

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

2019 NY Slip Op 31499(U)

May 29, 2019

Supreme Court, New York County

Docket Number: 190295/2017

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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 Justice PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

BEVERLEY ALLEYNE, INDEX NO. 190295/2017
- against - Plaintiffs, MOTION DATE 05/15/2019
A.O. SMITH WATER PRODUCTS CO., et al, MOTION SEQ. NO. 006
Defendants. MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on Revlon, Inc.'s motion pursuant to CPLR §3212 for summary judgment and cross-motions to compel discovery and for a protective order:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include 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 Revlon, Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross-claims asserted against it, is granted as stated herein.

Plaintiff, Beverley Alleyne, was diagnosed with mesothelioma in March of 2017 (Mot. Exh. B). She was born in England in 1960 and is a citizen of the United Kingdom. Her father was a resident of Brooklyn, New York. Plaintiff claims she came to the United States for visits lasting up to a month in 1980 through 2005.

Plaintiff was deposed over the course of eight days, November 14, 15, 16, and 17, 2017 and January 9, 10, 11, and 12, 2018 (Mot. Exh. C and Opp. Exh. B). She testified that in 1980, 1984, 1994, 2005, 2006, 2007, 2008 and 2010, when she visited her father and his family in Brooklyn, New York she would buy and use Revlon, Inc.'s "Charlie" talcum powder purchased at department stores in Brooklyn and Manhattan.

Plaintiff remembered that the "Charlie" talc powder came in a cylinder container approximately six to eight inches high and about one and a half to two inches round. She stated that the container of the Charlie" talc powder was not tin, or "cardboardy," it was a little bit firmer than cardboard.

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

Plaintiff stated that the “Charlie” talc powder container was a silvery color with the word “Charlie” written in script on it possibly in blue. Plaintiff never looked at the bottom of the container (Mot. Exh. C, pgs. 985-992). Plaintiff also remembered the word “Revlon” was printed in block letters in blue or red near the bottom of the container (Mot. Exh. C, pg. 1008).

Plaintiff stated that when she used Revlon, Inc.’s “Charlie” talc powder in New York a portion of it would remain in the air (Mot. Exh. C, pg. 1075). Plaintiff testified that when she used Revlon, Inc.’s “Charlie” talc powder in England it would create dusty conditions (Mot. Exh. C, pgs. 1076-1077).

Revlon, Inc.’s corporate representative Michael Helman, testified at his deposition that he started working at the company in 1994 and worked there until he retired in 2017 (Mot. Exh. D, pg. 14). He testified that the company’s paper records through the 1980’s that were kept at the Iron Mountain storage facilities - including formula histories and batch cards - were destroyed as a result of multiple fires in 1997. Mr. Helman testified that as a result of the fires there were no records available prior to 1997 (Mot. Exh. D, pgs. 119-124, and 144-145).

Mr. Helman testified that post-1999 there was a confirmation process with the suppliers that the talc received was asbestos-free. He testified that Revlon, Inc. first became aware that talcum powder could be contaminated with asbestos in the early 1980’s. Mr. Helman stated that the early 1980’s was the first time asbestos certified-free talc became available and the label “cosmetic grade talc” came into existence. He claims that Revlon, Inc. did not use talcum powder that was contaminated with asbestos starting in the early 1980’s, because it used only vendor asbestos certified-free talc which was also known as cosmetic grade talc. Mr. Helman testified that to his knowledge Revlon, Inc. did not test their finished products including “Charlie” body talcum powder for the presence of asbestos. (Mot. Exh. D, pg. 70-74, 80 and 134-135). He stated that there were multiple suppliers that sourced talc to Revlon, Inc. 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, would be co-mingled and used for all of the talc powder products produced by Revlon, Inc. (Mot. Exh. D, pgs. 22-25).

Plaintiff commenced this action with a summons and complaint on October 5, 2017. The complaint incorporated by reference Phillips & Paolicelli’s New York City Asbestos Litigation Standard Complaint for Personal Injury No. 1 (Mot. Exh. A and NYSCEF Doc. # 36).

Revlon, Inc.’s motion seeks an Order granting summary judgment, pursuant to CPLR §3212, dismissing the plaintiffs’ complaint and all cross-claims asserted against it.

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 NY2d 833, 652 NYS2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving 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 NY2d 525, 569 NYS2d 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 nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1<sup>st</sup> Dept. 1998]).

Revlon, Inc. argues that plaintiff cannot establish she was exposed to asbestos through her use of any Revlon, Inc. “Charlie” talc product during the relevant period or that Revlon, Inc.’s talc powder products were capable of causing her mesothelioma. Revlon, Inc. further argues that plaintiff’s experts reports are conclusory, speculative and unable to establish sufficient asbestos

contamination in the “Charlie” talc powder products used by plaintiff during the relevant period to cause her mesothelioma.

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. Georgia - 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]). Revlon, Inc. must unequivocally establish that Ms. Alleyne either was not exposed to asbestos from the “Charlie” talc powder products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of her 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]).

Revlon, Inc. provides no expert testimony to establish a prima facie case on causation, foreseeability on plaintiff’s negligence claims, or plaintiff’s defective design and failure to warn claims. Revlon, Inc.’s arguments that plaintiff lacks evidence, and that her experts’ reports are conclusory and speculative, amounts to “pointing to gaps in plaintiff’s proof” and fails to state a prima facie basis to obtain summary judgment.

Revlon, Inc. must first meet its prima facie burden before plaintiff is required to provide any evidence to raise an issue of fact. On Revlon, Inc.’s motion seeking summary judgment on causation, it is not plaintiff’s burden to prove that her exposure to Revlon Inc.’s “Charlie” talc powder product during the relevant time period was a substantial factor in causing her mesothelioma. “The fact that some talc might be asbestos-free does not eliminate the possibility that plaintiff was exposed to defendant’s asbestos containing product” (See *Feinberg v. Colgate-Palmolive Co. (In re New York City Asbestos Litigation)*, 53 Misc. 3d 579, 39 N.Y.S. 3d 629 [Sup. Ct., New York County, 2016] citing to *Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra at 521).

Alternatively, plaintiff as the non-moving party is entitled to the benefit of all favorable inferences, regardless of Revlon, Inc.’s allegation that she is unable to provide sufficient proof of her exposure.

“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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 2004]).

Revlon, Inc.’s corporate representative Mr. Michael Helman, by testifying that the company was aware of potential asbestos contamination in talc from the 1980’s, and the company’s failure to test any of the talc going into its products and choosing to rely on the suppliers test, creates issues of fact on plaintiff’s foreseeability and failure to warn claims.

Plaintiff relies on records provided by Cyprus Industrial Mineral, from various years starting in 1982 through 1989 showing shipments of Supra "S," and Suprafino talc bearing codes 1705 and 1706, sold to Revlon, Inc. (Opp. Exh. F). Records of sales from Cyprus Industrial Mineral Industrial Mineral from various years starting in 1989 through 1998 showing shipments of Supra "A" talc sold to Revlon, Inc. (Opp. Exh. G). Plaintiff claims that Supra "S," "Suprafino" and Supra "A" talc was all mined in Italy. Plaintiff also provides sales records from Whittaker Clark & Daniels for the sale of talc to Revlon Inc. (Opp. Exh. H). Plaintiff argues that the same Italian talc was tested by Dr. Steven P. Compton, Ph.D. and found to contain asbestos (Opp. Exh. N). Plaintiff also provides the expert report of Dr. Jacqueline Moline, MD, Msc, FACP, FACOEM, a specialist certified in Occupational and Internal Medicine (Opp. Exh. JJ). Dr. Moline relies on various studies, testing and reports - including those of Dr. Compton (Opp. Exh. N) and Dr. William Longo, Ph.D. which assesses the same Italian talc used by Revlon, Inc. that was also identified as used in Johnson & Johnson's Baby Powder and identifies asbestos contamination (Opp. Exh. Q, Parts. 1-6) - as establishing plaintiff's exposure to asbestos contaminated talc caused her mesothelioma.

Plaintiff's inability to provide detailed and specific testing of Revlon, Inc.'s "Charlie" talc powder product, is not enough for Revlon, Inc. to obtain summary judgment on causation. There remain issues of fact on her claims of negligence and defective design due to failure to warn.

Revlon, Inc. has stated a basis to obtain summary judgment on plaintiff's fifth cause of action for conspiracy (See NYSCEF Exh. 36). New York does not generally recognize an independent cause of action for civil conspiracy to commit a tort. The allegations asserted by plaintiff are only sustainable to connect actions of separate defendants with an otherwise actionable tort (See *Blanco v. Polanco*, 116 A.D. 3d 892, 986 N.Y.S. 2d 151 [2<sup>nd</sup> Dept. 2014] citing to *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y. 2d 968, 503 N.E. 2d 102, 510 N.Y.S. 2d 546[1986]). Plaintiff does not provide sufficient proof in support of her claim that Revlon, Inc.'s mere participation in the Cosmetic Toiletry and Fragrance Association, Inc. (hereinafter "CFTA") was sufficient to establish a conspiracy to avoid disclosure of the presence of asbestos in talc (See Opp. Exhs. BB, CC and DD). Plaintiff has not shown that Revlon, Inc. participated in establishing the CFTA's testing standards (see Exh. CC, Revlon Research is absent from the CFTA Standards Committee meeting in 1975 and Exh. DD makes no reference to Revlon, Inc. as a member of CFTA's Talc Subcommittee in 1976 ). Plaintiff has not raised an issue of fact or shown that Revlon, Inc. intentionally acted with other defendants to engage in the alleged tortious conduct, warranting summary judgment on the fifth cause of action for conspiracy.

Plaintiff's alleged cross-motion, is defective pursuant to CPLR §2215, it does not contain a "Notice of Cross-Motion" (See *Myung Chun v. North American Mortgage Co.*, 285 A.D. 2d 42, 729 N.Y.S. 2d 716 [1<sup>st</sup> Dept. 2001]). Although NYSCEF Docket # 394 is labeled "Affidavit or Affirmation in Opposition to Motion and In Support of Cross-Motion," the actual document plaintiff uploaded is titled "Affirmation in Support of Plaintiff's Opposition to Defendant Revlon, Inc.'s Motion for Summary Judgment" and makes absolutely no reference to the cross-motion relief. Plaintiff only addresses the cross-motion relief in the last section (Section F) of her Memorandum of Law, seeking to compel discovery.

Revlon, Inc.'s cross-motion seeking a Protective Order on the discovery plaintiff seek to compel, establishes that Revlon, Inc. was fully apprised of plaintiff's position and capable of responding to plaintiff's defective papers. The interrelatedness of the relief sought in both papers is also a factor to be considered, and permits this Court in its discretion to address the relief sought in both cross-motions (see *Marx v. Mark*, 258 A.D. 2d 366, 685 N.Y.S. 2d 224 [1<sup>st</sup> Dept. 1999] and *Fried v. Jacob Holding, Inc.*, 110 AD.3d 56, 970 N.Y.S. 2d 260 [2<sup>nd</sup> Dept. 2013]).

Plaintiff's cross-motion dated May 9, 2019 seeks to compel Revlon, Inc. to provide discovery in the form of more substantive responses to her Notice of Discovery and Inspection and to produce a corporate representative for a further deposition to address the content of any late produced documents. Plaintiff argues that Revlon, Inc. failed to respond to her Notice of Discovery and Inspection served on January 10, 2019 seeking documents referenced at Mr. Helman's October 4, 2018 deposition (Mot. Exh. D and Opp. Exh. AAA). Revlon, Inc. responded to plaintiff's demands on April 11, 2019. The responses object on the grounds of privilege (attorney-client, trade-secret, and joint-defense privileges) and provide reference to Revlon, Inc.'s Privilege Log with some redacted documents (Opp. Exh. BBB).

Revlon, Inc.'s cross-motion seeks a protective order arguing that plaintiff's cross-motion seeks documents it has identified as privileged and that much of the supplemental discovery sought by plaintiff does not exist as a result of the fires at the Iron Mountain storage facilities. Revlon, Inc. claims that a further deposition amounts to a "fishing expedition," is merely a delay tactic, and seeks information that is not in the company's possession. Revlon, Inc. further argues that plaintiff's cross-motion is untimely and that plaintiff made no mention of this additional discovery prior to the May 9, 2019 cross-motion made on the eve of trial. Plaintiff did not submit opposition papers to Revlon, Inc.'s cross-motion.

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 [1<sup>st</sup> Dept. 1991]).

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 [3<sup>rd</sup> Dept., 1998] and *Cascardo v. Cascardo*, 136 A.D. 3d 729, 24 N.Y.S. 3d 742 [2<sup>nd</sup> Dept., 2016]).

At the March 13, 2019 pre-trial conference plaintiff had this case assigned a May 14, 2019 trial date, there was no reference at that time to any outstanding discovery issues. Plaintiff has not established that the discovery sought exists, is outside of Revlon, Inc.'s asserted privileges or otherwise "material and necessary," warranting denial of her cross-motion. Revlon, Inc. is granted the protective order as to the additional discovery sought by plaintiff in the form of supplemental responses to her January 10, 2019 Notice of Discovery and Inspection and the production of a corporate representative for a further deposition to address the content of any late produced documents.

Accordingly, it is ORDERED that defendant Revlon, 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 fifth cause of action for conspiracy as stated in *Phillips & Paolicelli's New York City Asbestos Litigation Standard Complaint for Personal Injury No. 1* (NYSCEF Docket # 36), and it is further,

ORDERED, that plaintiff's fifth cause of action for conspiracy as stated in *Phillips & Paolicelli's New York City Asbestos Litigation Standard Complaint for Personal Injury No. 1* (NYSCEF Docket # 36), is severed and dismissed, and it is further,

ORDERED, that the remainder of plaintiff's causes of action asserted in the complaint remain in effect, and it is further,

ORDERED, that the remainder of the summary judgment relief sought in Revlon, Inc.'s motion for summary judgment, is denied, and it is further,

ORDERED, that plaintiff's cross-motion to compel discovery in the form of more substantive responses to her Notice of Discovery and Inspection and to produce a corporate representative for a further deposition to address the content of any late produced documents, is denied, and it is further,

ORDERED, that Revlon Inc.'s cross-motion for a protective order, is granted, and it is further,

ORDERED, that Revlon, Inc. is granted a protective order and plaintiff is prohibited from seeking additional discovery in the form of supplemental responses to her January 10, 2019 Notice of Discovery and Inspection and the production of a corporate representative for a further deposition to address the content of any late produced documents, and it is further,

ORDERED, that Revlon Inc. shall serve a copy of this Order with Notice Entry pursuant to e-filing protocol on the remaining parties, the Clerk of the Trial Support Office located in the General Clerk's Office, and the County Clerk who shall mark their records accordingly, and it is further,

ORDERED, that the Clerk of the Court shall enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

Dated: May 29, 2019

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