

**Germain v American Intl. Indus.**

2023 NY Slip Op 32822(U)

August 14, 2023

Supreme Court, New York County

Docket Number: Index No. 190049/2017

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.** 190049/2017

EDDIE GERMAIN,

**MOTION DATE** 06/29/2020

Plaintiff,

**MOTION SEQ. NO.** 020

- v -

AMERICAN INTERNATIONAL INDUSTRIES, FOR ITS CLUBMAN AND ITS CLUBMAN BRAND, AMERICAN INTERNATIONAL INDUSTRIES, AS SUCCESSOR-IN-INTEREST TO PINAUD COMPANY, AMERICAN INTERNATIONAL INDUSTRIES, AS SUCCESSOR-IN-INTEREST TO THE NESLEMUR COMPANY, BRENNTAG NORTH AMERICA, INC., BRENNTAG SPECIALTIES, INC., INDIVIDUALLY, AND F/K/A MINERAL PIGMENT SOLUTIONS, INC., AS SUCCESSOR-IN-INTEREST TO WHITTAKER, CLARK & DANIELS, INC., COLGATE-PALMOLIVE COMPANY, CYPRUS AMAX MINERALS COMPANY, IMERYS TALC AMERICA, INC., INDIVIDUALLY AND AS SUCCESSOR TO CHARLES MATHIEU, INC., METROPOLITAN TALC, AMERICAN TALC, AND RESOURCE PROCESSORS, INC., JOHNSON & JOHNSON, INC., LAMORAK INSURANCE CO., OBI AMERICAN INSURANCE COMPANY, AS SUCCESSOR-IN-INTEREST TO ONE BEACON AMERICAN INSURANCE COMPANY AND COMMERCIAL UNION INSURANCE COMPANY, WHITTAKER, CLARK & DANIELS, INC., JOHNSON & JOHNSON CONSUMER INC., LAMORAK INSURANCE CO., AS SUCCESSOR-IN-INTEREST TO ONE BEACON AMERICAN INSURANCE COMPANY AND COMMERCIAL UNION INSURANCE COMPANY., JOHNSON & JOHNSON, THE NESLEMUR COMPANY, JOHNSON & JOHNSON HOLDCO (NA) INC., JANSSEN PHARMACEUTICALS, INC., KENVUE, INC.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 020) 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 959, 960, 963, 964

were read on this motion to/for

**RENEWAL**

Upon the foregoing documents, it is ordered that defendant The Neslemur Company (“Neslemur”)’s instant motion for renewal and re-argument pursuant to CPLR § 2221(e) and CPLR § 2221(d) is denied for the reasons set forth below.

In this asbestos action, defendant Neslemur moves for renewal on the basis that new certificates from the Secretaries of State for Delaware and New York regarding the company’s registration status “are new developments” pursuant to CPLR § 2221(e). *See* Memorandum of Law in Support of Motion to Renew and Reargue by The Neslemur Company at p. 5. CPLR §2221(e) permits a party to move for leave to renew a decision to assert “new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination”. CPLR §2221(e).

Here, defendant Neslemur has failed to demonstrate how these certificates are “new” facts, as it is never clarified why they were not available during the original motion. However, more importantly, the Court agrees with Plaintiffs that they are “not material.” *See* Memorandum of Law in Opposition to Neslemur’s Motion to Renew and Reargue at p. 6. Defendant entirely misstates that Hon. Manuel J. Mendez’s original decision was based on a misunderstanding of Neslemur’s present activity/dissolution status in New York v. Delaware. In fact, Justice Mendez clearly addressed this issue in noting that “the plaintiffs’ cause of action arose *before Neslemur’s avoidance or dissolution*, and since it has not denied that it received service of process from the secretary of state, plaintiffs have met their burden of establishing that personal jurisdiction has been acquired over it.” *See* Memorandum of Law in Support, *supra*, Exh. A, Decision and Order of Hon. Manuel J. Mendez dated Feb. 28, 2020 at p. 7 (internal citation omitted) (emphasis added). Further, Justice Mendez evaluated every instance of attempted service by Plaintiffs, including their efforts to serve “either the Delaware Secretary of State or Neslemur’s registered

agent in the manner contemplated by the statute.” *See id.* at p. 3 (internal citation omitted) (emphasis added). The underlying action concerns Plaintiff Decedent’s interaction with Neslemur’s talcum powder product prior to 1995, during which time Neslemur was authorized to conduct business in New York and sold such talcum powder, as squarely addressed by Hon. Mendez’s original decision. The CPLR is clear that on a motion to renew, the moving party must submit new facts or demonstrate that there has been a change in the law. *See* CPLR §2221(e). The Court sees no new facts or changes in the law justifying a departure from Justice Mendez’s well-reasoned opinion.

Relatedly, defendant Neslemur moves for re-argument pursuant to CPLR §2221(d) on the basis that the Court “misapprehended” Neslemur’s authorization status as regarding the appropriate service of process procedure. 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 (1<sup>st</sup> Dep’t 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted).

Defendant Neslemur emphasizes both that they are an unauthorized foreign corporation to New York, and that they have never been “dissolved” in Delaware. Their position is that this takes Neslemur squarely outside of the service requirements under BCL § 306 and requires service under BCL § 307. However, Neslemur has failed to establish that the Prior Decision misapprehended the law. BCL § 1311 allows for service under BCL § 306 “[w]hen an authorized foreign corporation is dissolved or its authority or existence is otherwise terminated or cancelled

in the jurisdiction of its incorporation.” Justice Mendez noted that “Neslemur’s Delaware certificate of incorporation was voided in 1991 for failure to pay franchise taxes...and its authority to do business in New York was annulled on September 27, 1995.” See Memorandum of Law in Support, *supra*, Exh. A, Decision and Order of Hon. Manuel J. Mendez at p. 2. In fact, Neslemur’s purportedly “new evidence,” by way of an updated certificate from the Delaware Secretary of State, all but confirms Justice Mendez’s application of the law. Said certificate notes the filing of a “certificate of revival” for Neslemur corporation in 2020—a time after the initiation of this lawsuit. Therefore, whether Neslemur claims it was formally dissolved or not, it was, according to the Delaware Secretary of State, in some state of “pre-revival” activity. The Court agrees entirely with Hon. Mendez that this is sufficient for BCL § 1311 to apply and provides no basis to grant re-argument on the issue.

Accordingly, it is

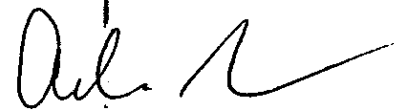
ORDERED that defendant Neslemur’s motion for renewal and reargument is denied in its entirety; and it is further

ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

08/14/2023

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: