

Moldow v A.I. Friedman, L.P.
2019 NY Slip Op 32060(U)
July 15, 2019
Supreme Court, New York County
Docket Number: 190301/2017
Judge: Manuel J. Mendez
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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

CHRIS MOLDOW, Plaintiff, - against - A.I. FRIEDMAN, L.P., et al, Defendants.

INDEX NO. 190301/2017 MOTION DATE 07/09/2019 MOTION SEQ. NO. 001 MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on Colgate-Palmolive Co.'s motion for summary judgment:

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, Colgate Palmolive Company's motion for summary judgment pursuant to CPLR §3212 dismissing plaintiff's complaint, all cross-claims, and plaintiff's claim for punitive damages asserted against it, is denied.

Plaintiff, Chris Moldow, was diagnosed with epithelioid mesothelioma in August of 2017 (Mot. Exh. 12, Pathologic diagnosis, Opp. Exh. B, pg. 29, and Opp. Exh. J). Plaintiff alleges she was exposed to asbestos from the use of Colgate-Palmolive Company's (hereinafter "defendant") cosmetic talc product, Cashmere Bouquet. Plaintiff alleges she was exposed to asbestos containing talc in Cashmere Bouquet on a daily basis while living in New York City, when she was twelve (12) years old in 1977, through 1983 when she left home to go to college (Mot. Exh. 8, pgs. 85-86, and 272-273, and Opp. Exh. B, pgs. 40, 49-50). She alleges she used Cashmere Bouquet periodically from 1983 through 1987, when she came home from college during breaks (Mot. Exh.8, pgs. 272-273).

Plaintiff was deposed on January 18 and 19, 2018. Her de bene esse deposition was on March 2, 2018 (Mot. Exh. 8 and Opp. Exh. B). At her deposition Ms. Moldow testified that during the period relevant to her alleged exposure she lived in Manhattan at 11 Riverside Drive (Mot. Exh. 8, pgs. 15-17, 85-86). Plaintiff described the Cashmere Bouquet bottle as pastel pink, rounded at the top and had "Cashmere Bouquet" written in script or "floofy font" with the word "talc." She remembered that the writing was dark in color. Plaintiff said the bottle was about seven or eight inches tall and held approximately ten ounces (Mot. Exh. 8, pgs. 87-89 and Opp. Exh. B, pg. 50). Plaintiff testified that it was highly unlikely that she read the ingredients of the bottle (Mot. Exh. 8, pg. 90).

Plaintiff testified that she favored baths over showers and would use the Cashmere Bouquet talcum powder about five days a week after she stepped out of the bathtub and onto the bath mat (Mot. Exh. 8, pg. 94). Plaintiff testified that she would twist the cap and talcum powder dust would come out in the form of a puff. She stated that she would shake some of the Cashmere Bouquet talcum powder into her hand and rub her hand together to "fluff it" on and between her breasts, her armpits, and lower genital areas. She estimated that it would be about three or four shakes or handfuls per application. Plaintiff stated that sometimes the talcum powder would get on the floor or the bath mat, and she would clean it up. She stated the clean-up process included shaking the bath mat out, which would disperse the talc powder into the air creating a cloud of dust that she would breathe in. Plaintiff testified that the Cashmere Bouquet talc powder would go on her and everywhere, creating clouds of dust-that would linger for seconds-that she would breathe in. She stated that when she applied the Cashmere Bouquet talcum powder "some would get on the floor inevitably, and some would stay in the air inevitably." Plaintiff stated that the Cashmere

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

Bouquet talcum powder was white and felt "fluffy," dry and soft, with more of a silky feel. She described the scent as powdery with some kind of sweetness or freshness to it (Mot. Exh. 8, pgs. 90-93, 96, 266-269 and 308 and Opp. Exh. B, pgs. 45-50).

Plaintiff claims that she was also exposed to asbestos in Cashmere Bouquet talcum powder by being present when her mother used it after bathing. She remembered her mother applying the Cashmere Bouquet talcum powder by putting it in her hands and then on herself. Plaintiff testified that at every stage along the way it would create dust clouds (Mot. Exh. 8, pgs. 274-275 and Opp. Exh. B, pgs. 52-54).

