

Germain v American Intl. Indus.
2020 NY Slip Op 30064(U)
January 8, 2020
Supreme Court, New York County
Docket Number: 190049/2017
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**EDDIE GERMAIN and MILDRED GERMAIN, as
Personal Representative of the Estate of
MICHELLE M. GERMAIN,**

Plaintiffs,

- against -

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

**190049/2017
12/18/2019
014**

AMERICAN INTERNATIONAL INDUSTRIES, et al.,

Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by defendant Whittaker Clark & Daniels Inc.:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	

Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Whittaker Clark & Daniels Inc.'s (hereinafter "WCD") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it based on lack of identification, is granted only as to dismissing plaintiffs' claims against Whittaker Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to American International Industries, Johnson & Johnson and Johnson & Johnson Consumer Inc. (hereinafter "J & J") for use in Johnson & Johnson's Baby Powder, and to Colgate-Palmolive Company (hereinafter "Colgate") for use in Cashmere Bouquet talcum powder products. The remainder of the relief sought in this motion is denied.

In February of 2017 Michelle Germain (hereinafter "decedent") was diagnosed with epithelial mesothelioma, she died from the disease on August 4, 2017. Plaintiffs, the surviving spouse and decedent's daughter, brought this action on behalf of the estate alleging that the decedent contracted the disease from exposure to asbestos in a variety of ways. It is alleged decedent was exposed to asbestos containing talc sold by WCD to the Neslemur Company or American International Industries (hereinafter "All"), the manufacturers of Clubman talc products.

Decedent testified at her deposition that she was exposed to "Clubman Talc" used by her husband, Eddie Germain in the barbershop he worked in, and at one point owned, in New York, from about 1978 through December of 1993 (Mot. Exh. D, pgs. 439-441, 449 and 839). Decedent stated that her husband initially worked in the barbershop in New York part-time, at least bi-weekly. Decedent visited her husband at the barbershop in New York and claimed that her visits became longer after he became the owner in 1985 (Mot. Exh D at pgs. 20-26 and 447). Decedent claimed that when she observed Mr. Germain at work in New York, he would sprinkle or pour the talcum powder on a brush and apply it to the back of a customer's neck. She testified that her husband would make at least two shakes of the Clubman talcum powder unto a brush before using it. Decedent stated that this procedure took place each time Mr. Germain finished cutting hair, and while she was visiting it happened at least fifteen times in one day (Mot. Exh. D, pgs. 455-458, Exh. 2, pgs. 203 and 216).

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

Decedent testified that she was also exposed to the asbestos contaminated Clubman talcum powder by washing Mr. Germain's aprons when they lived in New York. She claimed that he had two aprons, a white one worn by Mr. Germain when he cut hair and a black one that was worn by his clients. She described the process of washing the aprons as shaking the apron to remove the dust (*powder*) and hair, then making sure there was nothing else attached, like metal clips, and putting the aprons into the washing machine. She testified that he had white shirts that he used as a uniform but she never had to wash the shirts (Mot. Exh. D, pgs. 461-469 and 851-853 and Opp. Exh. 5, pg. 41-42).

Plaintiff, Eddie Germain (surviving spouse), testified that he only used Clubman talcum powder from two cases that were part of the purchase of a barbershop in 1985. He testified that after he purchased the barbershop in New York he had another woman, called Marie, clean the aprons weekly. He stated that she would pick them up on Saturday and drop off the clean ones on Tuesday. Mr. Germain stated that the decedent would clean his uniform shirts. He testified that while the decedent was washing the shirts he observed dust in the air from the powder. Mr. Germain testified that the decedent would visit the barbershop in New York two to three times a week from 1978 through 1985, and would stay on average about an hour. He stated that the decedent came more frequently, about three or four times a week, when he owned the shop from 1985 through her last visit in 1991 or 1992 (Mot. Exh. E, pgs. 342-343, 349-350 and 558-560). He stated that in 1990 he sold the barbershop but continued to work there for months after the sale. Mr. Germain testified that he stopped cutting hair until after he moved to Florida in January of 1994. He stated that he used that same Clubman talcum powder out of the two cases purchased with the barbershop in 1985 from 1994 through 2007 or 2008 when he completely stopped cutting hair (Mot. Exh. E, pgs. 339-340, 357-358 and 379-384).

Decedent claimed that after they moved to Florida, starting in October of 1994 Mr. Germain continued to work as a barber in a unisex beauty salon owned by a woman named Carmen. Decedent stated that her husband continued to use Clubman's talcum powder products on clients in the same manner as in New York (Mot. Exh. D, pgs. 475, 477, 480-481 and 832). She stated that after he stopped working at Carmen's beauty salon, her husband continued to cut hair in the garage (Mot. Exh. D, pgs. 495-496). Decedent testified that after they moved to Florida, Mr. Germain used the Clubman talcum powder he brought with him from New York and used it when he cut their son Jamar's hair in their garage where he had set up a work station. Decedent claimed that she was present when her husband cut hair in the garage. She testified that she would use a broom to sweep the garage floor after her husband was done cutting hair (Mot. Exh. D, pgs. 454-458, 490-492 and 495-496 and Opp. Exh. 5, pg. 44).

Mr. Germain testified that he worked part time at Carmen's beauty salon in Florida for two and a half to three years. He stated that his last year working as a barber at Carmen's beauty salon would have been 1997 or 1998. He stated that he continued to use Clubman talcum powder about seventy percent of the time that he worked at Carmen's beauty salon, using the remaining powder from the two cases which he had brought with him from New York (Mot. Exh. E, pgs. 368 and 378-380). Mr. Germain testified that he stopped working at Carmen's beauty salon to work as a musician, and he was never employed as a barber again (Mot. Exh. E, pg. 419-420). He stated that he also used the second case of Clubman talcum powder at home when he was cutting his son Jamar's hair. Mr. Germain testified that he stopped cutting hair at home when his son Jamar was about nineteen (19) or twenty (20) years old, in 2007 or 2008. Mr. Germain stated that he did not cut anyone else's hair at home (Mot. Exh. E pgs. 435-438).

Carmen Ramos testified that she was the owner of the beauty salon in Florida where Mr. Germain worked. Ms. Ramos stated the salon was called "C&G Hair Design" and she operated the business from 1986 through 2006 when she sold it (Mot. Exh. F pgs. 7-8, 21-22). She recalled that Mr. Germain was a barber

that rented a chair in the salon and his hours were "part-time" because he was also a musician. She estimated that he did about twelve to fifteen haircuts a day and that they would take on average a half hour each. Ms Ramos testified that she laundered all of the aprons and towels that were used in the salon and that Mr. Germain was not permitted to take them home (Mot. Exh. F, pgs 24-26 and 35-38).

Decedent and her surviving spouse, Eddie Germain, commenced this action on February 13, 2017 (WCD was named as a defendant (see NYSCEF Doc. #1)), and subsequently amended the complaint four times. The Fourth Amended Complaint substituted the decedent's daughter, Mildred Germain as representative of the estate (Mot. Exh. A and NYSCEF Doc. # 114). Plaintiffs' Second Amended Complaint dated February 21, 2017- under the Second Standard Complaint - asserts four causes of action for: (1) negligence for wrongful death and survival damages, (2) strict liability for wrongful death and survival damages, (3) loss of services, society and consortium and (4) punitive damages (NYSCEF Doc. # 8). On April 18, 2018, plaintiffs filed the Third Amended Complaint adding the Neslemur Company as a defendant (NYSCEF Doc. # 89). On February 27, 2017 WCD filed an Acknowledgement of Service (NYSCEF Doc. # 12 and Mot. Exh. B).

WCD now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, based on lack of identification.

At oral argument on this motion plaintiffs did not oppose the relief sought by WCD as to J&J and Colgate's talc products. Plaintiffs only oppose summary judgment as to the claims of decedent's exposure to asbestos in Clubman talc manufactured by Neslemur Company and American International Industries. WCD withdrew the part of the motion applying to asbestos content and causation and only seeks summary judgment on lack of identification.

Plaintiffs argue this motion should be denied as untimely and procedurally defective because it has been filed over a year after the Note of Issue was filed on October 2, 2018 (Opp. Exh. 66).

WCD previously filed a motion seeking summary judgment under Motion Sequence 011, the motion was fully submitted in the Submissions Part (Room 130) and scheduled for oral argument on September 25, 2019. The Part was closed due to exigent circumstances on September 25, 2019, the scheduled oral argument date, and pending motions were taken on submission. WCD withdrew the motion filed under Motion Sequence 011 on September 25, 2019, to obtain oral argument when the Part re-opened (Opp. Exh. 67). WCD subsequently filed this motion by Order to Show Cause for summary judgment under Motion Sequence 014, to expedite the submission of papers (NYSCEF Doc. # 719).

WCD has good cause for the second summary judgment motion due to the Part being closed and to obtain oral argument with potential liability being "disposed of without burdening the resources of the court and movants" (Rotante v. Advance Transit Co., Inc., 148 AD 3d 423, 49 NYS 3d 391 [1st Dept. 2017] citing to Varsity Transit v. Board of Education of City of New York, 300 AD 2d 38, 752 NYS 2d 603 [1st Dept., 2002]).

Plaintiffs state that WCD has added arguments and five new exhibits related to co-defendant All obtaining summary judgment (Opp. Exh. 70). Plaintiffs' opposition papers address WCD's additional arguments and exhibits. They also added eight exhibits to the opposition papers (Opp. Exhs. 1-73). Plaintiffs have not shown that they were prejudiced by WCD's withdrawal and re-submission of the motion.

This Court's September 18, 2019 Decision and Order filed under Motion Sequence 012, granted All summary judgment, finding that it was not liable for the decedent's exposure to asbestos in Clubman talcum powder purchased prior to 1987, and decedent was not exposed to Clubman talcum powder manufactured by All. Clubman talcum powder was manufactured by Neslemur prior to 1987, when All purchased the company (Opp. Exh. 70). Eddie Germain testified that he only used Clubman talcum powder purchased prior to his owning a barbershop in 1985, and before All could be held liable (Mot. Exh. G and Mot. Exh. E, pgs. 339-340, 357-358 and 379-384).

WCD argues that it cannot be held liable for talc sold to All which has been granted summary judgment, since there was no showing that plaintiff Eddie Germain used Clubman talcum powder manufactured after 1985. WCD is not liable for talc sold to All because that occurred after the period relevant to decedent's exposure.

WCD argues that plaintiffs cannot provide evidence or raise an issue of fact as to WCD's liability as a supplier of talc sold to Neslemur because there is no evidence of the formula used to blend Clubman talcum powder during the relevant exposure period of 1978 through 1985. WCD also argues that plaintiffs cannot provide evidence or otherwise show the decedent had second-hand exposure to WCD's talc in Clubman talcum powder during the relevant exposure period because of conflicting testimony, warranting summary judgment.

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 [1st Dept. 1998]).

WCD argues that the decedent's testimony establishes she had only intermittent second hand encounters with Clubman talcum powder and there is no evidence as to which if any of the talcs WCD sold to Neslemur were used in the formulation of the the talcum powder products.

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]). WCD must unequivocally establish that the decedent 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 her 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]). It is not until after WCD meets its preliminary burden that the plaintiffs are required to raise any issues of fact (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, supra).

WCD does not meet its prima facie burden with this proof. The burden is on WCD to prove that none of All or Neslemur's Clubman talcum powder products used by the decedent and her husband during the relevant time period contained any talc supplied, sold or distributed by WCD, or that the talc sold,

distributed or supplied by WCD did not contain asbestos. The burden does not shift to the plaintiffs until WCD makes a prima facie case.

WCD concedes that it sold and distributed talc to Neslemur during the relevant period of 1978 through 1985 and identifies the grade numbers as 123, 1615, 4609, 4619 and 4628. WCD claims it also sold other products to Neslemur (Mot. Exh. H).

Plaintiffs in opposition provide the August 8, 2016 testimony of Mr. Theodore Hubbard, corporate representative of WCD. He explained the grade numbers as: 123 produced by American Talc Company with the talc coming from Alpine Alabama; 1615 produced by Metropolitan Talc with the talc coming from Val Chinsone, Italy; 4619 produced by Clark Minerals with the talc coming from Montana Ore which was provided by Pfizer; and 4628 came from Metropolitan Talc and used three different ores from Italy and Montana. He was uncertain about the talc graded 4609 (Opp. Exh. 7, pgs. 74-79 and Opp. Exh. 71, pgs. 167-168).

On August 28, 2015 Mr. Hubbard testified that in May of 1979 WCD sold fifty bags weighing fifty pounds a piece of talc to Neslemur, and that twenty-two of the fifty pound bags of 1615 talc was sold by WCD to Neslemur in July of 1982. He stated that in December of 1981 forty-four fifty pound bags of 1615 talc was sold by WCD to Neslemur. He stated that eight hundred bags of 4628 talc was sold to Neslemur in February of 1979 and there were shipments of the 4628 talc from March of 1977 through January of 1979, most of them were of eight hundred fifty pound bags. Plaintiffs claim that Mr. Hubbard's testimony establishes that WCD supplied eleven tons of cosmetic grade talc to Neslemur (Opp. Exh. 71, pgs. 157-158, 161, 164-165, 171-172 and 174-175).

Plaintiffs provide copies of documents used at the August 28, 2015 deposition as further proof of WCD's sales to Nestlemur (Opp. Exh. 72).

Plaintiffs have raised an issue of fact as to whether WCD supplied, sold or distributed the alleged asbestos contaminated talc to Neslemur for use in Clubman talc products during the period relevant to decedent's exposure, from 1978 through 1985.

WCD's argument that the specific bottles of their products used by the decedent were not tested and there is no direct evidence of exposure to asbestos, is not dispositive.

Plaintiffs are not required to show the precise causes of damages, but only show facts and conditions from which WCD's liability may be reasonably inferred (*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]). The Plaintiff need "only show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga.-Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). A plaintiff's inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (*Lloyd v W.R. Grace & Co.*, 215 AD2d 177, 626 NYS2d 147 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

WCD argues that the conflicting testimony provided by the decedent, her husband Eddie Germain, and Carmen Ramos, is insufficient to establish exposure; however this is not a basis to obtain summary judgment. This conflicting testimony presents issues of fact to be determined by a jury.

Additionally "It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the decedent's exposure 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]). The 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 70 [2011], Almonte v. 638 West 160 LLC, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018]).

There remain issues of fact as to decedent's exposure to asbestos contaminated talc sold by WCD to Neslemur for use in Clubman talcum powder used by her husband.

Plaintiffs have also raised issues of fact on their claim 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]). To the extent WCD argues it has closed its traditional business operations effective 2004 and does not sell minerals, that does not preclude the imposition of punitive damages as a deterrent.

Plaintiffs' state that WCD conducted testing and found both chrysotile and tremolite asbestos 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. Plaintiffs have raised an issue of fact related to whether WCD placed corporate profits and reputation above the health and safety of the decedent, which together with WCD's continued insistence that there is no asbestos in its talc, requires that the decision to give the jury a charge on punitive damages be determined by the trial judge after submission of all evidence.

ACCORDINGLY, it is ORDERED that Whittaker Clark & Daniels Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, based on lack of identification, is granted only as to dismiss plaintiffs' claims against Whittaker Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to American International Industries, Johnson & Johnson and Johnson & Johnson Consumer Inc. for use in Johnson & Johnson's Baby Powder, and to Colgate-Palmolive Company for use in Cashmere Bouquet talcum powder products, and it is further,

ORDERED that plaintiffs' claims asserted against Whittaker Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to American International Industries, Johnson & Johnson and Johnson & Johnson Consumer Inc. for use in Johnson & Johnson's Baby Powder, and to Colgate-Palmolive Company for use in Cashmere Bouquet talcum powder products are severed and dismissed, and it is further,

ORDERED that the motion to dismiss the claims asserted against Whittaker, Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to Neslemur for use in Clubman talcum powder is denied, and it is further,

ORDERED that the remainder of plaintiffs' claims asserted against Whittaker Clark & Daniels, including for the sale, distribution or supply of asbestos contaminated talc to Neslemur for use in Clubman talcum powder, remain in effect, and it is further,

ORDERED that Whittaker, Clark & Daniels is directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the remaining parties, the General Clerk's Office and the County Clerk's Office, who are directed to mark their records accordingly, and it is further,

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

Dated: January 8, 2020


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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE