

Matter of New York City Asbestos Litig.

2012 NY Slip Op 30426(U)

February 23, 2012

Supreme Court, New York County

Docket Number: 107211-08

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Shulman
Justice

PART 1
107211-08
190078/08

Bernard, Lawrence

INDEX NO.

Brookfield Properties

MOTION DATE

MOTION SEQ. NO. 036

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Open commission

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>A-G</u>	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits <u>(letter)</u>	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

FILED

FEB 27 2012

NEW YORK COUNTY CLERK'S OFFICE

20 Sec

Dated: February 23, 2012

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
IN RE: NEW YORK CITY ASBESTOS LITIGATION
-----X

LAWRENCE BERNARD and MARILYN BERNARD
as co-executors of the estate of SHELLEY BERNARD,

Plaintiffs,

-against-

BROOKFIELD PROPERTIES CORPORATION, et al,

Defendants.
-----X

LORI KONOPKA-SAUER and RICHARD KONOPKA,
as executors of the estate of KAREN TEDRICK,

Plaintiffs,

-against-

COLGATE-PALMOLIVE COMPANY,

Defendant.
-----X

HON MARTIN SHULMAN, J.S.C.

Index No: 107211/08

Decision & Order

Index No. 190078/08

FILED

FEB 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Colgate-Palmolive Company ("defendant" or "Colgate") moves by order to show cause ("OSC") for an order directing the issuance of open commissions permitting defendant to seek testimony and/or documentation from non-party witnesses Dr. Jian-Jun Wei and Norma Cuffe, both out of state residents. Plaintiffs oppose the OSC, which is granted for the reasons set forth below.

Dr. Wei

Colgate seeks discovery from Dr. Wei, an Illinois resident, on the grounds that he has information relating to decedent plaintiff Shelley Bernard's ("Ms. Bernard") diagnosis of peritoneal mesothelioma. Colgate disputes this diagnosis. Dr. Wei is a

pathologist formerly affiliated with New York University ("NYU") who was allegedly responsible for preparing the majority of Ms. Bernard's pathology report containing her final diagnosis. That report contains the notation "[p]apillary serous carcinoma favored over mesothelioma."¹ OSC at Exh. D. On September 26, 2011, Colgate deposed Dr. Jonathan Melamed, who the pathology report indicates made the final diagnosis. However, Dr. Melamed testified that he was only responsible for three lines in the report and that his former colleague, Dr. Wei, was responsible for the remainder.

In opposition, plaintiff argues that Colgate has already deposed four (4) of Ms. Bernard's pathologists and her treating oncologist on the issue of her diagnosis; Colgate deposed Dr. Melamed, a pathologist from the same hospital as Dr. Wei; and defendant has received the "further disclosure" the Appellate Division, First Department allowed regarding Ms. Bernard's diagnosis.² Plaintiff further points out that Colgate knew Dr. Wei was involved in preparing the subject pathology report yet did not include him in its prior motion seeking open commissions for Ms. Bernard's pathologists.

Norma Cuffe

Colgate seeks discovery from Norma Cuffe, a Michigan resident, on the grounds that she has information regarding a potential source of asbestos to which decedent plaintiff Karen Tedrick ("Ms. Tedrick") may have been exposed during her lifetime.

¹ Ms. Bernard was initially diagnosed with ovarian cancer and subsequently was diagnosed with peritoneal mesothelioma.

² See *In re New York City Asbestos Litigation*, 87 AD3d 467 (1st Dept 2011), wherein the First Department reversed the denial of defendant's motion for an open commission to depose the pathologists who diagnosed Ms. Bernard's ovarian cancer and peritoneal mesothelioma.

* 4]

Specifically, defendant alleges Ms. Cuffe has lived at the same address in Dearborn, Michigan since 1963 and that her home is less than one block from the former Zonolite/W.R. Grace plant which produced insulation materials. Colgate contends that Ms. Cuffe will testify that until the late 1960's or early 1970's, the plant regularly spewed a substance that would cover her home and a playing field across the street. Ms. Cuffe's home is less than three miles from Ms. Tedrick's childhood home where she lived from approximately 1950 to 1966.

In opposition, plaintiff argues Ms. Cuffe's testimony is irrelevant in that Colgate fails to and cannot offer evidence that: Ms. Cuffe knew Ms. Tedrick; Ms. Tedrick was ever near or on Ms. Cuffe's property or the adjacent playing field; or that the allegedly spewed substance ever reached Ms. Tedrick's house. Plaintiff further contends that Colgate has known of Ms. Cuffe for almost a year and could have sought discovery from her prior to the imminent close of discovery.

DISCUSSION

CPLR §3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." As previously stated, the Appellate Division, First Department permitted Colgate to obtain discovery from Ms. Bernard's pathologists. *In re New York City Asbestos Litigation, supra*. In making this determination, the First Department reasoned that "the precise nature of Bernard's affliction appears central to the resolution of this dispute" and exercised its discretion to permit "further disclosure into a potentially dispositive issue." 87 AD3d at 469.

With respect to Dr. Wei, although he is listed as a signatory on the pathology report at issue, Colgate was unaware of the extent of his role in preparing it until it deposed Dr. Wei's former colleague on September 26, 2011. Dr. Wei's testimony is material and necessary to Colgate's defense of these actions and it has already been demonstrated that the pathology report's co-author had limited knowledge with respect thereto. As such, there is no indication that defendant can obtain the information it seeks on the "potentially dispositive issue" of Ms. Bernard's competing diagnoses from another source. In fact, Colgate contends in reply³ that it attempted to obtain additional medical records regarding Dr. Wei's analysis and diagnosis but learned in December 2011 that no further medical records were available. For the foregoing reasons, Colgate's OSC is granted with respect to Dr. Wei, subject to the time restraints set forth below.

Turning to Norma Cuffe, Colgate also demonstrates that this proposed witness possesses relevant information on the issue of alternate causation. Defendant disputes plaintiffs' unsupported claim of undue delay, stating in reply that it first learned of Ms. Cuffe in October 2011 and only obtained information from her in the following weeks. Colgate also contends that it will present evidence from other sources establishing that the emissions from the Zonolite/W.R. Grace plant in Dearborn, Michigan contained asbestos and that Ms. Tedrick lived close enough to the plant to have been exposed,

³ Colgate's counsel submitted a letter dated February 13, 2012 to this court requesting permission to respond to plaintiffs' opposition and briefly addressing certain alleged misstatements therein. Plaintiffs did not object to or otherwise seek to respond to this proposed submission and as such this court will consider it in determining the OSC.

thus establishing a possible link to Ms. Tedrick. Accordingly, the OSC is granted with respect to proposed witness Norma Cuffe, subject to the time restraints set forth below.


For all of the foregoing reasons, it is hereby

ORDERED that Colgate's motion is granted; and it is further

ORDERED that Colgate shall complete Dr. Wei and Ms. Cuffe's depositions on or before March 30, 2012.

The foregoing is this court's decision and order. Copies of this decision and order and the simultaneously signed Order Directing Issuance of Open Commissions and Commissions to Subpoena Out of State Nonparty Witnesses, in the proposed form submitted by movant, have been sent to counsel for plaintiffs and Colgate.

Dated: New York, New York
February 23, 2012



Hon. Martin Shulman, J.S.C.

FILED

FEB 27 2012

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