

**Rothlen v American Intl. Indus. for Clubman**

2019 NY Slip Op 33358(U)

November 12, 2019

Supreme Court, New York County

Docket Number: 190374/2016

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

SHARON ROTHLEN and JENNIFER ROTHLEIN N/K/A JENNIFER D. ANSELL, as Personal Representative of the Estate of EDWARD ROTHLEIN, Deceased,

INDEX NO. 190374/2016 MOTION DATE 10/16/2019 MOTION SEQ. NO. 011 MOTION CAL. NO.

Plaintiffs, - against -

AMERICAN INTERNATIONAL INDUSTRIES FOR CLUBMAN, et al., Defendants.

The following papers, numbered 1 to 10 were read on this motion for summary judgment by Colgate Palmolive Company:

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, to dismiss plaintiffs' complaint and all cross-claims asserted against it is denied.

Plaintiff, Edward Rothlein (hereinafter decedent), was diagnosed with peritoneal mesothelioma on or about October of 2016 and he died on October 17, 2018 (Opp. Exhs. 5 and 67, pgs. 3 - 4 of 20). Plaintiffs allege the decedent's exposure to asbestos - as relevant to this motion - is from asbestos containing talc in Cashmere Bouquet talcum powder that was manufactured by Colgate Palmolive Company (hereinafter "Colgate").

Decedent was deposed over the course of two days, January 24 and 25, 2017 and his de bene esse deposition was conducted on June 16, 2017 (Mot. Exhs. 9 and 10, and Opp. Exhs. 1 and 2). At his deposition the decedent testified that he personally used Cashmere Bouquet talcum powder starting just after he got married in 1969 until approximately 1972 when he switched to using another talcum powder product. He testified that he used Cashmere Bouquet talcum powder two to three times a week, and stated he would take between "three seconds" and "20 seconds" to apply it.

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

Decedent testified that he also had second hand exposure to Cashmere Bouquet talcum powder from his wife's use of the product. Decedent testified that his wife was obsessed with using talcum powder, "she was a powderholic. I mean she would just take this stuff either in a powder puff or on her hands and all over her body, and the whole room would fill with - it looked like smoke, a cloud." He claimed that they had "many, many, many, many, fights early on" because of his wife's use of Cashmere Bouquet talcum powder, as he could not stand breathing it in. He stated that he was present most of the time when his wife, Sharon Rothlein, applied talc in their black bathroom after she bathed, three or four times a week and the fixtures were covered with powder to the extent of looking white. He claimed he would walk into a cloud after she had turned the bathroom white, and he would stay as long as he was able, breathing in the dust. He stated that it looked like she would use the whole can on herself. Decedent testified his wife used a shaker can to pour the Cashmere Bouquet talcum powder on herself and then she would use a powder puff. Decedent recalled that the sheets on their bed were covered with Cashmere Bouquet talcum powder and when they changed the bedding "there was another snowstorm." He stated that he and his wife took turns changing the bedding (Opp. Exh. 1, pgs. 171- 174, 217-218 and 222 Opp. Exh. 2 pgs. 36-39).

Plaintiff, Sharon Rothlein, testified at her deposition that she loved the smell of Colgate's Cashmere Bouquet talcum powder and used it from when she married the decedent in 1969 through the 1990's. She recalled applying Cashmere Bouquet talcum powder on her husband a couple of times using a powder puff. Mrs. Rothlein testified that when she used the Cashmere Bouquet talcum powder, she "made the whole room look like a smoke screen." She stated that her husband would walk into the bathroom and everything was covered with powder, and that the decedent complained about it for at least ten years and probably more. She testified that the decedent helped her clean the bathroom and the powder (Opp. Exh. 3, pgs. 38-41 and 54).

Decedent's daughter, plaintiff Jennifer Ansell, testified at her deposition that she also used Cashmere Bouquet talcum powder at home from when she was about three years old in 1976 through the time she moved out of her parents house in 1991 (Opp. Exh. 4, pgs. 11 and 75-76).

Plaintiffs commenced this action on December 8, 2016 to recover for injuries resulting from the decedent's exposure to asbestos from the defendants' products. Colgate served an Answer to plaintiffs' complaint on January 9, 2017 and an Answer to plaintiffs' Complaint on February 22, 2017 (Mot. Exh. 12).

Colgate now moves summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. Colgate argues that the plaintiffs are unable to establish general or specific causation, or their claim for punitive damages.

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 non-moving 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 [1<sup>st</sup> Dept. 1998]).

Colgate argues that plaintiffs are not expected to present any admissible evidence of exposure to asbestos. Colgate further argues that plaintiffs' 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, fails to raise issues of fact as to causation.

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 [1<sup>st</sup> Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1<sup>st</sup> Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of 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]). Defendants must unequivocally establish that the decedent either was not exposed to asbestos from their products, or that the levels of asbestos he was exposed to were not sufficient to contribute to the development of his 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]).

Colgate's arguments, that plaintiffs' experts - including Dr. Moline - fail to provide admissible evidence on the issue of causation and cannot raise any issues of fact amount to "pointing to gaps in plaintiffs' proof" and fail to state a prima facie basis to obtain summary judgment. To the extent Colgate argues plaintiffs' withdrawn expert, Dr. Ronald Gordon, does not provide sufficient evidence to establish lack of causation, this fails to state a basis to obtain summary judgment as plaintiffs are not relying on his opinions.

Colgate argues that plaintiffs 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. Plaintiffs provide a sworn affidavit incorporating the report of Dr. Jacqueline Moline, and the report of Dr. William E. Longo is incorporated into his deposition testimony. Both expert reports are in admissible form.

Colgate is correct that the letter reports of Dr. Murray Finkelstein, Ph.D., M.D. dated September 14, 2017 and Revised (supplemental report) March 6, 2018, are unaffirmed and unsworn. These reports are not in admissible form, have no probative value and therefore fail to raise an issue of fact to defeat summary judgment on causation (*Grasso v. Angerami*, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991]; *Quinones v. Ksieniewicz*, 80 AD 3d 506, 915 NYS 2d 70 [1st Dept. 2013]; *Lazu v. Harlem Group, Inc.*, 89 AD 3d 435, 931 NYS 2d 608 [1st Dept. 2011]; *Migliaccio v. Miruku*, 56 AD 3d 393, 869 NYS 2d 24 [1st Dept. 2008]; and *McLoryd v. Pennypacker*, 178 AD 2d 227, 577 NYS 2d 272 [1st Dept. 1991] *lv. denied* 79 NY 2d 754, 590 NE 2d 250, 581 NYS 2d 665 [1992]).

Colgate argues that the specific bottles of Cashmere Bouquet used by the decedent and his wife, plaintiff Sharon Rothlein, were not tested and plaintiffs have no direct evidence of exposure. Colgate cites to precedent from multiple jurisdictions other than New York - including California, Maryland, Georgia and Delaware - in support of this argument. Colgate does not establish that the evidentiary standard applied by these other jurisdictions is the same as the standard in The State of New York where plaintiffs are not required to show the precise cause of their damages, only facts and conditions from which the Colgate's liability may be reasonably inferred. Plaintiffs' failure to provide the actual bottles of Cashmere Bouquet that were 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 Colgate'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 NY 3d 1116, 116 NE 3d 75, 91 NYS 3d 784 [2018], because plaintiffs are unable to establish general and specific causation. Colgate relies on its experts, Dr. Matthew S. Sanchez, a doctor of geology; and Jennifer Sahmel, M.P.H., C.I.H., C.S.P., a certified industrial hygienist and certified safety professional, 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*).

Colgate argues that its experts' opinions are supported by peer reviewed epidemiology and independent risk assessments, and demonstrate that 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 Colgate's Cashmere Bouquet talcum powder products, decedent's and his wife's use of the product would not have been capable of causing his mesothelioma.

Defendant relies on Dr. Sanchez's January 24, 2019 affidavit and December 1, 2017 report (Mot. Exh. 1, 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, this 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) testing and standards for testing, to determine if asbestos fibers are present, and the Environmental Protection Agency (EPA) R-93 protocol for determining the optical properties of asbestos to determine if it is a mineral type and whether it is asbestos or not. Dr. Sanchez cites to historical testing by the FDA which typically found little or no asbestos contamination in the talc used by Colgate for Cashmere Bouquet. Dr. Sanchez analyzes the talc mined from the regions in Southwest Montana, specifically the Willow Creek mine and the Bearhead mine in Montana, from the Regal Mine in North Carolina, and from Val Germanasca, Italy which he states were used in Colgate's Cashmere Bouquet talcum powder during the period relevant to decedent's exposure. He cites to reports and studies of testing of the talc and concludes that the talc that was used in defendant's Cashmere Bouquet talcum powder product, that was mined in Italy, North Carolina and Montana, does not contain asbestos (Mot. Exh. 1).

Defendant's expert Jennifer Sahmel, cites to the Occupational Safety and Health Administration - Permissible Exposure Limits (OSHA-PEL) and the National Institute of Occupational Safety and Health (NIOSH) 1988 standards for determining respirable dust. She discusses the Food and Drug Administration's (FDA) 1985 risk analysis of 0.1% of asbestos from cosmetic talc products from testing done in the mid to late 1970's. She determines that the decedent's cumulative exposure to any asbestos in Colgate's Cashmere Bouquet talcum powder from both his and his wife's use would be below the cumulative ambient or background levels of asbestos found in the air (Mot. Exh. 2, Parts 1 through 3).

Dr. Moline's November 20, 2017 report discusses plaintiff's medical and exposure history, past medical history, family history, cigarette smoking history, and his 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 the National Institute for Occupational Safety and Health (NIOSH), 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 (Opp. Exh. 67).

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 - PEL of 0.1 fibers per cubic centimeter can cause disease. Dr. Moline concludes, to a reasonable degree of medical certainty, that the decedent 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 (from 2014) that found they were contaminated with asbestos. She determines that decedent's mesothelioma was caused by his exposure to asbestos and asbestos contaminated talcum powder (Opp. Exh. 67).

Defendant argues that summary judgment is warranted under *Cornell v. 360 West 51<sup>st</sup> 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 Colgate's 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 [1<sup>st</sup> 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 Jennifer Sahmel rely on recognized studies and reports to establish that there is no causal relationship between defendant's Cashmere Bouquet talcum powder product and mesothelioma. Plaintiffs' expert, Dr. Jacqueline Moline, also relies on studies and reports in part from the same scientific organizations, including OSHA and the EPA, to establish that decedent's exposure to asbestos contaminated talc in Colgate's Cashmere Bouquet talcum powder product can cause mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

#### Specific Causation:

Colgate 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. Colgate 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 the decedent's mesothelioma, thus plaintiffs are 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.

The Court of Appeals has enumerated several ways an expert might demonstrate specific 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.

Dr. Sanchez states that the only analytical protocol recognized by the FDA for certifying talc as "asbestos free" requires XRD (infrared absorption) testing. Dr. Sanchez reviews reports and studies and interprets them as demonstrating that there is no asbestos in the source mines used for the production of Colgate's Cashmere Bouquet talcum powder. He identifies the various forms of asbestos fibers and provides the geology of source mines. He analyzes the talc mined from the regions in Southwest Montana (specifically the Willow Creek mine and the Bearhead mine), from the Regal Mine in North Carolina, and from Val Germanasca, Italy, which he states were used in Colgate's Cashmere Bouquet talcum powder during the period relevant to decedent's exposure. Dr. Sanchez concedes that trace amounts of tremolite were found in some rocks adjacent to the talc that was mined, but it states it was non-asbestiform, therefore not asbestos. He states that even if the tremolite were somehow mined with the talc and made it into the processed product it would be minute. Dr. Sanchez relies on his own facility, RJ Lee's testing, which found no asbestos in the containers of Cashmere Bouquet that it tested, and FDA testing in 1976 and 1977 that found no asbestos in Cashmere Bouquet. He states that in 1986 the FDA found no basis to conclude a health warning was needed of the hazardous effects of asbestos in talc because there was no basis to do so. Dr. Sanchez refers to a study by the FDA in 2012 that found no asbestos in the samples. Dr. Sanchez evaluates the testing performed by plaintiffs' expert, Dr. Longo, and concludes that the methodology used for his 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. 1, Parts 1 through 3).

Ms. Sahmel relies on multiple articles, reports and studies that she summarizes and attaches to her report, which totals three volumes. Ms. Sahmel assesses OSHA PEL standards and compares them over time and to more recent standards, as reflected in a chart. She also addresses the EPA's standards. 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 (Mot. Exh. 2, parts 1 through 3).

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 the decedent and Mrs. Rothlein. She 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. 2, Table 3). Ms. Sahmel, in assessing decedent's cumulative asbestos exposure potential (Mot. Exh. 2, 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 decedent's total cumulative lifetime theoretical exposure could be as much as 0.0034 f/cc-year, which is below the range of ambient exposure. She further states, 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. 2, 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. 2, Table 7). Ms. Sahmel determines that the decedent'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 relevant to decedent's exposure would have resulted in any measurable exposure to the decedent. She further concludes that decedent's cumulative range of exposures were well below any lifetime cumulative ambient exposures and well below OSHA PEL for asbestos (Mot. Exh. 2).

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. 81, pg. 18). Plaintiffs provide a copy of Dr. Longo's Curriculum Vitae and his September 28, 2018 deposition testimony concerning his report in an unrelated action (Opp. Exhs. 83 and 85).

Dr. Moline refers to testing done using phase contrast microscopy and transmission electron microscopy that found significant levels of asbestos fibers (anthrophyllite, tremolite and chrysotile) in the breathing zones of the person applying the talcum powder and of bystanders. Dr. Moline states that there is bystander exposure to asbestos in talc of 1.35 f/cc, with potential exposure for those using the talc by shaking of 4.8 f/cc with an actual asbestos fiber measurement of 1.8 f/cc. She cites to measurements using a puff for bystanders of 13.7 f/cc and 9.7 f/cc, and an actual asbestos fiber measurement of 4.9 f/cc and 3.5 f/cc. Dr. Moline cites to the Mine Safety and Health Administration's (MSHA) 1984 results of monitoring mill personnel for Italian talc, that concluded bulk Italian talc was comprised of approximately 0.6% anthrophyllite. She refers to testing conducted by MVA Scientific Consultants which found that there was significant amounts of exposure to tremolite, anthrophyllite and chrysotile asbestos fiber in talcum powder, including Cashmere Bouquet. She determines that decedent's mesothelioma was caused by his exposure to asbestos contaminated talc (Opp. Exh.67).

Plaintiff provides the April 16, 2015 trial testimony and the January 23, 2015 deposition testimony, in unrelated actions, 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, Regal Mine and Willow

Creek Mine - used in Cashmere Bouquet during the period relevant to decedent's exposure also showed asbestos contamination. She recalled that testing performed in the 1980's and 1990's detected asbestos in the talc used by Colgate (Opp. Exh. 9, pgs. 655-658, 663-672, 685-687, 694-701, 860-861, 867-875, 886-888, 910-913 and 919-925, and Exh. 10, pgs. 98-107, 110-116, 122-125, 130-142 and 149-161). Plaintiffs also provide correspondence to Colgate reporting testing of its talc in 1974 that found chrysotile asbestos fibers and Colgate's lab notebooks showing asbestos was identified by the company's testing (Opp. Exhs. 13, 14, 15 and 59).

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 and Dr. Longo, and the other evidence plaintiffs 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 Colgate's Cashmere Bouquet talcum powder products were contaminated with asbestos, and whether decedent and his wife's use of those products, during the periods relevant to his alleged exposure to asbestos, caused his 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. Colgate's reference on reply to an unrelated power point presentation made by plaintiffs' counsel in an unrelated action concerning a different defendant, does not state a prima facie basis to grant summary judgment.

There remain issues of fact as to whether defendant intentionally avoided prior test results that found asbestos fibers, continued to advocate for the use of its talc as uncontaminated and for the use of testing that would not be able to detect any asbestos. To the extent that plaintiffs argue that Colgate placed corporate profits and reputation above the health and safety of the decedent, the issue of punitive damages is to be determined by the trial judge after submission of all the evidence.

Colgate in reply cites to In the Matter of New York City Asbestos Litigation (*DiScala*), 173 AD 3d 573, 103 NYS 3d 92 [1<sup>st</sup> Dept. 2019]) in support of its argument that plaintiffs' expert reports are defective and incapable of establishing a level of exposure for purposes of causation. The *DiScala* case is distinguishable 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. Summary judgment applies a different standard, having evidence construed in a light most favorable to the plaintiffs as the non-moving parties (*SSBS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 A.D. 2d 583, supra).

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:

  
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MANUEL J. MENDEZ

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

Dated: November 12, 2019

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
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