

Williams v Madvapes Holdings, LLC

2018 NY Slip Op 33569(U)

June 6, 2018

Supreme Court, Queens County

Docket Number: 705934/2016

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

KATERINA WILLIAMS, Index No.: 705934/2016

Plaintiff, Motion Date: 5/24/18

- against - Motion No.: 191

MADVAPES HOLDINGS, LLC, VAPE EASY, and Motion Seq.: 8
LG CHEM LTD.,

Defendants.

- - - - - X

The following electronically filed documents read on this motion by defendant LG CHEM LTD. (LG Chem) for an Order pursuant to 22 NYCRR 202.21(e), vacating plaintiff's Note of Issue and Certificate of Readiness for Trial, and striking this action from the trial calendar or, alternatively, an Order pursuant to CPLR 3124, compelling production of various items of outstanding discovery on a date certain and extending the time for all dispositive motions, including summary judgment motions, until 120 days after discovery had been completed; on this cross-motion by defendant MADVAPES HOLDINGS, LLC (Madvapes) for an Order striking the Note of Issue, removing the case from the trial calendar, and extending time to file motions for summary judgment; and on this cross-motion by plaintiff KATRINA WILLIAMS for a Protective Order pursuant to CPLR 3103, denying and/or modifying defendant LG Chem's request for a third session of testing, for an Order pursuant to CPLR 3124 and 3126, striking the answer of defendant LG Chem for its willful failure to comply with plaintiff's Notice for Discovery and Inspection, dated December 6, 2017, and willful failure to provide plaintiff with copies of all photographs taken by defendants' examining plastic surgeon, or, alternatively, for an Order compelling LG Chem to comply with plaintiff's Notice for Discovery and Inspection and to provide plaintiff with copies of all photographs taken by defendant's examining plastic surgeon:

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....EF 128 - 140
Notice of Cross-Motion-Affirmation-Exhibits.....EF 141 - 146
Affirmation in Opposition-Exhibits.....EF 162 - 17

Notice of Cross-Motion-Affirmation-Exhibits.....EF 213 - 238,
239
Affirmation in Opposition to Cross-Motion-Exhibits..EF 260 - 267
Reply Affirmation.....EF 270 - 271
Affirmation in Opposition to Cross-Motion.....EF 272

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on April 7, 2016 when she was injured by a vape/e-cigarette battery that combusted on her person.

After a conference held on May 24, 2018, branches of the motion and cross-motions were decided by Order filed on June 5, 2018. Remaining are those portions of the motion and cross-motions regarding the destructive testing and the inspection of plaintiff's clothing.

As is relevant here, defendant LG Chem seeks destructive testing of the battery cell at issue in the case (the Incident Cell), and the companion cell (the Companion Cell), which was also in the zipped pocket of plaintiff's pants at the time of the incident. On June 20, 2017, the Incident Cell, Companion Cell, and other equipment were transported to LG Chem's facility in Natick, Massachusetts for all day extensive non-destructive testing. Plaintiff's battery expert was also present. LG Chem then requested a second day of testing. By letter dated July 25, 2017, plaintiff confirmed that all testing had been completed, that defendant's expert had refused to finish testing of one piece of equipment due to a short-circuit, and that if defendant insisted that such testing had to take place at defendant's expert's facility then plaintiff would require reimbursement for all expenses. The second inspection and testing was conducted on August 30, 2017 in New York City on August 15, 2017, but due to scheduling conflicts, plaintiff's expert was unable to be present. LG Chem then requested destructive testing to be conducted at its expert's facility.

LG Chem now seeks an Order permitting the destructive testing of the Cells. Madvapes contends that destructive testing is necessary to the defense of the case. The destructive testing of the Cells is required for defendants' experts to determine the exact cause of the battery's failure and, thus, the proximate cause of the accident. Defendants seek to learn whether the battery failure was due to an external short or the result of an internal manufacturing defect.

Plaintiff does not consent to the destructive testing and cross-moves for a Protective Order, denying or modifying

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defendant LG Chem's request for destructive testing of Cells and denying or modifying the request for the inspection of plaintiff's clothing.

In support of the application seeking destructive testing, LG Chem submits an affidavit from Dr. Troy Hayes, the Principal Engineer of Exponent Inc. (Exponent). Dr. Hayes affirms that on June 20, 2017, the non-destructive inspection of the Incident Cell, Companion Cell, and other equipment was conducted. A second non-destructive inspection was conducted by Jessica Piper, an electrical engineer at Exponent, on August 30, 2017. After analyzing the data, Exponent determined that the Incident Cell could be consistent with a battery cell manufactured by LG Chem while the Companion Cell was likely inconsistent with a battery cell manufactured by LG Chem. Additionally, the results revealed that there was evidence on the top rim of the Incident Cell, indicating damage from the possible occurrence of external shorting on the Incident Cell. Such external damage can result from an external shorting of the Incident Cell, the Companion Cell, or other extenuating circumstances. Without cleaning the residue from the surface of the Incident Cell and Companion Cell, removing the wrapper located around the cells, and performing further testing of the cells, Exponent is unable to confirm that the damage of the Incident Cell resulted from external shorting of the Incident Cell and is unable to determine the potential factors that led to the external shorting of the Incident Cell. Destructive testing of the cells would allow Exponent the ability to determine the potential factors that led to damage to, and the failure of, the Incident Cell.

Parties are entitled to liberal discovery of "all matters material and necessary in the prosecution" of their action (CPLR 3101[a]). The determination of what is "material and necessary" is within the sound discretion of the trial court (See Andon v 302-304 Mott St. Assoc., 94 NY2d 740 [2000]). Destructive testing should be permitted when a defendant makes sufficient showing that it is material and necessary to their defense of plaintiff's claims and cross-claims, without which the defendant would be unable to mount proper defense (see Castro v Alden Leeds, Inc., 116 AD2d 549 [2d Dept. 1986]; Nenadovic v P.T. Tenants Corp., 84 AD3d 527 [1st Dept. 2011]).

Here, LG Chem made a sufficient showing that the destructive testing set forth in Dr. Hayes' affidavit is material and necessary to the defense of the action and that defendants would be prejudiced if they were not permitted to perform the tests. Dr. Hayes indicated the extent to which the test would alter or change the cells. Additionally, Dr. Hayes affirmed that no

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essential part of the cells would disappear aside from the removal of the wrapper and the cleaning of the residue. Based upon the record before the Court, it appears that defendants will be unable to properly defend themselves without the proposed destructive testing. Additionally, there is no dispute that photographs of the cells exist, which will enable the jury to assess the condition of the cells and the wrappers prior to the testing.

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that the motion and cross-motions are denied; and it is further

ORDERED, that plaintiff shall produce the Incident Cell and Companion Cell for destructive testing as set forth in Dr. Hayes' affidavit at and on a mutually agreeable place, date, and time on or before, but no later than **August 1, 2018**; and it is further

ORDERED, that if the parties cannot agree upon a date and time for the destructive testing, the testing shall be conducted at LG Chem Inc.'s expert's facility located in Princeton, New Jersey on **Wednesday, August 1, 2018 at 10:00 a.m.**; and it is further

ORDERED, that the destructive testing must be documented with video throughout the process so that it can be shown to jurors during trial; and it is further

ORDERED, that if plaintiff so desires, plaintiff's expert shall be permitted to be present for any and all destructive testing; and it is further

ORDERED, that the inspection of plaintiff's clothing shall take place on a mutually agreeable date and time on or before, but no later than **Wednesday, July 25, 2018** at plaintiff's counsel's office; and it is further

ORDERED, that defendant LG Chem, Inc. shall pay plaintiff's counsel \$5,000.00 for costs and expenses related to the testing; and it is further

ORDERED, that any and all applications not addressed herein are denied.

Dated: June 6, 2018
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

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