

Hooper-Lynch v Colgate-Palmolive Co.
2018 NY Slip Op 33171(U)
December 10, 2018
Supreme Court, New York County
Docket Number: 190328/2015
Judge: Manuel J. Mendez
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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,

INDEX NO. 190328/2015

- against -

MOTION DATE 11/28/2018

COLGATE-PALMOLIVE CO., et al,

MOTION SEQ. NO. 005

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on Colgate-Palmolive Co.'s motion for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers it is Ordered that defendant, Colgate Palmolive Company's motion pursuant to CPLR §3212 for summary judgment dismissing plaintiff's claims and all cross-claims, is denied.

Plaintiff, Desiree Hooper-Lynch, a New York resident, was diagnosed with mesothelioma in April of 2015. Plaintiff alleges she was exposed to asbestos in a variety of ways. Her exposure - as relevant to this motion - includes from the use of Colgate-Palmolive Company's ("defendant") cosmetic talc product, Cashmere Bouquet. Plaintiff alleges she was exposed to asbestos containing talc in Cashmere Bouquet from approximately 1968 through 1985.

At her deposition Ms. Hooper-Lynch testified that she started using Cashmere Bouquet afer she became a teacher while living in Guyana and England from 1968 through 1979, and continued using it after she moved to Brooklyn, New York, from 197 9 until about 1985 (Opp. Exh. 2, pgs. 181-190, 191-192, 226-227). She testified that she used Cashmere Bouquet daily, applying it, often more than once a day, to the front of her body, the nape of her neck and her back (Opp. Exh. 2, pgs.191, 203, 218, 259-261). In applying Cashmere Bouquet Ms. Hooper-Lynch testified that she would shake the bottle twice on each application,with between four and six shakes of powder applied to her front, back and the nape of her neck (Opp. Exh. 2, pgs. 202-203, 260-261). Ms. Hooper-Lynch testified that when she used Cashmere Bouquet, the atmosphere in the room became dusty because of the shaken powder, and that it was fair to say that she shook the powder about six to eight inches from her nose. She testified that she would also breathe in the powder that was shaken out of the bottle, and that sometimes it made her sneeze (Opp. Exh. 2, pgs. 259-261). Ms. Hooper-Lynch testified that although she did read the bottles of Cashmere Bouquet she was only looking for the name of the product and did not read anything else on the label. She did not remember seeing a warning on the bottle. Ms. Hooper Lynch testified that she would not have continued to use Cashmere Bouquet if she knew it could cause mesothelioma (Opp. Exh. 2, pgs. 199, 232, 263).

Plaintiff commenced this action on October 16, 2015 to recover for damages resulting from Ms. Hooper-Lynch's exposure to asbestos from defendant's products. Plaintiff Amended the Summons and Complaint on March 10, 2017 (Mot., DiMarco Aff., Exh. 6). Colgate-Palmolive Company's Verified Answer served on April 5, 2017asserts sixty-seven affirmative defenses and a cross-claim for indemnification and contribution (Mot. DiMarco Aff., Exh. 47).

Defendant, Colgate-Palmolive Company, seeks summary judgment pursuant to CPLR §3212 dismissing plaintiffs' complaint and all cross-claims asserted against it for lack of liability.

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

Defendant's motion does not address all of the causes of action asserted in the Amended Master Complaint. Defendants only argues that it is entitled to summary judgment on the causes of action for negligence and strict liability. They have not stated a prima facie case and are not entitled to summary judgment on the remaining third through tenth causes of action.

Defendant's argument that plaintiff is not expected to present any admissible evidence of exposure to asbestos, does not make a prima facie case.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to plaintiff's illness (*Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendant must unequivocally establish that Ms. Hooper-Lynch either was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to were not sufficient to contribute to the development of mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Defendant's argument that plaintiff has no evidence, cannot meet her burden of proof, or raise an issue of fact that Ms. Hooper-Lynch was exposed to asbestos from the use of Cashmere Bouquet during the alleged periods of 1968 to 1985 does not establish a prima facie case for summary judgment.

Defendant's argument that the specific bottles of Cashmere Bouquet used by Ms. Hooper-Lynch were not tested and plaintiff has no direct evidence of exposure, is not dispositive. Plaintiff is not required to show the precise cause of her damages, only facts and conditions from which the defendant's liability may be reasonably inferred (*Oken v. A.C. & S. (Matter of New York City Asbestos Litig.)*, 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept., 2004] and *Cornell v. West 51st Street Realty, LLC*, 22 N.Y. 3d 76, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

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 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). 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 N.Y. 2d 525, 569 N.Y.S. 2d 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 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Defendants rely on the expert affidavit and report of Jennifer Sahmel, M.P.H., C.I.H., C.S.P., in support of their argument that Ms. Hooper-Lynch was not exposed to asbestos through use of Colgate-Palmolive products, and that the talc in Cashmere Bouquet - which only came from Italy during the period relevant to plaintiff's claims - did not cause her mesothelioma. Ms. Sahmel, a Certified Industrial Hygienist (CIH), is also a Board Certified Safety Professional (Mot. DiSalvo Aff., Exh. 25, NYSCEF Docs. 190 and 191). Ms. Sahmel relies on multiple articles, reports and studies that she summarizes or attaches to her report in two volumes (Mot. DiSalvo Aff., Exh. 25, NYSCEF Docs. 190 and 191).

Ms. Sahmel using an upper bound assumption that trace asbestos could be found in the Cashmere Bouquet talcum powder used by Ms. Hooper-Lynch, determines that it would be well within cumulative lifetime background or ambient levels found in the air in the United States and below OSHA PEL for working with asbestos. In reliance on the materials cited, Ms. Sahmel performed an "evaluation of hypothetical cumulative exposures to asbestos from the use of cosmetic talc powder products." Her evaluation results are reflected in Table 1, "Estimates of

Potential Exposure Associated with the Consumer Use of Cosmetic Talcum Powder Products over a 70-Year Lifetime,” annexed as “Exhibit F” to the report (Mot. DiSalvo Aff., Exh. 25, NYSCEF Docs. 190, Exh. F). Ms. Sahmel, in assessing cumulative asbestos exposure potential, relied on industrial exposure finding that “occupational exposure over a working year of 2080 hours,” and concluded that exposure expressed in environmental years would be greater than 1 f/cc-year.”

Ms. Sahmel uses the expression as an environmental year to make a direct comparison to ambient exposure in the general U.S. population. She concludes that none of the cumulative asbestos exposure estimates for a 70 year lifetime of consumer talc use exceed upper bound cumulative ambient exposure associated with working lifetime at current OSHA PEL for asbestos (Mot. DiSalvo Aff., Exh. 25, NYSCEF Docs. 190, pg. 9, paras. 19-20). Ms. Sahmel also concludes that Ms. Hooper-Lynch’s alleged exposure for the period 1968-1985 was well within cumulative ambient exposure levels found in the air in the United States and did not create a significant risk of mesothelioma. Ms. Sahmel refers to no other studies and did not make any assessments as to ambient exposure in Guyana, South America or England, during the period plaintiff did not reside in the United States, which was about half of the relevant exposure period (1968-1979).

Defendant’s argument - that was not stated in their papers, but for the first time at oral argument - that plaintiff did not raise an issue of fact on this motion for summary judgment because the opposition papers rely on expert reports that are not in proper form, is unavailing. Plaintiff provides the unsworn expert reports of Steven P. Compton, Ph.D. a physicist and microscopist with experience in testing asbestos containing products (Opp. Exh. 4); David Y. Zhang, M.D., Ph.D., M.P.H. a licensed physician specializing in pathology and occupational medicine (Opp. Exh. 5); and Sean Fitzgerald P.G. a Professional Geologist (Opp. Exh. 6). Plaintiff’s unsworn expert reports may be utilized in opposition to a motion for summary judgment, even as hearsay, if they are not the only evidence submitted (See Navararez v. NYRAC, 290 A.D. 2d 400, 737 N.Y.S. 2d 76 [1st Dept., 2002]). In addition to her experts’ reports, plaintiff submitted other admissible evidence. She submitted other studies and reports that support her experts’ findings, including a copy of the sworn report of William E. Longo, Ph.D., a Doctor of Philosophy in Materials Science and trial testimony from other actions.

Arguments made in defendant’s motion papers demonstrate that it was aware of the plaintiffs’ experts, of what their reports stated, and no objections were made prior to oral argument. The Court can exercise its discretion in considering plaintiff’s expert reports in opposition to this motion for summary judgment in the absence of prejudice to the defendant (See Saggese v. Madison Mut. Ins. Co., 294 A.D. 2d 900, 741 N.Y.S. 2d 803 [4th Dept. 2002], CPLR §2001 and Status General Development, Inc. v. 501 Broadway Partners, LLC, 163 A.D. 3d 740, 82 N.Y.S. 3d 34 [2nd Dept., 2018] citing to Rosenblatt v. St. George Health & Raquetball Assoc., LLC, 119 A.D.3d 45, 984 N.Y.S. 2d 401 [2nd Dept. 2014]). Defendants have not shown that they were prejudiced such that exclusion of plaintiff’s expert disclosure is warranted.

Plaintiff’s arguments in opposition to summary judgment, taking into consideration the opinions of her experts and supporting documentation, raises credibility issues and issues of fact as to general and specific causation, requiring a trial of this matter..

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’s expert, Dr. Compton, refers to testing of cosmetic talc - including his own testing - which has repeatedly shown that there may be low levels of asbestos that are overlooked if not tested properly. Dr. Compton opines that because of the dusty nature of cosmetic talc powder even low levels of asbestos fibers can lead to significant airborne concentration. He further opines that the varying levels of asbestos that Ms. Hooper-Lynch inhaled through cumulative use of asbestos contaminated talc in Cashmere Bouquet caused her mesothelioma (Opp. Exh. 4).

Mr. Fitzgerald's report opines that bulk testing in multiple laboratories, including his own, has repeatedly found asbestos in Cashmere Bouquet and that releasability tests confirm significant concentrations of airborne asbestos when talc products were used in a manner consistent with testimony of use. Mr. Fitzgerald concludes that plaintiff was exposed to significant amounts of asbestos through the use of dry talc in Cashmere Bouquet (Opp. Exh. 6).

Dr. Zhang reviewed Mr. Fitzgerald and Dr. Compton's analysis and plaintiff's description of her exposure history from the use of Cashmere Bouquet. Dr. Zhang determined that plaintiff's cumulative exposure to asbestos from the contaminated talc in Cashmere Bouquet was a contributing factor in the development of her malignant mesothelioma (Opp. Exh. 5).

In addition to her experts, plaintiff provides the report of William E. Longo, Ph.D. a Doctor of Philosophy in Materials Science in an unrelated case, wherein he conducted testing of Cashmere Bouquet for asbestos covering the same periods relevant to Ms. Hooper-Lynch (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 the past were more likely to have been exposed to significant airborne levels of asbestos (Opp. Exh. 13, pg. 18).

Plaintiff further relies on trial testimony in an action in California, *Winkel v. Calaveras Asbestos, Ltd. et al.*, Case No. BC549253, wherein Marie Capdevielle, a Worldwide Director of Occupational Health and Product Sustainability, testified that testing performed on talc from the Italian mines used in Cashmere Bouquet in 1974 showed asbestos contamination (Exh. 10, pgs. 691-692, 1062-1065).

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 credibility 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]).

Conflicting affidavits and testimony, and construing the evidence in a light most favorable to the plaintiff as the non-moving party, warrants denial of this motion for summary judgment sought by the defendant on the strict liability and negligence claims. There remain issues of fact as to whether plaintiff's use of defendant's product, Cashmere Bouquet, during the relevant period (1968-1985), caused her mesothelioma.

Accordingly, it is ORDERED that defendant, Colgate Palmolive Company's motion pursuant to CPLR §3212 for summary judgment dismissing plaintiff's claims and all cross-claims, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: December 10, 2018

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