Plaintiff commenced this action on October 10, 2017 (Mot. Exh. 1). The complaint was amended on January 5, 2018 to assert causes of action against additional defendants (including Colgate-Palmolive Company) on claims resulting from Ms. Moldow's exposure to asbestos from Cashmere Bouquet talcum powder (Mot. Exh. 4). Colgate-Palmolive Company's Verified Answer, served on January 29, 2018, asserts sixty-seven affirmative defenses and a cross-claim for indemnification and contribution (Mot. Exh. 5).

Defendant, Colgate-Palmolive Company, seeks summary judgment pursuant to CPLR §3212 dismissing plaintiff's complaint, all cross-claims, and plaintiff's claim for punitive damages 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 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 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 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Defendant argues that plaintiff's experts, Dr. Jacqueline Moline, M.D., M.Sc., F.A.C.P., F.A.C.O.E.M., a doctor specializing in occupational and internal medicine; Mr. Sean Fitzgerald a professional geologist; Dr. Steven Compton, a doctor of physics, with laboratory experience in spectroscopy and microscopy; and Dr. William E. Longo, a Doctor of Philosophy in Materials Science and Engineering, all fail to provide evidence on the issue of causation and cannot raise any issues of fact.

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 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]). Defendant must unequivocally establish that Ms. Moldow 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 Asbestos Litig.)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendant's argument that plaintiff's experts failed to provide any evidence on the issue of causation amounts to "pointing to gaps" in plaintiffs' evidence and fails to establish a prima facie basis for summary judgment.

Defendant argues that plaintiff did not raise any issues of fact on this motion for summary judgment because the opposition papers rely on expert reports that are not in proper form. Plaintiff provides sworn affidavits incorporating the reports of Dr. Jacqueline Moline, M.D., and Mr. Sean Fitzgerald, P.G.. The unsworn expert reports of Dr. William E. Longo, and Dr. Steven P. Compton

may be utilized in opposition to a motion for summary judgment, even as hearsay, if they are not the only evidence submitted (See *Gonzalez v. 1225 Ogden Deli Grocery Corp.*, 158 A.D. 3d 582, 71 N.Y.S. 3d 473 [1st Dept., 2018]). Plaintiffs have submitted other evidence in admissible form, including the reports of Dr. Moline and Mr. Fitzgerald, therefore the defect in the remaining expert reports is not fatal. In addition, the Court can exercise its discretion in considering those plaintiff's expert reports in opposition to this motion for summary judgment in the absence of prejudice to the defendant (See *Status General Development, Inc. v. 501 Broadway Partners, LLC*, 163 A.D. 3d 740, 82 N.Y.S. 3d 34 [2nd Dept., 2018] citing to *Rosenblatt v. St. George Health & Raquetball Assoc., LLC*, 119 A.D.3d 45, 984 N.Y.S. 2d 401 [2nd Dept. 2014]). Defendant's motion papers demonstrate that it is aware of all of plaintiff's expert reports and the statements contained therein. Defendant and its experts have stated arguments in opposition to all of plaintiff's expert reports.

Defendant argues that the specific bottles of Cashmere Bouquet used by Ms. Moldow were not tested and plaintiff has no direct evidence of exposure. Plaintiff is not required to show the precise cause of her damages, only facts and conditions from which the defendant's liability may be reasonably inferred. Plaintiff's failure to provide the actual bottles of Cashmere Bouquet that she used, is not dispositive (See *Oken v. A.C. & S. (Matter of New York City Asbestos Litig.)*, 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept., 2004] and *Cornell v. West 51st Street Realty, LLC*, 22 N.Y. 3d 76, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

It is defendant's contention that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and *In the Matter of New York City Asbestos Litigation (Juni)*, 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], because plaintiff is unable to establish general and specific causation. Defendant relies on its experts Dr. Matthew S. Sanchez, a doctor of geology; Dr. Mark Taragin, M.D., M.P.H. a medical doctor specializing in epidemiology; Jennifer Sahmel, M.P.H., C.I.H., C.S.P., a certified industrial hygienist and certified safety professional, and Dr. Stanley Geyer, M.D., a pathologist, to establish lack of any causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, supra).

Defendant argues that its experts' (Dr. Sanchez and Dr. Taragin) opinions supported by peer reviewed epidemiology and independent risk assessments, demonstrate there is no scientifically established causal relationship between exposure to cosmetic talcum powder and mesothelioma. It is further argued that even if there were trace asbestos contamination in defendant's Cashmere Bouquet talcum powder products, plaintiff's use of the product would not have been capable of causing her disease.

Defendant relies on Dr. Sanchez's May 22, 2019 affidavit and report (Mot. Exh. 9, Parts 1 through 3). Dr. Sanchez states that talc in its purest form is not asbestos. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and analysis of the materials is needed to make a determination. Dr. Sanchez relies on the Food and Drug Administration (FDA) standard for testing using X-Ray Diffraction (XRD) to determine if asbestos fibers are present. To the extent fibers are identified Dr. Sanchez relies on Analytical Electron Microscopy (AEM) to test air samples or other bulk materials to confirm whether the talc may contain asbestos. Dr. Sanchez analyzes the talc mined from the regions in Southwest Montana, specifically the Willow Creek mine and the Bearhead mine in Montana, and from Val Germanasca, Italy which he states were used in defendant's Cashmere Bouquet talcum powder during the period relevant to plaintiff's exposure. He cites to reports and studies, his own site visits and testing of the talc from Italy in November of 2015, and concludes that the talc that was used in defendant's Cashmere Bouquet talcum powder product, that was mined in Italy and Montana, does not contain asbestos (Mot. Exh. 9).

Dr. Sanchez analyzes the defendant's product formulation and product testing record for Cashmere Bouquet talcum powder and cites to his employer RJ Lee Group Inc.'s (RJLG) testing of over 70 samples that found no asbestos. He also cites to historical testing by the FDA which typically found little or no asbestos contamination in the talc used by the defendant. Dr. Sanchez

states that he reviewed defendant's own testing protocols developed in the early 1970's which used both XRD and optical microscopy in which the overwhelming majority of talc that was tested was negative for asbestos. He states that it is his understanding that beginning in 1978 the defendant started requiring that suppliers analyze talc for asbestos content using XRD, optical microscopy, and TEM with SAED and certify that it was asbestos free. Dr. Sanchez evaluates the testing performed by plaintiff's experts Dr. Longo, Dr. Compton and Mr. Fitzgerald, and concludes that the methodology used for their testing was flawed. Dr. Sanchez ultimately concludes that defendants' talcum powder and the talc from the source mines are free of asbestos to a reasonable degree of scientific certainty (Mot. Exh. 9).

Dr. Taragin's October 9, 2018 report summarizes plaintiff's history and the epidemiology of mesothelioma. Dr. Taragin concedes that historically determining an individual's exposure level and whether asbestos was present was not an easy task, with the results being inconsistent as the technologies to assess the presence of asbestos changed. He explains that the cause of mesothelioma for patients with no known risk factor is termed "idiopathic." Dr. Taragin states that for mesothelioma there is an estimated 10-30% assessment that the cause is "idiopathic," with the rate of assessment being even higher, according to a report published in *Occupational and Environmental Medicine* in 1994 that state that the assessment of "idiopathic" mesothelioma is as much as 77% for women (Mot. Exh. 10).

Dr. Taragin refers to issues with assessing causation for low dose asbestos exposure, stating that "the greatest limitation is insufficient data." Dr. Taragin relies on the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) standard that there is a low dose exposure to asbestos that is permissible and does not pose a detectable risk of serious harm. In attempting to apply the relevant epidemiology to Ms. Moldow, Dr. Taragin states she was "probably diagnosed with pleural mesothelioma." He states that he conducted internet searches on the *National Library of Medicine* and only cites to some of the reports, studies and articles he read (See Mot. Exh. 10, Appendix). Dr. Taragin states that there is no study that finds an increased risk of mesothelioma from the use of cosmetic talc. Dr. Taragin states that the evidence suggests defendant's Cashmere Bouquet talcum powder product was not contaminated with asbestos or at worst it would have been contaminated at an extremely low level. He relies on the report of defendant's expert, Jennifer Sahmel, M.P.H., C.I.H., C.S.P., and the findings of the Food and Drug Administration (FDA) in 1973, 1974 and 1986, for the determination that plaintiff's exposure to any asbestos in defendant's Cashmere Bouquet talcum powder was not greater than ambient exposure. Dr. Taragin states to a reasonable degree of scientific certainty that plaintiff's mesothelioma "is either from asbestos exposure (but not cosmetic talc) or idiopathic." (Mot. Exh. 10).

Plaintiff's expert, Mr. Fitzgerald's June 18, 2019 report states that he has personally confirmed the presence of asbestos fibers in all of the primary mine sources for Cashmere Bouquet products. He assesses the talc from the Southwest Montana region, which includes the Beaverhead and Willow Creek mines. He notes that all of the talc mines in Southwest Montana were formed by the same geologic process and that serpentine and cross-fiber chrysotile fibers as well as tremolite have been identified with the talc from mines in the region. Mr. Fitzgerald tested samples of talc from the Southwest Montana region that had been taken by Robert Nolan, an expert witness for Whittaker, Clark, and Daniels, a talc supplier. He tested air samples using the analytical procedures provided by the EPA and found anthophyllite, tremolite and chrysotile asbestos fibers (Opp. Exh. M). Mr. Fitzgerald assesses the Val Germanesca and Val Chinsone mines in the Piedmont region of Italy, near Torino. He states that a majority of the talc was removed from the Fontaine mine in Val Germanesca. He cites to a 1966 geological study of the region by Luigi Peretti that identified amphiboles of the tremolite-actinolite series diffused throughout the deposit "at considerable volumes." Mr. Fitzgerald also personally tested samples of Italian talc ore from the 1970s, that were provided to him by Dr. Arthur Langer and Dr. Robert Nolan, experts retained by multiple companies including the defendant. Mr. Fitzgerald identified asbestiform anthophyllite and tremolite fibers in the samples (Opp. Exh. M).

From 2012 through 2014 and in 2016, Mr. Fitzgerald performed his own asbestos release testing of Cashmere Bouquet samples and found quantifiable asbestos fibers. He also tested some of the samples previously analyzed by the RJ Lee Group, Inc. (RJLG), which employs defendant's expert Dr. Matthew S. Sanchez, and found asbestos. Mr. Fitzgerald critiques the reports and findings of Dr. Sanchez and attempts to correct alleged misrepresentations of his prior statements.

He claims that he was repeatedly able to confirm asbestos in samples that were unreported by the RJLG. Mr. Fitzgerald cites the United States Geologic Survey and the EPA as both determining that RJLG failed to find asbestos that was observed by less biased investigators. He states serpentized dolomite and tremolite have been found at the Willow Creek mine in Montana, making the Beaverhead mine a better option between the two for obtaining cosmetic talc, however he would not recommend the use of talc from either mine without extensive additional testing. Mr. Fitzgerald states that the overall aspect ratio of asbestos in Cashmere Bouquet talc powder products is 52:1. He opines to a reasonable degree of scientific certainty that plaintiff's use of defendant's Cashmere Bouquet talcum powder products created significant exposure to asbestos (Opp. Exh. M).

Dr. Moline's April 4, 2019 report discusses plaintiff's medical and exposure history, past medical history, family history, cigarette smoking history, and her environmental and occupational history. Dr. Moline explains occupational medicine and its assessment of risk in relation to asbestos as the cause of mesothelioma. Dr. Moline explains the different types of diseases - including mesothelioma - that can be caused by exposure to asbestos. Dr. Moline considers mesothelioma to be a dose responsive disease. She cites to agencies - including OSHA and the EPA - together with a 2014 conclusion by the World Health Organization (the WHO), as recognizing that there is no "safe" level of exposure to asbestos regardless of the fiber type or size.

Dr. Moline cites to criteria for diagnosis and attribution established in 1997. She states that a great majority of mesothelioma is due to asbestos exposure and that mesothelioma can occur in cases with low asbestos exposures, however, very low background environmental exposures carry only an extremely low risk. Dr. Moline also cites to a study indicating that exposure to asbestos at levels below OSHA's Permissible Exposure Level (PEL) of 0.1 fibers per cubic centimeter can cause disease. Dr. Moline concludes to a reasonable degree of medical certainty that the plaintiff was exposed to levels of asbestos that was above ambient background levels. She relies on historic and recent analysis of the talc from source mines and defendant's Cashmere Bouquet talcum powder conducted by Dr. Gordon, plaintiff's expert Sean Fitzgerald, and James Millette (2014) that found they were contaminated with asbestos (See Mot. Exh. K). She determines that plaintiff's mesothelioma was caused by her exposure to asbestos contaminated talc (Opp. Exh. J).

Defendant argues that summary judgment is warranted under *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] because plaintiff is unable to establish general causation. In *Cornell*, 22 NY3d 762, supra, the defendant-corporation established a prima facie case as to general causation establishing generally accepted standards within the relevant community, of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiffs' experts are relying on some of the same scientists and scientific organizations as the defendants' experts in support of general causation.

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 (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

Defendant's experts Dr. Matthew S. Sanchez and Dr. Mark Taragin rely on recognized studies and reports to establish that there is no causal relationship between defendant's Cashmere Bouquet talcum powder product and mesothelioma. Plaintiff's experts, Dr. Jacqueline Moline and Sean Fitzgerald, P.G., also rely on studies and reports in part from the same scientific organizations, including OSHA and the EPA, to establish that plaintiff's exposure to asbestos contaminated talc in defendant's Cashmere Bouquet talcum powder product can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Special Causation:

Defendant argues that its Cashmere Bouquet talcum powder products did not have any asbestos in it, and to the extent there was asbestos contamination the amounts were incapable of causing mesothelioma. Defendant also argues that to the extent there was asbestos containing

talc in its Cashmere Bouquet talcum powder products, it would not produce breathable dust to a level sufficient to cause Ms. Moldow's mesothelioma, and thus plaintiff is unable to establish specific causation. In support of its arguments on specific causation, defendant relies on the reports of its experts Jennifer Sahmel, a certified industrial hygienist and certified safety professional, and Dr. Stanley Geyer, M.D., a pathologist to establish lack of special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin;" "[c]omparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (Parker v. Mobil Oil Corp., 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see Parker v. Mobil Oil Corp., 7 NY3d 434, supra at 448). In turn, the Appellate Division in the case *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Ms. Sahmel relies on multiple articles, reports and studies that she summarizes and attaches to her report, which totals three volumes (Mot. Exhs. 11a, 11b and 11c). Ms. Sahmel assesses OSHA PEL standards during the period relevant to plaintiff's exposure and compares them over time and to more recent standards, as reflected in a chart (Mot. Exh. 11a, Figure 1). She also addresses the EPA's standards requiring clearance at a value of 0.01 f/cc of asbestos exposure. She states that number or below is considered acceptable. Ms. Sahmel discusses the source mines for talc used in defendant's Cashmere Bouquet talcum powder products and the relevant testing that found no asbestos. Ms. Sahmel summarizes testing on Cashmere Bouquet talcum powder - including Mr. Fitzgerald's testing - and states that although he found asbestos fibers he did not provide actual concentrations.

Ms. Sahmel provides the various methods for determining exposure and risk assessment. She uses an upper bound assumption that trace asbestos could be found in the Cashmere Bouquet talcum powder used by Ms. Moldow, determines that it would be well within cumulative lifetime background or ambient levels found in the air in the United States and below OSHA PEL for working with asbestos. In reliance on the materials cited, Ms. Sahmel performed an "evaluation of hypothetical cumulative exposures to asbestos from the use of cosmetic talc powder products." Her evaluation results are reflected in Table 3, "Estimates of Potential Exposure Associated with the Consumer Use of Cosmetic Talcum Powder Products over a 70-Year Lifetime" (Mot. Exh. 11a). Ms. Sahmel, in assessing plaintiff's cumulative asbestos exposure potential (Mot. Exh. 11a, Table 4), used hypothetical fiber concentrations of 0.12 f/cc with a worst case asbestos content estimate of 0.1%. Ms. Sahmel determines that plaintiff's total cumulative theoretical exposure could be as much as 0.0012 f/cc-year, which is below the range of ambient exposure. She further states, relying on a study by *Dement et al.* in 1972, that the rate of exposure would drop off "sharply" thirty seconds following the "dusting activity." Ms. Sahmel finds even lower numbers as a result of bystander exposure and provides tables showing her analysis based on distance (Mot. Exh. 11a, Tables 5 and 6).

Ms. Sahmel prepared a table reflecting lifetime cumulative ambient exposure based on the lowest and highest measured asbestos specific airborne fiber concentrations. She calculates the lowest cumulative exposure over a period of 70 years as being 0.002 and the upper bound exposure as 0.4 (Mot. Exh. 11a, Table 7). Ms. Sahmel determines that Ms. Moldow's alleged exposure for the relevant period of exposure was well within cumulative ambient exposure levels found in the air in the United States and did not create a significant risk of mesothelioma. She concludes that there is no evidence that consumer use of Cashmere Bouquet talcum powder during the period of 1977 to 1985 would have resulted in any measurable exposure potential to plaintiff. She further concludes that plaintiff's cumulative range of exposures were well below any lifetime cumulative ambient exposures and well below OSHA PEL for asbestos (Mot. Exh. 11a).

Dr. Geyer reviewed plaintiff's pathologic diagnosis, claimed exposure history and deposition testimony. He concludes that plaintiff's exposure to defendant's Cashmere Bouquet talcum powder products played no role in the cause of her malignant mesothelioma. Dr. Geyer cites to published medical literature concerning miners and millers that do not support the theory

that the use of talc is a cause of malignant mesothelioma. He states that the *Gordon* report relied on by plaintiff has been called into question because of the lack of a methodological basis for determining general causation. Dr. Geyer further states that he saw no evidence or objective biomarkers in the medical records to establish that plaintiff's mesothelioma is a result of excessive exposure to talc, such as talcosis. Dr. Geyer determines that because reports establishing consumer use of cosmetic talcum powder have not shown exposure above background levels, any use or exposure by plaintiff of defendant's Cashmere Bouquet talcum powder products could not have caused her mesothelioma. Dr. Geyer concludes that plaintiff's mesothelioma most likely occurred spontaneously with no relationship to defendant's Cashmere Bouquet talcum powder products (Mot. Exh. 12).

Mr. Fitzgerald's report opines that bulk testing in multiple laboratories, including his own, has repeatedly found asbestos in Cashmere Bouquet and that releasability tests confirm significant concentrations of airborne asbestos when talc products were used in a manner consistent with plaintiff's testimony of use. He states that asbestos concentrations have been determined to range between 550,000 to over 100 million asbestos fibers per gram of Cashmere Bouquet talcum powder products, with tremolite asbestos fiber found in every test. Mr. Fitzgerald concludes that plaintiff was exposed to significant amounts of asbestos through the use of defendant's Cashmere Bouquet talcum powder products during the relevant time period to have caused her mesothelioma (Opp. Exh. M).

Dr. Steven Compton's August 1, 2017 report is based on his assessment and testing of thirteen Italian talc samples (Opp. Exh. O). 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 that "Fiber release studies of consumer talc products within this range documented elevated concentrations of airborne asbestos fibers during use of those products" (Opp. Exh. O).

Dr. Longo's September 11, 2018 report of his Polarized Light Microscopy (PLM) and Analytical Transmission Electron Microscopy (ATEM) testing of historic samples of defendant's Cashmere Bouquet talc powder products, analyzed talc samples and found that 28 of 38 samples contained detectable amounts of asbestos. He concluded that individuals that used Cashmere Bouquet talc products in the past were more likely to have been exposed to significant airborne levels of asbestos (Opp. Exh. N, pg. 18).

Dr. Moline relies on testing by Mr. Fitzgerald, Dr. Compton, Dr. Longo, and Dr. Gordon. She refers to bystander exposure to asbestos in talc of 1.35 f/cc, with potential exposure for those using the talc by shaking as 4.8 f/cc with an actual asbestos fiber measurement of 1.8 f/cc. She refers to Dr. Longo's below the waist testing and report which found that there was a mean exposure to tremolite asbestos fiber of 2.57 f/cc during that activity. She determines that plaintiff's mesothelioma was caused by her exposure to asbestos contaminated talc (Opp. Exh. J).

Plaintiff provides the April 16, 2015 trial testimony in an unrelated action of defendant's corporate representative, Marie Capdevielle, Worldwide Director of Occupational Health and Product Sustainability. She testified that asbestos fibers were identified during testing of the talc by the National Safety Council, which included defendant as a member, as early as 1935. Ms. Capdevielle also testified that the company started testing talc in 1971 and that later testing of talc - including the Italian mine and Willow Creek Mine - used in Cashmere Bouquet during the period relevant to plaintiff's exposure also showed asbestos contamination (Opp. Exh. E, pgs. 663-672, 685-687, 695-701, 80-861 867-875 and 886-888 and 1062-1065). Plaintiffs also provide defendant's reports of testing of its talc in the 1970s that found asbestos fibers (Opp. Exhs. YY, ZZ, AAA, BBB and CCC).

The conflicting affidavits and testimony, and construing the evidence in a light most favorable to the plaintiff as the non-moving party, warrants denial of this motion for summary judgment. Plaintiff's deposition testimony, the reports of plaintiff's experts, Dr. Moline, Mr. Fitzgerald, Dr. Longo and Dr. Compton and the other evidence plaintiff presented sufficiently create "facts and conditions from which [Colgate-Palmolive Company's] liability may be reasonably

inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), and raise issues of fact. There remain issues of fact as to whether defendant's Cashmere Bouquet talcum powder products were contaminated with asbestos, and whether plaintiff's use of those products , during the periods relevant to her alleged exposure to asbestos caused her mesothelioma.

Plaintiffs have also raised issues of fact as to the cause of action for punitive damages. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). Defendant argues it should not be found wanton and reckless because its own additional testing under the proper standards during the plaintiff's alleged period of exposure found no asbestos in the talc or its Cashmere Bouquet talcum powder products. Plaintiffs' arguments, the expert reports and the trial testimony of defendant's own corporate representative raise issues of fact on punitive damages. There remain issues of fact as to whether defendant conducted testing and found asbestos fibers throughout the 1970's and continued to advocate for the use of its talc as uncontaminated and for the use of XRD testing that would not be able to find any asbestos. To the extent that plaintiff argues the defendant placed corporate profits and reputation above the health and safety of Ms. Moldow , the issue of punitive damages is to be determined by the trial judge after submission of all the evidence.

Defendant attempts in the reply papers to include the June 20, 2019 decision of the Appellate Division First Department, in Claudine DiScala as Administrator of Joan Robusto v. Charles B. Chrystal Company, Inc., 2019 N.Y. Slip Op. 05005 [1st Dept. 2019]), as proof that plaintiff's expert reports are defective and incapable of establishing causation. Defendant admits in its reply memorandum that the decision in *DiScala, supra* was rendered *the day after* plaintiff submitted her opposition papers to this motion (Reply Memorandum of Law, pg. 2, Preliminary Statement). Defendant provided detailed arguments of the alleged flaws in plaintiff experts' reports used in the *DiScala* action, and also cited to the case as "Robusto."

New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept., 2012], In re New York City Asbestos Litigation (Konstantin), 121 A.D. 3d 230, 990 N.Y.S. 2d 174 [1st Dept., 2014] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]).

Defendants new arguments as to *DiScala (Robusto), supra* and plaintiff's expert submissions in that case, are being raised for the first time on reply and did not provide plaintiff with the opportunity to properly respond. Additionally, the DiScala case is distinguishable from this action because it involved the sufficiency of expert evidence presented at the time of trial by a talc supplier for an entirely different talcum powder manufacturer.

Accordingly, it is ORDERED that defendant, Colgate Palmolive Company's motion for summary judgment pursuant to CPLR §3212, dismissing plaintiff's complaint, all cross-claims, and plaintiff's claim for punitive damages asserted against it, is denied.

ENTER:

Dated: July 15, 2019



MANUEL J. MENDEZ J.S.C. MANUEL J. MENDEZ J.S.C.

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