

Hunter v Coty, Inc.

2022 NY Slip Op 31146(U)

April 7, 2022

Supreme Court, New York County

Docket Number: Index No. 190326/2020

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**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 03/01/2022

MOTION SEQ. NO. 003

- 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 003) 182, 183, 184, 185, 186, 187, 188, 189, 190, 194, 196, 197, 198, 199, 204, 205, 206, 207, 208

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is hereby ordered that Defendant Whittaker Clark & Daniels, Inc.'s (hereinafter referred to as WCD) motion to reargue and vacate the Decision/Order of this Court dated February 24, 2022 (hereinafter referred to as the Prior Decision) is hereby granted in part for the reasons set forth below.

In the instant matter, Plaintiff is an 84-year-old mesothelioma patient who brought suit against WCD for alleged exposure to asbestos. Over the course of two days, Plaintiff testified at her deposition lasting over seven hours. Subsequently, her anxiety condition prevented her from

continuing. WCD then moved to compel the continuation of her testimony or otherwise, preclude the Plaintiff's testimony already on the record. In addition to denying the motion to compel, this Court also ruled that WCD's right to cross examine had been satisfied, as well as ordering that the remainder of WCD's inquiry to proceed in the form of interrogatories. WCD now moves to reargue and vacate such rulings only as to WCD's right to cross examine and to submit interrogatories in lieu of compelling the completion of the deposition.

CPLR 2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep't 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted).

Here, WCD contends that their right to cross examination has not been satisfied, since "neither before nor during Ms. Hunter's 2 day discovery deposition was there any limitation placed on the length of the deposition by Plaintiff Faye Hunter or her counsel, and there was no warning that the deposition length might be affected by an unforeseen and unknown anxiety issue." Affirmation of Christopher S. Kozak, Esq. In Support of Defendant Whittaker, Clark & Daniels, Inc.'s Motion To Reargue, p. 4, ¶ 5, section d (internal emphasis omitted). Conversely, Plaintiffs argue that there was no misapprehension of fact or law and "WCD merely provides a more fulsome version of the argument it raised in its initial appeal". Plaintiffs' Opposition To Defendant Whittaker Clark & Daniels, Inc.'s Motion For Leave To Reargue Pursuant to CPLR 2221(d), p.16. The Court notes that WCD correctly argues there was no advanced notice regarding the potential

limitations of the deposition testimony, in which WCD did not have the opportunity to allocate questions that would be communicated by the lead examiner. It is undisputed that Plaintiff's inability to continue the deposition was indeed an unforeseen circumstance. Undoubtedly, had WCD been aware that Plaintiff would be unable to complete the deposition, they would have used their limited time with more discretion. Therefore, this Court will modify the Prior Decision solely to the extent of removing the last sentence of the first paragraph on page 3 of the Prior Decision which reads "[a]lthough WCD's contention that defendants have the right to cross examine is correct, such right has been satisfied given the Plaintiff's appearance and cooperation". Such sentence is hereby vacated.

As for WCD's motion to vacate the portion of the Prior Decision requiring the production of interrogatories in lieu of further deposition testimony, such motion is denied. WCD argues that had they been aware this Court was considering interrogatories as a substitute for further deposition testimony, they would have contended "the only evidence of product identification and alleged use comes from the plaintiff and his / her family members. . . As required by the NYCAL CMO, Ms. Hunter already had responded to Interrogatories and had provided basic details of her alleged product identifications. . . [t]hus after basic product identifications, depositions are the only time in asbestos cases when a defendant can confront [a witness] and test the veracity of those product identifications". Affirmation of Christopher S. Kozak, Esq. In Support of Defendant Whittaker, Clark & Daniels, Inc.'s Motion To Reargue, p. 7, ¶ 6, section c (internal emphasis omitted). As this Court has previously held, Plaintiff shall not be subjected to further depositions given her current health, particularly given the fact that there are feasible alternatives to gather information. There is no viable reason why WCD would be unable to complete the deposition of Plaintiff using interrogatories. While it is not WCD's preferred method to confront Plaintiff and

test the veracity of her product identification, interrogatories are a common discovery tool and are often used in place of depositions where a deposition is not possible or is unduly burdensome. *See Kuriakose v Motor Vehicle Acc. Indem. Corp.*, 169 AD3d 502(1st Dep't 2019). As such, WCD's motion to vacate the order requiring WCD to serve interrogatories as a substitute for further deposition testimony is denied. WCD is hereby ordered to serve interrogatories on Plaintiff within 45 days to complete Plaintiff's deposition. The Court notes that WCD is hereby provided with the opportunity to cross examine Plaintiff. Failure to comply with this Court's discovery order shall result in the waiver of such discovery.

Accordingly, it is

ORDERED that Defendants' motion to reargue the right to cross examination is granted solely as to vacate the last sentence of the first paragraph on page 3 of the Prior Decision as indicated above; and it is further

ORDERED that Defendants' motion to vacate the use of interrogatories in lieu of deposition testimony is denied; and it is further

ORDERED that WCD shall serve interrogatories on Plaintiff within 45 days to complete Plaintiff's deposition; and it is further

ORDERED that failure to complete discovery as ordered herein shall result in the waiver of such discovery; and it is further

ORDERED that, within 20 days of entry, plaintiff shall serve upon Defendant a copy of this decision and order, together with notice of entry.

This constitutes the decision / order of the Court.

4/07/2022

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE