Kevin J. McCarthy, Esquire
O'Malley, Miles, Farrington & McCarthy
99 Commerce Place
Upper Marlboro, MD 20772
Attorney for A. C. and S., Inc.

H. Patrick Donohue, Esquire
Donahue, Ehrmantraut & Montedonico,
Chartered
51 Monroe Street - Suite 700
Rockville, MD 20850
Attorneys for Atlas Turner, Inc.
and Bell Asbestos Mines, Ltd.

David P. Durbin, Esquire
Jordan, Coyne, Savits & Lopata
1030 15th Street, N.W. - Suite 500
Washington, D.C. 20005
Attorney for Celotex Corporation

Louis R. Moffa, Jr.
Schnader, Harrison, Segal & Lewis
1111 19th Street, N.W.
Washington, D.C. 20036
Attorney for National Gypsum Company

R. G. Guziak, Esquire
Brault, Graham, Scott & Brault
1314 19th Street, N.W.
Washington, D.C. 20036
Attorney for Nicolet, Inc.

Brock R. Landry, Esquire
Keck, Mahin & Cate
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorney for United States
Gypsum Company

Patrick James Attridge, Esquire
Macleay, Lynch, Bernhard & Gregg
51 Monroe Street, Suite 806
Rockville, MD 20850
Attorney for United States Mineral
Products Co.

Edward J. Lopata, Esquire
Jordan, Coyne, Savits & Lopata
1030 15th Street, N.W. - Suite 500
Washington, D.C. 20005
Attorney for W. R. Grace Company


Hopewell H. Darneille, III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
SEP 5 1984

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS

BYRON F. GRANGER, ET AL,
Plaintiffs

V.

OWENS CORNING FIBERGLAS
CORPORATION, ET AL,
Defendants

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CA-3-83-0183-D ✓

O R D E R

Came on for consideration before the Court the motion of defendant Turner and Newall PLC (T & N) to dismiss all remaining defendants' cross actions for lack of personal jurisdiction. Having considered the parties' briefs and the relevant case law, the Court is of the opinion the motion should be granted.

This is an asbestos action filed by plaintiff Byron F. Granger. As usual, most of the defendants have filed cross actions. Certain defendants have settled with Granger. In this motion T & N asserts that this Court may not exercise personal jurisdiction over it. Granger has filed a voluntary notice of dismissal of his claims against T & N. The motion to dismiss is opposed, however, by A C and S, Inc. (A C and S), a defendant that filed a cross action against T & N.

This motion to dismiss for lack of personal jurisdiction is the latest of T & N's fight to avoid being drawn into the ring with the ubiquitous "asbestos" plaintiffs and cross claimants. T & N has proven a formidable pugilist, having successfully avoided the

CA83-3520

attachment

assertion of jurisdiction in Texas at least twice before. See Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983); Price v. Armstrong World Industries, Inc., CA-4-83-165-K (N.D. Tex. Dec. 6, 1983). In passing judgment on this latest confrontation, this Court must be concerned with both the legal effect of the earlier victories as well as the merits of the present arguments.

I. Jurisdiction Based on the Activities of Keasbey & Mattison

A C and S initially contended T & N was subject to this Court's jurisdiction based on the activities of Keasbey and Mattison, Inc. (K & M), a former wholly owned subsidiary of T & N. That argument was expressly rejected, however, by the Fifth Circuit in the consolidated appeals reported as Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983). In Hargrave the court assumed that K & M would be subject to jurisdiction under the Texas long-arm statute. The court found, however, that the party seeking to establish jurisdiction had not shown that T & N exercised sufficient control over K & M for the activities of the subsidiary to be attributed to T & N. The court noted: "Cannon [Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333 (1925)], then, stands for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other." 710 F.2d at 1160.

This Court finds that A C and S has not presented any evidence or arguments that would alter the conclusions reached in Hargrave. Consequently, this Court holds that T & N is not subject to this Court's jurisdiction based on the activities of K & M.

II. Jurisdiction Based on T & N's Direct Contacts

A C and S has more than one punch in its arsenal and asserts that jurisdiction may be maintained on the basis of T & N's contacts with Texas. In Hargrave, supra, the court expressly refused to reach this issue because it had not been raised in the lower court. 710 F.2d at 1159. Here A C and S has properly raised and briefed the issue. Consequently this Court must reach the merits of this argument.

At the outset T & N contends A C and S is collaterally estopped from attempting to assert jurisdiction on the grounds of Judge Belew's Order in Price v. Armstrong World Industries, Inc., CA-4-83-165-K (N.D. Tex. Dec. 6, 1983). That Order, while dismissing T & N for lack of personal jurisdiction, merely states that conclusion without presenting the reasons for the holding. This Court has no means to determine what arguments were raised in that court or the very grounds of dismissal. Therefore this Court is reticent to consider that Order controlling under the doctrine of collateral estoppel. However, since this Court finds that jurisdiction may not be asserted based on T & N's activities in the case sub judice, it becomes unnecessary to reach a conclusion as to the effect of the Order in Price.

The gravamen of A C and S's argument that T & N has sufficient contacts with Texas is a licensing agreement between J. W. Roberts, Ltd. (Roberts), a wholly owned subsidiary of T & N, and A C and S. Pursuant to this agreement, A C and S was authorized to distribute a spray-on asbestos product called "Limpet." Limpet was a trademark owned by Roberts. Thus, A C and S makes the argument: "T & N through the license agreement between A C and S and J. W. Roberts, Ltd., distributed the product Limpet and application machinery to A C and S with the understanding that A C and S would be entering into

contracts to install industrial and commercial insulation throughout the United States, including Texas." (Brief p. 10). A C and S consequently concludes jurisdiction is proper because of this distribution scheme.

This Court considered A C and S's argument and requested additional briefing from T & N on the potential application of Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980). See Order Feb. 6, 1984. In Oswalt the appeals court found jurisdiction over Tokai-Seiki, a Japanese corporation that manufactured an allegedly defective cigarette lighter. The basis of jurisdiction was the presence in Texas of lighters manufactured by Tokai-Seiki as a result of an expansive distribution arrangement intended to serve the entire country. Through this arrangement Tokai-Seiki had sold between three and four million lighters per year. The court held that the corporation should have known that its products would reach Texas in the normal course of the distribution claim.

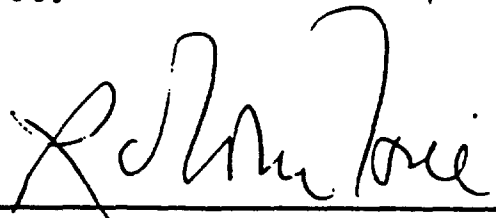
The facts before this Court are different from those in Oswalt. First, the plaintiff has admitted through its answers to interrogatories that there was no exposure to the product Limpet. Second, A C and S is again attempting to base jurisdiction on the activities of a wholly owned subsidiary of T & N. The materials presented to this Court do not contain any evidence of the close relationship between a parent and subsidiary necessary to attribute the acts of one to the other. See Hargrave, supra, at 1159. The party seeking to establish jurisdiction has the burden of establishing jurisdiction by making a prima facie showing of the facts upon which jurisdiction may be based. Product Promotions, Inc. v. Cousteau,

495 F.2d 483, 490-91 (5th Cir. 1974). A C and S has not made such a showing.

The Court concludes that it has no personal jurisdiction over T & N. Therefore the motion to dismiss should be granted.

It is so ORDERED.

Dated this 9 day of May, 1984.

A handwritten signature in cursive script, appearing to read "Robert M. Jones", is written over a horizontal line.

United States District Judge