

Hardman v Bristol-Myers Squibb Co.

2020 NY Slip Op 33564(U)

October 27, 2020

Supreme Court, New York County

Docket Number: 190443/2018

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13
Justice
INDEX NO. 190443/2018
BETSEY HARDMAN, JODY HARDMAN, MOTION DATE N/A
Plaintiff, MOTION SEQ. NO. 009

- v -

BRISTOL-MYERS SQUIBB CO., COLGATE-PALMOLIVE CO., CYPRUS AMAX MINERALS CO., CYPRUS MINES CORP., IMERYS TALC AMERICA INC., IMERYS TALC ITALY S.P.A., IMERYS TALC VERMONT INC., IMERYS USA INC., JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER INC., REVLON INC., WHITTAKER, CLARK & DANIELS INC., PFIZER INC., BARRETT'S MINERALS INC., REVLON CONSUMER PRODUCTS CORP.

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, and after oral arguments held by the Court on October 13, 2020, it is hereby ordered that defendants Revlon, Inc., Revlon Consumer Products Corporation, and Bristol-Myers Squibb Co.'s (hereinafter referred to as the "Revlon Defendants") order to show cause appealing the Special Master's ruling of August 26, 2020, which ordered moving defendants to produce certain paper discovery, is denied.

The Court notes that in the NYCAL litigation, the Special Master supervises discovery such as the adequacy of discovery responses, production of documents, the completion of depositions, and other discovery disputes that may arise.

Here, a discovery dispute arose regarding responses to plaintiff's supplemental

interrogatories and requests for production which were served on May 28, 2020 with the permission of the Special Master. The Revlon Defendants filed a motion for a protective order which was subsequently withdrawn at the request of the Special Master. Thereafter, on August 26, 2020, the Special Master ordered the Revlon Defendants to provide substantive responses to plaintiff's demands within 20 days. This timely appeal of the Special Master's recommendation followed. The Revlon Defendants contend that the Special Master ignores the argument that plaintiff's supplemental demands are palpably improper. The Revlon Defendants argue that such demands are overly broad and it would cause extreme hardship to prepare objections and responses. According to the Revlon Defendants, plaintiff did not limit the scope of the discovery to the relevant product during the relevant period of use, but instead are asking for information on all talc products for an extended period of time. The Revlon Defendants state that the product at issue is Jean Nate dusting power which plaintiff used during 1963 to 1996 such that ordering discovery on all talc products is overbroad. At oral arguments, the Revlon Defendants further argued that plaintiff's supplemental demands are duplicative of plaintiff's standard discovery demands that are currently on file for all NYCAL cases. Plaintiff opposes and the Revlon Defendants reply.

It is well settled that discovery shall be broad. CPLR §3101(a)(4) states that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof”. The Court of Appeals has held that “[t]he words ‘material and necessary’ ... must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Matter of Kapon v Koch*, 23 NY3d 32, 38 (2014)(internal citations and quotations omitted).

Here, the complaint specifically alleges that the Jean Nate talc product is contaminated by asbestos and has caused personal injury to plaintiff, of which defendants are liable. Preliminarily, the Court notes that asbestos litigation differs drastically from other tort litigation in New York County and both plaintiffs and defendants are keenly aware of such differences. Standard interrogatories and standard responses are the typical avenue of discovery in asbestos litigation. The Court further notes that litigation involving talcum products have been litigated in the NYCAL docket for years without objection. Thus, the production of certain documents and the scope of discovery should be no surprise to the parties. However, in case of discovery disputes, the Case Management Order dated June 20, 2017 (hereinafter referred to as the “CMO”) explicitly states that discovery issues shall be raised with the Special Master who is charged with resolving such disputes.

Plaintiff’s opposition papers focus on an alleged pattern of the Revlon Defendants in delaying and failing to comply with discovery orders. This was also argued during the oral arguments. However, the main issue herein is whether the recommendation by the Special Master, which orders the production of documents and responses, should stand. Here, plaintiff has established that plaintiff purchased and used Jean Nate talcum product for a period of over three decades. Plaintiff argues that the time period requested, and the information currently sought is appropriate because information on related products are relevant and necessary in light of the fact that defendants have claimed that many of the relevant documents sought were destroyed. Plaintiff further argues that the discovery requests at hand have been specifically tailored to talc cases so as to avoid the prior discovery issues which resulted from the standard discovery being inapplicable to the facts of this case thus necessitating supplemental discovery.

The Revlon Defendants argue that it is plaintiff’s burden to establish that Jean Nate

products were contaminated with asbestos and caused plaintiff's injuries. Such argument is plaintiff's entire reason for requesting the discovery sought herein. The Revlon Defendants appear to confuse plaintiff's burdens. While the burden of proving liability and damages rests with plaintiff at trial, the scope of discovery, as stated above, is much broader. The burden lies with the Revlon Defendants to establish that the requested documents are "utterly irrelevant to any proper inquiry". *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112. The Revlon Defendants have failed to establish that the requested discovery is "utterly irrelevant". *Id.*

Furthermore, as per the CMO, "[o]bjections to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place or manner of production, or as to burdensomeness, shall state a reasonable available alternative as a counterproposal." CMO, §IX. J. Here, the Revlon Defendants failed to comply with the CMO in that moving defendants have not described with particularity the burden, nor have they provided an alternative as a counterproposal. 22 NYCRR §202.7(a) provides that no motion which relates to discovery shall be filed unless it includes, "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion". Such affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions". 22 NYCRR §202.7(c). In fact, following receipt of plaintiff's supplemental demands, the Revlon Defendants did not even attempt to resolve the discovery issues. Here, the Revlon Defendants concede, through their moving papers, that following receipt of the discovery demands no attempt was made to resolve the issues, either with plaintiff directly or with the Special Master. *See Kelly Aff.*, ¶¶14-16. Rather, the Revlon Defendants filed a motion for a protective order.

Lastly, the Revlon Defendants' argument that plaintiff's supplemental demands are

duplicative of the standard interrogatories also fails. The CMO specifically states that “[a]fter a defendant has answered the plaintiff’s applicable standard set of interrogatories, a plaintiff may serve supplemental, non-repetitive interrogatories upon good cause shown and approval of the Special Master.” CMO, IX. C. Here, it is undisputed that the standard interrogatories relate specifically to asbestos products rather than talcum products. The Revlon Defendants concede that the majority of the standard discovery did not apply to the facts, and the product, at issue in the instant action as the alleged asbestos containing product herein is a talcum powder product. In fact, the Revlon Defendants state that the “Standard Interrogatories are largely inapplicable to Defendants.” Kelly Aff., ¶7. However, the Revlon Defendants are now arguing that plaintiff’s supplemental demands violate the CMO in that they are repetitive of the standard discovery; the same discovery which moving defendants state are not applicable to them.

Although plaintiff, admittedly, modelled the supplemental demands after the standard discovery, plaintiff tailored the supplemental demands to the facts of the instant action and to talc cases. The Revlon Defendants simultaneously argue that the supplemental demands, which are now tailored, are repetitive while also arguing that responding to such repetitive and over broad demands would be unduly burdensome. Thus, the Revlon Defendants are essentially arguing, and would have the Court believe, that the supplemental demands at issue herein, which have been tailored to the facts of this case, are duplicative of the standard discovery which the Revlon Defendants concede is not applicable to them. If the Revlon Defendants were correct in this argument, the duplicate supplemental discovery demands would also be inapplicable herein such that it would not be burdensome for the Revlon Defendants to respond. Upon review, the Court finds that the supplemental demands herein are not repetitive, rather, they are tailored to request information applicable to the instant action. As such, this argument fails.

As the requested discovery is material and necessary to the prosecution of this action, and as the Revlon Defendants have failed to establish that such discovery is utterly irrelevant or is duplicative of the standard discovery, and also failed to comply with the CMO with regard to allegedly overbroad demands, the instant order to show cause to vacate the Special Master's August 26, 2020 recommendation is denied.

Accordingly, it is

ORDERED that defendants Revlon, Inc., Revlon Consumer Products Corporation, and Bristol-Myers Squibb Co.'s order to show cause to vacate the Special Master's August 26, 2020 recommendation is denied; and it is further

ORDERED that the Special Master's August 26, 2020 recommendation is affirmed; and it is further

ORDERED that defendants Revlon, Inc., Revlon Consumer Products Corporation, and Bristol-Myers Squibb Co.'s shall comply with the recommendation of the Special Master and provide the ordered discovery within 45 days.

This constitutes the Decision/Order of the Court.



10/27/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE