Peterson v Occidental Chem. Corp.
2020 NY Slip Op 30805(U)
March 17, 2020
Supreme Court, New York County
Docket Number: 190169/2018
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

STANLEY PETERSON AND DEBBY PETERSON,

Plaintiffs,

-against-

OCCIDENTAL CHEMICAL CORPORATION, et al.,

Defendants.

INDEX NO. 190169/2018
MOTION DATE 03/04/2020
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion by plaintiffs to renew, reargue and vacate:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 10

CROSS-MOTION ☐ YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion to renew, reargue and/or to vacate the part of this Court's February 24, 2020 Decision and Order that granted defendant Vanderbilt Mineral, LLC (hereinafter referred to as "defendant") summary judgment dismissing this case, is granted as stated herein.

Plaintiffs commenced this action seeking to recover for injuries sustained by Stanley Peterson resulting from his alleged exposure to asbestos from defendant's product. Mr. Peterson was diagnosed with malignant pleural mesothelioma in March of 2017 (Mot. Exh. 3). Plaintiffs allege that Mr. Peterson was exposed to asbestos in the defendant's talc products while assisting his wife, Debby Peterson, when he worked part-time in her business (Lakeside Ceramics) in Watertown, South Dakota between 1980 and 2000.

Defendant moved to dismiss plaintiffs' complaint against them for lack of personal jurisdiction, alternatively pursuant to CPLR §327(a) for forum non conveniens, and pursuant to CPLR §3212 for summary judgment (Mot. Seq. 009).

This Court's February 24, 2020 Decision and Order filed under Motion Sequence 009, acknowledged the defendant's withdrawal of the relief seeking dismissal of the complaint for lack of personal jurisdiction and denied dismissal pursuant to CPLR §327(a) for forum non conveniens (Mot. Exh. 7). Defendant was granted summary judgment after making a prima facie case on causation with the reports of its experts. Plaintiffs' five expert reports submitted in opposition to the motion were unaffirmed, unsworn, uncertified, and therefore not in proper form and deemed hearsay, resulting in plaintiffs' inability to raise any issues of fact. Plaintiffs e-filed corrected expert reports on February 19, 2020, three weeks after the motion was argued and marked fully submitted, and this Court deemed the subsequently filed reports late and did not consider them on defendant's summary judgment motion (Mot. Exh. 7).

Plaintiffs' now move to renew, reargue and/or to vacate that part of this Court's February 24, 2020 Decision and Order that granted defendant summary judgment and dismissed this case.

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

Renewal applies to the submission of new evidence not available at the time the original motion was submitted or a change in the law that would affect the outcome of the case (Laura Vazquez v. JRG Realty Corp., 81 AD 3d 555, 917 NYS 2d 562 [1st Dept. 2011] and Spierer v. Bloomingdale's, 59 AD 3d 267, 873 NYS 2d 66 [1st Dept. 2009]).]). A party seeking renewal is required to provide a reasonable justification for the failure to provide the new evidence or facts (See CPLR §2221(e)(3) and Henry v. Peguero, 72 AD 3d 600, 90 NYS 2d 49 [1st Dept. 2010] leave to appeal denied 16 NY 3d 726, 942 NE 2d 301, 917 NYS 2d 92 [2011]).

Plaintiffs state that pursuant to a telephonic agreement partially documented by e-mails, they agreed to allow the defendant to withdraw the arguments made in the underlying motion as to personal jurisdiction in exchange for being allowed to substitute corrected expert reports (Mot. Exhs. 5 and 6). Plaintiffs concede that the corrected expert reports are not new evidence and that they were available at the time the underlying motion was submitted. They claim the corrected reports were in plaintiffs' possession before the motion was argued, but inadvertently were not presented at oral argument because of the mistaken belief that corrected exhibits could be substituted on NYSCEF at any time. Plaintiffs states that at oral argument the Court was advised that the form of the reports were not at issue. Plaintiffs allege that after making unsuccessful attempts to substitute and upload the corrected expert reports as exhibits to the underlying motion, they contacted the Part Clerk and were told the corrected expert reports had to be uploaded separately.

Plaintiffs argue that this Court should in its discretion grant renewal because the failure to provide the reports earlier was inadvertent and there is no prejudice to the defendant because they had telephonically agreed to the submission of the report before oral argument. They also claim the defendant will not be prejudiced because it already knows the content of the expert reports. Plaintiffs claim that Mr. Peterson is still alive with mesothelioma and seek to restore this case to the trial calendar in the interest of justice.

The Court in its discretion can grant renewal in the interest of justice upon facts known to the movant at the time of the original motion to avoid defeating substantive fairness. Renewal in the interest of justice is available "where the movant presents a reasonable excuse for failure to provide the evidence in the first instance." Law office failure may be deemed a reasonable excuse to grant renewal (Henry v. Peguero, 72 A.D. 3d 600, supra at pg. 602, Cruz v Bronx Lebanon Hosp. Center, 73 AD 3d 597, 905 NYS 2d 135 [1st Dept., 2010], Burro v. Kang, 167 AD 3d 694, 90 NYS 3d 298 [2nd Dept., 2018] and Kazar v. Cho, 160 AD 3d 501, 71 NYS 3d 355 [1st Dept. 2018] citing to Rancho Santa Fe Assn. v. Dolan-King, 36 AD 3d 460, 829 NYS 2d 39 [1st Dept, 2007]). Renewal has been granted in the interest of justice to allow for the submission of an expert report in proper form where the failure to do so was inadvertent and there is no showing of prejudice to the defendant (Ramos v. Dekhtyar, 301 AD 2d 428, 753 NYS 2d 489 [1st Dept. 2003] and Cespedes v McNamee, 308 AD 2d 409, 764 NYS 2d 818 [1st Dept. 2003]).

Plaintiffs attorneys' mistaken belief that the corrected expert reports could be easily substituted on NYSCEF and the inadvertent delay resulting from attempts to e-file substitutions of the expert report over a period of time constitutes a reasonable excuse to allow renewal in the interest of justice. Defendant argues that plaintiffs did not previously seek the Court's permission to file corrected expert reports three weeks after oral argument.

Defendant has not shown that the delay in substituting the plaintiffs' expert reports has prejudiced the defendant. The e-mails exchanged between the parties demonstrate that the defendant agreed to accept the substitution of plaintiffs' properly sworn expert reports in opposition to summary judgment on the underlying motion (Mot. Exhs. 5 and 6 and Opp. Exhs. C and D).

Defendant argues that there was no agreement to withdraw arguments about admissibility of the substituted expert reports (Opp. Exh. G) and that the sworn reports lack a proper certificate of conformity requiring denial of the relief sought by plaintiffs. The absence of a certificate of conformity "is a mere irregularity, and not a fatal defect" (Matapos Technology Ltd. v Compania Andina de Comercio Ltda,68 AD 3d 672, 891 NYS 2d 394 [1st Dept. 2009]). The defect can be secured later and given nunc pro tunc effect (Hall v. Elrac, Inc., 79 AD 3d 427, 913 NYS 2d 37 [1st Dept. 2010] and Bank of New York v. Singh, 139 AD 3d 486, 33 NYS 3d 1 [1st Dept. 2016]). Plaintiffs submitted proper certificates of conformity for their experts with the reply papers, with the exception of Arnold R. Brody, Ph.D. a pathologist whose affidavit was taken before a notary in the State of Florida (Reply Exhs. 2, 3, 4 and 5). Plaintiffs can separately upload to NYSCEF a corrected certificate of conformity for Arnold R. Brody, Ph.D. within five (5) days of the date of this Order.

Accordingly, this Court pursuant to CPLR 2221(e), in its discretion and in the interest of justice, grants plaintiffs the renewal of that part of the February 24, 2020 Decision and Order that granted the defendant summary judgment. There is no need to address plaintiffs' remaining arguments pursuant to CPLR §2221 (d) seeking reargument or pursuant to CPLR §5015(a)(5) and CPLR §2001 seeking to vacate the February 24, 2020 Decision and Order.

