

**Hardman v Bristol-Myers Squibb Co.**

2020 NY Slip Op 30638(U)

March 2, 2020

Supreme Court, New York County

Docket Number: 190443/2018

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

BETSEY P. HARDMAN and JODY E. HARDMAN,  
Plaintiffs,  
-against-

INDEX NO. 190443/2018  
MOTION DATE 02/19/2020  
MOTION SEQ. NO. 006  
MOTION CAL. NO. \_\_\_\_\_

BRISTOL-MYERS SQUIBB CO., et al.,  
Defendants.

The following papers, numbered 1 to 15 were read on this motion pursuant to CMO Section III C, to vacate the Special Master's recommendation and cross-motion to transfer this case to the April 2020 In Extremis Trial Cluster:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

<u>PAPERS NUMBERED</u>	
_____	<u>1- 4</u>
_____	<u>5-7, 8-9, 10-12, 13-14</u>
_____	<u>15</u>

Cross-Motion:  No  Yes

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion pursuant to the Case Management Order (CMO) Section III (C) to vacate Special Master Shelley Olsen's December 29, 2019 recommendation denying the plaintiffs' request for a more detailed fact witness list is denied. Defendants, Revlon, Inc., Revlon Consumer Products Corporation, and Bristol-Meyers Squibb Co.'s cross-motion to transfer this case to the April 2020 In Extremis Trial Cluster, was withdrawn at oral argument and is denied as moot.

Plaintiff, Betsey P. Hardman, was diagnosed with mesothelioma in October of 2018. She alleges that she was exposed to asbestos through the frequent use of talcum powder products. Plaintiffs commenced this action on November 26, 2018 and it was assigned to the October 2019 In Extremis trial group (Mot. Exhs. 1, pg. 1, and 15). The schedule for the October 2019 In Extremis Trial Cluster states that as of September 10, 2019 defendants were to serve the fact witness list and plaintiffs had until September 20, 2019 to serve notices of deposition of the defendants' fact witnesses (Mot. Exh. 1, pg. 6). Defendants, Revlon, Inc., Revlon Consumer Products Corporation, Bristol-Meyers Squibb Co. (Mot. Exh. 2), Colgate-Palmolive Co. (hereinafter individually as "CPC")(Mot. Exh. 3), Johnson & Johnson and Johnson & Johnson Consumer, Inc. (hereinafter individually as "J&J")(Mot. Exh. 4), and Whittaker Clark and Daniels (hereinafter individually as "WCD")(Mot. Exh. 5), (all jointly referred to as "defendants"), served timely fact witness lists.

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

On September 19, 2019, the day before the notices of depositions were due, plaintiffs' sent emails to Special Master Olsen seeking a recommendation striking defendants' fact witness lists with prejudice, or to have the defendants amend the witness lists to include specific names and pertinent information which included: "address, telephone number, email address, employer, and nature of testimony" (Mot. Exhs. 9 and 10).

On September 30, 2019 Special Master Olsen issued a recommendation addressed to all of the defendants' counsel that stated in relevant part: "I don't have a problem extending a few of the response deadlines for witness lists. I think those of you who spoke up and defended your responses are probably in a better position than those of you who remain with extremely broad witness lists. I presume these responses will be part of the issues on appeal, so I would advise those of you who have essentially responded, 'any witness anywhere' to tighten it up." (Mot. Exh. 11).

On November 11, 2019, Special Master Olsen, addressing Revlon Consumer Products Corporation's (hereinafter individually as "RCPC") failure to comply with an October 2, 2019 discovery order or to appear at a scheduled conference, wrote a directive giving RCPC twenty (20) days to provide listed discovery. Included on the list of discovery was "6. Serve a fact witness list with actual names." (Mot. Exh. 12).

On December 2, 2019 RCPC, Revlon, Inc. and Bristol-Meyers Squibb Co. (hereinafter individually as "BMS"), responded to Special Master Olsen's November 11, 2019 directive. They sought to have the Special Master reconsider the prior ruling on actual names of fact witnesses, arguing that unlike expert witnesses there is no requirement in either the CMO or the CPLR for a party to provide the identity of a fact witness. It was further argued that the bulk of the fact witnesses produced by RCPC, Revlon, Inc. and BMS are corporate representatives, and under the CPLR the corporate entities are afforded the right to designate the individual that will testify, with specific individuals produced "most likely" by subpoena (Mot. Exh. 13).

On December 29, 2019 Special Master Olsen reconsidered and granted RCPC, Revlon, Inc. and BMS's request as to actual names of fact witnesses saying: "Also, upon reconsideration, I am granting Revlon's request that they need not, at this juncture so far from trial, specify by name, its fact witnesses for trial" (Mot. Exh.14).

Plaintiffs now move for an Order pursuant to CMO Section III (C) vacating the part of Special Master Olsen's December 29, 2019 recommendation applying to the defendants' fact witness lists removing any requirement of specificity. Plaintiffs claim that in allowing RCPC, Revlon, Inc. and BMS to provide witness lists that lack specificity, the December 29, 2019 recommendation will "impliedly" overturn the prior recommendation for the remaining defendants in this action.

Defendants Revlon, Inc., Revlon Consumer Products Corporation, and Bristol-Meyers Squibb Co.'s cross-moved to transfer this case to the April 2020 In Extremis Trial Cluster. The cross-motion was withdrawn at oral argument and is denied as moot.

In New York City Asbestos Litigation ("NYCAL") the CMO states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring the parties comply with discovery, and as a result, recommends rulings on all discovery disputes (Ames v A.O. Smith Water Products, et al., 66 AD3d 600, 887 NYS2d 580 [1st

Dept. 2009]). CMO Section III (C), specifically states in relevant part: "No motion to compel discovery shall be made without first seeking the assistance of the Special Master. Any party objecting to a ruling by the Special Master shall notify by email the Special Master and *all other interested parties* within three days of receiving the Special Master's ruling..."(emphasis added). Furthermore, pursuant to CMO Section III (C), the Special Master's recommendations are appealable to this court.

The November and December of 2019 e-mails to and from Special Master Olsen only identify plaintiffs' attorneys and defense counsel for RCPC, Revlon, Inc., and BMS (See Mot. Exhs. 12, 13 and 14). Plaintiffs' December 29, 2019 objection to Special Master Olsen's recommendation and notice of intent to appeal does not name counsel for CPC, J&J or WCD (Mot. Exh. 14). The last email recommendation by the Special Master that included CPC, J&J and WCD was dated September 30, 2019 (Mot. Exh. 11), and they have all stated in their opposition papers that no other notice was received as to this discovery dispute prior to this motion being filed by plaintiffs' counsel on January 6, 2020 (NYSCEF Docket Nos. 220 through 239). Additionally, defendant CPC has provided proof that it had already modified its fact witness list on October 8, 2019 to make it more specific and, therefore, it could not be "impliedly" included in the December 20, 2019 emails (CPC Opp. Exh. H).

Plaintiffs have not provided any proof that CPC, J&J or WCD had notice of their objection to Special Master Olsen's December 29, 2019 recommendation, or that it was the Special Master's intent to "impliedly" overturn the September 30, 2019 recommendation made for all of the defendants. Accordingly, plaintiffs' motion is denied as to defendants CPC, J&J and WCD.

Plaintiffs argue that RCPC, Revlon, Inc. and BMS's failure to provide specific identification of fact witnesses results in failure to comply with CPLR §3101(a). Plaintiffs further argue that the identity of those defendants' fact witnesses is material and necessary to their case.

CPLR §3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." 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 [1<sup>st</sup> Dept. 1994] and Allen v. Crowell-Collier Publ. Co., 21 NY 2d 403, 235 NE 2d 430, 288 N.Y.S. 2d 449 [1968]). The Court in its discretion determines whether the information sought is "material and necessary" (Allen v. Crowell-Collier Publ. Co., 21 NY 2d 403, supra at 406). The applicable standard is whether defendant's demands may lead to relevant evidence (CPLR §3101[a]; SNI/SI Networks LLC v DIRECTV, LLC, 132 AD3d 616, 18 NYS3d 342 [1<sup>st</sup> Dept. 2015]; Matter of Steam Pipe Explosion at 41st St. & Lexington Ave., 127 AD3d 554, 8 NYS3d 88 [1<sup>st</sup> Dept. 2015]).

RCPC, Revlon, Inc. and BMS oppose the motion arguing that plaintiffs request for more detailed fact witness lists are premature because at the time this discovery was sought the parties were still conducting product identification discovery, and this case is not trial ready. They further argue that although discovery should be material and necessary, plaintiffs demands seek extensive information about all of the employees from the period Jean Nate was manufactured and is therefore excessive. They claim that they would otherwise be compelled to drain their resources to provide detailed

**disclosures of specific witnesses - rather than just naming corporate entities - while there is still outstanding product identification evidence to be provided by plaintiffs.**

The CPLR does not require a party to generate a fact witness list specifically naming the individual being called to testify at the time of trial (See Cruz v. City of New York, 132 AD 3d 593, 18 NYS 3d 617 [1st Dept., 2015] citing to Sheppard v. Blitman/Atlas Building Corp., 288 AD 2d 33, 734 NYS 2d 1 [1st Dept., 2001]). A party is also not required to provide a specific list if they are not required to do so by individual court rules (Gonzalez v. City of New York, 151 AD 3d 629, 58 NYS 3d 331 [1st Dept. 2017] citing to Hunter v. Trybinski, 278 AD 2d 844, 719 NYS 2d 422 [4th Dept. 2000]). There is nothing in CPLR Article 31 requiring that a party generate a witness list per se, a party may be reasonably required to disclose the name and address of witnesses whose identity were learned as part of the investigation of the case, "but of whom the opposing party is ignorant." (Hunter v. Trybinski, 278 AD 2d 844, supra at 844).

Plaintiffs have not cited to any section of the CMO requiring that defendants' fact witness lists provide specific identities and addresses of the witnesses to be used at the time of trial. Plaintiffs have not demonstrated that they are otherwise ignorant of the individuals to be produced as fact witnesses on behalf of RCPC, Revlon, Inc. and BMS, or that the Special Master was incorrect in her determination that "at this juncture so far from trial," while discovery was still ongoing, the corporate entities should be compelled to specify by name their fact witnesses for trial.

Special Master Olsen's December 29, 2019 recommendation correctly determined "at this juncture" that RCPC, Revlon, Inc. and BMS do not need to specify by name the fact witnesses to be used for trial, warranting denial of this motion.


Accordingly, it is ORDERED, that plaintiffs' motion pursuant to the Case Management Order (CMO) Section III (C) to vacate Special Master Shelley Olsen's December 29, 2019 recommendation denying the plaintiffs' request for a more detailed fact witness list, is denied, and it is further,

ORDERED that Special Master Shelley Olsen's December 29, 2019 Decision and Recommendation is confirmed, and it is further,

ORDERED that defendants Revlon, Inc., Revlon Consumer Products Corporation, and Bristol-Meyers Squibb Co.'s cross-motion to transfer this case to the April 2020 In Extremis Trial Cluster, was withdrawn at oral argument and is denied as moot.

**ENTER:**

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

  
\_\_\_\_\_  
**MANUEL J. MENDEZ  
J.S.C.**

**Dated: March 2, 2020**

**Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION**  
**Check if appropriate:  DO NOT POST  REFERENCE**