IN THE UNITED STATE S DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUAN and AIDA PADILLA, Plaintiffs,	:	CIVIL ACTION
v.	:	
BLACK & DECKER CORPORATION, Defendant.	:	NO. 04-CV-4466

MEMORANDUM ORDER

AND NOW, this 24st day of March, 2005, presently before the Court is the Motion for Summary Judgment filed by Defendant Black & Decker Corporation ("Defendant") on December 27, 2004 (Def.'s Mot., Doc. No. 8) and the Motion for Leave to File Second Amended Complaint filed by Plaintiffs Juan and Aida Padilla ("Plaintiffs") on January 12, 2005 (Pls.' Mot., Doc. No. 9). For the reasons that follow, Plaintiffs' Motion to Leave to File is GRANTED. Defendant's Motion for Summary Judgment is DENIED in part and GRANTED in part.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about July 5, 2002, Plaintiff Juan Padilla was operating a 9 inch, 2 horsepower, type 3, power miter saw mounted to a work bench, both allegedly designed, manufactured, and distributed by Defendant. As he was operating the saw, it suddenly jammed and kicked back. As the saw and the work table to which it was mounted began to tip over towards Mr. Padilla, he fell backwards and put his left hand up to protect his face. As a result of the contact between his hand and the still-operating saw, Mr. Padilla suffered the amputation of his left third, forth, and fifth fingers and required reparative surgery for the complex wounds, open fractures and tendon lacerations of what remained of those fingers.

Plaintiffs initiated the instant proceedings in the Court of Common Pleas, Philadelphia County by writ of summons on July 2, 2004. Def.'s Mot. at Ex. A. Plaintiffs filed a Complaint on August 23, 2004, asserting negligence, strict products liability, and breach of warranty, based on Defendant's design, sale, and/or manufacture of the miter saw and work bench that caused his injuries. Def.'s Mot. at Ex. B. On September 15, 2004, Defendant filed its preliminary objections to Plaintiffs' complaint, moving to dismiss for lack of personal jurisdiction, as Black & Decker Corporation (1) has no place of business in the Commonwealth of Pennsylvania and (2) is a holding company not involved in the design, manufacture, assembly or sale of the products at issue. Def.'s Mot. at Ex. C., ¶¶ 33, 34. Defendant removed the case to this Court on September 22, 2004 on grounds of complete diversity between the parties. Defendant answered the complaint on October 6, 2004, denying that it was ever in the "business of designing, manufacturing or distributing power tools or associated products" including the saw and work bench that injured Mr. Padilla. Def.'s Ans. at 1, ¶ 3. Defendant's ninth affirmative defense echoed this contention. Id. at 8.

For approximately a year and six months prior to Plaintiffs' institution of the present action, Plaintiffs and Defendant Black & Decker Corporation exchanged various communications regarding the later's potential liability for the injuries suffered by Mr. Padilla. Plaintiffs addressed their initial correspondence of January 9, 2003, detailing the incident that injured Mr. Padilla and his resulting injuries in great detail, to Black & Decker Corporation, located at 701 East Joppa Road, Towson, Maryland, 21210. Pl's Opp'n, Ex. A. On January 16, 2003, a letter responsive to Plaintiffs' January 9 communication was sent to them from Albert K. Rommal on stationary that identified the sender as only "Black & Decker." Pl's Opp'n, Ex. B. Plaintiffs and/or their attorney then received a series of letters from a representative of Black &

Decker Corporation's casualty insurer, Crawford & Company, who requested the opportunity to examine the saw and work bench in order to make an investigation of the incident. Id. at Exs. C, D, & E. When Plaintiffs did not produce the requested materials, attorney Dean F. Murtagh sent Plaintiffs a letter, identifying himself as counsel for "Black & Decker (U.S.), Inc. in connection with [this matter] in the event that you choose to bring litigation." Id. at Ex. F. In his letter, Mr. Murtagh referenced a packet of information that Plaintiffs had previously provided to Black & Decker Corporation. Id. at 5. Several other communications from Mr. Murtagh or another member of his law firm followed. Id. at Exs. G, H, I. Mr. Murtagh is currently serving as counsel for Defendant Black & Decker Corporation in this matter. See Def.'s Mot. at 6 (listing Mr. Mutaugh as counsel to Black & Decker Corporation).

On December 27, 2004, Defendant filed the pending motion for summary judgment on the grounds that Plaintiffs had sued the wrong party, as Black & Decker Corporation did not design, manufacture, assemble, distribute, market, or sell the saw and work bench that injured Mr. Padilla. Def.'s Mot. at Ex. F., ¶ 3. Defendant also moves for summary judgment with respect to Count III ¶41(j) and Count VI ¶71(u) of the Amended Complaint, as Plaintiffs' allegations rest on a post-sale duty to remedy or warn of a defect in a product, a duty that Defendant claims is not recognized by Pennsylvania law. Id. at 3.

II. MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiffs move to amend their complaint to correct the name of the defendant party from Black & Decker Corporation to Black & Decker (U.S.), Inc.[1] Defendant claims that this

[1] In the alternative, Plaintiffs move to add Black & Decker (U.S.) Inc. as an additional party to all the allegations in the Complaint and/or to add an allegation that Black & Decker (U.S.) Inc. is a mere instrumentality of Black & Decker Corporation. As the Court finds that Plaintiff may correct the name of the defendant in this matter, it will not reach these arguments.

amendment should not be permitted, as the statute of limitations has expired and Plaintiffs cannot meet the requirements of Federal Rule of Civil Procedure 15(c).

Federal Rule of Civil Procedure 15 provides that a complaint may be amended such that the amendment of the pleading relates back to the date of the original pleading when:

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15. An amendment that relates back to the date of the filing of the original complaint under Rule 15(c)(3) is treated, for statute of limitations purposes, as if it had been filed at that time. Garvin v. City of Philadelphia, 354 F.3d 215, 220 (3d Cir. 2003).

The Commonwealth of Pennsylvania imposes a two year statute of limitations on personal injury actions brought in tort. 42 Pa. Cons. Stat. § 5524. The statute of limitations on Plaintiffs' claims therefore expired on July 5, 2004, a mere three days after Plaintiffs' commencement of this action by Writ of Summons. As the statute of limitations has run, Rule 15(1) is not available to them. The question thus becomes whether Plaintiffs' amendment is permissible under Rule 15(c)(2) or Rule 15(c)(3).

As a threshold question, the Court must determine whether Plaintiffs' proposed amendment merely corrects the name of a party or whether it adds a new party altogether. If it is the former, Plaintiffs need only meet the requirements of Rule 15(c)(2). If it is the latter,

Plaintiffs must meet the four requirements for relation back under Rule 15(c)(3) set forth by the United States v. Schiavone, 477 U.S. 21 (1986): (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirement must have been fulfilled within the prescribed limitations period. Id. at 29.

The Court finds that Plaintiffs have merely mislabled the proper plaintiff. In Datskow v. Teledyne, Inc., 899 F.2d 1298 (2d. Cir. 1990), the Second Circuit found that the plaintiffs had mislabeled the correct defendant, rather than having selecting the wrong defendant. The plaintiffs in Datskow were the decedents of persons who perished in a plane crash. Plaintiffs brought suit against "Teledyne, Inc., Continental Motors Division," whom they had identified as the manufacturer of the doomed aircraft. The named plaintiff was not actually the manufacturer of the plane, but rather a holding company with 39 subsidiaries, one of which was the actual manufacturer. After the applicable statute of limitations had run, plaintiffs moved to amend the complaint to name the correct plaintiff, which was known as "Teledyne Industries, Inc." and which was the parent company of the manufacturer of the plane, "Continental Motors Aircraft Products, a Division of Teledyne Industries, Inc." Id. at 1300-01. Teledyne, Inc. maintained that plaintiffs' action in suing Teledyne, Inc. (the parent) rather than Teledyne Industries, Inc. (the subsidiary), was fatal to their claim.

