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

**PRESENT:** MANUEL J. MENDEZ *Justice* **PART** 13

**IN RE: NEW YORK CITY ASBESTOS LITIGATION**

DESIREE HOOPER-LYNCH,

Plaintiff,

- against -

COLGATE-PALMOLIVE CO., *et al*,

Defendants.

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| INDEX NO. | 190328/2015 |
| MOTION DATE | 11/28/2018 |
| MOTION SEQ. NO. | 004 |
| MOTION CAL. NO. | |

The following papers, numbered 1 to 7 were read on Imerys Talc America, Inc. and Cyprus Amax Minerals, Co.'s motion for summary judgment:

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1- 5 |
| Answering Affidavits — Exhibits | 6 - 7 |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes X No

Upon a reading of the foregoing cited papers it is Ordered that defendants Imerys Talc America, Inc. ( hereinafter individually "Imerys") and Cyprus Amax Minerals, Co.'s ( hereinafter individually "CAMC") motion pursuant to CPLR §3212 for summary judgment on plaintiff's complaint and all cross-claims asserted against them, is granted to the extent of dismissing plaintiff's claims for exposure to asbestos during the years 1968-1979. The remainder of the relief sought is denied.

Plaintiff, Desiree Hooper-Lynch, a resident of New York, was diagnosed with mesothelioma in April of 2015. Plaintiff alleges she was exposed to asbestos in a variety of ways including from the use of Colgate-Palmolive Company's cosmetic talc product, Cashmere Bouquet. Plaintiff alleges she was exposed to asbestos containing talc in Cashmere Bouquet from approximately 1968 through 1985. Plaintiff asserts claims against Imerys and CAMC (hereinafter referred to jointly as "defendants") alleging that they supplied the raw talc to Colgate-Palmolive that was used to make Cashmere Bouquet. This action was commenced on October 16, 2015 to recover for plaintiff's injuries resulting from exposure to asbestos (Mot., Exh. A).

Charles Mathieu, Inc. ("Charles Mathieu") was the exclusive supplier of talc used to manufacturer Colgate-Palmolive Company's Cashmere Bouquet during the years 1968 - 1979 the period during which Ms. Hooper-Lynch alleges exposure to the product. (Opposition Papers Exs. 121 and 122). Charles Mathieu was owned and operated by Donald Ferry and Peter Bixby from the 1930s (Mot. Ex. 7, pgs. 15, 17, 76 and 80). Charles Mathieu had three main business lines by the 1970s, including importing talc from Italy, mining and exploring U.S. talc, and processing talc at facilities in Alabama and New Jersey (*Id*, pgs. 17-19). Charles Mathieu and Cyprus Mines Corporation ("Cyprus Mines") were competitors in the 1970s (Mot., Ex.8).

Cyprus Georesearch, Inc., a wholly owned-subsidiary of Cyprus Mines, purchased part of Charles Mathieu's assets and none of its liabilities in August 1979 (Mot. Ex. 9 at ITA-Herford 002313, 2591-2522). The initial contemplated stock acquisition was for $2.4 million (Id). Cyprus Georesearch, Inc. offered an extra $1 million for all liabilities to remain with Charles Mathieu (*Id* at ITA-Herford 002591,

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

2599, 2605, 2610, 002519-22). Cyprus Mines agreed to pay $3.5 million in cash and up to $1.5 million in commissions on sales of Italian talc over the next twenty (20) years (*Id* at ITA-Herford-002362-74, 2519-22; "1979 Agreement"). Charles Mathieu retained its talc importation business and Cyprus Mines became one of its customers. Cyrpus Mines began selling Italian talc imported by Charles Mathieu, who received a 4% commission on all sales (*Id* at ITA-Herford-002363-74). Charles Mathieu eventually changed its name to Charles Mathieu & Co., but remained the same company. The parties agreed to an Amendment in April 21, 1983 to reflect the name change to Charles Mathieu & Co., and continued commission sales (Mot. Exs. 7, 11; "1983 Amendment").

Cyprus Mines sold its talc business on June 5, 1992. Prior to the sale, it created Cyprus Talc Corporation and transferred its entire talc business to that entity (Mot. Ex. 26). Rio Tinto purchased all outstanding stock from Cyprus Talc Corporation (Mot. Ex. 27). Rio Tinto subsequently changed the name of Cyprus Talc Corporation to Luzenac America, Inc. (*Id*). Defendant Imerys America purchased all outstanding stock of Luzenac America, Inc. and changed the name of the company to Imerys Talc America, Inc. (Downey Affidavit #1, NYSCEF Docket No. 284).

Defendant CMAC was created by the merger of Amax Inc. and Cyprus Minerals Company in 1993 (Downey Affidavit #2, NYSCEF Docket No. 285).

The defendants now move for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Complaint and all cross-claims against them. The defendants have met their prima facie burden by establishing that they are not liable as the putative successor to Charles Mathieu, who was the exclusive supplier of the talc used to manufacture Cashmere Bouquet during the years of 1968-1979, the period during which Ms. Hooper-Lynch alleges she was exposed to the product.

Plaintiff in opposition to this motion states in a footnote that she "does not dispute defendants' assertion that they are not responsible for any exposures to Cashmere Bouquet prior to 1979." (See Aff. In Opp, pg. 2, para. 3, footnote 1).

The defendants are granted summary judgment on plaintiff's claims against them for exposure to asbestos during the period of 1968-1979.

The defendants argue that they are also entitled to summary judgment for the remaining years of Ms. Hooper-Lynch's alleged exposure - 1980 - 1985 . They claim that there is no proof that the talc sold to Colgate Palmolive was asbestos-contaminated and at best any contamination would be a "sporadic occurrence" that was insufficient for plaintiff to establish causation against them.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Bare conclusory assertions and failure to make a showing and to provide admissible evidence requires denial of the motion regardless of the sufficiency of the opposing papers (Winegrad v. New York University Medical Center, 64 N.Y. 2d 851, 476 N.E. 2d 642, 487 N.Y.S. 2d 316 [1985] and Pullman v. Silverman, 28 N.Y. 3d 1060, 66 N.E. 3d 663, 43 N.Y.S. 3d 793 [2016]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

The defendants in the middle of their Memorandum of Law in Support of the Motion - for the first time- attempt to inappropriately have this Court deem this motion made as a Cross-Motion to Motion Sequence 005 and to incorporate the arguments and evidence submitted by Colgate-Palmolive under Motion Sequence 005 (See Memo. of Law in Support, section F, pg. 23). The defendants have not properly made a cross-motion to Motion Sequence 005. Aside from their failure to file a Notice of Cross-Motion, they failed to file any cross-motion documents under Motion Sequence 005.

The defendants, in support of this motion, only provide an expert affidavit of Dr. Matthew S. Sanchez, that was e-filed in another unrelated action by Colgate-Palmolive in support of their motion in that separate action for summary judgment (NYSCEF Docket No. 286). The defendants did not have Dr. Sanchez prepare a report for this action.

Dr. Sanchez has a doctorate in geology and specializes in asbestos analysis. He describes asbestos as a regulated group of six naturally occurring, highly fibrous, silicate minerals that when crystallized can become one of two families of asbestos containing minerals: serpentine and amphibole. Dr. Sanchez claims that while talc may contain either of the two asbestos containing minerals, that does not mean there is asbestos contamination, and that analysis is needed to make a determination. He does not state the frequency of testing needed to make a determination and whether the asbestos containing samples would be identified consistently throughout a given location.

Dr. Sanchez identifies four sources of talc, Val Germanasca Italy, Willow Creek Montana, Beaverhead, Montana, and Regal North Carolina. He relies on governmental and academic studies - not all of them are annexed to either the motion papers or his report, and concludes that the talc used in Cashmere Bouquet, is to a reasonable degree of scientific certainty, free of asbestos. The defendants do not state that the other plaintiff in the action Dr. Sanchez's report was taken from has a similar exposure period to their product as the plaintiff. The references to the time periods involved are not specific and some of the reports and studies are outside of the period relevant to Ms. Hooper-Lynch's exposure. The report includes reference to Dr. Sanchez's own visit to mining and milling operations in Val Germanasca Italy from November 9th to 12th, 2015 to collect twenty samples for testing, that he studied and included in the report. The 2015 samples are substantially after 1980-1985 the period of plaintiff's alleged exposure and are not relevant to this action. The defendants' reliance on Dr. Sanchez does not unequivocally establish that their talc could not have contributed to causation of plaintiff's injury during the alleged period of 1980-1985 or establish a prima facie case (Sanchez Aff., pg. 16, para. 28) (See Berensman v. 3M Company (Matter of New York City Asbestos Litig.,122 A.D. 3d 520, 977 N.Y.S. 2d 381 [1st Dept., 2014]).

Alternatively, plaintiff has raised issues of fact to be resolved at trial.

In toxic tort cases, an expert opinion must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered, and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries. Specific causation can be established by an expert's comparison of the exposure levels found in the subjects of other studies. The expert is required to provide specific details of the comparison and show how the plaintiff's exposure level related to those of the other subjects (Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, 857 N.E. 2d 1114, 824 N.Y.S. 2d 584 [2016]).

Plaintiff in opposition to the motion provides the report of William E. Longo, Ph.D. a Doctor of Philosophy in Materials Science. The report was e-filed in another unrelated action in opposition to a motion for summary judgment by

Colgate Palmolive (Mot. Exh. 13). Dr. Longo performed studies on samples of Cashmere Bouquet, that allegedly included the moving defendants' talc, covering the same periods relevant to Ms. Hooper-Lynch's period of exposure (Opp. Exh. 13). Dr. Longo's analysis of samples, using the analytical electron microscope, found 28 of 38 samples contained detectable amounts of asbestos. He concluded that individuals that used Cashmere Bouquet talc products in a manner similar to the plaintiff over an extended period were more likely to have been exposed to significant airborne levels of asbestos (Opp. Exh. 13).

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved. The Court's function on a motion for summary judgment is issue finding, not issue determination. It should not be granted when there is any doubt (Insurance Co. of New York v. Central Mut. Ins. Co., 47 A.D. 3d 469, 850 N.Y.S. 2d 56 [1st Dept., 2008] citing to Millerton Agway Cooperative v.Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966] and Brunetti v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347 [1st Dept., 2004]). Conflicting testimony raises credibilty issues, that cannot be resolved on papers. They should be determined by a jury instead, and are a basis to deny summary judgment (Prevost v. One City Block LLC, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept. 2017] and Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [1st Dept. 2011]).

There are credibility issues on the conflicting expert testimony provided by the moving defendants and the plaintiff. There remains an issue of fact as to whether the defendants' talc had asbestos and whether plaintiff's mesothelioma was caused through the use of Cashmere Bouquet during the period of 1980 - 1985.

Accordingly, it is ORDERED that defendants Imery's Talc America, Inc., and Cyprus Amax Minerals, Co.'s motion pursuant to CPLR §3212 for summary judgment on plaintiff's complaint and all cross-claims asserted against them, is granted only as to dismissing plaintiff's claims for the years 1968 - 1979, and it is further,

ORDERED that plaintiff's claims against defendants Imerys Talc America, Inc. and Cyprus Amax Minerals Company, alleging exposure to asbestos from their talc for the years 1968 - 1979, are severed and dismissed, and it is further,

ORDERED that the remainder of the summary judgment relief sought by defendants Imerys Talc America, Inc. and Cyprus Amax Minerals Company on the plaintiff's claims alleging exposure to asbestos from their talc for the years 1980 - 1985, is denied.

ENTER:

Dated: December 4, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE