

Alleyne v A.O. Smith Water Prods. Co.

2019 NY Slip Op 31454(U)

May 24, 2019

Supreme Court, New York County

Docket Number: 190295/2017

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

Plaintiff also testified to using Johnson & Johnson's baby powder along with two other English store brands - "Tesco" and "Sainburys"- on her children from about 1986 through 1997 when she lived in England (Mot. Exh. E, pgs. 349-350).

Plaintiff testified that she purchased talc powder in the United States during her visits with her father and his family in Brooklyn, New York during the years 1980, 1984, 1994, 2005, 2006, 2007, 2008 and 2010. She stated that she would buy and use talc powder purchased at department stores in Brooklyn and Manhattan. She claimed that she would purchase three or four packages of multiple types of talc products while visiting the United States but not all at the same time (Mot. Exh. E, pgs. 336-339 and 344-348, Opp. Exh. A, pgs. 340-343).

Plaintiff stated that she used a powder puff to apply talc powder all over her body. She would dip the powder puff in the talc and dab it under each arm, under her breasts, on her legs and sometimes on her feet, between her toes, and then her stomach and shoulders. She did her best to also apply the powder on her back (Opp. Exh. A, pgs. 307-308). Plaintiff testified that when she used talc powder it would make the bathroom dusty, a portion of the powder would linger in the air and then fall to the floor around her body creating footprints when she walked (Opp. Exh. A, pgs. 1070-1077).

Plaintiff commenced this action on October 5, 2017 the complaint incorporates by reference the Phillips & Paolicelli's New York City Asbestos Litigation Standard Complaint for Personal Injury No. 1 (Mot. Exh. A and NYSCEF Doc. # 36). Plaintiff's complaint identifies Lehn & Fink Products Corporation as successor in interest to Dorothy Gray, Inc., and Proctor & Gamble Productions, Inc. as the successor in interest to The Shulton Company (Mot. Exh. A). WCD served its Verified Answer to the Complaint on November 2, 2017 (Mot. Exh. C).

WCD now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims asserted against it based on lack of identification.

WCD stated during argument on the record that plaintiff withdrew the punitive damages cause of action asserted against it. Plaintiff made no objection to WCD's statement on the record, accordingly, WCD is granted summary judgment on plaintiff's tenth cause of action for punitive damages (NYSCEF Doc. # 36). The tenth cause of action for punitive damages is severed and dismissed.

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 [1st Dept. 1998]).

WCD argues that it did not supply, sell or distribute talc to Johnson & Johnson and it is entitled to summary judgment on plaintiff's claims related to that manufacturer's products during the relevant time period of about 1986 through 1997. In support of its argument, WCD provides the trial and deposition testimony of Dr. John Hopkins, corporate representative for Johnson & Johnson, in unrelated actions. Dr. Hopkins testified at trial that Johnson & Johnson purchased Windsor Minerals, Inc. in 1968 and sourced its talc solely from that entity until 1989 when Windsor Minerals, Inc. was sold to Cyprus Minerals (Mot. Exh. P, pg. 2550). At another trial Dr. Hopkins testified that WCD's supply was never a "source of product used for sale to the consumer." He testified that very

small batches of talc would be purchased from WCD for use in research and development of new products, but not for consumer use (Mot. Exh. R, pgs. 1245-124). WCD also provides the trial testimony of Patrick J. Downey, a corporate representative of talc supplier, Luzenac, the predecessor to defendant Imery's Talc America, Inc.. Mr. Downey testified that from 1989 after the acquisition of Windsor Minerals through 2018, either Luzenac or Imerys were the sole suppliers of talc to Johnson and Johnson (Mot. Exh. P, pg. 1350).

Plaintiff did not state any arguments or provide evidence refuting WCD's arguments that it did not sell, distribute, or supply talc for consumer use in Johnson & Johnson's Baby Powder during the relevant years - from about 1986 through 1997 - and has not raised any issues of fact. WCD is granted summary judgment on plaintiff's claims asserted against it as to Johnson & Johnson's Baby Powder. The claims based on WCD's supply of talc to Johnson & Johnson during the years 1986 through 1997 for use in their baby powder are severed and dismissed.

WCD claims that it closed its traditional business activities in 2004. WCD argues that for each manufacturer of asbestos contaminated talc plaintiff alleges she purchased, that the relevant period ends in 2004. WCD claims it did not sell, distribute or supply the talc plaintiff alleges was contaminated after 2004. Plaintiff does not provide proof or raise an issue of fact on whether WCD sold, distributed or supplied asbestos contaminated talc to the manufacturers of talc powder she purchased after 2004. WCD is granted summary judgment on plaintiff's claims asserted against WCD for the period after 2004.

WCD argues that it is entitled to summary judgment because plaintiff is not expected to present any admissible evidence that WCD sold, distributed or supplied talc contaminated with asbestos to the various manufacturers of the talc powders she used during the relevant time period or otherwise show WCD's talc was contaminated with asbestos. WCD claims that plaintiff's arguments rely on speculation and conjecture and cannot raise an issue of fact. WCD further argues that there were multiple suppliers of talc and plaintiff's experts are unable to provide specific evidence of which supplier's talc was used at any particular time in any specific product, or that WCD was the exclusive supplier for any of the different talc powder manufacturers she identified during the relevant periods.

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 [1st Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st 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. Georgia - Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st 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 [1st Dept. 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that plaintiff 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 A sbestos Litig.)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

WCD's arguments as to plaintiff's lack of evidence, amount to "pointing to gaps in plaintiff's proof" and are not a prima facie basis to obtain summary judgment.

WCD provides sales sheets and provides the Talc Grades for the various manufacturers of talc powder products purchased by plaintiff (Mot. Exhs. F, H, J, K, L, N and O). WCD claims that it sold talc, other minerals and pigments to Avon Products, Inc. from 1980 through 2004 which included Talc Grades: 1, 123, 141, 1621, 1623, 1625, 2278, 2450, 2462, 2755, 2923, 3300, 3355, 3465 and 3468 (Mot. Exh. F). WCD claims that it sold talc, other minerals and pigments to Chanel Co. and Chanel, Inc. from 1980 through 2004 which included Talc Grades: 184, 1625, 1629, 3465, 5141 and 5251 (Mot. Exh. H). WCD claims that it sold talc, other

minerals and pigments to Revlon Inc., the manufacturer of "Charlie" talc powder products, from 1980 through 2004 which included Talc Grades: 127, 141, 643, 1623, 1625, 1626, 1629, 1656, 1745, 1821, 1886, 1888, 1889, 2611, 2796, 3465, 3468, 3481, 5210 and 5251 (Mot. Exh. J). WCD claims that it sold talc, other minerals and pigments to Elizabeth Arden Co., the manufacturer of "Blue Grass" talc powder, from 1980 through 2004 which included Talc Grades: 1, 141, 1625, 3443, 3460 and 5251 (Mot. Exh. K). WCD claims that it sold talc, other minerals and pigments to The Shulton Company, the manufacturer of "Desert Flower" talc powder, from 1980 through 2004 which included Talc Grades: 1615, and 2450 (Mot. Exh. L). WCD claims that it sold talc, other minerals and pigments to Proctor & Gamble Productions, Inc., the successor in interest to The Shulton Company, from 2003 through 2004 which included Talc Grades: 1745 and 2755 (Mot. Exh. N). WCD claims that it sold talc, other minerals and pigments to Lehn & Fink Products Corporation, the successor in interest to Dorothy Gray, Inc., from 1977 through 2004 which included Talc Grades: 1 and 1625 (Mot. Exh. O).

WCD argues that the sales sheets provide no means of telling which talc could have been used or the ingredients in any of the manufacturer's talc powder products that plaintiff alleged she used during the relevant periods. WCD does not meet its prima facie burden with this proof. The burden is on WCD to prove that each manufacturer's talc powder product used by plaintiff during the relevant time period did not contain talc supplied by WCD, and that the talc sold, distributed and supplied by WCD did not contain asbestos. The burden does not shift to plaintiff until WCD makes a prima facie case.

WCD claims that plaintiff was not exposed to asbestos contamination from WCD's talc because: (1) the talc was sourced from "asbestos free" mines, (2) there were internal tests to ensure the lack of contamination and (3) that the talcum powder products that used WCD talc were not formulated to contain asbestos. It is WCD's contention that plaintiff was not exposed to asbestos through use of the various manufacturer's talc powder products that contained WCD's talc, and it did not cause her mesothelioma.

WCD provides the expert reports of Mr. Alan M. Segrave, Professional Geologist (P.G.), employed by Maxxam, a Bureau Veritas Group Company, dated February 15, 2019, January 5, 2018, September 24, 2015 (Mot. Exh. G, I and M). WCD also attaches Mr. Segrave's reports dated June 13, 2014, April 25, 2016, June 22, 2016 and July 14, 2016, as part of Exhibit G. Mr. Segrave's January 5, 2018 and February 15, 2019 reports, were prepared for unrelated actions and do not specifically assess plaintiff's exposure to WCD's talc sold to each manufacturer for their talc powder products. WCD argues that all of Mr. Segrave's reports demonstrate that the Talc Grades WCD sold to the manufacturers were tested and came from regions that did not contain asbestos.

Mr. Segrave's February 15, 2019 report summarizes available literature on regions from where WCD talc was sourced, specifically Val Chinsone, Italy, Murphy, North Carolina, Southwest Montana and Alpine, Alabama (Mot. Exh. G, pgs. 13-20). Mr. Segrave also summarizes testing performed from 1971 through 1987. Mr. Segrave states that testing of Avon Products Inc. talc for the period of 1971 through 1987 shows no detectable asbestos minerals were in WCD Talc Grades: 1, 141, 1621, 1623, 2450, 2755 and 3300 (Mot. Exh. G, pg. 27). Mr. Segrave also reports on testing performed on a sample from the Mill in Guangxi, China, and states no asbestos was detected (Mot. Exh. G).

Mr. Segrave's June 13, 2014 report re-analyzes - using X-Ray Diffraction (XRD)- the testing done by Walter C. McCrone and Associates, New York University (Seymour Z. Lewin) and the Hitchcock Corporation for Talc locations: 141, 1615 and 2450. He determined that 141 talc had no regulated asbestos; 1615 had potential asbestos fibers in three (3) out of the 88 examined; and 2450 had one (1) out of the 81 examined (Mot. Exh. G).

Mr. Segrave's June 22, 2016 report uses XRD testing to re-analyze samples testing done by Walter C. McCrone and Associates, New York University (Seymour

Z. Lewin) and the Hitchcock Corporation. Mr. Seagrave analyzed 1002 samples of talc sourced from twelve (12) Talc Grades: 1, 123, 127, 140, 141, 971, 1233, 1615, 1625, 1745, 2755 and 5251. The testing resulted in six (6) asbestos tremolite fibers identified in the 1233 sample; one (1) confirmed asbestos fiber in the 1615, 2755, and 5251 locations; one (1) unconfirmed asbestos fiber in the 127 sample, and two (2) asbestos fibers with an unconfirmed tremolite fiber in the 1625 sample (Mot. Exh. G, 6/22/16 report, pg. 2 of 6).

Mr. Seagrave's April 25, 2016 report summarizes testing done on two samples collected from the Nancy Jordan Mine, in North Carolina. Mr. Seagrave conducted Polarized Light Microscopy (PLM) and Transmission Electron Microscopy (TEM) testing, no asbestos was identified in the two samples.

The July 14, 2016 report applies to testing done on fifteen (15) samples collected by Mr. Seagrave between November 9 and 12, 2015 at the Imerys' Fontana talc mine in Rodoretto, Italy. Mr. Seagrave conducted PLM and XRD testing, he only identified amphibole fibers, including tremolite, actinolite and hornblende in the three samples collected outside the talc deposits. Mr. Seagrave concludes that asbestos is not a constituent in the Italian talc and if present at all it would be extremely rare and of no scientific significance (Mot. Exh. G).

