

**Zicklin v Bergdorf Goodman Inc.**

2022 NY Slip Op 32119(U)

July 6, 2022

Supreme Court, New York County

Docket Number: Index No. 190254/2019

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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CAROLE ZICKLIN,

Plaintiff,

- v -

BERGDORF GOODMAN INC., BLOOMINGDALE'S, INC., ELIZABETH ARDEN, INC., HOLLINGSWORTH & VOSE COMPANY, HONEYWELL INTERNATIONAL, INC. FKA ALLED SIGNAL, INC./BENDIX, L'OREAL USA, INC., F/K/A COSMAIR, INC., LORILLARD TOBACCO COMPANY, MACY'S INC., MERLE NORMAN COSMETICS, INC., REVLON, INC., THE NEIMAN MARCUS GROUP LLC., UNION CARBIDE CORPORATION, R.J. REYNOLDS TOBACCO COMPANY, AS SUCCESSOR BY MERGER TO LORILLARD TOBACCO COMPANY, CHRISTIAN DIOR, INC., CHRISTIAN DIOR NEW YORK, INC., COLGATE-PALMOLIVE CO., CONOPCO, INC., SAKS FIFTH AVENUE-GIMBEL BROTHERS FOUNDATION, INC., SAKS FIFTH AVENUE LLC, YOL (U.S.), L.L.C., WHITTAKER, CLARK & DANIELS INC., COTY, INC., THE PROCTOR & GAMBLE COMPANY, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO YARDLEY OF LONDON, INC., YARDLEY OF LONDON, LTD., YARDLEY OF LONDON (U.S.), LLC, MAX FACTOR & COMPANY, BRISTOL-MYERS SQUIBB COMPANY, YVES SAINT LAURENT AMERICA, INC.,

Defendant.

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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 161, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 228, 229, 230, 231, 232, 233, 234, 246, 247, 248, 249

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is hereby ordered that Colgate-Palmolive Company's (hereinafter referred to as Colgate) motion for summary judgment is denied for the reasons set forth below.

The instant matter is premised upon Caroline Zicklin's (hereinafter referred to as Plaintiff) alleged exposure to asbestos from her use of Cashmere Bouquet (hereinafter referred to as CB), a product Colgate has manufactured for over a century. Plaintiff has "applied CB regularly for more than two decades, beginning in the early 1950s and ending in the 1970s." Affirmation In Opposition To Defendant Colgate – Palmolive Company's Motion For Summary Judgment, p. 2, ¶ 4. At Plaintiff's deposition, she testified that when she applied the powder puff product, she "would see [dust] fly around, and [she] would have to wipe off the counter and stuff afterwards because it would get all over the place." Notice of Motion, Exh. 2, Depo. Tr. Of Caroline Zicklin, dated November 26, 2019, p. 680, ln 4 – 6. Plaintiff contends that her exposure to asbestos fibers from CB was sufficient to cause mesothelioma. Plaintiffs support their argument by referring to Colgate's own testing, independent testing, geological surveys, and the establishment of the presence of asbestos in Talc within the scientific and medical community. Conversely, Colgate contends that no genuine issue of fact exists as to Plaintiff's exposure to asbestos. Namely, Colgate argues that CB never contained asbestos, and that CB is "a product Colgate safely sold for more than 100 years." Memorandum Of Law In Support Of Colgate – Palmolive Company's Motion For Summary Judgment, p. 1. More specifically, Colgate premises their argument on general and specific causation "on the grounds that (1) the alleged toxin, if any, in [CB] talcum powder is not capable of causing mesothelioma (general causation), and (2) Plaintiff was not exposed to sufficient levels of asbestos, as purportedly contained in [CB] to have caused her mesothelioma (specific causation)." *Id.* Colgate further contends that the Plaintiff's illness was caused by her use of Kent cigarettes with Micronite filters that contained crocidolite amphibole asbestos. Colgate now moves for summary judgment, Plaintiffs oppose, and Colgate replies.

Pursuant to CPLR 3212(b), a motion for summary judgment, “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action”. *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). “The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers”. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

Colgate first asserts that exposure to CB does not cause peritoneal Mesothelioma. Specifically, Colgate argues that for general causation, “it must be determined whether asbestos as an alleged trace contaminant in cosmetic talcum powder causes mesothelioma.” Memorandum Of Law In Support, *supra*, at p. 7. Colgate states that “[n]ot a single epidemiological study has found increased risk of mesothelioma in individuals who use cosmetic talcum powder products, regardless of the alleged content of those powders.” *Id.* at p. 8. Colgate even references peer-reviewed epidemiological studies of talc miners. It concludes, *inter alia*, that even at high levels, there is no causal connection between mesothelioma and talc exposure. *See* Notice of Motion, Exh. 11, Mortality and Morbidity Among Talc Miners and Millers In Italy. However, Plaintiffs refers\ to the Center for Disease Control’s article on Malignant Mesothelioma Mortality, which

expressly states that malignant mesothelioma can develop after short – term asbestos exposure, and that “[t]here is no evidence of a threshold level below which there is no risk for mesothelioma.” Affirmation In Opposition, *supra* at Exh. 16, Malignant Mesothelioma Mortality – United States, 1999-2015, dated March 3, 2017, p. 217, n. 666. Plaintiff also references the case study of Sean Fitzgerald, PG. It is Mr. Fitzgerald’s “opinion, to a reasonable degree of scientific certainty, that [Plaintiff’s] use of...cosmetic talc products, over the course of approximately twenty years, created significant and repeated exposure to asbestos.” See Affirmation In Opposition, Exh. 6, Fitzgerald Report, dated August 11, 2020. The proffered evidence of Colgate and Plaintiff demonstrates the existence of a genuine issue of material fact as to causation.

As for specific causation, Colgate contends that Plaintiff’s exposure is less than sufficient levels of asbestos to cause peritoneal mesothelioma from CB. Colgate’s industrial hygiene expert, Jennifer Sahmel, Ph.D., concludes through a mathematical model of Plaintiff’s asbestos exposure that even considering a worst-case scenario of asbestos exposure through CB, Plaintiff’s exposure would have been within the limits of lifetime ambient asbestos exposure. See Notice of Motion, Exh. 9, Affidavit and Report of Dr. Sahmel, dated April 20, 2020, p. 9, ¶ 20. However, Plaintiffs proffer the report of Jacqueline Moline, MD, MSc, FACP, FACOEM, which describes studies of exposure above background levels. Within her report, Dr. Moline states that “[b]oth historic and recent analyses...of the talc from the source mines used in CB...have shown significant amounts of chrysotile, anthophyllite, and tremolite asbestos.” Affirmation In Opposition, *supra*, Exh. 3, Moline Report, dated August 14, 2020, p. 17. It is Dr. Moline’s opinion within a reasonable degree of medical certainty that Plaintiff’s use of CB contributed to her illness. *Id.*

It is well established that “conflicting expert opinions raise issues of fact and credibility that cannot be resolved on a motion for summary judgment”. *Severino v Weller*, 148 AD3d 272, 275 (1st Dept 2017) (internal citations and quotations omitted). In the instant matter, there is a clear conflict in the medical opinions of Colgate’s experts and Plaintiff’s experts as to whether CB was the cause of Plaintiff’s mesothelioma. Thus, summary judgment is precluded herein.

Finally, Colgate argues that Plaintiff’s smoking of Kent cigarettes containing crocidolite asbestos may have contributed to Plaintiff’s peritoneal mesothelioma. Colgate states that “[i]t is widely acknowledged in the scientific community that blue asbestos exhibits the greatest potency as a cause of malignant mesothelioma.” Memorandum Of Law In Support, *supra*, at p. 15 (internal quotations omitted). However, Plaintiff contends that even if a jury found Plaintiff’s smoking was a substantial contributing factor in her illness, that only amounts to contributory negligence. Namely, Plaintiff argues that her smoking does not negate CB’s substantial effect resulting in Plaintiff’s peritoneal mesothelioma. The court’s role is “issue-finding, rather than issue-determination”. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, Plaintiff’s smoking of Kent cigarettes does not alter the potentially harmful impact CB may cause after exposure. Since genuine issues of fact exist, Colgate’s motion for summary judgment is denied.

Accordingly, it is

ORDERED that the defendant’s motion for summary judgment is denied in its entirety; and it is further

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

This constitutes the decision / order of the Court.

7/6/2022

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: