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,

Plaintiffs,

- against -

A.O. SMITH WATER PRODUCTS CO., *et al*,

Defendants.

INDEX NO. 190295/2017
MOTION DATE 05/29/2019
MOTION SEQ. NO. 014
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on Revlon, Inc.'s motion pursuant to CPLR §3101(d) to exclude the May 2019 report of plaintiff's expert Dr. William Longo:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1- 4, 5-6
Answering Affidavits — Exhibits	7 - 9
Replying Affidavits	

Cross-Motion: ☐ Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that defendant Revlon, Inc.'s motion pursuant to CPLR §3101(d) to exclude the May 10, 2019 report of plaintiff's expert, Dr. William Longo, Ph.D., is denied.

Plaintiff, Beverley Alleyne, was diagnosed with mesothelioma in March of 2017 (Mot. Exh. A, A.9.I.(c) pgs. 12-13). Ms. Alleyne alleges she was exposed to asbestos in a variety of ways, including the use of various manufacturers' talc powder products. Her exposure - as relevant to this motion - is from the use of Revlon, Inc.'s "Charlie" talc powder product that was purchased in the United States from about 1980 through 2010.

Plaintiff was deposed over the course of eight days, November 14, 15, 16, and 17, 2017 and January 9, 10, 11, and 12, 2018 (NYSCEF Docket #'s 102, 103, 104, 105, 106, 107, 108 and 109, and Opp. Exh. A). Plaintiff testified that Revlon, Inc.'s "Charlie" talc powder was one of the brands she carried in her handbag for freshening up (NYSCEF Docket # 109, pg. 1005). Plaintiff stated that when she used Revlon, Inc.'s "Charlie" talc powder in New York a portion of it would remain in the air (NYSCEF Docket # 109, pg. 1075). Plaintiff testified that when she used Revlon, Inc.'s "Charlie" talc powder in England it would create dusty conditions (Opp. Exh. A, pgs. 1076-1077).

Revlon, Inc.'s corporate representative, Michael Helman, testified at his October 4, 2018 deposition 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 in 1997 as a result of multiple fires. Mr. Helman testified that as a result of the fires there were no records available prior to 1997 (Opp. Exh. C, pgs. 119-124, and 144-145).

He 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 certified asbestos-free talc became available and the label "cosmetic grade talc" came into existence. He claims that Revlon, Inc. did not use talcum powder contaminated with asbestos starting in the early 1980's, because it used only vendor certified

asbestos-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 (Opp. Exh. C, pg. 70-74, 80 and 134-135).

Mr. Helman testified that initially a beginning sample would be sent to Revlon, Inc. by suppliers for comparison to the standard to make sure it was the same talc, then it would be thrown away and the batch going to the plant for first production would become the new standard. He stated that there are no exemplars of the initial approved sample, and that typically they might be kept up to a year, then Revlon, Inc. would throw them out. He also testified that Revlon, Inc. kept the formulas for a short period of time as part of the line standard and then, between six months and a year later depending on the shelf life of the powder, or sooner if manufacturing was stopped, the exemplars would be thrown out (Opp. Exh. C, pgs. 199-201).

Plaintiff's counsel purchased historic samples of Revlon, Inc.'s "Charlie" talc powder from sellers on the website "Etsy," on October 11, 2017, November 19, 2017 and June 14, 2018 (Mot. Exh. R, "Chain of Custody" Information).

The parties proceeded with discovery before the Special Master Shelley Olsen. On January 10, 2019 plaintiff served a supplemental Notice for Discovery and Inspection on defendant Revlon Inc. seeking additional discovery after Mr. Helman's October 4, 2018 deposition (Opp. Exh. D). The demand did not seek any Revlon, Inc. product exemplars, it only sought batch formula cards from 1970 through 2005 (Opp. Exh. D, item 15). Plaintiff's initial Expert Witness Disclosure Pursuant to CPLR 3101 (d), dated January 11, 2019, lists Dr. William Longo, Ph.D., as an expert, but only made general references to his testimony and does not specifically identify which materials he is going to rely on.

On January 18, 2019 a trial readiness conference was held by Special Master Olsen, over the defendants' - including Revlon Inc.'s - objections to plaintiff's expert witness disclosure (Mot. Exh. E). Plaintiff filed a Note of Issue and Certificate of Readiness for Trial on February 27, 2019 (Mot. Exh. I). This case was placed in the Phillips & Paolicelli, LLP April 2018 - In Extremis Trial Cluster over the defendants' objections, and transferred to this Court (Mot. Exh. B and NYSCEF Docket # 62). A pre-trial conference was held on March 13, 2019; at that time the case was assigned a May 14, 2019 trial date.

On April 11, 2019 Revlon, Inc. responded to plaintiff's supplemental demands (Opp. Exh. E). Revlon, Inc.'s responses reiterated that paper records and files were destroyed on March 19, 1997 by multiple warehouse fires at the Iron Mountain records management storage facility in South Brunswick, N.J..; provided the raw material specifications for the suppliers of cosmetic grade talc used; and provided two redacted copies of the Pilot Batch Formula for Charlie White Xmas Body Powder. Revlon Inc. asserted trade-secret privlege as the basis for the redactions in the batch formula (Opp. Exh. E).

Plaintiff served an "Amended Expert Witness Disclosure Pursuant to CPLR 3101(d)," dated April 12, 2019, detailing Dr. Longo's testimony on his testing and analysis of Chanel, Inc.'s talcum powder products and Johnson's Baby Powder. The expert disclosure does not make any reference to Dr. Longo's testing of Revlon, Inc.'s "Charlie" talc powder products (Mot. Exhs. O and P). Plaintiff served a "Second Amended Expert Witness Disclosure Pursuant to CPLR 3101 (d)," dated April 22, 2019, which only removed one of the other listed expert witnesses, there is no reference to any testing being done by Dr. Longo on Revlon, Inc.'s "Charlie" talc powder product (Mot. Exh. Q).

On April 12, 2019, the day after Revlon, Inc. responded to the plaintiff's supplemental discovery demands and about a month after the pre-trial conference, plaintiff's counsel sent the historic samples of Revlon, Inc.'s "Charlie" talc powder obtained from the "Etsy" website on October 11, 2017,

November 19, 2017 and June 14, 2018, to Dr. Longo's lab - Materials Analytical Services, LLC - in Suwanee, Georgia. Dr. Longo received the samples on April 15, 2019, conducted testing, and prepared a report titled "Analysis of Charlie Perfumed Powders" dated May 10, 2019 (Mot. Exh. R). Plaintiff provided this report to the defendants on May 10, 2019, four (4) days before the scheduled trial date.

On May 14, 2019, a request was made for an adjournment of the trial by all parties. The application was granted and the trial date was adjourned three weeks to June 4, 2019. Dr. Longo was subsequently deposed by the defendants on May 23, 2019, the only date he was available. Plaintiff's counsel sought to have the defendants on May 20, 2019, three days before Dr. Longo's deposition, conduct their own testing of the samples provided to Dr. Longo. Revlon, Inc. refused plaintiff's offer.

Revlon, Inc.'s motion seeks an Order pursuant to CPLR §3101(d) excluding plaintiff's expert, Dr. William Longo's May 10, 2019 report.

Revlon, Inc. claims that plaintiff's counsel should have, but never: (1) disclosed that they were in possession of historic samples of "Charlie" talcum powder; (2) disclosed that as of the April 12, 2019 amendment to CPLR 3101(d) expert witness disclosure, there was anticipated testimony of Dr. Longo's testing of the historic samples of "Charlie" talcum powder; and (3) offered an earlier opportunity for defense experts to conduct testing on the exemplars of historic samples of "Charlie" talcum powder. Revlon, Inc. argues that the failures of plaintiff's counsel amount to a lack of good faith for the admission of Dr. Longo's May 10, 2019 report, and results in substantial prejudice to the defendant Revlon, Inc. if forced to defend itself at trial against this evidence.

Defendant Whittaker, Clark & Daniels (hereinafter "WCD") submitted an affirmation in support adopting the arguments made by Revlon, Inc. and provides additional copies of exhibits.

The NYCAL Case Management Order (CMO) Section IX. (O) "Post-Note Discovery," permits discovery after the note of issue pursuant to 22 NYCRR §202.21(d) at the directive of either the Special Master or the Court.

CMO Section IX. (O) "Post-Note Discovery," states:

> "Where necessary, discovery shall continue after the filing of a note of issue pursuant to the Uniform Rules for the New York State Trial Courts §202.21(d) upon directive of the Court or the Special Master. Except as set forth in Section XI.D below, or upon consent of the parties. *Absent extraordinary circumstances no further discovery shall be allowed ten days before a firm date to select a jury in a trial-ready case*" (Emphasis added).

"Extraordinary circumstances" has been equated with the "unusual or unanticipated circumstances" standard stated in 22 NYCRR §202.21(d) (See Marks v. Morrison, 279 A.D. 2d 1027, 714 N.Y.S. 2d 167 [4th Dept. 2000]).

22 NYCRR §202.21(d) permits post note of issue discovery where there are "unusual or unanticipated circumstances," requiring the disclosure to prevent "substantial prejudice" to a party (See Arons v. Jutkowitz, 9 N.Y. 3d 393, 880 N.E. 2d 831, 850 N.Y.S. 2d 345 [2007]). The mere lack of diligence does not constitute "unusual or unanticipated circumstances" (Schroeder v. IESI NY Corp., 24 A.D. 3d 180, 805 N.Y.S. 2d 79 [1st Dept. 2005] and Colon v. Yen Ru Jin, 45 A.D. 3d 359, 845 N.Y.S. 2d 281 [1st Dept., 2007]). The realization of the importance of a non-party expert witness' testmony after the filing of the note of issue is sufficient to establish "unusual or unanticipated circumstances" (Masa v. Lower Manhattan Development Corporation, 142 A.D. 3d 927, 27 N.Y.S. 3d 893 [1st Dept. 2016]).

Plaintiff argues that the "unusual or unanticipated circumstances" causing the delay in testing was a result of Revlon, Inc.'s dilatory response to the

supplemental demand for discovery which was provided about two months after the Note of Issue was filed. Plaintiff's counsel provides no explanation for its own dilatory practice of waiting until January 10, 2019, more than three months after Mr. Helman's October 4, 2018 deposition, to serve a supplemental discovery demand. Plaintiff served the demand about a month before the Note of Issue was filed on February 27, 2019.

Plaintiff had the historic samples for Dr. Longo to test as of June 14, 2018 and was aware that Revlon, Inc. did not retain any exemplars as of Mr. Helman's October 4, 2018 deposition. Plaintiff has failed to establish that it was necessary to wait for the discovery provided by Revlon, Inc. on April 11, 2019, to determine whether Dr. Longo should conduct the testing of the historic samples. There is no proof that Revlon, Inc.'s discovery responses would have altered either Dr. Longo's testing by Polarized Light Microscopy (PLM) and Analytical Transmission Electron Microscopy (ATEM) of the historic samples, or the results of that testing.

CPLR §3101(d)(1)(i) 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)(1)(i) 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 (See 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 [1st Dept. 2014] citing to Martin v. Triborough Bridge and Tunnel Authority, 73 A.D. 3d 481, 901 N.Y.S. 2d 193 [1st Dept. 2010]). "Prejudice is shown where the expert is testifying as to new theories, or where the opposing party has no time to prepare a rebuttal" (Haynes v. City of New York, 145 A.D. 3d 603, 45 N.Y.S. 3d 387 [1st Dept. 2010]).

Plaintiff argues that Dr. Longo's May 10, 2019 report was disclosed "weeks" before his May 23, 2019 deposition. Plaintiff claims her attorneys actions are not willful and that defendants are not prejudiced because they were offered an opportunity to have their own experts conduct testing of Dr. Longo's samples on May 20, 2019 but they refused to do so. It has not been shown that plainitff's attorneys actions were wilful or intentional. Revlon, Inc. has established that accepting plaintiff's May 20, 2019 date for having defense experts test the samples used by Dr. Longo would mean that together with Dr. Longo's deposition testimony on May 23, 2019, they would only have about a week before the June 4, 2019 trial date to alter the entire defense strategy; this lack of time could be prejudicial to this defendant.

Plaintiff argues that she is more prejudiced by the exclusion of Dr. Longo's May 10, 2019 report than the defendants. Plaintiff's counsel misinterpreted the provisions of the CMO by providing Dr. Longo's report of his analysis of Revlon, Inc.'s "Charlie" talcum powder historic samples four days before the initial May 14, 2019 trial date. Plaintiff's counsel informed the Court that all parties would be ready for trial on June 4, 2019, but was aware that discovery was ongoing and that the defendants were unable to depose Dr. Longo before May 23, 2019, about a week before the next scheduled trial date. Plaintiff's counsel seeks to have Revlon, Inc. and its experts scramble to obtain discovery and be ready for trial in less time than the approximately three weeks it took Dr. Longo just to prepare his report after he completed testing of Revlon, Inc.'s "Charlie" talcum powder.

Plaintiff's alleged illness and any potential substantial prejudice to her claims against Revlon, Inc. should be balanced against the potential prejudice to the defendants. They would be prejudiced if compelled to alter the defense to include Dr. Longo's May 10, 2019 report without an opportunity to have their own experts test plaintiff's "Charlie" talc exemplars before the current June 4, 2019 trial date. The potential prejudice to each of the parties is equal under these specific circumstances.

Dr. Longo's May 10, 2019 report was prepared after the note of issue was filed and less than ten days before the initial trial date which was subsequently adjourned on consent of the parties. Subsequently additional discovery - including Dr. Longo's deposition - has been obtained by the defendants before the adjourned trial date. If this Court were to preclude the May 10, 2019 report the allegedly injured plaintiff would be as equally prejudiced as Revlon Inc..To prevent the resultant prejudice to the parties the best course of action is to adjourn the trial of this case for a period of four (4) months, to October 15, 2019 to afford the defendants the time to complete the necessary testing of the "Charlie" talcum powder tested by Dr. Longo and to amend their expert witness reports. Any reports prepared by Dr. Longo of Revlon, Inc.'s "Charlie" talcum powder subsequent to May 10, 2019 are precluded at the time of trial.

Accordingly, it is ORDERED that defendant Revlon, Inc.'s motion pursuant to CPLR §3101(d) to exclude the May 10, 2019 report of plaintiff's expert, Dr. William Longo, Ph.D., is denied, and it is further,

ORDERED, that the trial of this case is adjourned to October 15, 2019 to afford the defendants the opportunity to complete the necessary testing of the "Chalie" talcum powder tested by Dr. Longo and to amend their expert witness reports, and it is further,

ORDERD, that defendants are to complete the testing of the "Charlie" talcum powder tested by Dr. Longo and provide any amended expert witness report by September 14, 2019, and it is further,

ORDERED, that Revlon Inc., serve a copy of this Order with Notice Entry pursuant to e-filing protocol on the remaining parties.

ENTER:

Dated: June 4, 2019

MANUEL J. MENDEZ
J.S.C.

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