UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WILLIAM J. ROMANI, Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 96-30047-MAP
	)	
CRAMER, INC., Defendant	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the plaintiff and opposes the defendant's motion for summary judgment. As grounds, the plaintiff alternatively submits (1) there is a genuine issue of material fact regarding the date when the defendant may have last parted with the product which is the subject of this action, and (2) under a choice of law analysis, the Massachusetts statute of limitations, and not the statute of repose of Connecticut, ought to be applied to determine the timeliness of the plaintiff's claim. The plaintiff's memorandum in support of his opposition follows below.

I. MATERIAL FACTS IN DISPUTE

According to the plaintiff's affidavit, the chair which is the subject of this products liability action was new and still in its original packaging when the plaintiff's employer, Hamilton Standard, opened its new plant in about 1990. All of the new chairs were visually identical, and no used or old chairs were brought into that plant. Exhibit A, appended hereto.

II. ARGUMENT AND AUTHORITY

a. There exists a factual dispute requiring jury determination when the defendant last parted with the chair

The defendant, Cramer, maintains that it has no records of its parting with possession of the chair which is the subject of this case. Exhibit B, at 46-47. Cramer's explanation for the non-existence of these documents is a flood in 1980 at its plant, after which its documents were thrown away. Id., at 50. See Wide Check Corp., Inc. v. Forest Hills Distribs., Inc., 692 F.2d 214, 217-220 (adverse inference warranted due to knowing destruction of documents). Cramer has made no attempt to gather purchase and sale documentation regarding the chair in question from the plaintiff's employer. Id. Cramer's representative asserts the chair must have been produced before August 1980, he feels the chair was MIG welded and Cramer did not have an MIG welder until after that time. Id., at 47.

The Connecticut statute of repose, if applied, runs from the time the defendant last parted with the product sued upon. Conn.Gen.Stat. §52-577a. The court is bound to draw all reasonable inferences in favor of the plaintiff, the party opposing this motion for summary judgment. There is only secondary evidence regarding the date Cramer parted with the chair in question; Cramer cannot access any records to establish its affirmative defense on which it bears the burden of proof. It has likewise failed to support its assertion of the purchase of an MIG welder in 1980. Id., at 107; 114. In sum, Cramer has no documents which show the chair was produced before 1984. Id., at 110-111.

The sworn assertion of the plaintiff that the chair in question was new and unpackaged in 1990, when weighed against Cramer's lack of documentation, would tend to rebut and cast doubt in the minds of reasonable persons whether Cramer must have produced this chair before 1980. While it is possible an intermediary could have paid for the chairs (recall they were shipped f.o.b.) in 1980, and then hoarded them until they could be sold to Hamilton Standard, this seems remote. Business-people do not usually view office chairs as a commodity and postpone for a decade seeking a return on their investment. Similarly, it is unlikely that Hamilton Standard would have purchased a cache of chairs from an intermediary in 1980 for an undetermined need, and then warehoused them for ten years. A rational factfinder, after weighing the evidence and applying common-sense could well find Cramer did not meet its burden of proving it last parted with the accident-chair in 1980, and infer it had possession until at least March 27, 1984.

b. The Connecticut Statute of Repose is not substantive

A federal court in Connecticut has ruled 10-year statute of repose applicable to products liability actions, Conn.Gen.Stat. §52-577a, is not substantive for choice of law purposes. Kelley v. Goodyear Tire & Rubber Co., 700 F.Supp. 91, 93 (D.Conn. 1987). In Kelley, the plaintiff, a Connecticut resident, was injured by a product manufactured by the defendant in 1955. The defendant argued the statute of repose was substantive and should therefore be applied. The court rejected that analysis: "In this court's view, a Connecticut court would not characterize Conn.Gen.Stat.

§52-577a as substantive for this purpose." Id.

Under Connecticut conflicts of law principles, a limitations period is only substantive when it is interwoven within a statute creating "new liabilities" previously unknown at common law. Thomas Iron Co. v. Ensign-Bickford Co., 42 A.2d 145 (Conn. 1945). The Kelley court noted products liability claims existed in Connecticut before 1979, so the statute of repose contained in the Connecticut Product Liability Act was not inseparable from the Act and therefore the statute of repose was not substantive. In dicta, the court hinted that under a choice of law analysis (which would have been necessary if the limitations period was substantive), the law of place of the accident, Ohio, should give way to Connecticut's legitimate and strong interests of protecting its citizens from defective products. Kelley, 700 F.Supp. at 93 & n.5.

As support for its conclusion the Connecticut statute of repose was not substantive, the Kelley court referenced two prior federal court decisions in the district of Connecticut, both of which "rejected the argument that limitations periods found in state Products Liability Acts are substantive for the purposes of Connecticut conflict of laws analysis." Id., at 93.

In Estate of Mikulis v. Olin Corp., No. B-80-456 (D.Conn. March 28, 1983), a Connecticut plaintiff's decedent was killed in New Hampshire when a rifle manufactured by the defendant discharged. The defendant argued the New Hampshire Product Liability Act created a liability theretofore unknown, so its limitation period inseparable from that liability was

substantive. Similarly, in Bowman v. Sturm, Ruger & Co., No. B-82-393 (D.Conn. Feb. 23, 1983), in the wake of an Oregon product accident to a Connecticut plaintiff the manufacturer-defendant argued for the application of the Oregon statute of repose, Or.Rev.Stat. §30.905 (1979), contending it was substantive. As the court in Kelley observed, both New Hampshire and Oregon recognized products liability claims before the enactment of their respective products liability acts. Since those acts did not create new "liabilities" within the meaning of Thomas Iron Co. these Acts were not substantive. As a result, these courts applied the procedural limitations period contained in the Connecticut Products Liability Act. Kelley, 700 F.Supp. at 93-94.

Since the Kelley decision, the Connecticut Supreme Court has also ruled §52-577a is procedural in nature. Champagne v. Raybestos-Manhattan, Inc., 212 Conn. 509, 525, 562 A.2d 1100, ___ (1989).

Although the federal court is bound to apply Massachusetts conflicts of law principles to determine if the Connecticut Statute of Repose is substantive, the plaintiff submits the rulings of the Connecticut courts are instructive. Massachusetts has not yet determined whether statutes of repose are substantive or procedural. Cosme v. Whitin Machine Works, Inc., 417 Mass. 643, 645, 632 N.E.2d 832, 834 (1994) ("we have not determined whether statutes of repose are procedural with respect to choice of law.").

c. Massachusetts has the most significant interest in the application of its limitations period in this case

If the court determines the Connecticut Statute of Repose is a substantive part of Connecticut tort law, then the court should consider whether the limitations periods expressed in Massachusetts or Connecticut law should be applied. A federal court sitting in a diversity case must apply the conflicts of law rules of the forum. Klaxon v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487 (1941). In recent years, the Massachusetts courts have employed a functional approach in examining conflicts issues, assessing various choice influencing considerations provided in the Restatement (Second) of Conflicts of Laws and those suggested by various commentators. Cosme v. Whitin Machine Works, Inc., 417 Mass. 643, 646, 632 N.E.2d 832, ____ (1994). Cf. Freeman v. World Airways, Inc., 596 F.Supp. 841, 845 (D.Mass. 1984) (S.J.C. analysis of conflicts of laws similar if not identical with that of Restatement), citing Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 333-337, 450 N.E.2d 581, 585-587 (1983) (applying Restatement). According to the Restatement, the tort law of the state which has the most significant relationship to the occurrence and the parties should be applied, taking into account:

§145 Factors	State(s) Implicated
(a) the place where the injury occurred	Conn. & Mass.
(b) the place where the injury producing conduct occurred	Kansas
(c) the domicile, residence and place of business of the parties	Mass. & Kansas

(d) the place where the relationship between the parties is centered	Inapplicable

For personal injury actions, the law of the place where the accident occurred is determinative of the rights and liabilities of the parties, **"unless some other state has a more significant relationship . . . <whereupon> . . . the local law of the other state will be applied."** Restatement (Second) of Conflicts of Laws, §146 (emphasis supplied). The weight to be given to these contacts depends on their relevance to the particular issue. Id., §145(2).

Applying the principles of the Restatement, the limitations of actions law of Massachusetts should govern the rights and liabilities of the parties in this case. According to the Restatement, the law of the state which has the most significant relationship to the issue should be applied, taking into account various factors set out in §6 of the Restatement:

Choice Influencing Factors	State(s) with Interest
(a) the needs of the interstate and international systems	Inapplicable
(b) the relevant policies of the forum	Mass. (strong)
(c) the relevant policies of other interested states	Mass. (strong) Conn. (weak)
(d) the protection of justified expectations	Inapplicable
(e) basic policies underlying field of tort law	Mass. (strong)
(f) certainty, predictability and uniformity of result	Inapplicable
(g) ease of determination and application of law to be applied	Inapplicable -or- Mass. (weak)

In this case, the plaintiff's domicile is in Massachusetts and this action has been brought in a Massachusetts court. The defendant's product was manufactured in Kansas and shipped f.o.b. on an unknown date to an undetermined intermediary, and then came into the possession of the plaintiff's employer in Connecticut, where the plaintiff's accident occurred.

Massachusetts has a strong interest in providing a remedy to persons injured by defective products. The S.J.C. has recently expanded liability under its consumer protection statute to products liability claims, Maillet v. AFT Davidson Co., 407 Mass. 185, 193, 552 N.E.2d 95, 100 (1990), to not only deter but to punish manufacturers whose products injure Massachusetts residents. Massachusetts breach of warranty products liability claims are co-extensive with strict liability under Restatement of Torts (Second) §402A. Swartz v. General Motors Corp., 375 Mass. 628, 630, 378 N.E.2d 61, ___ (1977). Massachusetts also has an articulated interest in allowing a recovery on used and older products. Fernandez v. Union Bookbinding Co., Inc., 400 Mass. 27, 33-34 507 N.E.2d 728, ___ (1987) (strict liability remedy against sellers of used products sanctioned); Cosme, supra at 648 ("Massachusetts . . . has no policy of protecting defendants from injuries caused by older products."). Finally, Massachusetts has articulated a significant interest in seeing its resident plaintiff be compensated for his products liability injury, even if he is suing on a defective product supplied in 1939, Cosme v. Whitin Machine Works, Inc., 417 Mass. 643 (1994), because if such persons were deprived of a remedy from their

wrongdoer they are liable to become a public charge. See Tiernan v. Westext Transp. Co., 295 F.Supp. 1256, 1264 (D.R.I. 1969).

The policy behind the field of products liability law, as identified in Cosme, is to provide a cause of action to compensate individuals injured by defective products. "Public policy demand that the burden of accidental injuries caused by products intended for consumption to be placed upon those who market them . . . and that the <user> of such products is entitled to the maximum protection at the hands of someone, and the proper persons to afford it are those who market the products." Cosme, at 647-648, quoting from comment c of §402A of the Restatement (Second) of Torts. Massachusetts embraced the corresponding policy of holding accountable those whose defective products cause injury. Id., at 648.

The State of Connecticut would have relatively little interest in either providing or depriving the plaintiff of a remedy. To the extent the Connecticut statute of repose was enacted to prevent long-tail liabilities of Connecticut-based manufacturers in order to lower insurance premiums, this case would not frustrate the legislative purpose of that Act. While Connecticut has an interest in deterring recoveries from Connecticut manufacturers, it would appear to have no interest favoring application of statute of repose in this case. Moreover, since Connecticut itself recognizes its statute of repose as procedural, "it is therefore likely has a diminished expectation of having it apply in other jurisdictions as part of its substantive law." Cosme, at 649.

"The state in which the injury occurred, as such, has relatively little interest in measure of damages to be recovered unless it can be said with reasonable certainty that defendant acted in reliance on that state's rule." Moser v. Bostitch Div. of Textron, 609 F.Supp. 917, 920 (E.D.Pa. 1985) (citation omitted) (applying tort law of residence of plaintiff, and not the substantive law of Massachusetts, where product injury occurred). In the case sub judice, deposition questioning has established Cramer had no particular reliance on the application of the limitations law of the State of Connecticut in placing its product into the stream of commerce. See Exhibit B, at 72. There should be no concern in the protection of justified expectations anyhow, because "persons who unintentionally cause injury usually act without giving thought to the law that may be applied to determine the legal consequences of the conduct." Restatement (Second) of Conflicts of Laws, §145, comment b, quoted in Cosme, supra at 650.

Similarly, the First Circuit Court of Appeals affirmed a Rhode Island district court ruling that the state with the most significant interest was not where the accident occurred (Massachusetts), but the residence of the plaintiff's decedent (Rhode Island). Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974). Even though the car was sold in Massachusetts, Ford had no reasonable expectation a wrongful death action caused by the car's alleged defects would be brought under the Massachusetts death statute (limiting recovery to $50,000) and no evidence existed Ford had planned the transaction accordingly.

defendant-manufacturer> were a Connecticut business, and Connecticut's corresponding interest in protecting its courts from such claims is obviously not at stake." Cosme, 417 Mass. at 648-649.

An argument by an Ohio-based manufacturer that the Connecticut Statute of Repose ought to apply to bar a claim of a New York resident injured at his workplace in Connecticut was roundly rejected in Rossi v. Ed Peterson Cutting Equipment Corp., 498 N.Y.S.2d 283 (N.Y. Sup. Ct. 1986), appended hereto as Exhibit C. Even assuming arguendo Connecticut's statute of repose was substantive, the fact "plaintiff traveled every day to Connecticut to work, was employed by a Connecticut company, was injured in and treated in Connecticut" did not make Connecticut's contacts more significant that the state of plaintiff's residence, New York. New York has a paternal interest of providing a remedy for resident's claims time-barred elsewhere; therefore the plaintiff was able to seek recovery from his 1980 injury in Connecticut on a machine shipped to his employer in 1923. Id., at 285-286.

In addition, the place of a plaintiff's injury (and the state from which she received workers' compensation benefits) was outweighed by the residence of a plaintiff and the place of incorporation of the manufacturer-defendant in Roy v. Star Chopper Co., Inc., 584 F.2d 1124, 1128-1130 (1st Cir. 1978) (applying Rhode Island conflicts principles). The defendant's expectations would not have been disturbed because it did not manufacture its products to meet different liability standards of

various states. The accident-state's interest in protecting its corporations from excessive liability was inapplicable because the defendant-manufacturer was an foreign corporation. Id.

The coalescence of a statute of repose existing in the state where a product liability accident occurred does not lead to an inexorable determination that statute should be applied to bar the claim of a plaintiff residing elsewhere. To the contrary, there is much to the notion the accident-locus state's interests are not affected. For instance, in Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242 (5th Cir. 1990), the court observed:

> North Carolina has little governmental interest in the resolution of the parties' claims and defenses. Its statute of repose was enacted to shield North Carolina manufacturers from open-ended liability that might exist for an indefinite period of time after a product is sold and distributed. (citation omitted). However, there is no North Carolina manufacturer involved as a defendant in this lawsuit. No compelling reason exists why the North Carolina legislature would have an interest in the application of its statute of repose to eliminate the claims of foreign plaintiffs against foreign defendants.

Id., at 249-250.

The needs of the interstate system do not point in any particular direction in this case anymore than they did in Cosme, supra at 649. Cf., Hemphill v. Smith & Wesson Corp., 6 Mass. L. Rptr. 497, 499 (Mass. Super. Ct. 1997), appended hereto as Exhibit D. Similarly, the protection of justified expectations is not a concern because we are dealing with unintentional conduct, as discussed above. Additionally, the values of certainty, predictability and uniformity of result do not weigh in favor of applying Connecticut law, because of the strong

interests articulated and recognized by Massachusetts identified above. Finally, as noted in Cosme, simplification of the judicial task does not point either to Massachusetts or Connecticut. Id., at 650 (application of either is simple).

In sum, the Commonwealth of Massachusetts has the most significant interest in the application of its limitations laws to this case. The State of Connecticut's legitimate governmental interests would not be offended by application of Massachusetts' limitations period, and its interests are marginal when compared to the interests of Massachusetts.

III. CONCLUSION

For all the foregoing reasons, the plaintiff respectfully requests the court to deny Cramer's motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the within document was served upon each other party or counsel this ___ day of June, 1997.

_____
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