Mr. Seagrave's January 5, 2018 report applies to a plaintiff with alleged exposure to WCD's talc for the period of 1972 through 1998 (Mot. Exh. I). Mr. Seagrave assesses Talc Grades 141, 1623 and 3300, sourced from the different locations and mines that WCD used from 1972 through 1998 (Mot. Exh. I, pg. 28). Mr. Seagrave states that tremolite occurs in both asbestiform and "non-asbestiform" varieties, and that amphiboles in tremolite are not asbestos or regulated as such. Mr. Seagrave 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 (Mot. Exh. I, pgs. 13-21). Talc Grades 141, 1623 and 3300 were not included in WCD's references to Chanel Co. and Chanel, Inc., The Shulton Company, Proctor & Gamble Productions, Inc. and Lehn & Finks Product Corporation's talc powder products for the periods relevant to plaintiff's testimony. WCD claims that the testing and January 5, 2018 report shows that there was no asbestos in the talc sold to those manufacturers. WCD claims that Mr. Seagrave's January 5, 2018 report on testing of Talc Grades 141 and 1623 which are included in the talc sold to Revlon Inc., Elizabeth Arden Co., and Avon Products Inc., included multiple regions, not just Italy, and had no reported findings of amphibole or serpentine minerals in any of the talc, proving that there was no asbestos contamination.

Mr. Seagrave's September 24, 2015 report applies to testing done on three samples of "Desert Flower" talc dusting powder with PLM and TEM for the presence of asbestos. The result was that no asbestos was detected (Mot. Exh. M).

Plaintiff provides the deposition testimony of Donald Ferry, corporate representative of Charles Mathieu Inc. predecessor to Cyprus, wherein he states that WCD was a sales agent on behalf of the companies (Opp. Exh. C, pgs. 77 and 85). Plaintiff provides the deposition transcripts of Amy Wyatt, corporate representative of Chanel, Inc., taken in unrelated actions, to establish that the talc used in Chanel's talc powder products were either sold by Cyprus and distributed by WCD or directly sold by WCD, and consisted of talc obtained from Italy, which included 1615 talc, during the period relative to plaintiff's alleged exposure (Opp. Exh. D, pgs. 154-158 and 161-162, Exh. F, pgs. 85-87, and Exh. G pgs. 113, 125 and 254). Plaintiff also provides the formulas for Chanel, Inc.'s Chanel No. 5 bath powder which shows Italian talc was used during the time period relevant to plaintiff's alleged exposure (Opp. Exh. F).

Plaintiff refers to the deposition testimony of Wifred G. Kaenzig, Jr. a former employee of Shulton, Inc. during the period relevant to plaintiff's alleged exposure. Mr. Kaenzig described Shulton, Inc.'s bath powder products as consisting of talc, flowing agent, a small amount of perfume and maybe a few other ingredients. He

stated that he was unaware of what the other ingredients were (Opp. Exh. I at pg. 19). Mr. Kaenzig testified that WCD was the distributor of raw talc to Shulton, Inc. during the period relevant to plaintiff's exposure. He stated that WCD had one purchase order for the entire year, and that the same grades of talc would be used for all of the Shulton, Inc.'s talc powder products. He testified that he observed all of the raw talc being placed in a hopper and then the talc was separated for mixture with the appropriate fragrance and flowing agent for each of Shulton Inc.'s talc powder products. Mr. Kaenzig stated that Shulton, Inc. exclusively used WCD for about 99 percent of the talc powder products and that other suppliers may have been used for testing or for a lesser brand (Opp. Exh. J, pgs. 191-192 and Exh. K, pgs. 79-81).

The deposition testimony of Michael Helman, one of Revlon Inc.'s corporate representatives from an unrelated action, states he was aware that WCD and Brenntag, and Cyprus were the suppliers of talc for the company's products. He testified that Revlon did not have a stated particular talc product for a particular line or particular batch product. The only specification was that the suppliers had to provide talc from an approved vendor, certified asbestos free, a certain color, odor and appearance. There might also be a requirement for a particle size (Opp. Exh. L, pg. 76, 207-210). Mr. Helman testified on behalf of Revlon Inc., in this action, that there were multiple suppliers that sourced talc during the period relevant to plaintiff's exposure and certified that it was asbestos free. He stated that the talc materials sourced from multiple sites came to the facility, it would be co-mingled and used for all of the talc powder products produced by Revlon, Inc. (Opp. Exh. Q, pgs. 22-25). Plaintiff provides Revlon Inc.'s sale records which show that the majority of the talc purchased for its products were sourced from Italian mines (Opp. Exhs. N, O and P). Plaintiff also provides the trial testimony, in an unrelated action, of Theodore Hubbard, WCD's president from September of 2000 through February of 2004. Mr. Hubbard stated that WCD was sold as part of an asset sale to Brenntag in 1998 (Opp. Exh. M, pg. 36).

Plaintiff has provided proof through deposition testimony that WCD was either the exclusive supplier or sold the raw talc for use by Chanel, Inc., Shulton, Inc. and Revlon, Inc.'s talc powder products during the relevant periods sufficient to raise an issue of fact.

Plaintiff relies on studies or reports of: testing on Italian 1615 talc performed by Walter C. McCrone Associates, Inc. (hereinafter "MCCrone") in 1972 that found chrysotile asbestos. In 1978 McCrone performed tests on behalf of WCD and found approximately 1% asbestos tremolite fibers in talc from North Carolina (Opp. Exhs. S and W); testing performed by Dr. Seymour Lewin from New York University on behalf of WCD on talc from multiple regions including the 1615 talc from Italy found 2% tremolite asbestos fibers (Opp. Exh. T); testing done on November 20, 1973 by Ernest Fullam Inc. for WCD finding asbestos in WCD's talc from Italy, North Carolina, and Alabama (Opp. Exh. U), and testing done by Ernest Fullam Inc. in December of 1973 finding tremolite and chrysotile in talc mined in North Carolina and Italy (Opp. Exh. V). Plaintiff also cites to Ronald E. Gordon, Sean Fitzgerald and James Millette's report titled "Asbestos in commercial cosmetic talcum powder as a cause of mesothelioma in women" published in 2014, Vol. 20, No. 4 of the *International Journal of Occupational and Environmental Health* assessing talc from Montana, North Carolina and Val Chinsone, Italy (Opp. Exh. KK).

The studies and reports used by plaintiff that were prepared on behalf of WCD, contradict the findings of WCD's expert, Mr. Seagrave, and raise issues of fact as to WCD's claim that the talc it sold, supplied and distributed was properly deemed from "asbestos free" mines, and that internal tests ensured the lack of contamination. The remainder of the reports and studies submitted by plaintiff and their stated conclusions, are hearsay that have no foundation, and are not "proof in admissible form" (Zuckerman v. City of New York, 49 N.Y. 2d 557, 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980]).

Plaintiff provides the August 1, 2017 report of Dr. Steven P. Compton, Ph.D., assessing and testing thirteen of the Italian talc samples obtained by WCD's expert Mr. Alan Seagrave (Opp. Exh. Y and Alan Seagrave's July 14, 2016 report, Mot. Exh. G). Dr. Compton performed TEM analysis, Energy Dispersive Spectrometry (EDS), and Selected Area Electron Diffraction (SAED). Dr. Compton detected amphibole fibers in eleven of the thirteen samples analyzed. He determined that "the primary fibrous contaminants are anthophyllite and tremolite/actinolite and the asbestos content of the samples ranged from approximately 1.7 to 660 million fibers per 0.0002% to 0.68% by weight." Dr. Compton states "Fiber release studies of consumer talc products within this range documented elevated concentrations of airborne asbestos fibers during use of those products"(Opp. Exh. Y).

Plaintiff relies on the January 19, 2019 expert reports of testing done on historic samples of Chanel No. 5 talcum powder products by Dr. William E. Longo, Ph.D. and Dr. Mark W. Rigler, Ph.D., employed by MAS, Analytical Services, LLC (Opp. Exhs. JJ and II, parts 1 through 4). The reports analyze 21 containers. The testing conducted included Polarized Light Microscopy (PLM), Analytical Transmission Electron Microscopy (ATEM), and Automated Field Emission Scanning Electron Microscopy (FESEM). The report states that 19 of 21 samples were positive for regulated amphibole asbestos. The asbestos positive containers by ATEM/FESEM were 17 samples and there were two samples that had non-detectable asbestos using only ATEM testing. The report further states that tremolite and anthophyllite amphibole asbestos were detected (Opp. Exh. II, part 1, pgs. 1-3 and 22). Dr. Longo and Dr. Rigler conclude that "individuals that used Chanel #5 talcum powder products in the past will more likely than not, (have) been exposed to significant levels of regulated amphibole asbestos"(Opp. Exh. II, part 1, pg. 23)

It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (*Vega v. Restani Const. Corp.*, 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). 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 [1st Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Prevost v. One City Block LLC*, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept. 2017] and *Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [1st Dept. 2011]).

The conflicting evidence, expert reports and affidavits, when construed in a light most favorable to the plaintiff as the non-moving party and providing her with the benefit of all favorable inferences, warrants denial of the summary judgment sought by WCD. Regardless of whether it was exclusively, WCD has not denied that it also sold or supplied talc to Avon Products, Inc., Elizabeth Arden Co., Proctor & Gamble Productions, Inc., and Lehn & Fink Products Corporation, and there remain issues of fact as to the whether any it was contaminated with asbestos. Plaintiff has sufficiently raised credibility issues and issues of fact, requiring a trial of this matter. There remain issues of fact as to whether WCD's talc was contaminated with asbestos, and whether WCD's talc, including the Italian talc, in the various manufacturer's talc powder products used by plaintiff during the relevant period caused her mesothelioma, warranting denial of summary judgment.

Alternatively, WCD claims that plaintiff failed to provide the specific talc powder products used by the different manufacturers for the relevant periods that she identified, and they were not tested. WCD argues that there is no direct evidence of plaintiff's exposure to asbestos from the talc supplied, distributed or sold by WCD and summary judgment is warranted. WCD's argument does not state a basis to obtain summary judgment.

“In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant’s product” (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff need “only show facts and conditions from which defendant’s liability may be reasonably inferred” (Reid v Ga.-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). A plaintiff’s inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has “presented sufficient evidence, not all of which is hearsay, to warrant a trial” (Oken v A.C. & S. (*In re N.Y.C. Asbestos Litig.*), 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Plaintiff is not required to show the precise causes of her damages, but only show facts and conditions from which WCD’s liability may be reasonably inferred to raise an issue of fact. To the extent that defendant WCD relies on potentially contradictory evidence, plaintiff has provided sufficient proof to create a reasonable inference and raise issues of fact. There remain issues of fact as to whether WCD’s talc that was sold, supplied and distributed to the remaining manufacturer’s of talc powder products identified by plaintiff for the relevant periods was from “asbestos free” mines and not contaminated with asbestos.

Accordingly, it is ORDERED that defendant Whittaker Clark & Daniels, Inc.’s motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross-claims asserted against it, is granted only to the extent of dismissing plaintiff’s tenth cause of action for punitive damages, dismissing plaintiff’s claims asserted against Whittaker Clark & Daniels, Inc. after 2004, and dismissing plaintiff’s claims asserted against Whittaker Clark & Daniels, Inc. as to Johnson & Johnson and Johnson Baby Powder for the period of 1986 through 1997, and it is further,

ORDERED that plaintiff’s tenth cause of action for punitive damages asserted against Whittaker Clark & Daniels, Inc. is severed and dismissed, and it is further,

ORDERED that plaintiff’s claims asserted against Whittaker Clark & Daniels, Inc. for the sale, distribution or supply of asbestos contaminated talc to the manufacturer’s of talc powder she used after 2004, are severed and dismissed, and it is further,

ORDERED that plaintiff’s claims asserted against Whittaker Clark & Daniels, Inc. alleging it sold, distributed or supplied asbestos contaminated talc for use in Johnson & Johnson Baby Powder for the period of 1986 through 1997, are severed and dismissed, and it is further,

ORDERED that Whittaker Clark & Daniels, Inc. is directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the remaining parties, the trial support clerk located in the General Clerk’s Office and the County Clerk’s Office, who are directed to mark their records accordingly, and it is further,

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

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: May 24, 2019

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
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