SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

JENNY SHULMAN and BRONISLAV KRUTKOVICH,

Plaintiffs,

- against -

BRENNTAG NORTH AMERICA, INC., *et al.*,

Defendants.

INDEX NO. 190025/2017

MOTION DATE 12/19/2018

MOTION SEQ. NO. 011

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on plaintiffs' motion to vacate the recommendation of the Special Master:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion to vacate the November 6, 2018 and November 9, 2018 recommendations of Special Master Shelley Olsen, is granted only to the extent of allowing plaintiffs to use at the time of trial the October 2018 report of Dr. William Longo, that was provided to the defendants on November 2, 2018. The remainder of the relief sought is denied.

Plaintiff, Jenny Shulman, was diagnosed with peritoneal mesothelioma after a hysterectomy and oophrectomy for endometrial cancer on or about February 2016. She was forty (40) years old at the time of her diagnosis. Ms. Shulman's exposure - as relevant to this motion - is allegedly from the use of Johnson & Johnson and Johnson &Johnson Consumer Inc.'s (hereinafter referred to jointly as "defendants") products, specifically, Johnson & Johnson Baby Powder ("JJBP"). Ms. Shulman alleges that she used JJBP daily from 1980 to 1990 and continued to use JJBP with less regularity, when she started using other manufacturers talc products, from 1991 through 2011.

Plaintiffs' case was assigned to the April 2018 - In Extremis trial cluster and transferred to this Court as trial ready on June 26, 2018. The Note of Issue stating that all discovery is complete in this action, was filed on October 2, 2018 (Opp. Kurland Aff., Exh. E).

On July 17, 2018 plaintiffs' expert Dr. William Longo received ten samples of JBP from the defendants' museum collection for testing, representing a period from about 1966 to 1985. The samples were provided as part of a Court Ordered Stipulation in a Federal Multi-District Litigation pending in New Jersey, that is unrelated to this action (Mot. Block Aff., Exh. D). Plaintiffs claim that Dr. Longo completed testing on ten samples on October 29, 2018 and prepared a report of the testing results on October 29-31, 2018 (Mot. Block Aff., Exh. E). On November 2, 2018 plaintiffs served a copy of Dr. Longo's October 2018 report on the defendants in another unrelated matter pending in Maryland (Mot. Block Aff., Exh. H).

Defendants sent an e-mail to Special Master Shelley Olsen on November 6, 2018 seeking a clear instruction as to plaintiffs' use of Dr. Longo's October 2018 report at trial and expressing concern that he was about to release "a slew of new testing results that have not been previously disclosed to J&J in any jurisdiction"

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

(Mot. Block Aff. Exh. A). On November 6, 2018 Special Master Olsen issued a recommendation that "Plaintiff will not introduce testing results on which J&J had not been given the opportunity to depose Dr. Longo during discovery of this case." She further determined that "Post-note of issue testing will not come in (at trial) unless Dr. Longo was produced (post-note of issue) for deposition and was questioned on that post-note of issue testing prior to the case being transferred for trial" (Opp. Kurland Aff., Exh. K).

On November 9, 2018 plaintiff's e-mailed Special Master Olsen to further clarify that the testing on the ten samples by Dr. Longo in the October 2018 report was highly probative and that defendants had delayed in providing the samples of JBP until a protracted discovery process that was part of the Federal MDL, and there had been discovery in the form of depositions of Dr. Longo concerning the October 2018 report in other actions (Opp. Kurland Aff., Exh. F).

By e-mail dated November 8, 2018 plaintiffs sought to have Special Master Olsen clarify and/or reconsider the November 6, 2018 recommendation. Plaintiffs stated that it was unclear which specific testing the defendants were objecting to and expressed concerns that her earlier recommendation would include precluding Dr. Longo's October 2018 report. Plaintiffs claimed that although Dr. Longo had more recently tested other JBP samples the significance of Dr. Longo's testing of defendants samples instead of those obtained from other sources that were repeatedly challenged, warranted excluding them from preclusion. Plaintiffs claimed they had sought the samples tested by Dr. Longo in the October 2018 report, as early as April 4, 2018 but did not obtain them until mid-July of 2018. Plaintiffs also argued that there was no prejudice to the defendants because the ten samples tested by Dr. Longo had always been in the defendants possession and Dr. Longo had been deposed on the testing of these samples and the October 2018 report in other actions (Opp. Kurland Aff., Exh. L).

Special Master Olsen issued her second recommendation on November 9, 2018 confirming the prior recommendation (Opp. Kurland, Exh. F). She specifically recommended that plaintiffs "proceed to trial without these new results, or withdraw their Note of Issue to reopen discovery, Or appeal this ruling" (Opp. Kurland Aff, Exh. F).

Plaintiffs' motion seeks to vacate Special Master Shelley Olsen's November 6, 2018 and November 9, 2018 recommendations precluding the plaintiffs from using Dr. Longo's October 2018 report at the time of trial.

In New York City Asbestos Litigation ("NYCAL") the Court has "full authority under the controlling Case Management Order (CMO) to issue its discovery order." The CMO is recognized as a controlling factor for all cases and states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring that parties comply with discovery, and as a result, recommends rulings on all discovery disputes (Ames v A.O. Smith Water Products, et al., 66 AD3d 600, 887 NYS2d 580 [1st Dept. 2009]). Pursuant to CMO Section III(C) the Special Master's recommendations are appealable to this court.

By restricting Dr. Longo's trial testimony, Special Master Olsen properly concluded that defendants are entitled to an end date for discovery before trial. This restriction is permitted under the NYCAL CMO Section IX(O) "Post-Note Discovery" which permits discovery after the note of issue pursuant to 22 NYCRR §202.21(d) and the directive of either the Special Master or the Court.

22 NYCRR §202.21(d) permits post note of issue discovery where there are "unusual or unanticipated circumstances," requiring the disclosure to prevent substantial prejudice to the party seeking discovery. The mere lack of diligence does not constitute "unusual or unanticipated circumstances." (See Arons v. Jutkowitz, 9 N.Y. 3d 393, 880 N.E. 2d 831, 850 N.Y.S. 2d 345 [2007] and Audiovox Corporation v. Benyamini, 265 A.D. 2d 135, 707 N.Y.S. 2d 137 [2nd Dept., 2000]).

The delay in obtaining disclosure before the note of issue is filed is an "unusual or unanticipated circumstance" sufficient to warrant post-note of issue discovery under 22 NYCRR §202.21(d) to avoid prejudice (Bermel v. Dagostino, 50 A.D.3d 303, 855 N.Y.S. 2d 73 [1st Dept. 2008] and Jones v. Seta, 143 A.D. 3d 482, 38 N.Y.S. 3d 422 [1st Dept. 2016]).

Special Master Olsen correctly concluded that plaintiffs' expert reports prepared after the note of issue is filed, and the case is deemed trial ready, should generally be excluded at trial to avoid any prejudice to the defendants. Therefore any reports subsequent to Dr. Longo's October 2018 report are precluded.

Plaintiffs have shown that the materials tested by Dr. Longo in the October 2018 report were not provided earlier and could not have been tested sooner because they were only obtained through a Court Ordered Stipulation in the Federal Multi-District Litigation. The test samples used by Dr. Longo in his October 2018 report were the same samples used by defendants' experts, and would serve to refute claims that the other samples were purchased through unsecure or unverified means and potentially tainted. The inability to use Dr. Longo's October 2018 report would prejudice the plaintiffs.

CPLR §3101(d)(1)(i) requires that a party identify the expert witness being called and provide in reasonable detail the subject matter the expert is expected to testify about, the expert's qualifications, and a summary of the grounds for the expert's opinion. CPLR §3101(d)(1)(i) does not have a specific time frame for the exchange of expert testimony and preclusion can be avoided by a showing of "good cause" for the delay, that the noncompliance was not willful, and that the other party being served with the report would not be prejudiced (See McKinney's Consolidated Laws of New York Annotated CPLR §3101(d)(1)(i), Public Adm'r of Bronx County v. 485 -188th Street Realty Corp., 116 A.D. 3d 1, 981 N.Y.S. 2d 381 [1st Dept. 2014] citing to Martin v. Triborough Bridge and Tunnel Authority, 73 A.D. 3d 481, 901 N.Y.S. 2d 193 [1st Dept. 2010]).

Plaintiffs have shown that in this instance their actions were not willful and there is good cause for the delay since the materials tested by Dr. Longo were always in the defendants possession, not provided willingly as part of discovery, and could not have been tested sooner because they were only obtained after a Court Ordered Stipulation in the Federal Multi-District Litigation. Plaintiffs did not delay and Dr. Longo's report was provided to the defendants within less than a week after the testing was completed.

Defendants have not shown that they would be prejudiced by the late additional disclosure. Dr. Longo's report was exchanged approximately two months before the assigned trial date, and since that time defendants have had multiple opportunities to depose Dr. Longo and have deposed him about the report in other actions. The CMO "Section XI. Depostions" permits the parties to use depositions and other discovery obtained in other cases and jurisdictions. Plaintiff have shown Dr. Longo was deposed by the defendants in other actions on November 5, 6, and 27, 2018 and on December 4 and 5, 2018 (Mot. Block Aff. Exhs. I and K and Reply Exhs. 1, 2 and 3). Dr. Longo's deposition testimony that included references to the October 2018 report was completed in an unrelated California action on December 5, 2018 (See Reply Exh. 2). Plaintiffs have also shown that defendants' expert Dr. Matthew Sanchez has conducted testing of the same ten samples as Dr. Longo, and prepared a "counter- report" dated November 12, 2018 (Mot. Block Aff. Exh. F). On November 21, 2018 Dr. Sanchez also testified at a deposition about Dr. Longo's test results in another unrelated action (Reply Exh. 4, pgs. 50 - 54). Defendants will be able to use Dr. Longo's deposition testimony and their expert's report and testimony to refute Dr. Longo's findings at trial.

Plaintiffs have shown that the defendants will not be prejudiced by their use at the time of trial of Dr. Longo's October 2018 report, avoiding the need to

preclude his testimony at the time of trial.

ACCORDINGLY, it is ORDERED that plaintiffs' motion to vacate the November 6, 2018 and November 9, 2018 recommendations of Special Master Shelley Olsen, is granted only to the extent of allowing plaintiffs to use at trial the October 2018 report of Dr. William Longo, that was provided to the defendants on November 2, 2018 and it is further,

ORDERED that Special Master Shelley Olsen's November 6, 2018 and November 9, 2018 recommendations are vacated only as to the use at trial of the October 2018 report of Dr. William Longo that was provided to the defendants on November 2, 2018, and it is further,

ORDERED, that the remainder of Special Master Shelley Olsen's November 6, 2018 and November 9, 2018 recommendations are confirmed as to any reports prepared by Dr. William Longo after October of 2018, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied.

ENTER:

Dated: January 7, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE