

Matter of Rodriguez v Avon Prods., Inc.

2019 NY Slip Op 31758(U)

June 19, 2019

Supreme Court, New York County

Docket Number: 190151/2017

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
MIGUELINA RODRIGUEZ, as Administratrix of
The Estate of DINORA PERALTA, a/k/a DINORA
ANTONIA PERALTA, deceased, and DOMINGO
ROSARIO-DURAN, Individually

INDEX NO. 190151/2017

Plaintiff(s),

MOTION DATE 6/12/2019

- against -

MOTION SEQ. NO. 002

AVON PRODUCTS, INC., et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 5 were read on plaintiffs' motion for summary judgment:

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1- 3</u>
Answering Affidavits – Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion for leave to reargue, pursuant to CPLR § 2221, and upon re-argument, to vacate this Court's Decision and Order dated March 11, 2019 that dismissed Cyprus Amax Minerals Company (hereinafter, "CAMC") for lack of personal jurisdiction is denied.

Plaintiff Dinora Peralta grew up in the Dominican Republic and came to the United States in 1993 and has since lived in Brooklyn, New York. In December of 2016, when she was about 55 years old, Ms. Peralta was diagnosed with epithelial mesothelioma. Ms. Peralta alleged that she was exposed to asbestos from the use of cosmetic talc, specifically Avon Products Inc.'s (hereinafter "Avon") talc powder products. Ms. Peralta claimed that she used Avon products from about 1976 through 2016. She started using Avon talc powder when she was fifteen years old in the Dominican Republic. Ms. Peralta operated a small store in the Dominican Republic where she sold Avon products from a catalog. She testified that she personally used one bottle of Avon talc powder a week and would order five bottles a month just for herself when she was living in the Dominican Republic. Ms. Peralta specifically remembered Avon's "Noche Azul" (Blue Night). Her sister Oneida also identified Avon's "Charisma" as one of Ms. Peralta's favorites. Avon's perfumed talcs, "Timeless" and "Cotillion," were sampled by Ms. Peralta before recommending them to her store customers. Ms. Peralta used Avon's "Imari" product line starting in 1993 when she came to the United States (Aff. in Supp., Exh. 1 at 2).

Charles Mathieu, Inc. (hereinafter referred to as "Charles Mathieu") supplied Italian talc used by Avon for its talc products. Charles Mathieu was owned and operated by Donald Ferry and Peter Bixby from the 1930s. Charles

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Mathieu had three main business lines by the 1970s, including importing talc from Italy, mining and exploring U.S. talc, and processing talc at facilities in Alabama and New Jersey. Charles Mathieu and Cyprus Mines Corporation (“Cyprus Mines”) were competitors in the 1970s (Aff. in Supp., Exh. 1 at 2).

Cyprus Georesearch, Inc., a wholly-owned subsidiary of Cyprus Corporation, purchased part of Charles Mathieu’s assets and none of its liabilities in August 1979. Cyprus Georesearch, Inc. offered an extra \$1 million for all liabilities to remain with Charles Mathieu. Cyprus Mines agreed to pay \$3.5 million in cash and up to \$1.5 million in commissions on sales of Italian talc over the next twenty (20) years. Charles Mathieu retained its talc importation business and Cyprus Mines became one of its customers. Cyprus Mines began selling Italian talc imported by Charles Mathieu, who received a 4% commission on all sales. Charles Mathieu eventually changed its name to Charles Mathieu & Co. but remained the same company. The parties agreed to an Amendment in April 21, 1983 to reflect the name change to Charles Mathieu & Co. and continued the commission sales (Aff. in Supp., Exh. 1 at 3).

Cyprus Mines sold its talc business on June 5, 1992. Prior to the sale, it created Cyprus Talc Corporation and transferred its entire talc business to that entity. Rio Tinto purchased all outstanding stock from Cyprus Talc Corporation. Rio Tinto subsequently changed the name of Cyprus Talc Corporation to Luzenac America, Inc. In 2011, defendant, Imerys purchased all outstanding stock of Luzenac America, Inc. and changed the name of the company to Imerys Talc America, Inc. (Aff. in Supp., Exh. 1 at 3).

Defendant CAMC was created in 1993 after Rio Tinto acquired the Cyprus Mines’ talc business, and was separated from mining, milling, manufacture, sale or distribution of talc. CAMC was created by the merger of Cyprus Minerals Company-and its wholly-owned subsidiary Cyprus Mines-with Amax Inc. (Aff. in Supp., Exh. 1 at 3). Cyprus Mines did not, however, merge; rather, it remained an independent wholly-owned subsidiary of Cyprus Mineral. It was Cyprus Minerals that merged with Amax, Inc. to form CAMC.

CAMC moved to dismiss for lack of general or specific personal jurisdiction. This Court held that general jurisdiction could not be exercised over CAMC because it was not incorporated nor had its principal place of business in New York. This Court also held that plaintiffs had not met their burden in opposition or shown that there was any basis for specific personal jurisdiction over CAMC.

Plaintiffs now move for leave to reargue, claiming that this Court misapprehended that CAMC is subject to specific personal jurisdiction under CPLR 302(a)(1) based on Cyprus Minerals’ sale of Olympic talc to Avon and Kolmar in New York for the manufacture of the Avon products plaintiff, Mrs. Peralta, used. CAMC opposes the motion, arguing that plaintiffs have failed to present any evidence showing that CAMC is the successor to any talc business or talc liabilities.

CPLR § 2221[d] states that a motion for leave to reargue (i) shall be identified specifically as such, (ii) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (iii) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

A motion to reargue requires a showing that the Court “has overlooked significant facts or misapplied the law in its original decision” (*Town of Poestenkin v New York State Dept. of Environmental Conservation*, 229 AD 2d 650, 644 NYS 2d 602 [3rd Dept 1996], citing *Foley v Roche*, 68 AD 2d 558, 418 NYS 2d 588 [1st Dept 1979]). The movant cannot use a motion to reargue as a successive opportunity to merely restate previously unsuccessful arguments, reargue previously decided issues, or present new and different arguments (*Setters v AI Properties and Developments (USA) Corp.*, 139 AD 3d 492, 32 NYS 3d 87 [1st Dept 2016]).

Plaintiff argues that leave to reargue and personal jurisdiction over CAMC are warranted because this Court failed to attribute liability for talc operations to CAMC in accordance with the “original tortfeasor” doctrine.

Defendant opposes the motion, arguing that the motion to reargue should be denied because the operative transfer and assumption agreement clearly identifies Cyprus Mines Corporation as the wholly-owned subsidiary of Cyprus Minerals Company (the seller). Therefore, plaintiffs have conflated different entities.

While CAMC’s argument concerning the function of the “original tortfeasor” doctrine is abstractly valid, it is not proper to apply it in this case such as to now attribute personal jurisdiction and liability to CAMC for talc product related torts. The “original tortfeasor” doctrine does not apply in this case because CAMC was the parent holding company of Cyprus Mines Corporation and Cyprus Mines Corporation was the wholly-owned subsidiary of Cyprus Minerals Company. This corporate relationship is significant because it brings forth another principle of law which makes clear that the “original tortfeasor” doctrine does not apply under the present circumstances: “A parent company is not liable for the torts of its subsidiary, even if it is a wholly-owned subsidiary, unless it can be shown that the parent’s control over the subsidiary disregards its corporate independence” (*Horowitz v Aetna Life Ins.*, 148 AD2d 584, 586 [2d Dept 1989]; citing to *Billy v Consol. Mach Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 [1980]).

In the instant case, plaintiffs simply make no showing that Cyprus Minerals Company exercised so much control over Cyprus Mines Corporation such as to make CAMC ultimately liable for the talc related torts of Cyprus Mines Corporation. Amax, Inc. merged with Cyprus Minerals Company in 1993 and, by that time, Cyprus Mines Corporation had already sold the talc business; moreover, Cyprus Minerals Company would not, in the first place, be liable for talc related torts because it has not been shown that it exercised so much control over Cyprus Mines Corporation (its wholly-owned subsidiary) such as to make it

liable for these torts (see *Horowitz v Aetna Life Ins., supra*). Therefore, the court did not overlook the facts or misapply the law in the previous Decision and Order, and the motion to reargue and upon re-argument, to vacate this Court's March 11, 2019 Decision and Order is denied.

Accordingly, it is ORDERED, that plaintiffs' motion for leave to reargue this Court's Decision and Order from March 11, 2019, pursuant to CPLR § 2221 and, upon re-argument, to vacate the order dismissing Cyprus Amax Minerals Company for lack of personal jurisdiction is denied.

MANUEL J. MENDEZ
J.S.C.

ENTER:

Dated: June 19, 2019



MANUEL J. MENDEZ
J.S.C.

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Check if appropriate: DO NOT POST REFERENCE