SUMMARY JUDGMENT

Plaintiffs claim that Mr. Peterson worked at Lakeside Ceramics about twenty hours a week, hosting classes four days a week, and sold finished pieces as well as "slip." Mr. Peterson testified at his deposition that "slip" consists of clay, talc, silicate and soda ash mixed with water. He stated that he mixed the ingredients about three time a month to make the "slip" for all classes and for the finished products, and that Lakeside Ceramics received about four hundred to eight hundred pounds of the talc each month. The talc came in fifty-pound bags that were made out of craft paper (NYSCEF Doc. No. 255, pgs. 43-44, 47-53, 55, 60-62, 65, 66-67 and 123-124). He estimated he spent forty percent of his time unloading deliveries of defendant's NYTAL 100 (NYSCEF Doc. No. 217, pgs. 61-62 and 64-65). He identified defendant's talc because the word "Vanderbilt" with a distinctive "V" on it was printed on the bag (NYSCEF Doc. No. 217 pg. 65 and NYSCEF Doc. No. 255, pgs. 61-62).

Mr. Peterson stated he was exposed to asbestos in multiple ways: from cutting bags with a knife and dumping the talc into a mixing tank; carrying bags of talc from the delivery truck to the storage space because they were frequently torn; rolling up the recently-emptied bags; from getting slip spilled on him when pouring it into the ceramic molds; from sanding and cleaning the dried greenware and sweeping up the talc-covered workspace. He stated that when he performed these tasks, it created dust that he breathed in (NYSCEF Doc. No. 255, pgs. 66-69, 71, 74, and 76-77).

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 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent 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 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

This Court's February 24, 2020 Decision and Order determined that the reports of defendant's experts Mickey Gunther, Ph.D., (Opp. Exh. A, Exh. 19), Drew R. Van Orden, P.E. (Opp. Exh. A, Exh. 20) and Linda Dell (Opp. Exh. A, Exh. 21) established a prima facie case of lack of general and specific 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).

Defendant argues that its NYTAL talc products did not contain asbestos, alternatively, that there is no evidence Mr. Peterson was exposed to sufficient amounts of asbestos from defendant's talc products to cause his mesothelioma.

Plaintiffs in opposition rely on the expert reports of: Sean Fitzgerald, P.G., a Professional Geologist (Mot. Exh. 10); James S. Webber, Ph.D, a pathologist/ toxicologist (Mot. Exh. 11); Mr. Darrell A. Bevis, an Industrial Hygienist (Mot. Exh. 12); Arnold R. Brody, Ph.D., a pathologist/cytologist (Mot. Exh. 13) and Dr. John Coulter Maddox, M.D. a pathologist (Mot. Exh. 14).

Mr. Fitzgerald's February 18, 2019 report describes Mr. Peterson's exposures and defines asbestos. He identifies fibrous minerals as stated in the U.S. Code of Federal Regulations (CFR 40 763.80), states the geological relationship between talc and asbestos, and the interrelationship between talc formation and potential asbestos contamination. He also assesses the talc mined in the Gouveneur region of upstate New York that was mined, milled and sold by RT Vanderbilt. Mr. Fitzgerald refers to his own testing of RT Vanderbilt's talc in 2007, 2008, 2009, 2012, 2013, and 2014, and states that he identified tremolite, chrysotile, and anthophyllite asbestos fibers in all grades of Vanderbilt's NYTAL products. Mr. Fitzgerald used the U.S. Environmental Protection Agency's (EPA's) testing methods, using Polarized Light Microscopy (PLM), Transmission Electron Microscopy (TEM) and Selected Area Electron Diffraction (SAED) to detect asbestos in talc (Mot. Exh. 10).

Dr. Webber's February 24, 2018 report refers to the National Institute for Occupational Safety and Health's (NIOSH) 2011 definition of asbestos and states that x-ray diffraction (XRD), Phase-Contrast Microscopy (PCM) and PLM are the EPA's recognized means of assessing asbestos fibers. He provides a table identifying the optical properties of asbestos as stated by the EPA in 1993. (Mot. Exh. 11, pgs. 4-5 of 25, Table 1). Dr. Webber also refers to TEM and SAED when used with energy dispersive x-ray spectroscopy (EDX) as being used to analyze asbestos in air, water and bulk materials to determine the crystal structure and chemical composition of fibers. He provides a second table stating the characteristics of asbestos for TEM anaylsis from the New York State Department of Health in 2015 (Mot. Exh. 11, pgs. 5-6 of 25). Dr. Webber refers to EPA 1993 research methods for analysis of commercial asbestos and a 2006 EPA report that states that "For the purposes of public health assessment and protection, EPA makes no distinction between fibers and cleavage fragments of comparable chemical composition, size and shape."(Mot. Exh. 11, pgs. 10-11 of 25). He finds the evidence for a link between exposure to upstate New York talc and mesothelioma and concludes with a reasonable degree of scientific certainty that the talc from RT Vanderbilt mines contains asbestos and Mr. Peterson was exposed to it (Mot. Exh. 11).

Dr. Brody's February 22, 2019 report identifies asbestos fiber types describing chrysotile as a serpentine fiber and tremolite as an amphibole fiber. He describes the various asbestos related diseases, including mesothelioma. Dr. Brody states that mesothelioma is a cancer that occurs when asbestos fibers reach pleural surfaces, interact with target cells and cause a genetic mutation. He states that no fiber size should be excluded as an agent responsible for causing mesothelioma. Dr. Brody cites to the World Health Organization (the WHO), International Agency for Research on Cancer (IARC), Occupational Safety and Health Administration (OSHA), the International Agency for Cancer Research (IARC) and NIOSH as agreeing that all asbestos fiber types can cause

mesothelioma and that no amount of exposure to asbestos above ambient levels is too low to induce mesothelioma (Mot. Exh. 13).

Dr. Maddox's February 25, 2019 report assesses Mr. Peterson's pathology reports dated September 6, 2018 and November 30, 2018 (Mot. Exh. 14, Exh. 1 and 2). Dr. Maddox relies on the criteria of the IARC requiring that all available evidence of the dangers of asbestos exposure be looked at. He refers to OSHA's definition of asbestos fibers as being at least five micron's long. He provides a diagram of the human lungs and explains the relationship between asbestos and lung disease. Dr. Maddox states that the EPA, OSHA, NIOSH and an overwhelming majority of medical authorities have concluded that all forms of asbestos, including chrysotile and tremolite, can cause mesothelioma. He states that there is no other proven cause of mesothelioma other than asbestos. He also provides charts showing the EPA and OSHA's relative risk resulting from cumulative exposure to asbestos. Dr. Maddox opines that Mr. Peterson's exposure to anthophyllite, tremolite and chrysotile asbestos from the repetitive, routine and regular use of defendant's talc, during the relevant time period, was many orders of magnitude above background level and that cumulatively it was the cause of his mesothelioma (Mot. Exh. 14).

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, 215 N.E. 2d 341, 268 N.Y.S. 2d 18 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc.,129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st 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]).

Plaintiffs' experts rely on their own testing, studies and reports and recognized standards by agencies like the EPA and OSHA. They also rely on testing standards, studies and reports in part from some of the same scientific organizations as the defendants - including OSHA and the EPA - to establish that Mr. Peterson's exposure to anthophyllite, tremolite and chrysotile asbestos fibers caused his mesothelioma. On renewal, these conflicting affidavits raise credibility issues, and issues of fact on general causation.

Specific Causation:

It is defendant's contention that its NYTAL talc products did not contain asbestos or if they did it was at an insufficient level to cause Mr. Peterson's mestothelioma, resulting in plaintiffs inability to establish special causation.

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 1114 [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, In re New York City Abestos Litigation, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] states that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Plaintiffs' expert, Mr. Fitzgerald, tested three samples relevant to Mr. Peterson's exposure, one sample was collected on June 28, 1995 by Dr. James Webber, and the two other samples of NYTAL were purchased on-line. He also tested slip figurines that were provided by the plaintiffs. Mr. Fitzgerald identified "abundant" anthophyllite, tremolite and chrysotile structures. He concludes that the defendant's talc contained asbestos well above one percent by weight, and that the talc itself is highly friable and hydrophobic making it easy for the fibers to

enter into the air and be inhaled. He further concludes with a reasonable degree of scientific certainty that Mr. Peterson was exposed to significant levels of airborne asbestos from talc while performing various tasks related to his wife's ceramics business over the course of twenty years (Mot. Exh. 10).

Dr. Webber refers to his own analysis of the talc ores collected from RT Vanderbilt's mine in 1995. Dr. Webber determined that a vast majority of the mineral particles were asbestiform rather than "cleavage fragments." Dr. Webber states that contrary to industry claims, his analysis of talc ores identified substantial amounts of asbestos. He found clearly fibrous and asbestiform bundles using a scanning electron microscope, with fibers and bundles literally hanging from the parent bundle. Dr. Webber crushed a piece of ore of about 300mg with a mortar and pestle which yielded a powder that was 15% respirable particles by weight and asbestiform fibers typified by aspect ratios exceeding 10. He also found that a vast majority of the elongate mineral particles are asbestiform rather than cleavage fragments, with 40% anthophyllite asbestos. Dr. Webber states that cleavage fragments with widths thinner than 0.5 micrometers have a 50% chance of reaching the lungs, while those that are 2 micrometers have a 10% chance of reaching the lungs, and cleavage fragments present the same risks as asbestos fibers of the same dimensions. He concludes that, to a reasonable degree of scientific certainty, the talc from RT Vanderbilt's mines used by Mr. Peterson contains asbestos (Mot. Exh. 11).

Mr. Bevis' February 18, 2019 report assesses the 3M # 8500 disposable respirator mask Mr. Peterson stated he wore when he worked with defendant's talc products during the relevant time period. Mr. Bevis states that the 3M #8500 disposable respirator mask provides poor to no protection from airborne particulates and was not accepted for testing from the U.S. Bureau of Mines and NIOSH. Mr. Bevis identifies seven defects with 3M #8500 disposable respirator masks - including that the filter media allowed penetration of virtually all small or sub-micron airborne particles. Mr. Bevis states that available research shows a leakage rate of 40 to 50 percent. He concludes that to the extent Mr. Peterson wore a 3M #8500 disposable respirator mask he would have been exposed, by inhalation, to a large percentage of respirable airborne asbestos fibers (Mot. Exh. 12).

Dr. Maddox makes a qualitative assessment of epidemiologic evidence, incorporating private studies and reports, creating charts that summarize the relative risk with various levels of exposure and the odds ratio based on asbestos fibers and years of exposure. He states that a normal person breathes approximately sixteen times per minute while working and that a concentration of one fiber per cubic centimeter would result in a worker breathing as much as 3,840,000 fibers in an eight hour work day. He calculates that ambient background exposure would result in 192 fibers per an eight hour work day and a worker may be exposed to 20,000 times more asbestos than normal ambient background exposure. He states that in his opinion, relying on Mr. Peterson's testimony of the use of defendant's talc products during the relevant time period, Mr. Peterson was exposed to a very high asbestos exposure from his work, at least thousands of times higher than normal ambient air. Dr. Maddox states that mesothelioma is a dose-responsive disease, and that Mr. Peterson's mesothelioma is a result of cumulative exposure to asbestos. He states that the high, repetitive and prolonged exposure to talc - including defendant's talc products - are the cause of Mr. Peterson's mesothelioma (Mot. Exh. 14).

Plaintiffs are not required to show the precise causes of damages as a result of Mr. Peterson's exposure to defendant's talc products, only "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference as to specific causation for defendant's talc products (Reid v Ga.- Pacific Corp., 212 AD 2d 462, 622 NYS 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 AD 3d 285, 776 NYS 2d 253 [1st Dept. 2004]).

Plaintiffs cite to Mr. Peterson's deposition testimony as showing that he identified defendant's NYTAL talc as a source of his exposure to asbestos. He described the manner of his exposure, specifically being in the presence of, and inhaling the dust (NYSCEF Doc. No. 255, pgs. 66-69, 71, 74, and 76-77). Mr. Peterson's deposition testimony, when combined with the plaintiffs' expert reports, has created "facts and conditions from which [defendant's] liability may be reasonably inferred" (Reid Ga.- Pacific Corp., 212 AD 2d 462, supra), and is sufficient to raise issues of fact, warranting denial of summary judgment.

Punitive Damages

Defendant additionally sought summary judgment on the plaintiffs' cause of action for punitive damages. Defendant argues it could not be found wanton and reckless because it relied on numerous studies, competent researchers and labs, to ensure that the talc products were safe and all had negative findings.

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 NY 3d 478, 868 NE 2d 189, 836 NYS 2d 590 [2007]).

Plaintiffs have raised issues of fact on the cause of action for punitive damages. Plaintiffs' expert reports combined with documentation demonstrating that the defendant was aware that there was a correlation between talc dust and cancer - including mesothelioma - before and during the period relevant to Mr. Peterson's alleged exposure (NYSCEF Doc. Nos. 288,289, 290, 291, 292 and 294), and the deposition testimony of defendant's own corporate representative (NYSCEF Doc. No. 293, pgs. 30, 91-93 and 101), raise issues of fact on punitive damages. There remain issues of fact as to the extent of the defendant's awareness of possible asbestos contamination from the use of their talc products and whether defendant continued to advocate for the use of its talc products as uncontaminated. To the extent that plaintiff argues that the defendant placed corporate profits above the health and safety of Mr. Peterson, the issue of punitive damages is to be determined by the trial judge after submission of all the evidence.

Defendant's argument that the complaint does not strictly comport with the CPLR, is unavailing. The Appellate Division First Department in affirming the CMO stated that the lack of strict conformity - including "notice in connection with punitive damages claims" - is acceptable "so long as they do not deprive a party of its right to due process" (In re New York City Asbestos Litigation, 159 AD 3d 576, 74 NYS 3d 180 [1st Dept. 2018]).

Upon renewal, the part of defendant's underlying motion (Mot. Seq. 009) that pursuant to CPLR §3212 seeks summary judgment is denied.

CHANGE OF VENUE

On the same day as Motion Sequence 009, the parties argued and submitted defendant's motion pursuant to CPLR §503 and CPLR §510 to change the venue of this action. The February 24, 2020 Decision and Order filed under Motion Sequence 010, denied the motion to change venue because summary judgment was granted under Motion Sequence 009 (see NYSCEF Doc. No. 366). Upon renewal of Motion Sequence 009, a determination of Motion Sequence 010 on the merits is warranted.

Defendant under Motion Sequence 010 sought, pursuant to CPLR §503 and CPLR §510, to change venue from New York County to St. Lawrence County.

CPLR §503 (a) states that the place of trial "shall be in the county in which on of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or if none of the parties resided in the state, in any county designated by the plaintiff..." (McKinney's Consolidated Laws of New York Annotated, CPLR §503)

CPLR § 510(1) permits the Court, in its discretion, upon motion to change the venue of the trial on the grounds that the county designated for that purpose is not proper. The defendant is required to show that its choice of venue is proper (CPLR §510(1), Lividini v. Goldstein, 175 AD 3d 420, 107 NYS 3d 18 [1st Dept. 2019]).

Defendant argues that it never had a place of business in New York County, but its predecessor corporation, now a dissolved entity, had its principal place of business in Gouverneur, New York located in St. Lawrence County, therefore the change of venue is warranted. Defendant acknowledges that when plaintiffs commenced this action two corporate defendants, Pfizer, Inc. and Union Carbide Corporation would have been deemed residents of the City of New York but argues that neither of those entities are currently a party. Defendant claims that as it is the only remaining defendant jurisdiction should be transferred to the place of business of its predecessor in St. Lawrence County.

Plaintiffs argue that they do not reside in New York, but that venue was properly designated in New York County because of the two corporate defendants Pfizer, Inc. and Union Carbide Corporation. They cite to CPLR §503(c) which states that "a domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located..." (McKinney's Consolidated Laws of New York Annotated, CPLR §503). Plaintiffs argue that this motion is untimely pursuant to CPLR §511(a) because defendant waited seventeen (17) months after the service of its answer to seek a change of venue, and a motion seeking relief pursuant to CPLR §510(1) should be served with the answer or a reasonable time thereafter.

Defendant concedes that this motion was not served at the same time as the answer but states that because the co-defendants relied on for jurisdiction were dismissed from this action there is no longer a basis to continue jurisdiction in New York County. Defendant claims that the motion is not untimely because the relief is being sought after dismissal of the co-defendants.

Defendant's motion to change venue is untimely. Pursuant to CPLR §511(a) the application to change venue based on plaintiff's designation of an improper county must be served with or prior to the answer (Kurfis v. Shore Towers Condominium, 48 AD 3d 300, 852 NYS 2d 76 [1st Dept., 2008] and Villalba v. Brady, 162 AD 3d 533, 80 NYS 3d 220 [1st Dept. 2018]). A motion to change venue should be granted after the action is dismissed against an improper party, within a reasonable time after the movant obtains knowledge of the facts supporting the request (Moracho v. Open Door Family Medical Center, Inc., 79 AD 3d 581, 914 NYS 2d 102 [1st Dept., 2010] and Clase v. Sidoti, 20 AD 3d 330, 799 NYS 2d 194 [1st Dept. 2005]).

