

Rasso v Avon Prods., Inc.

2023 NY Slip Op 31173(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 190346/2018

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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PATRICIA RASSO,

Plaintiff,

- v -

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., CHARLES B. CRYSTAL COMPANY,
INC., CONOPCO, INC., COTY, INC., COTY US, LLC, ELI
LILLY AND COMPANY, ELIZABETH ARDEN, INC., IMERYS
TALC AMERICA INC. F/K/A LUZENAC AMERICA,
INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST
TO WINDSOR MINERALS, INC., PFIZER, INC., REVLON
INC., AS SUCCESSOR-IN-INTEREST TO ELIZABETH
ARDEN, INC., UNILEVER UNITED STATES,
INC., WHITTAKER CLARK & DANIELS, INC., WHITTAKER
CLARK & DANIELS, INC. INDIVIDUALLY AND AS
SUCCESSOR TO CHARLES MATHIEU, INC. AND
METROPOLITAN TALC CO., JOHN DOE 1 THROUGH
JOHN DOE 75 (FICTITIOUS), COLGATE - PALMOLIVE
COMPANY (FOR CASHMERE BOUQUET), IMERYS TALC
AMERICA, INC., JOHNSON & JOHNSON, JOHNSON &
JOHNSON CONSUMER COMPANIES, INC., LUZENAC
AMERICA INC., PROCTER & GAMBLE MANUFACTURING
COMPANY AS SUCCESSOR-IN-INTEREST TO SHULTON,
INC., KOLMAR LABORATORIES, INC.

Defendant.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 019) 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259

were read on this motion to/for

PRECLUDE

Upon the foregoing documents, and after oral arguments, it is ordered that defendant Colgate-Palmolive Company's (hereinafter referred to as defendant "Colgate") instant motion seeking to preclude the supplemental reports of Dr. William Longo, to preclude any expert

opinions based upon such supplemental reports, or alternatively to strike the note of issue and compel discovery, is denied for the reasons set forth below.

Defendant Colgate moves to preclude plaintiff's expert, Dr. Longo's supplemental reports dated January 12, 2021, February 23, 2021, March 19, 2021, March 24, 2021, May 17, 2021, and June 23, 2021, arguing that such reports are untimely as they were not exchanged until May 6, 2022. Alternatively, defendant Colgate seeks to postpone the trial and to compel plaintiff to produce the light fraction materials and the TEM grids which were referred to in Dr. Longo's supplemental reports. Defendant Colgate argues that, absent disclosure and postponement of the trial, it will be prejudiced as such materials have never been disclosed by plaintiff. Although CPLR §3101(d) is silent as to the timing of the disclosure, moving defendant argues that the Case Management Order dated June 20, 2017 (hereinafter referred to as the "CMO") explicitly provides for discovery deadlines to be set by the Special Master based upon the Accelerated Trial Cluster, and that plaintiff failed to meet such deadlines.

In opposition, plaintiff argues that Dr. Longo's supplemental reports are timely as there were several stays in this action resulting from the Covid-19 pandemic, a bankruptcy, as well as plaintiff's death. Plaintiff further argues that the original expert disclosure was timely made. According to plaintiff, Dr. Longo was deposed for numerous days in multiple jurisdictions regarding the supplemental reports at issue herein, which were also exchanged in other jurisdictions. Contrary to defendant Colgate's argument, plaintiff argues that the CMO permits discovery up to ten (10) days prior to trial. Defendant Colgate replies.

Preliminarily, the Court notes that CPLR §3101(d)(1)(i) states that

"[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a

summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just."

Notably, CPLR §3101(d) is silent as to the timing of such expert disclosure. Moreover, while the CMO, XV. D. states that "'[e]ach case in an Accelerated Trial Cluster will be prepared strictly in accordance with the discovery order prepared by the Special Master", as argued by defendant Colgate, the CMO also permits post-note discovery as ordered by the Court or the Special Master. With regards to such post-note discovery, "absent extraordinary circumstances, no further discovery shall be allowed ten days before a firm date to select a jury in a trial-ready case." CMO, IX. O. Here, plaintiff's original expert disclosure was timely served on January 10, 2019. The Court notes that no trial date has been scheduled in this action, and, as no deadline is set by the Legislature, plaintiff's expert disclosure is timely.

As to defendant Colgate's argument that Dr. Longo's supplemental reports must be precluded, such argument fails as CPLR §3101(d) specifically states that preclusion is not warranted. As stated above, no trial has been scheduled in this action such that there is no prejudice to defendant Colgate. With regards to moving defendant's argument seeking to compel plaintiff to provide samples of the materials referred to in Dr. Longo's supplemental reports, CPLR §3101(d)(1)(iii) specifically states that "[f]urther disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate." The Appellate Division, First Department, has held that special circumstances exist where the "expert...appears to be the only person ever to

examine the [materials] and thus the only witness with personal knowledge of its condition at the relevant time". *Coello v Progressive Ins., Co.*, 6 AD3d 282, 283 (1st Dep't, 2004).

Here, defendant Colgate has failed to establish that special circumstances exist such that Dr. Longo's testing material must be produced. In fact, the original materials tested by Dr. Longo were provided during discovery by defendant Colgate. As such, there is no indication that defendant Colgate is unable to obtain such materials from any other sources. While Dr. Longo performed updated tests on the samples provided by defendant Colgate, moving defendant has not established that such tests could not be replicated, or that the samples tested by Dr. Longo are somehow different than the samples originally provided to plaintiff by defendant Colgate itself. Thus, plaintiff's motion seeking to compel production of Dr. Longo's materials is denied.

Accordingly, it is

ORDERED that defendant Colgate-Palmolive Company's motion 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.



ADAM SILVERA, J.S.C.

4/10/2023

DATE

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