In reversing the district court's denial of plaintiffs' motion to amend, the Second Circuit determined that plaintiffs had merely mislabeled the correct defendant and that the defendant's conduct precluded it from using the absence of personal service to defeat plaintiffs' claims. The

Court found that the plaintiffs had identified the proper defendant in several ways – they had clearly intended to sue the manufacturer of the plane that caused the deaths of their decedents; they had listed the correct address in the caption for the entity they wanted to sue; and they had approximated the name of the entity they wished to sue in the caption of the complaint. Id. at 1301. The Court also emphasized that the proper plaintiff's choice to use the word "Teledyne" in its name was crucial, as it had essentially assumed the risk of being conflated with its parent and the 38 other subsidiaries, most of which had names containing the word "Teledyne" as well. Id. The Court stated that "the line between naming the wrong defendant and misnaming the right one must be drawn in light of the context of the nomenclature created by the defendant and the labeling undertaken by the plaintiffs assessed against that context." Id. The Court concluded that the combination of these factors resulted in Teledyne Industries, Inc. having been sufficiently alerted that it was the corporation being sued; it therefore found the case to be one of mislabeling. Id. at 1302.

The Court believes that the case at hand calls for a result identical to that reached by the Second Circuit in Teledyne. Plaintiffs have taken a number of steps to identify the proper defendant in this case. First, Plaintiffs clearly intended to sue the entity that manufactured the saw and work bench that injured Mr. Padilla. Second, Plaintiff states that Black & Decker (U.S.) Inc. and Black & Decker Corporation have the exact same address, a contention that Defendant Black & Decker Corporation does not dispute in its response to Plaintiff's motion to amend. Pl.'s Mot. to Amend at 9. This indicates that, as in Teledyne, Plaintiffs served the named defendant at the address of the proper defendant. Third, the Plaintiffs sued a party with a name substantially similar to that of the proper defendant. The record shows that Defendant Black & Decker Corporation uses the words "Black & Decker" as shorthand for the parent holding

corporation, as well as its subsidiaries, which indicates that Plaintiff's confusion as to the appropriate name was understandable. Pl.'s Opp'n at Exs. I, J, L, M. Moreover, there are additional facts in this case that compel the conclusion that Plaintiffs sued the correct party. Materials that were sent by Plaintiffs to Black & Decker Corporation apparently made their way to Mr. Murtagh, who self-identified as counsel to Black & Decker (U.S.), Inc. Additionally, Mr. Murtagh is serving as counsel to Black & Decker Corporation in the instant action, leading to the inevitable conclusion that an agent of Black & Decker (U.S.), Inc. has been appraised of all aspects of this litigation since its inception in state court. Given all of the above, the Court concludes that Plaintiffs' motion is, in fact, one to merely change a misnomer rather than one to change a party.

Even if the Plaintiffs did intend to change parties by naming Black & Decker (U.S.), Inc., the Court alternatively finds that relation back is appropriate under Rule 15(c)(3). There is no question that the basic claim asserted against Black & Decker (U.S.), Inc. arose out of the identical conduct set forth in Plaintiffs' original pleading. Under the test set out by the Supreme Court in Schiavone, Plaintiffs must still show that (1) Black & Decker (U.S.), Inc. has received such notice that it will not be prejudiced in maintaining its defense; (2) that Black & Decker (U.S.), Inc. must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (3) that both of these things happened within120 days following the filing of the action, the period provided for service of the complaint by Rule 4(m) of the Federal Rules of Civil Procedure.

The Court finds that Plaintiffs met both of these requirements within the 120 day period imposed by Rule 4(m). Plaintiff's complaint was filed on August 23, 2004. The 120 day period for service therefore ended on December 21, 2004. The Third Circuit has found that a district

court can impute notice to a party sought to be named under Rule 15(c)(3) through the "shared attorney" method. See Garvin v. City of Philadelphia, 354 F. 3d 215, 222 (3d Cir. 2003). This method of imputing notice reflects the common sense notion that when the originally named party and the party sought to be added have the same attorney, "the attorney is likely to have communicated to the latter party that he may very well be joined in the action." Id. at 222-23 (citing Singletary v. Pennsylvania Dep't of Corrs., 266 F.3d 186, 196 (3d Cir. 2001). The relevant inquiry under the "shared attorney" method is whether "notice of the institution of the action can be imputed to [the defendant sought to be named] within the relevant 120 day period . . . by virtue of representation [he] shared with a defendant originally named in the lawsuit." Id. at 223 (citing Singletary, 266 F.3d at 196). Counsel for Black & Decker Corporation in the instant action clearly communicated his status with respect to Black & Decker (U.S.) Inc. in a letter to Plaintiffs' counsel dated August 14, 2003. On that date, Mr. Murtagh wrote, "Please be advised that I will be counsel for Black & Decker (U.S.) Inc. in connection with [this] matter, in the event that you choose to bring litigation." Pl.'s Opp'n at Ex. F. The Court finds that the imputation of notice to Black & Decker (U.S.), Inc. through Mr. Murtagh is proper.

Moreover, the Court finds that there would be no prejudice to Black & Decker (U.S.) Inc. by being joined to this action via a relation-back under Rule 15(c)(3). The prejudice referred to in Rule 15 has been described by the Third Circuit as that which inures to "one, who, for lack of timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale." Garvin v. City of Philadelphia, 354 F. 3d 215, 220 n.6 (citing Nelson v. County of Allegheny, 60 F.3d 1010, 1014-15 (3d Cir.1995)). There is evidence in the record that a representative of Black & Decker (U.S.) knew of the possibility that it would be sued as a result of Mr. Padilla's injuries as early as August 14, 2003, more than a full year

prior to Plaintiff's filing suit in the Court of Common Pleas. Pl's Opp'n, Ex. F. Moreover, once Plaintiff did file suit, the named defendant was represented by counsel who had previously identified himself as counsel to Black & Decker (U.S.), Inc. The Court therefore finds no reason to believe that Black & Decker (U.S.) Inc. would not be able to mount a full defense in this action, especially given that factual and expert discovery in this matter is not due to be completed until September 11, 2005 and dispositive motions are not due until September 25, 2005.[2] See Doc. No. 12 (Revised Scheduling Order).

For all of the above reasons, Plaintiffs shall be permitted to amend their complaint to correct the name of the defendant party from Black & Decker Corporation to Black & Decker (U.S.), Inc.

III. MOTION FOR SUMMARY JUDGMENT

Defendant Black & Decker Corporation moves for summary judgment on two distinct grounds. First, Defendant moves for summary judgment on all claims, as it was not involved in the design, manufacture, assembly, or supply of the saw or the work bench involved in Mr. Padilla's accident. Def.'s Mot. at 2. Second, Defendant moves for summary judgment with respect to Count III ¶41(j) and Count VI ¶71(u) of the Amended Complaint, as those paragraphs articulate a post-sale duty to remedy or warn of a defect in a product, a duty that Defendant claims is not recognized by Pennsylvania law. Def.'s Mot. at 3.

[2] Factual discovery in this matter is due to be completed on June 11, 2005. If Defendant Black & Decker (U.S.) Inc. finds it requires more time to complete that process, it should a motion to amend the discovery schedule with this Court. Given that materials have already apparently passed between Black & Decker Corporation and Black & Decker (U.S.) Inc. with no trouble to speak of, the Court does not anticipate that Black & Decker (U.S.) Inc. should find itself prejudiced by the existing discovery schedule.

The first part of Defendant's summary judgment is dismissed as moot, as the Court has determined above that Plaintiff may amend its complaint to correct its misnomer. The Court has found that Plaintiff indeed sued the correct defendant responsible for the design, manufacture, assembly and/or supply of the saw and workbench.

The second part of Defendant's summary judgment strictly involves a question of Pennsylvania products liability law. Defendant claims that Pennsylvania law does not recognize a post-sale duty to warn, retrofit, or recall. Def.'s Mot. at 3. Plaintiff claims that Pennsylvania law does, in fact, recognize such a duty. Pls.' Opp'n at 3.

The Supreme Court of Pennsylvania has recognized a manufacturer's limited post-sale duty to warn in Walton v. Avco Corp., 610 A.2d 454 (1992). In that case, the decedents of two persons who were killed in a helicopter crash sued, among others, Hughes Helicopter, Inc., the helicopter manufacturer. Plaintiffs alleged that Hughes Helicopter had incorporated an engine with a defective part into the helicopter, then had failed to warn the owners of the helicopter after it received a service bulletin from the engine manufacturer detailing the exact defect at issue in the case, as well as how to repair it; the jury returned a verdict in plaintiffs' favor. Id. at 457. The Court upheld the imposition of a duty to warn on Hughes Helicopter, noting that "[i]t has long been the law in Pennsylvania that a "defective condition" includes the lack of adequate warnings or instructions required for a product's safe use." Id. at 458 (citations omitted).

The Court in Walton also emphasized that the particular context of that case made the imposition of a post-sale duty to warn appropriate. First, the Court noted that Hughes' duty to warn stemmed from its actual knowledge of the defect in the engine. Id. at 457. This limitation is consistent with the Superior Court of Pennsylvania's holding in Lynch v. McStome & Lincoln Plaza Associates, 548 A.2d 1276 (1988), that no post-sale duty to warn existed where no defect

existed in the product at the time of sale. In reviewing the jurisprudence of other jurisdictions that have recognized a "continuing duty to warn," the Court stated that this obligation describes no more than that "imposed where a manufacturer or seller, believing that it has sold a non-defective product, subsequently learns that its product was, in fact, defective when placed in the stream of commerce. . . . saying that there is a 'continuing duty to warn' is, of course, a tacit recognition that the duty existed in the first instance. " Id. at 1281. Post-Walton, other Pennsylvania courts have continued to recognize the distinction between circumstances in which a plaintiff attempts to impose a post-sale duty to warn where the product was defective from the date of the manufacture and where the manufacturer had notice of the defect and those in which the product was not defective at the time of the sale. See Sullivan v. Modern Group, Ltd., 46 Pa. D. & C. 4th 524, 531 (Pa. Ct. Com. Pl. 2000) ("The most important distinction between [Walton] and [Lynch] is that in Walton . . . the product was detective from the date of the manufacture and where the manufacturer had notice of the defect. . . . [i]n Lynch, the product was not defective at the time of the sale"); DeSantis v. Frick, 745 A.2d 624, 630 (Pa. Super. Ct. 1999) ("This Court has ruled that no post-sale duty to warn exists where no defect existed in the product at the time of sale.").

Second, the Court in Walton noted that the "peculiarities of the industry also go far to support this imposition of responsibility":

> Helicopters are not ordinary goods. By their nature they are not the types of objects that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate. Helicopters are not mass-produced or mass-marketed products; to the contrary, they are sold in a small and distinct market. Additionally, establishments that service helicopters are convenient and logical points of contact.

Id. at 459. As with the Walton court's first limitation, other Pennsylvania courts and federal courts sitting in diversity, have used the Supreme Court's language to limit the number of plaintiffs able to go forward or prevail on a post-sale failure to warn theory. In Habecker v. Clark Equipment Co., 797 F. Supp. 381 (M.D. Pa. 1992), aff'd 36 F.3d 278 (3d. Cir.1994), cert. denied, 514 U.S. 1003 (1995), the plaintiff was a decedent of a forklift operator who was thrown from the cab of an out-of-control forklift and subsequently crushed to death; plaintiff attempted to proceed on a theory of post-sale failure to warn that the forklift's lack of operator restraints made operation of the forklift more dangerous. The district court found that the holding in Walton appeared to be "in a state of confusion." Without guidance from other Pennsylvania courts, the district court held that it was not willing to extend the holding in Walton to "common business appliances such as forklifts." Id. at 388. Similarly, in Engle v. BT Industries AB, 41 Pa. D. & C.4th 25 (Pa. Ct. Com. Pl. 1999), the court was faced with the issue as to whether a plaintiff could proceed on a failure-to-warn theory against the manufacture of a forklift. In holding that Lynch controlled, the court reasoned that a forklift is "a product not as unique as a helicopter" and declined to extend the duty to warn, quoting Habecker's language regarding to "common business appliances." Id.

The Court believes that the cases discussed above illuminate two points. First, the Pennsylvania Supreme Court has held that, in certain circumstances, a plaintiff may proceed on a theory of a post-sale duty to warn. Second, whether a plaintiff will be able to proceed on such a theory is a highly fact-intensive question. Potential material questions of fact on this matter will include, but perhaps not be limited to, whether the product was defective at the time it left the hands of the manufacturer, whether the manufacturer subsequently became aware of that defect, whether the goods are sold in a "small or distinct market," and whether the establishments that

service the product are "convenient and logical points of contact." It appears that the most important of these questions, for purposes of determining whether a cause of action for post-sale failure to warn will lie under Pennsylvania law, is whether the saw and workbench had a latent defect at the time of sale. In Habecker, the district court noted that plaintiff was not alleging that the forklift had a latent defect at the time it left the manufacturer that would make the product dangerous for everyday use, but rather that a new device (a restraint) could be installed to an existing product to make it safer to use in certain circumstances (in the event of a rollover). Habecker, 797 F. Supp. at 387. If Plaintiffs are able to allege such a latent defect, the Court does not feel that allowing such a post-sale duty to warn claim to proceed would require an enormous extension of the holding in Walton.

Moreover, the Court believes that the timing of this motion for summary judgment is relevant to its determination that it should be denied. Factual discovery is not set to close in this matter until June of 2005, while expert discovery is not set to close in this matter until September 2005. See Doc. No. 12 (Revised Scheduling Order). The Court believes that precluding a claim for a post-sale duty to warn is premature at this early stage of discovery. This is especially so, given that the facts most relevant to the claim's ultimate survival or demise have yet to be uncovered, or at least revealed to this Court.

Lastly, the Court finds that the limited duty to warn created in Walton does not, however, extend to the duty to recall and retrofit. See Boyer v. Case Corp., 1998 WL 205695 *2 (E.D. Pa. 1998) (declining to extend Walton to include a duty to recall and retrofit); see also Girard v. Allis Chalmers Corp., Inc., 78 F. Supp. 482, 486 n.3 (W.D. Pa. 1992). Insofar Plaintiff's complaint articulates a claim for such post-sale duties, the Court will not permit Plaintiff to proceed on such claims.

As such, Defendant's motion for summary judgment as to Count III ¶41(j) and Count VI ¶71(u) of the Amended Complaint, insofar as those paragraphs articulate a post-sale duty to warn of a defect in a product is denied. To the extent that those paragraphs allege a cause of action based on a duty to retrofit or recall, the Court finds that there is no support in Pennsylvania law for such a claim and Defendant's motion is granted.

IV. CONCLUSION

Plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. No. 9) is GRANTED. Plaintiffs shall amend their complaint to correct the name of the defendant party from Black & Decker Corporation to Black & Decker (U.S.), Inc. Defendant's Motion for Summary Judgment as to Count III ¶41(j) and Count VI ¶71(u) of the Amended Complaint is DENIED with respect to Plaintiffs' post-sale failure to warn claim and GRANTED with respect to Plaintiffs' post-sale failure to retrofit or recall.

BY THE COURT:

/s/
Legrome D. Davis, J.