Defendant's arguments that the motion to change venue should be deemed timely, is unavailing. Only one of the defendants that formed the basis for jurisdiction in New York was dismissed from this action as an improper party. Pfizer, Inc. settled the action with the plaintiff and was not dismissed from this action. Defendant's delay in seeking this relief for seventeen months after the answer and after a trial date was scheduled warrants denial of the relief sought. Alternatively, defendant has stated that it is not incorporated or has a principal place of business in New York State, none of the parties reside in New York and pursuant to CPLR §503 plaintiff's designation of New York County is correct (Singh v. Empire International, Ltd., 95 AD 3d 793, 947 NYS 2d 1 [1st Dept. 2012]).

In addition, defendant's argument that a discretionary change of venue is warranted because travel to New York County is burdensome to its fact witness, James Knowlden, who resides at Highway 812, Gouverneur, New York located in St. Lawrence County, is unpersuasive. Defendant did not provide an affidavit of the witness or otherwise state how the fact witness would be inconvenienced in the event a change venue is not granted. Defendant also failed to identify the specific inconvenience incurred by the fact witness, further warranting denial of the change of venue relief sought (see Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, 9 AD 3d 299, 780 NYS 2d 582 [1st Dept. 2004], Herrera v. R. Conley, 52 AD 3d 218, 860 NYS 2d 21 [1st Dept. 2008] and Villalba v. Brady, 162 AD 3d 533, supra).

Defendant has not stated a basis for this Court, pursuant to CPLR §503 and CPLR §510, to change venue from New York County to St. Lawrence County, therefore Motion Sequence 010 to change the venue of this action is denied.

Accordingly, it is ORDERED that plaintiffs' motion pursuant to CPLR §2221(d) and CPLR §2221(e) to renew, reargue, and to vacate the part of this Courts' February 24, 2020 Decision and Order that granted defendant Vanderbilt Mineral, LLC summary judgment dismissing this case, is granted, and it is further,

ORDERED that the February 24, 2020 Decision and Order of this Court filed under Motion Sequence 009, that granted Vanderbilt Mineral, LLC summary judgment severing and dismissing plaintiffs' claims and any cross-claims, is vacated and it is further,

ORDERED that any judgment entered by the Clerk of the Court on behalf of Vanderbilt Mineral, LLC dismissing plaintiffs' claims and any cross-claims pursuant to the February 24, 2020 Decision and Order filed under Motion Sequence 009, is vacated, and it is further,

ORDERED that Vanderbilt Mineral, LLC's motion to dismiss plaintiffs' complaint against them for lack of personal jurisdiction, alternatively pursuant to CPLR §327(a) to dismiss for forum non conveniens, and pursuant to CPLR §3212 for summary judgment, filed under Motion Sequence 009, is denied in its entirety, and it is further,

ORDERED that the February 24, 2020 Decision and Order of this Court filed under Motion Sequence 010, that denied as moot, Vanderbilt Mineral, LLC's motion pursuant to CPLR §503 and CPLR §510 to change venue, is vacated, and it is further,

ORDERED that Vanderbilt Mineral, LLC's motion filed under Motion Sequence 010, seeking pursuant to CPLR §503 and CPLR §510 to change venue, is denied, and it is further,

ORDERED that within twenty (20) days of the date of Entry of this Order, plaintiffs are directed to upload to NYSCEF a corrected certificate of conformity for the Affidavit of Dr. Arnold R. Brody, Ph.D., and it is further,

ORDERED that plaintiffs are directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on Vanderbilt Mineral, LLC, and the remaining defendants, and it is further,

ORDERED that within twenty (20) days of the date of Entry of this Order, plaintiffs are directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the General Clerk's Office and the County Clerk's Office, who are directed to mark their records accordingly and restore this action, and it is further,

ORDERED that upon receipt of a copy of this Order with Notice of Entry the General Clerk's Office is directed to restore this case to the trial calendar of this Court.

ENTER:

Dated: March 17, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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