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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CELIA D. HALL, Administratrix of the Estate of
ROBERT H. HALL, Deceased, and Individually
as the Surviving Spouse of ROBERT H. HALL

Plaintiff,

vs.

A.P. GREEN INDUSTRIES, INC., et al.

Defendants.

MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF MOTION TO DISMISS AND TO REMAND ACTION TO STATE COURT

Civil Action No. 99 CV-0732 S(M)

Nov. 1999

Respectfully submitted,

LIPSITZ & PONTERIO, LLC
Nan L. Haynes, Esq. of Counsel
Attorneys for Plaintiffs
135 Delaware Avenue, Suite 506
Buffalo, NY 14202
(716) 849-0701

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INTRODUCTION

This is an action for personal injuries allegedly caused by exposure to asbestos and asbestos-containing products. The plaintiffs claim exposure to defendants' asbestos and asbestos-containing products during the course of their careers at the Durez Division of Occidental Chemical Company (hereinafter "Durez"). Among the defendants is Asbestos Corporation, Ltd. (hereinafter "ACL"), a corporation that from 1955 until 1977 sold raw asbestos to Durez.

The plaintiffs commenced this action by filing a complaint in New York State Supreme Court on August 19, 1999. Claiming to be a foreign state within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 USC §1603(a), defendant ACL removed the action to the United States District Court, Western District of New York by invoking the provisions of 28 USC §1441(d), that provides for the removal of "any civil action brought in a state court against a foreign state as defined in §1603(a)." This is a motion to dismiss and remand the action to New York State Supreme Court on the ground that ACL was not a foreign state at anytime relevant to this action.

FACTS

ACL supplied raw asbestos to Durez from 1955 until 1977. See Affidavit of Nan L. Haynes, Esq., submitted in support of plaintiffs' motion at paragraph "8". (Hereinafter affidavit of Nan L. Haynes). By September, 1978, Durez had stopped using raw asbestos entirely. See affidavit of Nan L. Haynes at paragraph "7". In 1981, four (4) years after Durez stopped purchasing asbestos from ACL, the Québec government acquired indirect control of ACL. See affidavit of Nan L. Haynes at paragraph "9". Prior to 1981, Québec had no ownership interest in or control of ACL. See affidavit of Nan L. Haynes at paragraph "10". It was not until 1986 that Québec became the majority shareholder of ACL. See affidavit of Nan L. Haynes at paragraph "11". Québec sold 100% of its shares in ACL to the Mazarin Corporation on September 5, 1992. See affidavit of Nan L. Haynes at paragraph "12". Québec has had no ownership interest in ACL since it sold its shares to the Mazarin Corporation. See affidavit of Nan L. Haynes at paragraph "13".

ARGUMENT

ACL IS NOT A FOREIGN STATE WITHIN THE MEANING OF THE FSIA

THE FSIA defines a foreign state as including "an agency or instrumentality of a foreign state", further defined as any entity "which is a separate legal person, corporate or otherwise, ...the majority of whose shares where other ownership interest is owned by a foreign state". 28 USC §1603(a)-(b). There are only two circumstances where courts have applied this definition of a foreign state to a defendant corporation. The first approach requires that the corporation be owned by the foreign state at the time of the events given rise to the action. Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988).

The New York Court of Appeals has clearly held that in a latent injury case involving asbestos exposure, the tortious injury occurs at exposure. Consorti v. Owens-Corning Fiberglas Corp. 86 N.Y.2d 449, 657 N.E. 2d 1301, 634 N.Y.S.2d 18 (1995). The Consorti Court summarized the law of New York as follows:

> "Thus, through succeeding generations of Judges composing this Court, over some 60 years, the Schmidt rule fixing the occurrence of tortious injury as the date when the toxic substance invades or is introduced into the body has been reconsidered and reaffirmed, despite importunings that adoption of a medical date-of-injury standard would achieve more just results. Nothing has been presented here to warrant departure from Schmidt and the resulting destabilizing of what is now a settled, certain principle of New

> York tort law. It follows that, as a matter of law, Mr. Consorti's tortious injury occurred when he was exposed to and inhaled asbestos during the 1960's[...].

Consorti, 86 N.Y.2d at 454, 657 N.E. 2d at 1301, 634 N.Y.S.2d at 20. (*emphasis added*)

The last year any of the plaintiffs could possibly have been exposed to raw asbestos supplied by ACL was 1978. By September, 1978, Durez had stopped using raw asbestos entirely. See affidavit of Nan L. Haynes at paragraph "7". Durez bought no asbestos from ACL after 1977. See affidavit of Nan L. Haynes at paragraph "8". It was not until four (4) years after Durez stopped buying raw asbestos from ACL that Québec acquired any interest or control of ACL. See affidavit of Nan L. Haynes at paragraph "9". And it was not until nine (9) years after Durez stopped buying ACL's raw asbestos that Québec became the majority shareholder of ACL. See affidavit of Nan L. Haynes at paragraph "11". Therefore, at no time during the events giving rise to this action was ACL a foreign state. ACL's claim that it is a foreign state must fall under this first approach.

The second approach requires that the corporation be owned by the foreign state when the complaint is filed. See for example, Straub v. A.P. Green Industries, Inc., 38 F.3d 448 (9th Cir. 1994). Québec divested itself of all ownership interest in ACL in 1992. See affidavit of Nan L. Haynes at paragraph "12". The present action was filed seven (7) years later. See affidavit of Nan L. Haynes at paragraph "14".

ACL's claim that it is a foreign state must also fall under the second and only other approach.

The question of which of these two periods a defendant corporation must be owned by a foreign state in order to qualify as a foreign state within the meaning of the FSIA has not been answered definitively by the Second Circuit. Belgrade v. U.C.F. International Trading, Inc., et al., 2 F.Supp. 2d 407, 412 (S.D.N.Y. 1998), citing Caigilo International S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1015-16 (2d Cir. 1993); cf Morgan Guaranty Trust Company v. Republic of Palau, 924 F.2d 1237 (2d Cir. 1991); and Braka v. Bancomer, S.A., 589 F.Supp. 1465, 1469 (S.D.N.Y. 1984), affirmed, 762 F.2d 222 (2d Cir. 1985). In Belgrade, the Court held that the "correct approach under the FSIA is to ask whether the underlying conduct took place on the foreign state's watch, even if the state is no longer in control of the party by the time of the lawsuit, or alternatively whether the defendant is currently a foreign state, regardless of its status at the time of the underlying conduct." Belgrade at 414.

The Court in Belgrade reasoned that the presence of a party which is a foreign sovereign at the time of suit is relevant because it directly implicates the FSIA's purpose of channeling lawsuits against foreign sovereigns into the federal courts. It also reasoned that the FSIA's policies are implicated when a party was owned by foreign sovereign at the time of the underlying conduct because in such a case the conduct and potential liability of the foreign sovereign are the subject of judicial scrutiny which implicates the dignity of the foreign sovereign. Belgrade at 413.

It would not further the purposes of the FSIA for this Court to find that ACL is a foreign state. The legal proceedings in no way impinge on Québec's sovereignty. This is not a lawsuit against a foreign state because ACL is currently owned by the Mazarin Corporation - not Québec. The evidence of ACL's liability in no way relates to the activity of a foreign state because all the underlying conduct took place prior to the time Québec acquired any ownership interest in ACL.

ACL's request is unprecedented. In researching the case law on the time for determining whether an entity is a foreign state for purposes of the FSIA, counsel found no cases in which a defendant claimed the status merely because some time after the underlying conduct, but before the filing of the complaint, the defendant happened to be owned by a sovereign state. ACL's removal is without factual and legal support.

CONCLUSION

ACL was at no time relevant to this action a foreign state as defined by the FSIA. This Court therefore lacks jurisdiction over the action and should be remanded to New York State Supreme Court.

Respectfully Submitted,

LIPSITZ & PONTERIO, LLC

Nan L. Haynes, Esq., of counsel
Attorneys for Plaintiff
135 Delaware Avenue, Suite 506
Buffalo, NY 14202-2410
(716) 849-0701

To: Edward J. O'Connor, Esq.
Bouvier, O'Connor
Attorneys for Defendant
Asbestos Corporation, Ltd.
1400 Main Place Tower
Buffalo, NY 14202-3714
(716) 856-1344

cc: All Counsel of Record