

**Hunter v Coty, Inc.**

2022 NY Slip Op 30599(U)

February 23, 2022

Supreme Court, New York County

Docket Number: Index No. 190326/2020

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART 13

Justice

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FAYE HUNTER, BENJAMIN HUNTER,
Plaintiff,

INDEX NO. 190326/2020

MOTION DATE 06/09/2021

MOTION SEQ. NO. 002

- v -

COTY, INC., COTY US, LLC, KOLMAR LABORATORIES, INC., PFIZER INC., JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS), AVON PRODUCTS, INC., CHANEL, INC., COLGATE-PALMOLIVE COMPANY (FOR CASHMERE BOUQUET), CYPRUS AMAX MINERALS COMPANY, SUED INDIVIDUALLY, DOING BUSINESS AS, AND AS SUCCESSOR TO AMERICAN TALC COMPANY, METROPOLITAN TALC CO. INC., CHARLES MATHIEU, INC., SIERRA TALC COMPANY, UNITED TALC COMPANY, RESOURCE PROCESSORS, INC., WINDSOR MINERALS INC., AND VERMONT TALC, CYPRUS MINES CORPORATION INDIVIDUALLY, DOING BUSINESS AS, AND AS SUCCESSOR-IN-INTEREST TO AMERICAN TALC COMPANY, METROPOLITAN TALC CO. INC., CHARLES MATHIEU INC., RESOURCE PROCESSORS, INC., CYPRUS INDUSTRIAL MINERALS COMPANY, ESTEE LAUDER, INC., WHITTAKER CLARK & DANIELS, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 169

were read on this motion to/for

PRECLUDE

Upon the foregoing documents, it is hereby ORDERED that Defendant Whittaker Clark & Daniel's (hereinafter referred to as WCD) appeal of the Special Master's ruling of May 26, 2021, which determined that the deposition testimony of plaintiff Hunter Faye should not be precluded, 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.

A discovery dispute arose between WCD and plaintiff Hunter Faye, a terminally ill 84-year-old suffering from mesothelioma. During discovery, plaintiff was unable to complete her deposition testimony due to her anxiety. Conferring with plaintiff, WCD requested that the deposition testimony not be used because it was incomplete, in which plaintiff refused. Thereafter, WCD raised the issue to the Special Master requesting either a completion of the deposition or preclusion of plaintiff's incomplete deposition testimony in its entirety. In a recommendation dated May 26, 2021, Special Master denied the request made by WCD and ruled that the admissibility of deposition testimony should be ruled upon by a trial judge. WCD now appeals.

In the instant matter, plaintiff was subjected to tedious and exhaustive questioning which spanned over two days that was beyond seven hours long. *See* Plaintiffs' Memorandum of Law In Opposition to Defendant Whittaker, Clark, and Daniel, Inc.'s Appeal of the Special Master's May 26, 2021 Recommendation, p.8-9. Notably, plaintiff is an 84-year-old woman with terminal cancer who suffers from anxiety, as evidenced by her Nurse Practitioner's letter regarding the deposition. *See* Notice of Motion, Exhibit M. The note also indicates that it is within the Nurse Practitioner's professional judgment that continuing the deposition would be detrimental to plaintiff's health. WCD contends, without regard to the plaintiff's well-being, that the plaintiff's anxiety is an insufficient basis to block her from being deposed. However, considering these factors, it is clear that the plaintiff could no longer continue her deposition, and that plaintiff was not blocking WCD from taking plaintiff's testimony, as her "[f]ailure to appear was not willful, contumacious, or a result of bad faith" *Garcia v Alvarez*, 264 AD2d 325 (1st Dept 1999).

In addition, the plaintiff voluntarily, and without hesitation, participated in her deposition until she was no longer able to do so because of her condition. “The fact that defendants may have contemplated further deposing the witness does not, on its own, preclude use of the deposition that they themselves had already taken”. *Vera v Beth Israel Med. Ctr.*, 175 AD2d 716, 716 (1st Dept 1991). WCD had ample opportunity to ask the questions required for a successful deposition during the period in which the plaintiff was able to testify. WCD’s current attempt to preclude plaintiff’s deposition testimony or to extend the plaintiff’s already lengthy deposition despite her health conditions teeters on frivolity. Although WCD’s contention that the defendants have the right to cross examine is correct, such right has been satisfied given the plaintiff’s appearance and cooperation.

WCD improperly and distortedly argues that plaintiff testified “[w]ithout any hint of an anxiety issue”, and that “WCD and defendants can work around plaintiff’s schedule, continue to offer her breaks, and limit the amount of questioning per day”. Memorandum of Law In Support of Defendant Whittaker Clark and Daniel’s Appeal of the Special Master’s Refusal to Grant or Deny Defendant’s Application, pp. 4 and 5. It is sufficient to this Court that the Nurse Practitioner opines that the plaintiff suffers from anxiety and is unable to continue with the deposition. WCD’s implication that the plaintiff is using her anxiety as a means not to testify, particularly in light of the fact that plaintiff testified for two days which lasted more than seven hours, is a serious yet entirely unsupported allegation.

WCD further argues that should the Court hold that plaintiff need not continue her testimony, it would facilitate future deponents in other cases to avoid being deposed in a similar fashion. WCD’s concern of a slippery slope does not outweigh the welfare of the physical and mental well-being of a deponent, especially one such as the plaintiff herein. Moreover, such

concerns shall be alleviated “by use of interrogatories limited to material and necessary questions.” *Jones v Maples*, 257 AD2d 53, 57 (1st Dept 1999). This Court will not condone the notion of putting a terminally ill 84-year-old plaintiff suffering from Mesothelioma through an unreasonably lengthy and redundant deposition, especially when interrogatories may be used herein to supplement plaintiff’s deposition testimony, as well as safeguard her mental and physical well-being. Thus, WCD’s motion to either preclude plaintiff’s incomplete deposition testimony or to compel plaintiff to appear to complete such testimony is denied. Rather, interrogatories are herein ordered to complete the remainder of plaintiff’s deposition.

Lastly, the Court must address defense counsel’s decision to pursue the instant matter through motion practice after having a full opportunity to litigate and resolve this issue before the Special Master. Defense counsel are warned that there is a fine line between zealous advocacy and frivolous motion practice. Should this issue arise in a future action, counsel should take note of the decision herein and consider their options carefully prior to filing an identical motion.

Accordingly, it is

ORDERED that defendant’s motion to preclude is denied in its entirety; and it is further

ORDERED that within 30 days, defendant WCD shall serve interrogatories upon plaintiff; and it is further

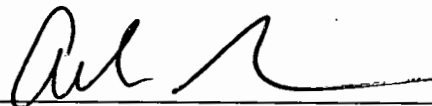
ORDERED that within 30 days of receipt of such interrogatories, plaintiff shall serve her response; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon defendant with notice of entry.

This constitutes the decision/order of the Court.

2/23/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: