

Alleyne v A.O. Smith Water Prods. Co.
2019 NY Slip Op 31875(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 190295/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13IN RE: NEW YORK CITY ASBESTOS LITIGATION

BEVERLEY ALLEYNE,

INDEX NO. 190295/2017

Plaintiffs,

MOTION DATE 06/26/2019

- against -

MOTION SEQ. NO. 017

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

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 6 were read on Chanel, Inc.'s motion pursuant to CPLR §3108 and §3111 for an open commission:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1- 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	

Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Chanel, Inc.'s motion pursuant to CPLR §3108 and §3111 to obtain an open commission to issue subpoenas and subpoenas duces tecum on out of state nonparty witnesses, is denied with leave to renew.

Plaintiff, Beverley Alleyne, was diagnosed epithelioid mesothelioma on March 9, 2017. Ms. Alleyne alleges she was exposed to asbestos from the use of various manufacturers' talc powder products. Her exposure - as relevant to this motion - is from the use of Chanel, Inc.'s "talcum powder product."

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 Doc. #s 102-109). Plaintiff remembered that the Chanel, Inc. powder she used came in a white cardboard box with the word "CHANEL" written in silver block capital letters, with the Chanel, Inc. logo, and the words "London, Paris, New York." She described the inner packaging as a round container with a white lid and silver around the bottom of the lid, with a white powder puff that had two C's and a couple of little bows (NYSCEF Docket # 105, pgs. 574-578 and 577, 586-587 and 591). Plaintiff testified that one container had about eight ounces of powder in it (NYSCEF Doc. # 105, pgs. 579-580). Plaintiff stated that she used a powder puff to apply talcum powder all over her body (NYSCEF Docket # 103, pgs. 307-308). Plaintiff testified that when she used Chanel, Inc. talcum 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 (NYSCEF Doc. # 109, pgs. 1070-172).

Plaintiff filed a Note of Issue and Certificate of Readiness for Trial on February 27, 2019 (NYSCEF Doc. # 702). This case was placed in the Phillips & Paolicelli, LLP April 2018 - In Extremis Trial Cluster and transferred to this Court (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 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, subsequently the trial was adjourned to October 15, 2019 so that the parties could complete all outstanding discovery - including plaintiff obtaining depositions and any necessary additional reports of testing performed by Chanel, Inc.'s experts (NYSCEF Doc. # 715).

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

Plaintiff's attorneys exchanged the reports of their expert, Dr. William Longo, Ph.d. with Chanel, Inc.'s attorneys in January of 2019. Dr. Longo obtained twenty-four (24) historic samples of Chanel, Inc.'s "Chanel No. 5" talcum powder products from plaintiff's attorneys who purchased them over the internet and from a plaintiff in an unrelated action. Dr. Longo conducted Polarized Light Microscopy (PLM), Analytical Transmission Electron Microscopy (ATEM) and Automated Field Emission Scanning Electron Microscopy (FESEM) to analyze the products and determined that eighteen (18) samples had asbestos fibers or bundles. Dr. Longo prepared two reports in January of 2019 explaining his testing techniques and the results of the testing (Opp. Exh. B, Parts 1 through 4, and C). Plaintiff's attorneys exchanged Dr. Longo's report with Chanel, Inc. in January of 2019.

Chanel, Inc.'s motion seeks an Order pursuant to CPLR §3108 and CPLR §3111, directing an open commission to enable issuance of subpoenas and subpoenas duces tecum for document discovery and depositions of the non-party witnesses: Robert Delashaw of Key Largo, Florida; Aneta Klusak of Waterbury, Connecticut; Ryan Fish of West Gardiner, Maine; and Orlando Munoz, also residing outside of the State of New York.

Chanel, Inc. claims that the four non-party witnesses are responsible for selling over the internet the alleged historic samples of "Chanel No. 5" talcum powder used by Dr. Longo for testing. Chanel Inc. states that prior to Dr. Longo's May 23, 2019 deposition the names of the non-party witnesses and sources of the alleged historic samples were unknown and were not provided despite "repeated requests for such information" (Mot. Murski Aff., para. 4, pg. 2). Chanel, Inc. further claims that no information was provided about the sellers or source of the alleged historic samples of "Chanel No. 5" until the night before Dr. Longo's May 25, 2019 deposition. Chanel, Inc. provides no proof of the alleged requests for the discovery of the sources of the historic samples.

Chanel, Inc. claims that the out of state discovery sought is material and necessary to the defense of this action on the issue of chain of custody and authentication of the materials tested by Dr. Longo. Chanel, Inc. claims that it is seeking evidence of where, or from whom the sellers obtained the products; if they were already used or opened when first received from the sellers; whether they were re-sealed prior to shipment; and how the products were stored by the seller over time. Chanel, Inc. states that it does not authorize the sale of any of its products on either "eBay" or "Etsy." Chanel Inc. argues that any discovery of prior "take-down" notices issued to the sellers would establish that they were on notice that the "Chanel No. 5" talcum powder products sold to plaintiff's attorneys were counterfeits, which goes to the crux of the chain of custody and authentication issue that is central to resolution of this action.

CPLR § 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." "The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity" (Kapon v. Koch, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]). It is within the court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (Roman Catholic Church of the Good Shepherd v Tempco Systems, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994] and Reuters Ltd. v Dow Jones Telerate, 231 AD2d 337, 662 NYS2d 450 [1st Dept. 1997]).

Plaintiff opposes the motion arguing that Chanel Inc. has not provided any documentation in support of the relief sought in this motion to establish necessity and that the discovery sought amounts to a "fishing expedition" to obtain additional unnecessary discovery. Plaintiff claims that Chanel Inc. is speculating

as to whether the historic samples are counterfeit. Plaintiff argues even if “take down” notices were given to the four sellers because Chanel, Inc. does not authorize sales on Ebay or Etsy, the unauthorized sales do not establish the “Chanel No. 5” talcum powder that was tested by Dr. Longo is counterfeit, or unauthentic. Plaintiff claims that “Chanel No. 5” samples were provided by another plaintiff that has mesothelioma and that some of the historic samples came in sealed packages. Plaintiff argues that at least some of the discovery sought is unnecessary or irrelevant to this action, which includes discovery of Chanel fashion products or jewelry, and applies to other manufacturer’s products or brands.

CPLR § 3108 states in part that, “A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state.” A party seeking an open commission must demonstrate that the testimony sought is not only necessary to prosecution or defense of the case, but also “is otherwise unavailable.” (*Karaduman v. Newsday, Inc.*, 95 A.D.2d 669, 463 N.Y.S.2d 221 [1st Dept. 1983]). The movant is required to make “a strong showing of necessity and demonstrate that the information is unavailable from other sources (*MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC*, 103 A.D. 3d 486, 960 N.Y.S. 2d 25 [1st Dept. 2013]).

CPLR § 3111 applies to the documents used in aid of conducting a deposition. It requires that the party seeking disclosure first determine the identifiable documents, and if they cannot do so, then accurately pinpoint the specific materials through deposition testimony (*Harding v. Spofford Laundry Corp.*, 44 A.D. 2d 804, 355 N.Y.S. 2d 590 [1st Dept. 1974] citing to *Ramo v. General Motors Corp.*, 36 A.D. 2d 693, 318 N.Y.S. 2d 951 [1st Dept. 1971]).

Chanel, Inc. has not established that the discovery that would be obtained from these four non-party witnesses cannot be obtained elsewhere. Chanel, Inc. has either had its own experts test the same samples used by Dr. Longo or is in the process of testing them. Chanel, Inc. is aware of the formula used in “Chanel No. 5” and could readily determine, by its own expert’s testing of the samples, whether they are unauthentic or counterfeit.

In addition, the proposed subpoenas makes overly broad inquiries, including seeking discovery: of “all” or “any brand of cosmetic or talcum powder products;” “a list identifying all ‘Chanel’ products (including but not limited to fashion items, jewelry and fragrances);” and all “Chanel” labeled cosmetic or talcum powder products (Dr. Longo only tested “Chanel No. 5” talcum powder). These overbroad demands are outside of the stated scope of the alleged discovery for authenticity and chain of custody (See Mot. Exhs. A through D, pgs. 4-6). To the extent Chanel, Inc. seeks an open commission, the inquiries stated in the subpoena must be limited to the chain of custody and authenticity of “Chanel No. 5 talcum powder.” Chanel Inc.’s relevant inquiries are further limited to: where the “Chanel No. 5” talcum powder was obtained; whether it was opened, or in a sealed container when first received from the sellers; whether the Chanel No. 5 talcum powder was re-sealed prior to shipment; and how the products were stored by the seller over time.

Generally, the procedure employed when seeking the deposition of a nonparty witness is to “secure a stipulation, or in the alternative serve a subpoena on the nonparty witness, pursuant to CPLR §3106.” (*Wiseman v. American Motors sales Corp.*, 103 A.D.2d 230, 479 N.Y.S.2d 528 [2nd Dept. 1984]). However, obtaining the deposition of a nonparty witness outside of New York State depends “solely upon the cooperativeness of the witness...” (*Id.*). In seeking CPLR §3108 relief a party is required to provide proof that the proposed out of state witness would not cooperate, is unwilling to otherwise voluntarily come to the State of New York, or that the judicial imprimatur that accompanies a commission will be necessary or helpful (See *Reyes v. Riverside Park Community (Stage I), Inc.*, 59 A.D. 3d 219, 873 N.Y.S. 2d 58 [1st Dept. 2009], *In re Part 60 RMBS Put-Back Litigation*, 155 A.D. 3d

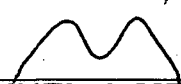
482, 65 N.Y.S. 3d 133 [1st Dept. 2017] and MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC, 103 A.D. 3d 486, supra at pg. 488).

Chanel, Inc. provides no proof of alleged attempts made to obtain the nonparty witnesses' deposition testimony and discovery, or their refusal to come to New York, further warranting denial of the CPLR §3108 relief sought on this motion. The issuance of an open commission under these circumstances is not proper.

Accordingly, it is ORDERED, that defendant Chanel, Inc.'s motion pursuant to CPLR §3108 and §3111 to obtain an open commission to issue subpoenas and subpoenas duces tecum on out of state nonparty witnesses, is denied with leave to renew.

ENTER:

Dated: June 27, 2019


MANUEL J. MENDEZ

J.S.C. MANUEL J. MENDEZ

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION J.S.C.

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE