

Young v Avon Prods., Inc.

2019 NY Slip Op 30635(U)

March 13, 2019

Supreme Court, New York County

Docket Number: 190383/2016

Judge: Manuel J. Mendez

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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

KIM YOUNG and J.C.YOUNG,
Plaintiffs,

INDEX NO. 190383/2016

- against -

MOTION DATE 03/06/2019

AVON PRODUCTS, INC., et al.,
Defendants.

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on plaintiffs' motion to vacate the Special Master's Recommendation:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion to vacate the February 7, 2019 Recommendation of Special Master Shelley Olsen that granted defendant Avon Products Inc.'s (hereinafter "Avon") application for defense expert discovery of samples using a Scanning Electron Microscope ("SEM") located at the plaintiff's expert, Dr. Mark Longo's laboratory, owned by Material Analytical Services, LLC ("MAS") and pursuant to CPLR §3103 for a protective Order, is denied.

Plaintiff, Kim Young, was diagnosed with peritoneal mesothelioma. She is 61 years old. Plaintiff was deposed in this action over the course of two days on March 16 and 17, 2017 (Mot. Tully Aff., Exh. A). During her deposition Mrs. Young identified several different talc products used by her and her family on a daily basis. Mrs. Young's exposure - as relevant to this motion - is from Avon talc products during the period of 1961 through 1999. Mrs. Young specifically identified three Avon talc products: "Unforgettable," "Bird of Paradise" and "Skin So Soft." Plaintiffs allege that the Avon talc products Mrs. Young used during the relevant period were contaminated with asbestos that caused her mesothelioma (Mot. Tully Aff., Exh. A).

Plaintiffs' expert Dr. William Longo - between April 12, 2017 and April 9, 2017 - analyzed two historic samples of Avon's product "Unforgettable," using a Transmission Electron Microscope ("TEM"), Selected Area Diffraction ("SAED") and Energy Dispersive Spectroscopy ("EDXA"), as a means of determining the presence of amphibole asbestos fibers. Dr. Longo did not perform any analysis using a Scanning Electron Microscope ("SEM"), and plaintiffs allege this is because the methodology is not recognized for the identification of regulated asbestos fibers.

Avon's counsel sent a letter dated January 18, 2019 to plaintiff's counsel requesting permission for its expert Mr. Drew Van Orden and at least one other individual to go to MAS within thirty (30) days to obtain samples and utilize MAS's TEM and SEM equipment (Opp. McAtee Aff. Exh. 7). Avon's counsel sent a letter dated January 24, 2019 to plaintiff's counsel objecting to February 6, 7, 11 or 18, 2019 as not providing enough time to conduct expert discovery before trial (Opp. McAtee Aff. Exh. 8). By e-mail dated January 30, 2019, Avon maintained its

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

objections to the plaintiffs proposed dates, but proposed a protocol for Mr. Van Orden's visit to MAS, that included: obtaining aliquot; inspecting Dr. Longo's grids, which could not be moved because they are extremely fragile; and obtaining full access to MAS and SEM with a microscopist to operate the equipment (Mot. Tully Aff., Exh. C). On February 1, 2019 plaintiffs' counsel confirmed all of the protocol except for access to the SEM, because Dr. Longo did not use that testing, and claiming that it was irrelevant, unnecessary and overly burdensome (Mot. Tully Aff. Exh. D).

On February 4, 2019 Avon's counsel wrote to Special Master Shelly Olsen advising her of the dispute over Mr. Van Orden's use of the SEM equipment on a February 6, 2019 scheduled visit (Mot. Tully Aff. Exh. E). On February 5, 2019 the Special Master provided plaintiff's counsel an opportunity to reply to Avon's e-mail. Plaintiff's counsel objected on the grounds that Avon was trying to force Dr. Longo to change his lab schedule to permit additional testing that is not required by recognized protocol, on short notice, and when the equipment was unavailable. Plaintiff's counsel also advised that Dr. Longo had not performed any SEM testing only TEM testing of the "Unforgettable sample (Mot. Tully Aff. Exh. F). Avon's counsel agreed to conduct any SEM testing on a different date and otherwise proceed on February 6, 2019 with the protocol the parties had agreed to. On February 7, 2019, Special Master Olsen sent an e-mail agreeing with Avon's position (Mot. Tully Aff. Exh. G).

Plaintiffs now move for an Order vacating Special Master Shelley Olsen's recommendation made on February 7, 2019, that granted Avon's application and pursuant to CPLR §3103(a) for a protective order.

Plaintiffs argue that Special Master Olsen's February 7, 2019 recommendation should be set aside because it failed to take into account that: (1) SEM testing is not part of any recognized protocol; (2) Mr. Van Orden in a prepared affidavit dated February 18, 2019 already made a determination without the SEM testing (See Mot. Tully Aff., Exh. J); (3) Avon can question Dr. Longo about his analysis at his scheduled March 14, 2019 deposition; (4) having Dr. Longo make the SEM equipment available to Avon's expert when there is only one available at MAS, and it costs \$500.00 per hour to operate, is unduly burdensome, financially and operationally; and (5) that Avon will not be prejudiced if prevented from conducting SEM testing because Avon is in possession of historic samples of the "Unforgettable" product and can conduct testing on its own in whatever manner or facility it chooses.

Avon argues that Special Master Olsen's recommendation was correct because the TEM and SEM testing on the same samples used by Dr. Longo will support Mr. Van Orden's formation of his own opinion regarding the reliability and adequacy of Dr. Longo's methods and conclusions. Avon relies on CPLR §3101[a] arguing that Mr. Van Orden's SEM testing of Dr. Longo's samples at MAS is material and necessary.

CPLR §3101[a] requires full disclosure of "material and necessary" discovery regardless of the burden of proof. Discovery should lead to disclosure of admissible proof and parties to an action are entitled to reasonable discovery of any relevant facts (*Allen v. Crowell-Collier Publ.Co.*, 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968] and *In re New York County DES Litigation*, 171 A.D. 2d 119, 575 N.Y.S. 2d 19 [1st Dept. 1991]). It is within the Court's discretion to determine whether the discovery sought is "material and necessary." "Material and necessary" is to be liberally interpreted as requiring disclosure of any relevant facts which will assist in trial preparation (*Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994] and *Rahman v. Pollari*, 107 A.D. 3d 452, 967 N.Y.s. 2d 31 [1st Dept., 2013]).

CPLR §3103[a] permits the Court to issue a protective order to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other

prejudice” The movant bears the burden of proof to establish entitlement to a protective order. The Court has broad discretion to issue protective orders while taking into consideration the competing interests of the parties (See CPLR §3103[a] and *Willis v. Cassia*, 255 A.D. 2d 800, 680 N.Y.S. 2d 313 [3rd Dept., 1998] and *Cascardo v. Cascardo*, 136 A.D. 3d 729, 24 N.Y.S. 3d 742 [2nd Dept., 2016]).

It is Avon’s contention that whether or not Mr. Van Orden has access to other samples of “Unforgettable” is irrelevant, because the assessment is being made as to whether Dr. Longo properly detected five tremolite structures in the two samples he tested. Avon argues that Mr. Van Orden should be permitted to perform independent testing of Mr. Longo’s samples because plaintiffs will not permit the removal of Dr. Longo’s samples from MAS. Avon also argues that SEM testing is accepted by the International Standards Organization (“ISO”) under standard ISO 22262-1 which applies to procedures for bulk testing and that plaintiff is only applying the standards for identifying asbestos in the air. Avon is willing to pay the \$500.00 per hour for the use of the SEM equipment at the MAS laboratories and is willing to accommodate any scheduling constraints (Opp. McAtee Aff., pgs. 15-16, ft. 6). Avon is also willing to use MAS employees to perform the SEM testing and expects that it will take less than three hours.

The TEM and SEM testing are “material and necessary” to Avon’s defense and in preparation for trial. Avon is entitled to the discovery sought to present a defense and prior to the deposition of plaintiffs’ expert, Dr. Longo. To the extent plaintiffs argue that Mr. Van Orden previously worked with a group that deleted Dr. Longo’s test results in another matter, there was no proof provided in support of that claim, including an affidavit from Dr. Longo. Balancing the competing interests of the parties, and Avon’s willingness to accommodate MAS, the plaintiffs have not met their burden of establishing prejudice, “unreasonable annoyance, expense, embarrassment, or disadvantage,” warranting denial of the CPLR §3103[a] motion for a protective order.

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 the Special Master supervises discovery. 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 A.D. 3d 600, 887 N.Y.S. 2d 580 [1st Dept. 2009] and *In re New York City Asbestos Litigation*, 109 A.D.3d 7, 966 N.Y.S. 2d 420 [1st Dept., 2013]). Pursuant to CMO Section III(C) the Special Master’s recommendations are appealable to this court.

Special Master Olsen properly determined that Avon should be permitted to perform SEM testing on Dr. Longo’s samples and her recommendation is confirmed.

Accordingly, it is ORDERED, that plaintiff’s motion to vacate the February 7, 2019 Recommendation of Special Master Shelley Olsen that granted defendant Avon Products Inc.’s application for defense expert discovery of samples using a Scanning Electron Microscope located at the plaintiff’s expert, Dr. Mark Longo’s laboratory, owned by Material Analytical Services, and pursuant to CPLR §3103 for a protective Order, is denied, and it is further,

ORDERED, that Special Master Shelley Olsen’s February 7, 2019 Recommendation is confirmed, and it is further,

ORDERED that plaintiff shall provide Avon Product Inc.’s expert, Mr. Van Orden with available dates to conduct Scanning Electron Microscope testing of Dr. William Longo’s samples at the laboratories of MAS, LLC, within five (5) days from the date of service on plaintiffs’ attorney of a copy of this Order with Notice of Entry, and it is further,

ORDERED that Mr. Van Orden's testing of plaintiff's samples at the MAS, LLC, laboratories, shall take place within fifteen (15) days from the date of service of a copy of this Order with Notice of Entry.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: March 13, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**
Check if appropriate: **DO NOT POST** **REFERENCE**