

**Young v Avon Prods., Inc.**

2019 NY Slip Op 30760(U)

March 22, 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 03/08/2019

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

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on defendant Whittaker, Clark & Daniels, Inc.'s motion for summary judgment:

Table with 2 columns: PAPERS NUMBERED, and rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Whittaker, Clark & Daniels, Inc.'s (hereinafter "WCD") motion pursuant to CPLR §3212, for summary judgment on plaintiffs' claims and all cross-claims asserted against it, is denied.

Plaintiff, Kim Young, was diagnosed with peritoneal mesothelioma. She is 61 years old. Mrs. Young alleges her exposure - as relevant to this motion - is from Avon Products Inc.'s (hereinafter "Avon") talc products. Plaintiffs allege that during the relevant period, Avon's products were manufactured using WCD's asbestos contaminated talc, and that is what caused Mrs. Young's mesothelioma. Mrs. Young claims that she was exposed to the asbestos in the Avon talc products from about 1961 through 1999 (Mot. Kozak Aff., Exhs. A and D).

Mrs. Young was deposed in this action over the course of two days on March 16 and 17, 2017 (Mot. Kozak Aff. Exh. D and Opp. Woodard Aff. Exhs. A and UU). Mrs. Young identified several different talc products used by her and her family on a daily basis. Mrs. Young specifically identified three Avon talc products, "Unforgettable," "Bird of Paradise" and "Skin So Soft." She testified that her mother used Avon products daily and purchased them for the family. Mrs. Young used the same products as her mother and remembers using them from when she was about four or five years old in 1961 through her mother's death in 1999 (Mot. Kozak Aff. Exh. D, pgs. 133-136, 200 and 206-207). She testified that she used Avon's "Unforgettable" talc from about 1961 through 1999; "Bird of Paradise" talc from about 1970 through 1974; and "Skin So Soft" talc from about 1974 through 1999 (Mot. Kozak Aff. Exh. D, pgs. 155, 167-168, 182, 192-193, 200, 202- 203).

Mrs. Young testified that she applied the Avon talcum powder over her entire body including her arms, torso and legs. She used Avon talc almost daily starting at age four or five. Mrs. Young testified that starting at age ten or eleven, she used Avon talc at least daily after bathing, with an additional use before going out at night with her friends (Mot. Kozak Aff. Exh. D, pgs. 161-163, 190, 212 and Opp. Woodard Aff. Exh. A, pg. 318). She applied the Avon talc by shaking the bottle on her hands and applying the talc to her body, or at times by using a powder puff (Mot. Kozak Aff., pgs. 157-161 and 190). Mrs. Young testified that

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

when she used the Avon talc, it created a "dusty environment" that she would have to clean up, and that when she was a little girl, she would write in it. She testified that she could see the dust in the air and she would breathe it in (Opp. Woodard Aff., Exh. A, pgs. 318-320).

Plaintiffs commenced this action on December 19, 2016 to recover for damages resulting from Mrs. Young's exposure to asbestos from WCD's talc used in Avon products (Mot. Kozak Aff., Exh. A). WCD served an acknowledgment of plaintiffs' service on January 23, 2017 (Mot. Kozak Aff., Exh. B).

WCD now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint. It is argued that plaintiffs cannot establish WCD's liability as a supplier of talc, make content identification on the talc sold to Avon, or otherwise show WCD's talc was contaminated with asbestos. WCD further argues that plaintiff cannot establish causation from Avon products containing WCD talc, warranting summary judgment.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1<sup>st</sup> Dept. 1998]).

WCD's argument that plaintiffs are not expected to present any admissible evidence of Mrs. Young's exposure to asbestos does not establish entitlement to summary judgment.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1<sup>st</sup> Dept. 2016] and Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1<sup>st</sup> Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of Plaintiff's illness (Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.), 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to Reid v. Argostia - Pacific Corp., 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1<sup>st</sup> Dept., 1995], DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation*), 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1<sup>st</sup> Dept. 2014] and O'Connor v. Aerco Intl., Inc., 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3<sup>rd</sup> Dept., 2017]). Defendants must unequivocally establish that Mrs. Young either was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of mesothelioma (Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*), 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1<sup>st</sup> Dept., 2014]).

Defendants argue that plaintiffs have no evidence and that their experts, Dr. William Longo and Dr. Jacqueline Moline, cannot raise an issue of fact that Mrs. Young was exposed to asbestos. They also argue that plaintiffs' experts cannot raise an issue of fact on whether Mrs. Young was exposed to sufficient levels of asbestos contamination from the use of Avon products during the relevant periods of about 1961 to 1999, this is not a basis to obtain summary judgment.

WCD claims that it has no records prior to 1975 to establish whether talc was sold to Avon during the period of 1961 through 1974. WCD claims that its

records for the remaining period of plaintiff's alleged exposure, 1975 through 1999, identifies ten grades of talc sold to Avon. WCD argues that there is no evidence from any party, including from plaintiff, of which supplier's talc was used by Avon to make the products that exposed Mrs. Young to asbestos. WCD claims that the only affirmative evidence that Avon used WCD's talc shows the talc was not contaminated with asbestos, and the regions WCD's talc was sourced from were known to be "asbestos free."

WCD claims that there is no asbestos contamination from their products because: (1) the talc was sourced from "asbestos free" mines, (2) there were internal tests to ensure the lack of contamination and (3) both government and independent tests confirmed the product was asbestos free. It is WCD's contention that Mrs. Young was not exposed to asbestos through use of Avon products that contained WCD's talc, and that it did not cause her mesothelioma.

WCD contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and *In the Matter of New York City Asbestos Litigation (Juni)*, 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], because plaintiffs are unable to establish general and specific causation.

WCD relies on multiple articles and reports (Mot. Kozak Aff. Exhs. H, I, J, K, L and M); and the findings of the Food and Drug Administration (FDA), U.S. Dept. Of Health and Human Services, World Health Organization (WHO) (Mot. Kozak Aff. Exhs. N, O, P, Q, R and S). WCD also relies on the expert affidavit of Alan M. Segrave, Professional Geologist (P.G.) that was prepared in an unrelated action involving exposure to WCD talc from 1989 through 1999 (Mot. Kozak Aff. Exh. F). WCD argues that the reports and affidavit establish that Mrs. Young was not exposed to asbestos through use of their products or that they did not cause her mesothelioma. WCD claims that during the periods relevant to Mrs. Young's alleged exposure, talc was obtained from one of five sources: Val Chisone, Italy; Murphy, North Carolina; Southwest Montana; Alpine, Alabama; and Guangxi, China. WCD argues that all of these mines were known as being "asbestos-free."

WCD provides no expert affidavits or reports to specifically evaluate the articles and reports provided. WCD does not provide experts that specifically assess Mrs. Young's exposure to Avon talc products, "Unforgettable," "Bird of Paradise" and "Skin So Soft" during the alleged relevant period, or to perform evaluations of her exposure to their talc.

#### General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, *supra*).

WCD argues that no causal relationship exists between the talc sold to Avon and the development of peritoneal mesothelioma, eliminating any general causation. WCD relies on Avon's "Raw Ingredient Testing Specifications" reports from 1961, 1966, 1967, 1969, 1970, 1971, 1972, 1974, 1975, 1977, 1978, 1982, 1985, 1987, 1989, 1992, 1993, 1999 and 2000, and talc formulas (Mot. Kozak Aff. Exhs. H, I, J, K and L). WCD claims that the testing performed by Avon found little or no asbestos in WCD talc.

WCD refers to the findings of the FDA, U.S. Dept. Of Health and Human Services, and WHO as showing cumulative exposure to the low levels of asbestos in WCD's talc is insufficient to establish general causation (Mot. Kozak Aff. Exhs. N, O, P, Q, R and S).

WCD provides the expert report of Mr. Alan M. Segrave, Professional Geologist (P.G.), employed by Maxxam, a Bureau Veritas Group Company. Mr. Segrave's January 5, 2018 report, prepared for an unrelated action pending in New Jersey. The plaintiff's alleged exposure to WCD's talc in the New Jersey action was for the period of 1972 through 1998 (Mot. Kozak Aff., Exh. F). Mr. Segrave's Affidavit states that his January 5, 2018 report is being submitted in this action for "the facts, summaries of testing, statements and findings," and that "any opinions are held to a reasonable degree of scientific certainty." (Mot. Kozak Aff., Exh. F).

Mr. Segrave assesses talc from the different locations and mines that WCD used from 1972 through 1998. He states that tremolite occurs in both asbestiform and "non-asbestiform" varieties, and that amphiboles in tremolite are not asbestos or regulated as such. Mr. Segrave refers to the Occupational Safety and Health Administration (OSHA) not making any distinction between asbestos and tremolite fibers until 1992. Mr. Segrave cites to reports and standards from various individuals and entities, including the U.S. Environmental Protection Agency (EPA), and WHO, as further establishing that the WCD talc from mines in various regions was not contaminated. Mr. Segrave assesses the geological formations and processes for regions where WCD talc was obtained in Montana, Alabama, Italy, North Carolina and China, and concludes that none were contaminated with asbestos.

Plaintiffs in opposition rely on the November 22, 2017 report of Dr. Jacqueline Moline, M.D., a medical doctor specializing in occupational and environmental disease (Opp. Woodard Aff. Exh. CC). Dr. Moline reviewed Mrs. Young's clinical history, occupational and environmental history, and deposition testimony. She refers to studies, reports and findings from OSHA, EPA, the WHO and the Food and Drug Administration (FDA). Dr. Moline concludes that Mrs. Young's peritoneal mesothelioma is a result of cumulative exposure to asbestos contaminated talcum powder (Opp. Woodard Aff., Exh. CC).

Plaintiffs also provide reports, studies and findings to establish that even low doses of asbestos cause mesothelioma and that cosmetic talc is a risk factor for pleural mesothelioma (Opp. Woodard Aff., Exhs. II, KK, LL, MM, NN, OO, PP, QQ and RR).

WCD's argument that summary judgment is warranted under *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] because plaintiffs are unable to establish general causation, is unavailing. In *Cornell*, 22 NY3d 762, *supra*, the defendant-corporation established a prima facie case as to general causation establishing generally accepted standards within the relevant community, of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiffs' expert, Dr. Moline, is relying on some of the same scientists and scientific organizations as defendant's experts to show there is general causation.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1<sup>st</sup> Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

WCD's expert Mr. Segrave, P.G. relies on studies and reports to establish that there is no causal relationship between tremolite fibers in WCD's talc and mesothelioma. Plaintiffs' expert, Dr. Moline, also relies on studies and reports in part from the same scientific organizations to establish that Mrs. Young's

exposure to tremolite asbestos fibers can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

**Special Causation:**

WCD state that to the extent its talc did contain asbestos, it did not cause Mrs. Young's peritoneal mesothelioma, and thus plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin." The "[c]omparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, supra at 448]). In turn, the Appellate Division in the case *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Plaintiffs on special causation rely on the reports of Dr. Dr. William E. Longo, Doctorate of Philosophy in Materials Science and Engineering, employed by MAS, Analytical Services, LLC, and Jacqueline Moline, M.D., a medical doctor specializing in occupational and environmental disease (Opp. Woodard Aff. Exhs. AA and CC).

Dr. Longo performed Transmission Electron Microscopy (TEM), Selected Area Diffraction (SAED) and Energy Dispersive Spectroscopy (EDXA) on the talc found in two historic samples of Avon's "Unforgettable" perfumed talc, from the period relevant to Mrs. Young's exposure. Dr. Longo's report analyzed the results of his testing and found asbestos fibers or bundles with at least a 5 to 1 ratio in the "Unforgettable" samples (Opp. Woodard Aff. Exh. AA).

Plaintiffs also rely on the 1972 report of Dr. Seymour Lewin that analyzed Avon's Unforgettable perfumed talc and found five (5) percent of it consisted of asbestos fibers (Mot. Woodard Aff., Exh. Z).

Dr. Moline relies on Dr. Longo's and Dr. Lewin's testing, Mrs. Young's testimony of exposure to Avon's products containing WCD talc, and fiber release studies involving talc powder using the same source mines. Dr. Moline concludes Mrs. Young's mesothelioma was a result of exposure to asbestos contaminated talcum powder.

Summary judgment is a drastic remedy that should not be granted where issues raised in conflicting affidavits cannot be resolved. It should not be granted when there is any doubt. The Court's function on summary judgment is issue finding, not issue determination (*Insurance Co. of New York v. Central Mut. Ins. Co.*, 47 A.D. 3d 469, 850 N.Y.S. 2d 56 [1<sup>st</sup> Dept., 2008] citing to *Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966]). Conflicting testimony raises credibility issues, that cannot be resolved on papers. They should be determined by a jury instead, and are a basis to deny summary judgment (*Prevost v. One City Block LLC*, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1<sup>st</sup> Dept. 2017] and *Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [1<sup>st</sup> Dept. 2011]).

WCD's argument that the specific Avon talc powder and bottles of "Unforgettable," "Bird of Paradise" and "Skin So Soft" used by Mrs. Young were

not tested and that there is no direct evidence of exposure to asbestos from WCD talc, is not dispositive. Plaintiffs are not required to show the precise causes of Mrs. Young's damages, but only show facts and conditions from which WCD's liability may be reasonably inferred. The opposition papers have provided sufficient proof to create an inference as to specific causation for WCD's talc. (Oken v A.C. & S. (Matter of New York City Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, supra at pg. 448, and Cornell v. 360 West 51<sup>st</sup> Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

The conflicting expert affidavits, the "reasonable inference" standard and construing the evidence in a light most favorable to the plaintiffs as the non-moving party warrants denial of the summary judgment sought by WCD. Plaintiffs have sufficiently raised credibility issues and issues of fact as to general and specific causation, requiring a trial of this matter.

Plaintiffs cite to Mrs. Young's deposition testimony, that she used Avon talc products daily as a source of her exposure to asbestos from WCD's contaminated talc. She described the manner of her exposure through the use of Avon talc products (Mot. Kozak Aff. Exh. D, pgs. 161-163, 190, 212 and Opp. Woodard Aff. Exh. A, pgs. 318-321). Mrs. Young's deposition testimony, when combined with the reports of Dr. Longo and Dr. Moline, creates "facts and conditions from which [WCD's] liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 AD 2d 462, supra), and raise issues of fact. WCD and its expert Mr. Segrave do not specifically cite to Mrs. Young's exposure to WCD talc in Avon's products. There remains issues of fact as to whether WCD's talc was contaminated with asbestos, and whether WCD's talc used in Avon's talc products, "Unforgettable," "Bird of Paradise" and "Skin So Soft" during the relevant period of 1961 through 1999 exposed Mrs. Young to asbestos and caused her mesothelioma, warranting denial of summary judgment.

Plaintiffs have also raised issues of fact as to the eleventh cause of action for punitive damages. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent WCD argues it has closed its traditional business operations effective 2004 and does not sell minerals, that does not preclude the imposition of punitive damages as a deterrent. Plaintiffs' claim that WCD conducted testing and found both chrysotile and tremolite asbestos throughout the 1970's and continued to advocate for the use of its talc as uncontaminated and for the use of XRD testing that would not be able to find any asbestos. To the extent that plaintiffs argue that WCD placed corporate profits and reputation above the health and safety of Mrs. Young and that WCD's continued insistence that there is no asbestos in its talc, the issue of punitive damages is to be determined by the trial judge after submission of all evidence.

ACCORDINGLY, it is ORDERED that defendant, Whittaker, Clark & Daniels, Inc.'s motion for summary judgment pursuant to CPLR §3212, is denied.

ENTER:

Dated: March 22, 2019

  
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MANUEL J. MENDEZ J.S.C. MANUEL J. MENDEZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
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