

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

2019 NY Slip Op 32668(U)

September 9, 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 Justice PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

BEVERLEY ALLEYNE,
- against -
A.O. SMITH WATER PRODUCTS CO., et al.,
Defendants.

INDEX NO. 190295/2017
MOTION DATE 07/31/2019
MOTION SEQ. NO. 018
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on plaintiff's motion pursuant to CPLR §3101 and CPLR to compel Chanel, Inc. to produce fragrance formulas, alternatively to estop Chanel, Inc. from arguing at trial that samples tested by plaintiff's expert are not authentic:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for 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 plaintiff's motion seeking an Order pursuant to CPLR §3101 and CPLR §3103 compelling defendant Chanel, Inc. to produce the formulas for the Chanel No. 5 Fragrance Concentrate from 1924 to 2017, including the name of each and every chemical compound or compounds, as specified by the International Union of Pure and Applied Chemistry, alternatively, estopping Chanel Inc. from arguing at trial that the twenty-four (24) Chanel No. 5 samples tested by plaintiff's expert Dr. William Longo are not authentic, is denied.

Plaintiff, Beverley Alleyne, was diagnosed with 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 allegedly asbestos contaminated talc in Chanel, Inc.'s Chanel No. 5 talcum powder 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 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 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 (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 three came from a plaintiff in an unrelated action. Plaintiff claims the three sample products tested by Dr. Longo purchased by a plaintiff in an unrelated action have a flawless chain of custody. Plaintiff states that of the remaining twenty-one (21) samples, fourteen (14) were sealed before testing. 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 (Mot. Exh. B, Parts 1 through 4, and C). Plaintiff's attorneys exchanged Dr. Longo's report with Chanel, Inc. in January of 2019.

Plaintiff's motion seeks an Order pursuant to CPLR §3101 compelling defendant Chanel, Inc. to produce the formulas from the Chanel No. 5 fragrance concentrate from 1924 to 2017, including the name of each and every chemical compound or compounds, as specified by the International Union of Pure and Applied Chemistry, alternatively, estopping Chanel Inc. from arguing at trial that the twenty-four (24) Chanel No. 5 samples tested by plaintiff's expert Dr. William Longo are not authentic.

Plaintiff states that the documentary discovery produced by defendant Chanel, Inc. fails to provide a basis to authenticate the historic samples tested by Dr. Longo. Plaintiff claims that the only consistent component of the formulas and ingredient lists in the documents produced by Chanel, Inc. was the fragrance concentration. Plaintiff argues that the fragrance concentration is unique and the only clear ingredient that can identify the Chanel No. 5 talcum powder as authentic, distinguishing it from other powders. Plaintiff sought to obtain a confidentiality agreement with Chanel, Inc., but did not obtain any consent (Mot. Exhs. G and H).

CPLR § 3101 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 test concerning discovery is one of "usefulness and reason" and as such should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (*Allen v. Crowell-Collier Publ.Co.*, 21 NY 2d 403, 288 NYS 2d 449, 235 N.E. 2d 430 [1968] and *In re World Trade Center Bombing Litigation*, 298 AD 2d 72, 747 NYS 2d 433 [1st Dept., 2002]). 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]).

CPLR §3103 (a) permits the court, in its discretion, to issue an order denying, limiting, conditioning or regulating the use of any disclosure device. (*Cynthia B. v. New Rochelle Hosp. Medical Center*, 60 N.Y. 2d 452, 458 N.E. 2d 363, 470 N.Y.S. 2d 1122 [1983] and *148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.*, 62 A.D. 3d 486, 878 N.Y.S. 2d 727 [1st Dept., 2009]). Pursuant to CPLR §3103 (a) a confidentiality order can be issued to protect a party's interest in a trade secret as discovery material in dispute (*Finch, Pruyne & Co. Inc. v. Niagra Paper Co., Inc.*, 228 AD 2d 834, 643 NYS 2d 773 [3rd Dept. 1996]).

Chanel, Inc. opposes the relief sought in this motion arguing that the formula for Chanel No. 5 fragrance is a trade secret that has never been revealed to third-parties, and that even if plaintiff obtained access to the original formula it would not provide a "finger print" to determine the authenticity of the talcum powder tested by Dr. Longo.

A "trade secret" is defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity

to obtain an advantage over competitors who do not know it." Factors to be considered in determining the existence of a "trade secret" include:

"(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by the [business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

(Ashland Management Inc. v. Janien, 82 NY 2d 395, 524 NE 2d 1007, 604 NYS 2d 912 [1993] citing to Restatement of Torts §757, comment b)

There is only a minimal initial burden on an objectant asserting trade secret, requiring a non-conclusory assertion by one of the objectant's officers (See *Linderman v. Pennsylvania Bldg. Co.*, 289 AD 2d 77, 734 NYS 2d 67 [1st Dept. 2001] and *In re New York City Asbestos Litigation*, 133 AD 3d 463, 20 NYS 3d 27 [1st Dept. 2015]). The burden then shifts to the plaintiff to show that the information sought is indispensable to support her case and could not be acquired in any other way (*Mann ex re. Akst v. Cooper Tire Co.*, 33 AD 3d 24, 816 NYS 2d 45 [1st Dept. 2006], *Jackson v. Dow Chemical Co. Inc.*, 214 AD 2d 827, 624 NYS 2d 675 [3rd Dept. 1995] and *Bristol, Litynski, Wojcik, P.C. v. Town of Queensbury*, 166 AD 2d 772, 562 NYS 2d 976 [3rd Dept. 1990]). "Where a trade secret is involved, until all other possibilities have been exhausted, the trade secret need not be disclosed" (*Thomas v. Soft Sheen Product Co., Inc.*, 118 AD 2d 493, 500 NYS 2d 108 [1st Dept., 1986])

Chanel, Inc. provides the affidavit of Amy Wyatt, head of U.S. Innovation & Development, Regulatory Affairs and Quality Assurance (Opp. Exh. A). Ms. Wyatt states that the fragrance formula for Chanel No. 5 was developed in 1921, never replicated by any competitors, and that no third-parties are involved in the creation of development of the Chanel No. 5 trade secret formula, resulting in no disclosure of the formula. Ms. Wyatts claims Chanel No. 5 is one of the world's most iconic fragrances and also one of the most heavily marketed with a significant amount of the company's money, time, and resources spent on the product. She states that the fragrance is a chemically complex compound and that many of the attributes of the fragrance, after combination with other materials, changes in significant ways. Ms. Wyatt also claims that the fragrance formula is the property of a french entity protected by virtual and physical heightened security; the only individuals with direct access are in France; and the secret formula is accessible by only 1% of the global employee population of the brand (Opp. Exh. A).

Chanel, Inc. also provides the affidavit of Adrienne Hahn, Group Director, Intellectual Property & Legal Operations for Chanel, Inc., responsible for identifying and preventing counterfeit Chanel No. 5 products (Opp. Exh. B). Ms. Hahn states that Chanel Inc. tracks fraudulent products sold on the internet and conducts investigations into the manufacturing, importing, offering, selling and distributing fraudulent products to protect the consumer. Ms. Hahn claims that over 100,000 counterfeit pieces were apprehended in the United States during the two year period of 2017 through 2018. The Hahn affidavit further states that after review of over one hundred photographs of the twenty-one (21) Chanel No. 5 products purchased on the internet and tested by Dr. Longo, without conducting any testing of the talc, just from exterior packaging, about 50% of the products are counterfeit or at least suspicious. Ms. Hahn specifically identifies six shaker bottle products with a black lid and a gold band trim, stating that this style of packaging was not introduced until approximately 2000, however the talc shaker bottles were discontinued in the early to mid-1990's (Opp. Exh. B).

Chanel Inc. has sufficiently met the preliminary burden with the affidavits of Amy Wyatt and Adrienne Hahn establishing that the fragrance formula for Chanel No. 5 is a protected "trade secret." Chanel Inc. has established that there is a

genuine concern that competitors or counterfeiter's will attempt to gain some competitive advantage as a result of providing the secret formula for Chanel No. 5's fragrance (Linderman v. Pennsylvania Bldg. Co., 289 AD 2d 77, supra at pg. 78).

Plaintiff argues that Chanel, Inc.'s response to documentary discovery demands are from random years, provided heavily redacted formulas, and the ingredient lists failed to provide percentages of ingredients used to make the Chanel No. 5 talcum powder (Mot. Exhs. D and E). Plaintiff does not provide an affidavit and relies on the deposition testimony of expert witness Dr. William Longo, a geologist, stating that the fragrance concentrate and "the actual chemical formula of the perfume powder" are necessary for authentication of every batch and formula (Mot. Ex. I, pgs. 33-37). Plaintiff argues that Dr. Longo has shown that because talcum powders from different manufacturers commonly contain the same "accessory minerals" associated with the source talcs, the only means of unequivocally resolving the issue of authenticity is obtaining the precise formula for the fragrance concentrate (Mot. Ex. F, pg. 123). Plaintiff argues that a Confidentiality Order will protect Chanel, Inc. from any disclosure of the Chanel No. 5 trade secret formula and is indispensable so that she can prove causation.

Chanel Inc. provides the affidavit of expert, Mr. Alan M. Segrave, a professional geologist. He states that a list of ingredients that is typically found on the label of the cosmetics and the use of state of the art testing easily available to Dr. Longo at his Material Analytical Services, LLC ("MAS"), lab could easily result in a determination that the ingredients are present in the product being tested. Mr. Seagrave cites to the MAS website and specifically identifies: Scanning Electron Microscopy/Energy Dispersive Spectroscopy (SEM/EDS), TEM/SAED/EDS or PLM. Mr. Seagrave further states that an analyst with a genuine sample of Chanel No. 5 talcum powder product could also compare it to the suspected sample to determine whether they are chemically similar and encompass the same constituents and minerals, or organic versus inorganic content (Mot. Ex. C).

Chanel, Inc. cites to Dr. Longo's deposition testimony that he could actually reverse engineer the Chanel No. 5 products purchased on the internet to make a determination as to whether it is authentic (Mot. Ex. D, pg. 36). Chanel, Inc. also provides substantially less redacted ingredient lists for the period relevant to plaintiff's exposure (Mot. Ex. E). Chanel, Inc. states that it also provided plaintiff with twelve (12) Chanel No. 5 talcum powder retains, which are genuine samples that can be used for a comparison with the samples tested by Dr. Longo to determine authenticity. Dr. Longo did not test the retains for comparison.

Plaintiff seeks to determine whether Chanel No. 5 talc she used during the relevant period of 1980 through 2010 contained asbestos, as necessary to prove her case. She fails to establish that all other possibilities have been exhausted and that authenticity of samples purchased on the internet requires obtaining all of the fragrance formulas for Chanel No. 5 from 1924 through 2017 and the use of a Confidentiality Order. Chanel, Inc. has provided plaintiff with ingredient lists and authentic samples which it retained from the period relevant to plaintiff's alleged exposure. Chanel, Inc. has shown that Dr. Longo could determine whether samples are counterfeit by using the ingredient list and equipment at his lab to test them. Plaintiff did not refute the claims made by Adrienne Hahn that the exterior packaging on 50% of the samples purchased over the internet establishes they are counterfeit or suspicious. Plaintiff has not shown any efforts to ascertain the packaging was authentic, other than stating it was sealed, or shown that there is any special method used by Chanel, Inc. for sealing packages that would prove it could not have been re-sealed by any other sellers.

Additionally, a review of the samples purchased over the internet as listed by Dr. Longo in a chart annexed to plaintiff's reply affirmation, at least two samples, Container ID M69753-004 and Container ID M69753-009 are listed as from 1954-1976, prior to the period relevant to plaintiff's exposure. Approximately ten samples are listed as from the period "Late 1930s-1990's" this range includes a period of fifty (50) years before plaintiff's alleged exposure from 1980 through 2010. Plaintiff has not shown that her expert, Dr. Longo, could even determine whether

the samples obtained from the internet are from the period relevant to her exposure after obtaining the fragrance formulas. The demand for all fragrance formulas for Chanel No. 5 is a search to ascertain the existence of evidence that amounts to harassment, further warranting the denial of this motion.

Accordingly, it is ORDERED, that plaintiff's motion seeking an Order pursuant to CPLR §3101 and §3103 compelling defendant Chanel, Inc. To produce the formulas for the Chanel No. 5 Fragrance Concentrate from 1924 to 2017, including the name of each and every chemical compound or compounds, as specified by the International Union of Pure and Applied Chemistry, alternatively, estopping Chanel Inc. from arguing at trial that the twenty-four (24) Chanel No. 5 samples tested by plaintiff's expert Dr. William Longo are not authentic, is denied.

ENTER:



MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ

J.S.C.

Dated: September 9, 2019

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
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