

**Shulman v Brenntag N. Am., Inc.**

2019 NY Slip Op 30757(U)

March 22, 2019

Supreme Court, New York County

Docket Number: 190025/17

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

JENNY SHULMAN and BRONISLAV KRUTKOVICH,

INDEX NO. 190025 / 17

Plaintiff

MOTION DATE 03-20-2019

- Against-

MOTION SEQ. NO. 015

BRENTAG NORTH AMERICA, INC., et al.,  
Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion by defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc., to preclude the opinion testimony of Dr. Ronald Gordon regarding destructive testing of plaintiff's pathology blocks, or in the alternative to compel plaintiffs to disclose any analytical material used by Dr. Gordon, provide an expert report and make Dr. Gordon available for deposition.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits \_\_\_\_\_

3-4

Replying Affidavits \_\_\_\_\_

Cross-Motion: Yes  No

Upon a reading of the foregoing cited papers it is ordered that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s motion to preclude at trial the opinion testimony of Dr. Ronald Gordon regarding destructive testing performed on plaintiff Jenny Shulman's pathology blocks is denied. The portion of the motion that seeks an order compelling plaintiffs to disclose any analytical material used by Dr. Gordon, provide an expert report and make Dr. Gordon available for deposition is granted to the extent that Plaintiffs produce Dr. Ronald Gordon for a deposition to provide testimony on the methodology employed and his findings in performing the testing of the tissue blocks of Ms. Shulman's hysterectomy pathology tissues obtained from Memorial Sloan Kettering Cancer Center. Concomitantly defendants are to produce their expert for deposition to provide testimony on the same issue of his/her testing of the same tissue blocks.

Plaintiffs commenced this action to recover for personal injuries sustained by Jenny Shulman from the exposure to asbestos from defendants products. Plaintiffs allege that as a result of Ms. Shulman's extensive use over the years of defendants' asbestos contaminated products she has developed mesothelioma. Ms. Shulman treated at New York Presbyterian Medical Center and at Memorial Sloan Kettering Cancer Center. Sometime in 2017, prior to the filing of the Note of issue, the parties attempted to obtain pathology blocks from these hospitals in order to have their respective experts perform certain tests. New York Presbyterian refused to provide the tissue samples, ultimately requiring the court to issue a court order compelling their production. Memorial Sloan Kettering Cancer Center alleged that the tissue samples had been sent to another hospital in Boston and could not be located.

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

On September 28, 2017 Justice Lucy Billings issued an order directing the issuance of a Subpoena to New York Presbyterian to release to plaintiffs and defendants "original pathology materials, specifically all tissue blocks and corresponding slides of plaintiff Jenny Shulman". That same order directed that "Plaintiff and defendants may not conduct destructive testing of said pathology blocks without an agreement between plaintiffs and defendants as to the manner by which the materials are to be shared or by further order of the court if an agreement cannot be reached between the parties." The order further directed that "the plaintiff and defendant serve expert reports regarding the results of destructive testing of said pathology blocks in accordance with the NYCAL Case Management Order."

Despite the court order the parties encountered difficulties in obtaining the pathology materials from New York Presbyterian. Finally sometime in December 2017, after involvement of the Special Master, New York Presbyterian agreed to release portions of the pathology materials. It released 1/4 of 7 blocks to plaintiff and refused to release to plaintiffs' expert the defendants' portions of the blocks. Dr. Gordon retrieved plaintiff's portions of the pathology material to perform his testing, which included digestion testing. Defendants were informed that Dr. Gordon would be retrieving plaintiffs' portions of the material, that New York Presbyterian refused to give Dr. Gordon defendants' portions of the material and that they would have to retrieve their own portions to perform their own testing. Defendants did not object to any of this. Dr. Gordon proceeded to perform his testing on the samples he obtained.

On July 13, 2017 plaintiffs provided CPLR §3101(d) disclosure listing Dr. Ronald Gordon as one of their experts, providing the subject matter he was expected to testify about and a summary of the grounds for his opinion. On January 18, 2018 plaintiffs provided defense counsel the slides they had received from New York Presbyterian. On February 12, 2018 plaintiffs informed defendants that despite the Special Master's involvement New York Presbyterian would not release to plaintiffs the portions of the pathology materials that it was required to produce to defendants. Defendants were advised that if they wanted "original tissue for analysis and digestion, defendants will have to deal with Mr. Piels and Columbia Presbyterian directly. Re-cuts for analysis have already been provided to defendants." Again defendants did not object to this.

On October 2, 2018 plaintiffs filed their Note of Issue. On January 28, 2019 plaintiffs learned from Memorial Sloan Kettering Cancer Center that it had located Ms. Shulman's Hysterectomy Pathology. Dr. Gordon performed analysis on these tissues from February 12-19, 2019. Defendants were provided with samples of tissue from the block and with Dr. Gordon's results. ( see Memorandum in Opposition, item II time line of events pages 2-4, see exhibits annexed).

Defendants now moves to preclude the testimony of Dr. Gordon. Defendants allege that plaintiffs (1) violated Justice Billings court-ordered protocol for destructive testing and disclosure of test results and (2) Dr. Gordon's testimony relies on testing disclosed ( and in most cases conducted) after the Note of Issue.

Plaintiffs in opposing the motion correctly points out that defendants were fully informed of the difficulties encountered in obtaining the pathology blocks from New York Presbyterian and from Memorial Sloan Kettering Cancer Center. This court finds that Defendants were fully informed that Dr. Gordon had performed digestion testing on the samples plaintiff had obtained from New York Presbyterian. Plaintiffs learned

from Memorial Sloan Kettering Cancer Center, in January 2019, after the Note of Issue had been filed, that Ms. Shulman's hysterectomy pathology tissues had been located, quickly performed the digestion testing in February 2019, provided a copy of the pathology tissues to the defendants and provided a copy of Dr. Gordon's test results. Defendants cannot claim surprise or prejudice because they knew that Dr. Gordon had performed digestion testing on the New York Presbyterian blocks, and it was an unanticipated circumstance that the tissue block in possession of Memorial Sloan Kettering Cancer Center was located. The only party prejudiced by precluding Dr. Gordon from testifying would be plaintiff.

"CPLR §3101(a) allows for the full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR § 3124 allows the court to compel a party to provide discovery. CPLR § 3126 (2) allows a court to preclude a party who has failed to provide discovery, from introducing any evidence or from using certain witnesses.

CPLR§ 3101(d) 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) 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 ( 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 [1<sup>st</sup>. Dept. 2014] citing to Martin v. Triborough Bridge and Tunnel Authority, 73 A.D.3d 481, 901 N.Y.S.2d 193 [1<sup>st</sup>. Dept. 2010]).

Although discovery after a Note of issue has been filed is generally inappropriate, discovery may be permitted to prevent substantial prejudice where unusual or unanticipated circumstances develop subsequent to the filing of the Note of Issue (See 22 NYCRR §202.21[d]; Esteva v. Catsimatidis, 4 A.D.3d 210, 772 N.Y.S.2d 267 [1<sup>st</sup>. Dept. 2004]). 22 NYCRR §202.21 allows for 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 8331, 850 N.Y..S.2d 345 [2007] and Audiovox Corporation v. Benyamini, 265 A.D.2d 135, 707 N.Y.S.2d 137 [2<sup>nd</sup>. Dept. 2000]).

The fact Plaintiffs obtained Ms. Shulman's Hysterectomy pathology tissues from Memorial Sloan Kettering Cancer Center after the Note of Issue was filed, is an unusual or unanticipated circumstance sufficient to warrant limited post Note of Issue discovery under 22 NYCRR § 202.21, to avoid any prejudice from the failure to use this material and the results of its testing at trial ( Bermel v. D'Agostino, 50 A.D.3d 303, 855 N.Y.S.2d 73 [1<sup>st</sup>. Dept. 2008]; Jones v. Seta, 143 A.D.3d 482, 38 N.Y.S.3d 422 [1<sup>st</sup>. Dept. 2016]). Plaintiffs have provided expert witness disclosure pursuant to CPLR §3101(d), and a copy of the expert's results.

Accordingly it is ORDERED that defendants' Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s motion to preclude at trial the opinion testimony of Dr. Ronald Gordon regarding destructive testing performed on plaintiff Jenny Shulman's pathology blocks is denied, and it is further,

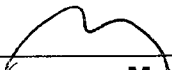
**ORDERED** that the portion of the motion that seeks an order compelling plaintiffs to disclose any analytical material used by Dr. Gordon, provide an expert report and make Dr. Gordon available for deposition is granted to the extent that Plaintiffs produce Dr. Ronald Gordon for a deposition to provide testimony on the methodology employed and his findings in performing the testing of the blocks of Ms. Shulman's hysterectomy pathology tissues obtained from Memorial Sloan Kettering Cancer Center, and it is further

**ORDERED** that defendants produce their expert for deposition to provide testimony on the same issues of his/her testing of the same Memorial Sloan Kettering Cancer Center tissue blocks, and it is further

**ORDERED** that the parties appear in Part 13 located at 60 Centre Street, Room 442, New York, N.Y. 10007 on April 9, 2019 for trial.

ENTER:

Dated: March 22, 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**