

Cardillo v Chanel, Inc.

2023 NY Slip Op 31172(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 190199/2020

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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INDEX NO. 190199/2020

RONALD CARDILLO,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 005

- v -

CHANEL, INC., COLGATE-PALMOLIVE COMPANY (FOR CASHMERE BOUQUET AND MENNEN), COTY, INC., COTY US, LLC, KOLMAR LABORATORIES, INC., PFIZER INC., REVLON CONSUMER PRODUCTS, CORPORATION, REVLON, INC., AMERICAN INTERNATIONAL INDUSTRIES, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST FOR THE CLUBMAN BRAND, AND TO THE NESLEMUR COMPANY AND PINAUD COMPANY, AVON PRODUCTS, INC., BRENNTAG NORTH AMERICA, BRENNTAG SPECIALTIES, INC., AS SUCCESSOR-IN- INTEREST TO MINERAL PIGMENT SOLUTIONS, INC., AS SUCCESSOR-IN-INTEREST TO WHITTAKER CLARK & DANIELS, INC., BRISTOL-MYERS SQUIBB COMPANY, 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, JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER INC., PROCTER & GAMBLE MANUFACTURING COMPANY AS SUCCESSOR-IN-INTEREST TO SHULTON, INC., SHULTON, INC., WHITTAKER CLARK & DANIELS, INC., JOHN DOE 1 THROUGH JOHN DOE 75 (FICTITIOUS), COLGATE-PALMOLIVE COMPANY (FOR CASHMERE BOUQUET), COLGATE-PALMOLIVE COMPANY AS SUCCESSOR-IN-INTEREST TO THE MENNEN COMPANY, ESTEE LAUDER INC, LOREAL USA, INC., REVLON RESEARCH CENTER, INC., THE NESLEMUR COMPANY, HELENA RUBINSTEIN, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232

were read on this motion to/for

VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, and after oral arguments held by the Court, it is hereby ordered that defendant Colgate-Palmolive Company's (hereinafter referred to as defendant "Colgate") order to show cause appealing the Special Master's recommendation dated July 25, 2022, which ordered defendant Colgate to produce twenty-three (23) samples, is granted in part for the reasons set forth below.

The Court notes that in 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 the production of certain historical talcum powder product samples from The Mennen Company (hereinafter referred to as "Mennen") which the Special Master ordered moving defendant to provide. Thereafter, defendant Colgate, as a successor-in-interest to Mennen, filed the instant order to show cause seeking to appeal the July 25, 2022 ruling arguing that plaintiff did not use the specific samples sought herein, that no chain of custody has been established for such samples, that the production ordered is overly burdensome, and that production of the samples ordered herein could subject defendant Colgate to claims of spoliation. According to moving defendant, plaintiff failed to identify Mennen's shave or bath talc during her deposition such that the materials sought are not relevant herein.

In opposition, plaintiff argues that based upon the documents produced by defendant Colgate, the talc at issue herein, Talc 10362, was incorporated into numerous different products including the products which plaintiff was exposed to. According to plaintiff, the deposition

testimony of plaintiff decedent Margaret Cardillo establishes that she was in the vicinity when her husband shaved, she saw him apply the shave powder to his face, and she would clean up such shave powder which was very dusty and got all over the surrounding area. Plaintiff further testified that she would often visit her husband's salon where he would use the talcum powder on his clients. Plaintiff would, on occasion, also help clean the powder at her husband's salon and that such products were Mennen's shave and/or bath talc. Plaintiff argues that defendant Colgate has a heritage room in which old products are kept. Plaintiff seeks samples from such heritage room arguing that the products kept in such room are authentic.

In reply, defendant Colgate argues that no chain of custody documents were kept for the items stored in the heritage room such that there is no way of knowing whether the products in the containers are what the containers are labeled. Defendant Colgate further argues that plaintiff is seeking the samples for destructive testing of a finite amount of materials. According to moving defendant, production of such materials may lead to future claims, in other actions, of spoliation. Defendant Colgate contends that the production ordered by the Special Master is overly burdensome in that it would be excessively time consuming and expensive to counter-test all the samples.

Preliminarily, the Court will address the portion of defendant Colgate's order to show cause which argues that claims of spoliation may result from production of the subject samples as recommended by the Special Master. "Under the common law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence". *Hegbeli v TJX Companies, Inc.*, 64 Misc3d 1202(A)(Sup Ct, NY County 2019), citing *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1094-1095 (2nd Dep't 2018). "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed

an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense". *Pegasus Aviation I, Inc. v Varig Logistica, S.A.*, 26 NY3d 543, 547 (2015). Here, no valid claim of spoliation could be made in future actions, by future plaintiffs, should defendant Colgate produce the subject samples to plaintiff herein. Notably, defendant Colgate would not be destroying evidence with a culpable state of mind, but rather defendant Colgate would be complying with a court order to turn the evidence over to plaintiff. As such, defendant Colgate's argument regarding spoliation fails.

Here, the Special Master's recommendation orders the production of the 23 samples sought by plaintiff on the grounds that, *inter alia*, discovery is broad and that such production has been ordered in prior actions. Defendant Colgate argues that the Special Master failed to employ the useful and reasonable test in ordering the production of the samples. Pursuant to 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, defendant Colgate contends that the production of 23 samples for all of the years of plaintiff's exposure, which spanned from 1957 through 2006, nearly 50 years, would be excessively time consuming. Moving defendant further contends that counter-testing all such samples would cost in the six figures, thus, a timely and costly production. Alternatively, moving defendant has offered to produce 3 samples. Here, while discovery of such samples may be relevant, defendant Colgate has established that production of 23 samples for a period of 49 years would require it to incur excessive expenses during the discovery process wherein plaintiff

has not established that all such samples are necessary. In balancing the production of evidence with the burden of such production, the Court finds that the production of a portion of the samples is sufficient herein. As such, the instant order to show cause to vacate the Special Master's July 25, 2022 recommendation is granted solely as to amend the amount of samples defendant Colgate is ordered to produce. Moving defendant shall produce to plaintiff a total of 6 samples, 3 of the shave talc samples and 3 of the bath talc samples, requested by plaintiff herein for the plaintiff's years of exposure.

Accordingly, it is

ORDERED that defendant Colgate's order to show cause to vacate the Special Master's July 25, 2022 recommendation is granted solely to amend the amount of samples moving defendant is ordered to produce to plaintiff; and it is further

ORDERED that defendant Colgate shall produce to plaintiff a total of 6 samples, 3 of the shave talc samples and 3 of the bath talc samples, sought by plaintiff herein for the plaintiff's 49 years of exposure; and it is further

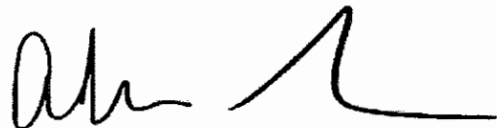
ORDERED that defendant Colgate shall provide the ordered discovery within 60 days; and it is further

ORDERED that, within 30 days of entry, defendant Colgate shall serve upon all parties to this action a copy of this decision and order, together with notice of entry.

This constitutes the Decision/Order of the Court.

4/12/2023

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: