

**English v Avon Prods., Inc.**

2020 NY Slip Op 30679(U)

March 5, 2020

Supreme Court, New York County

Docket Number: 190346/2018

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**

**LINDA ENGLISH AND PATRICIA RASSO,**

**INDEX NO. 190346/2018**  
**MOTION DATE 02/26/2020**  
**MOTION SEQ. NO. 009**  
**MOTION CAL. NO. \_\_\_\_\_**

**Plaintiffs,**

**-against-**

**AVON PRODUCTS, INC., et al.,**

**Defendants.**

The following papers, numbered 1 to 10 were read on this motion pursuant to CPLR §2221 to reargue and renew the Decision and Order of this Court:

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</u>
_____	<u>8 - 10</u>

**Cross-Motion:  Yes  No**

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion pursuant to CPLR §2221(d) to reargue and CPLR §2221(e) to renew the July 12, 2019 Decision and Order of this Court that dismissed this case for lack of personal jurisdiction, and upon reargument to have this Court modify the July 12, 2019 Decision and Order to hold defendants' motion in abeyance so that jurisdictional discovery can be conducted, is denied.

Plaintiff, Linda English, was diagnosed with peritoneal mesothelioma in February of 2018. She alleges that she was exposed to asbestos through the use of talcum powder products over the course of her life - including defendants Johnson & Johnson, and Johnson and John Consumer Inc.'s (hereinafter jointly referred to as "defendants") Johnson's Baby Powder.

Ms. English is a current resident of the State of Texas and previously resided in Maine. She stated that she was exposed to the defendants' products while working as a flight attendant for Delta Air Lines from 1966 to 1984, when she worked on domestic flights that would have layovers of one or two nights in New York, about three or four times per month, during which she occasionally used talcum powder products (Mot. Exh. C, pgs. 118-119 and Mot. Exh. D, pgs. 256-257 and 270). Ms. English claims that during the period between 1984 until she retired in 1999, she only had one layover in New York while working on Delta Air Lines international flights (Mot. Exh. D, pg. 137). She stated that during the years she worked as a flight attendant, she never purchased any talcum powder products in the State of New York, but would bring a bottle of Johnson's Baby Powder with her from Texas.

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

**Defendants are both incorporated and have principal places of business in New Jersey.**

**Defendants moved under Motion Sequence 003 to dismiss plaintiffs' complaint and all cross-claims asserted against them, pursuant to CPLR 3211(a)(8), CPLR §301 and CPLR §302, for lack of personal jurisdiction. This Court's July 12, 2019 Decision and Order granted defendants' motion and determined plaintiffs' arguments that: (1) defendants specifically targeted New York contacts to conceal information from the public about the asbestos content of their talcum powder products; and (2) that defendants' substantial revenue from interstate commerce was such that they "could reasonably foresee that their activities have consequences in New York," did not establish jurisdiction (Mot. Exh. B, pg. 2).**

**The July 12, 2019 Decision and Order stated that there is no general jurisdiction because the defendants are not incorporated, nor maintain their principal places of business in the State of New York. It was further determined that no specific jurisdiction exists because the plaintiffs' specific claims at issue rely on Ms. English's purchase of the defendants' talcum powder products in Texas, and her illness manifested itself outside of the State of New York (Mot. Exh. B, pgs. 3 and 5).**

**The July 12, 2019 Decision and Order was uploaded to NYSCEF on July 15, 2019 (NYSCEF Doc. No. 286). On the same day, July 15, 2019, defendants served and e-filed a copy of the Order with Notice of Entry (NYSCEF Doc. No. 288 and Opp. Exh. 2). Plaintiffs filed this motion five months later, on December 20, 2019.**

**Plaintiffs now move, pursuant to CPLR §2221(d) and CPLR §2221(e), to reargue and renew the July 12, 2019 Decision and Order of this Court filed under Motion Sequence 003 and upon reargument or renewal, plaintiffs seek to have this Court modify the July 12, 2019 Decision and Order to hold defendants' motion in abeyance so that jurisdictional discovery can be conducted.**

**Plaintiffs' notice of motion states that they seek reargument pursuant to CPLR §2221(d), but the motion papers do not address that relief. The failure to state a basis for reargument warrants denial of that relief. Alternatively, pursuant to CPLR §2221(d)(3) a motion for reargument shall be made within thirty (30) days after service of a copy of the Order with Notice of Entry. Plaintiffs filed this motion five months after the service of the Order with Notice of Entry, rendering it untimely (Macy's Inc. v. Martha Stewart Living Omnimedia, Inc., 144 AD 3d 453, 40 NYS 3d 265 [1st Dept. 2016] and Citigroup Global Markets, Inc. v. Fiorilla, 151 AD 3d 665, 54 NYS 3d 586 [1st Dept. 2017]). Plaintiffs failure to make any arguments - including seeking to have this Court address exceptions for service of an untimely motion to reargue - results in the denial of the reargument relief sought in this motion (See Irizarry v New York City Health and Hospitals Corp., 268 AD 2d 321, 268 NYS 2d 399 [1st Dept. 2000] and Garcia v. The Jesuits of Fordham, 6 A.D. 3d 163, 774 N.Y.S. 2d 503 [1st Dept., 2004]). Accordingly, the CPLR §2221(d) reargument relief sought in this motion is denied.**

Plaintiffs argue that renewal is justified pursuant to CPLR §2221(e)(2) and (3): (1) because a subsequent decision of this Court on November 20, 2019 in another case *Holleman v. Avon products, Inc., et al.*, Index No. 19077/2018 (Mot. Exh. A), resulted in the equivalent of a change in the law, setting new precedent that warrants jurisdictional discovery in this action; (2) there is new evidence in the form of discovery from Kolmar Laboratories, Inc. (hereinafter "Kolmar") demonstrating a relationship with the defendants obtained after Motion Sequence 003 was submitted that may subject them to jurisdiction; and (3) in the interest of justice so as not to defeat substantive fairness to the extent it is determined that plaintiffs' arguments were not made at the time the underlying motion was submitted.

Defendants oppose renewal arguing that the relief is untimely. The expiration of the time to appeal a decision renders a motion to renew untimely (see *Aspen Specialty Ins. Co. v. Ironshore Indemnity Inc.*, 167 AD 3d 420, 87 NYS 3d 469 [1st Dept., 2018] and *Redeye v. Progressive Ins. Co.*, 158 AD 3d 1208, 71 NYS 3d 233 [4th Dept., 2018]). Plaintiffs time to file an appeal expired at least four months before the relief sought in this motion, they have commenced and proceeded in another action against the defendants in the State of New Jersey, rendering the renewal relief sought in this motion untimely.

Alternatively, plaintiffs claim that after the defendants' motion to dismiss was decided, the November 20, 2019 Decision and Order in *Holleman v. Avon products, Inc., et al.*, Index No. 19077/2018 (Mot. Exh. A) granted jurisdictional discovery on essentially the same facts, resulting in a change in the law amounting to a new precedent warranting renewal and modification of the previous order to allow for jurisdictional discovery in this action. They state that the plaintiffs in both cases were exposed to asbestos in defendants' products manufactured by Kolmar in New York during the relevant time period and that the relationship between the defendants and Kolmar should be explored in this case.

Renewal relief relying on a change in the law requires "a new pronouncement of the law governing this case" and typically applies after a determination on appeal or a statutory amendment. The decisions of a court of concurrent jurisdiction do not compel the same relief in separate cases (*Spieler v. Bloomingdale's*, 59 AD 3d 267, 873 NYS 2d 66 [1st Dept. 2009] and *Alessandro v. Carro*, 123 AD 3d 1, 992 NYS 3d 520 [2014]). An intervening decision providing clarification of existing law does not create a basis for renewal (*Alessandro v. Carro*, supra at pg. 7, citing to *Philips v. Intl. Invs., LLC v. Pektor*, 117 AD 3d 1, 982 NYS 2d 98 [1st Dept. 2014]).

Plaintiffs' do not refer to an Appellate Court decision or statutory amendment, nor have they shown that the *Holleman* Decision and Order would amount to a change in precedent. At best, the *Holleman* Decision and Order represents a clarification of the law. Plaintiffs have not established that the November 20, 2019 Decision and Order in *Holleman* constituted a change in the law that applies to the July 12, 2019 Decision and Order dismissing this case for lack of jurisdiction.

Renewal applies to the submission of new evidence not available at the time the original motion was submitted (See CPLR §2221(e)(2) and *Laura Vazquez v. JRG Realty Corp.*, 81 A.D. 3d 555, 917 N.Y.S. 2d 562 [1st Dept. 2011] and *Spieler v.*

Bloomington's, 59 A.D. 3d 267, supra [1<sup>st</sup> Dept. 2009]). A party seeking renewal is required to provide a reasonable justification for the failure to provide the new evidence or facts. The failure to include relevant documents because of a "voluminous production" is unavailing (See *Henry v. Peguero*, 72 A.D. 3d 600, 90 N.Y.S. 2d 49 [1<sup>st</sup> Dept. 2010] leave to appeal denied 16 N.Y. 3d 726, 942 N.E. 2d 301, 917 N.Y.S. 2d 92 [2011]). Renewal is not available to parties that seek a "second chance" because of a failure to exercise due diligence (*Galasia v. Espinal*, 149 A.D. 3d 544, 50 N.Y.S. 2d 266 [1<sup>st</sup> Dept. 2017]).

Plaintiffs have not provided new evidence that was unavailable at the time the underlying motion was submitted. Defendants have provided proof that the same document production relied upon in *Holleman* as showing a potential relationship between the defendants and Kolmar were provided to the plaintiffs in this case as of March of 2019 (Opp. Exhs. 6 and 7). They failed to show that the defendants intentionally concealed this discovery in a voluminous document production, and in any case that is not a reasonable justification to obtain renewal. Plaintiffs are not entitled to renewal based on their failure to identify Kolmar from the discovery provided by the defendants prior to submission of the underlying motion.

Renewal can be granted in the Court's discretion to avoid "defeating substantive fairness," in the interest of justice. The remedy is only available in a "rare case" where liberality is required as a matter of judicial policy and "only where the movant presents a reasonable excuse for failure to provide the evidence in the first instance" (*Henry v. Peguero*, 72 A.D. 3d 600, supra at pg. 602 and *Vaca v. Village View Housing Corporation*, 170 AD 3d 619, 97 NYS 3d 91 [1<sup>st</sup> Dept., 2019]). Plaintiffs must also demonstrate that due diligence was exercised and the evidence could not have been produced at the time of submission of the underlying motion (*Sciss v. Metal Polishers Union Local 8A*, 149 AD 2d 318, 539 NYS 2d 899 [1<sup>st</sup> Dept. 1989]). Plaintiffs have not provided newly discovered evidence or a reasonable excuse for their failure to provide the documents related to the relationship between the defendants and Kolmar prior to the submission of the underlying motion, therefore they are not entitled to obtain renewal in the interest of justice.

There is no basis to grant renewal pursuant to CPLR §2221(e), under any of the arguments raised by plaintiff and this motion is denied.

On February 11, 2020, after this motion was fully submitted in the Submissions Part (Room 130), but two weeks before oral argument, plaintiffs e-filed a letter to this Court titled "re: supplementary evidence" (NYSCEF Doc. No. 491). The letter raises new arguments not raised in the motion and annexes fourteen new exhibits (NYSCEF Doc. Nos. 491 through 505). Plaintiffs stated that they were writing to advise the Court of "new developments in this matter that are critical to the resolution of Plaintiffs' pending motion" and attempt to incorporate a series of documents - including the deposition testimony of Kolmar's corporate representative, Ronald Yakupcin, that was taken on January 23 and 24, 2020 (NYSCEF Doc. No. 491). Plaintiffs concede in a footnote that they were already in possession of three of the fourteen newly presented exhibits (Exhs. 5, 6 and 7) which were produced by the defendants with their document production during discovery, but state "they were disclosed along with tens of thousands of other documents" (NYSCEF Doc. No. 491, pg. 2 footnote 2).

On February 18, 2020, a week before oral argument, defendants e-filed a letter addressed to this Court objecting in part to consideration of plaintiff's letter as containing new arguments raised after the motion was fully briefed and submitted, and amounting to a sur-reply that was filed without this Court's consent (NYSCEF Doc. No. 526).

Plaintiffs' February 11, 2020 "letter" and attached exhibits are an impermissible sur-reply to their motion that should be rejected (See *Queens Unit Venture, LLC v. Tyson Court Owners Corp.*, 111 AD 3d 552 [1st Dept. 2013 citing to *Coleman v. Korn*, 92 AD 3d 595, 939 NYS 2d 370 [1st Dept. 2012]). Plaintiffs are attempting to raise new arguments for the first time in their February 11, 2020 letter, while depriving the defendants of the opportunity to respond, with documents that are not properly before the Court. Plaintiffs have also annexed documents to the February 11, 2020 letter that they concede were in their possession even before the underlying motion (Motion Sequence 003) was filed. They failed to provide a reasonable justification for failing to provide the "supplementary evidence" as part of their motion papers. In an exercise of its discretion this Court declines to consider plaintiffs' new arguments and documents made in and annexed to their February 11, 2020 e-filed letter (*Garced v. Clinton Arms Associates*, 58 AD 3d 506, 874 NYS 2d 18 [1st Dept. 2009])

Accordingly, it is ORDERED that plaintiffs' motion pursuant to CPLR §2221(d) to reargue and CPLR §2221(e) to renew the July 12, 2019 Decision and Order of this Court that dismissed this case for lack of personal jurisdiction, and upon reargument to have this Court modify the July 12, 2019 Decision and Order to hold defendants' motion in abeyance so that jurisdictional discovery can be conducted, is denied.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

Dated: March 5, 2020

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
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