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 WHITAKER CLARK & DANIELS, INC.,CHARLES B. CHRYSTAL 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 SUCESSOR-IN-INTEREST TO SHULTON, INC.,KOLMAR LABORATORIES, INC.

Defendant.

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INDEX NO. 190346/2018

MOTION DATE 09/28/2020

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 920, 921, 922, 923, 924, 925, 926, 927, 928, 1194, 1195, 1202

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND)

Upon the foregoing documents, it is ordered that defendant Colgate-Palmolive Company's ("Colgate") motion is denied in accordance with the decision below.

Here, defendant Colgate primarily contends that Texas law should apply to the instant matter and that plaintiff has not demonstrated causation in accordance with Texas' standard. Defendant also argues that it has established a *prima facie* case against causation under New York law such that it is entitled to summary judgment. Plaintiff opposes, noting both that the law of the forum applies to the instant motion, and that plaintiff has offered sufficient evidence of causation under New York law. Defendant replies, re-iterating both the Texas standard for causation and that plaintiff's evidence is insufficient under New York causation.

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The 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 eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *See id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). 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, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979). Furthermore, the Appellate Division, First Department has held that on a motion for summary judgment, it is moving defendant's burden "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury". *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dep't 1995).

The issue in the instant matter is the choice-of-law applicable to Defendant Colgate's motion. Defendant Colgate argues that Texas law should apply because Ms. English was a resident of Texas, purchased Cashmere Bouquet talcum powder in Texas, and has never lived in New York, purchased the powder in New York, or received medical treatment in New York. *See* Memorandum of Law in Support of Colgate-Palmolive Company's Motion for Summary Judgment, p. 4. Defendants cite caselaw regarding the legal conflicts between Texas and New York, but none to support the finding that Texas law should apply in the first place.

In opposition, Plaintiffs argue that the case history includes multiple determinations on this issue in favor of New York law, that Ms. English used talcum powder significantly in New York, that defendant Colgate is New York-based, and that New York conflicts of law emphasizes the jurisdiction's interest in the litigation. *See* Plaintiffs' Memorandum of Law in Opposition to Defendant Colgate-Palmolive Co.'s Motion for Summary Judgment, p. 50-56.

The Court of Appeals has addressed cases involving conflicts of law between New York and other jurisdictions several times. "The traditional choice of law rule…has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort." *Babcock v Jackson*, 12 NY2d 473, 477 (1963). However, this rule has evolved over time to include "the 'center of gravity' or 'grouping of contacts' theory". *Id.* at 479

(citing *Auten v Auten*, 308 NY 155, 160 (1954)). This allows courts to "lay emphasis…upon the law of the place 'which has the most significant contacts with the matter in dispute'". *Id.* In *Neumeier v Kuehner*, 31 NY2d 121, 128 (1972), the Court summarized the conflict of law principles as applied to the differing domiciles of a passenger and driver in a motor vehicle accident. "[W]hen the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing… [such] rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." *Id.* citing *Tooker v Lopez*, 24 NY2d 569, 585 (1969).

Here, Ms. English testified unequivocally to her significant use of Cashmere Bouquet talcum powder in New York and has offered evidence which conflicts with defendant Colgate's evidence regarding the level of asbestos contamination therein. *See* Plaintiffs' Memorandum of Law in Opposition, *supra*, p. 2-8. With respect to plaintiff's deposition testimony, the Appellate Division, First Department, has held that "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint. The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony." *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dep't 1996) (internal citations omitted).

Further, defendant Colgate does not dispute that their principal place of business is New York or that they have historically sold such talcum powder in New York, indicating that their defense of the instant matter in New York will not "produc[e] great uncertainty" for them.

Neumeier v Kuehner, *supra*. Further, this establishes New York's interest in the substantive issue underlying the case.

As to causation, defendant Colgate claims that under *Parker v Mobil Oil Corp.*, 7NY3d 434 (2006), plaintiff must establish general causation by providing evidence that asbestos as a *component* of talc causes mesothelioma. Plaintiff, in fact, offers detailed evidence that the primary sources of talc used at the time were largely contaminated with asbestos. *See* Plaintiffs' Memorandum of Law in Opposition, *supra*, p. 8-43. Additionally, plaintiff offers conflicting evidence regarding defendant Colgate's choice to use talc contaminated with asbestos as opposed to other non-contaminated alternatives. *See id.* at 44. Such conflicting evidence is sufficient to preclude summary judgment. As to specific causation, defendant incorrectly states that plaintiffs have performed no mathematical calculations to establish such causation. Plaintiff's expert has, in fact, noted that Ms. English's number of years of talcum powder usage combined with the lack of other sources of exposure leads to a conclusion of substantial certainty for causation. *See id.* at 47-48.

A reasonable juror could determine that plaintiff was exposed to asbestos from defendant Colgate's cosmetic talcum powder, whether such exposure was a substantial cause of plaintiff's disease, and whether punitive damages should apply to defendant Colgate's conduct regarding safer alternatives. Therefore, sufficient issues of fact exist to preclude summary judgment.

Accordingly, it is

ORDERED that defendant Colgate's motion 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.

09/11/2023
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE