# 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
STEVEN ANDREW COHEN, Individually and as Personal Representative of the Estate of SANDRA FLORENCE COHEN, deceased,
Plaintiffs,

- against -

AMERICAN BILTRITE INC., *et al.*,
Defendants.

INDEX NO. 190044/2016
MOTION DATE 06/27/2018
MOTION SEQ. NO. 007
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Imerys Talc America, Inc. and Cyprus Amax Minerals Company:

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1- 3 |
| Answering Affidavits — Exhibits | 4 - 6 |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Imerys Talc America, Inc. ("Imerys America") and Cyprus Amax Minerals Company's ("CAMC," hereinafter the "Moving Defendants") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against them, is granted. The Complaint and all cross-claims against the Moving Defendants are dismissed.

Plaintiff-deceased Florence Cohen, a New York school teacher and school guidance coordinator, was diagnosed with peritoneal mesothelioma in December 2015 and passed away in October 2017. Plaintiffs allege Mrs. Cohen was exposed to asbestos through the daily use of Colgate-Palmolive Company's Cashmere Bouquet talcum powder and Mennen talcum powder from the 1950s through 1970s, and Johnson & Johnson's Baby Powder for around ten (10) years (Opposition Papers Exs. 1, 3, 4). Plaintiffs commenced this action on February 22, 2016 to recover for injuries resulting from Mrs. Cohen's exposure to asbestos (Moving Papers Ex. 1).

Charles Mathieu, Inc. ("Charles Mathieu") was the exclusive supplier of talc used to manufacturer Colgate-Palmolive Company's Cashmere Bouquet during the years that Mrs. Cohen alleged exposure to the product. Charles Mathieu also allegedly supplied Italian talc used for Johnson & Johnson's Baby Powder during the relevant years (Opposition Papers Exs. 171, 172, 173, 174, 149). Whittaker, Clark & Daniels ("Whittaker") was the exclusive supplier of the cosmetic talc used to manufacture Mennen products until the 1980s (Moving Papers Ex. 6, and Downey Affidavit).

Charles Mathieu was owned and operated by Donald Ferry and Peter Bixby beginning in the 1930s (*Id* at Ex. 7). 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*). Charles Mathieu and Cyprus Mines Corporation ("Cyprus Mines") were competitors in the 1970s (*Id* at 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 (*Id* at Ex. 9). The initial contemplated stock acquisition was for $2.4 million

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

(Id). Cyprus Georesearch, Inc. offered an extra $1 million for all liabilities to remain with Charles Mathieu (*Id* at ITA-Herford 002591, 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 (*Id* at 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 (*Id* at Ex. 26). Rio Tinto purchased all outstanding stock from Cyprus Talc Corporation (*Id* at 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).

Defendant CMAC was created by the merger of Amax Inc. and Cyprus Minerals Company in 1993 (Downey Affidavit).

The Moving Defendants now move for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against them. The Moving Defendants contend 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 and Johnson & Johnson Baby Powder, or to Whittaker, Clark & Daniels, the exclusive supplier of the cosmetic talc used to manufacturer Mennen products, during the years that Mrs. Cohen was exposed to the product. Plaintiffs oppose the motion contending that issues of fact remain as to whether the Moving Defendants should assume successor liability due to the de facto merger exception. Furthermore, the Plaintiffs contend that the Moving Defendants failed to address their alleged liability from Johnson & Johnson's Baby Powder.

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]). 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]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (Vega v Restani Constr. Corp., 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 [2012]). 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]).

In New York, a corporation that acquires the assets of another is not liable for the torts of its predecessor (Schumacher v Richards Shear Co., 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 [1983]). There are four exceptions to New York's general rule on successor liability, as the successor may be "held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*Id*). New York declined to "adopt the product line exception" to the rule that a corporation that purchases another corporation's assets is not liable for the seller's torts since "extending liability to a corporate successor places responsibility for a defective product on a party that did not put the product into the stream of commerce," which is inconsistent with the justification for strict products liability (Semenetz v Sherling & Walden, Inc., 7 NY3d 194, 818 NYS2d 819, 851 NE2d 1170 [2006]).

The "De facto merger" and the "mere continuation" theories generally overlap and as a consequence, "no criteria can be identified that distinguish them in any useful manner"(Lumbard v Maglia, Inc., 621 F. Supp. 1529 [SDNY 1985]). "A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a "de facto" merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation" (Van Nocker v A.W. Chesterton, Co. (In re N.Y.C. Asbestos Litig.), 15 AD3d 254, 789 NYS2d 484 [1st Dept. 2005]).

Imerys America makes a prima facie showing of entitlement to judgment as a matter of law. None of the four exceptions apply to hold Imerys America liable for the torts of its predecessor. Imerys America cannot be considered a mere continuation of Charles Mathieu since Charles Matthieu survived the 1979 asset purchase agreement (Schumacher, *supra*). Cyprus Mines did not require Charles Mathieu to dissolve but rather it paid Charles Mathieu cash consideration for the assets it purchased along with hundreds of thousands of dollars in commissions over the course of a decade. The 1979 Agreement did not require Cyprus Mines to acquire Charles Mathieu's liabilities. Furthermore, Charles Mathieu continued its importation business independently throughout the 1980s and retained the right to sell talc to other customers in the event that Cyprus Mines did not make any purchases. Imerys America makes a prima facie showing that it is not liable for the alleged torts of Charles Mathieu as the 1979 Agreement was not a "de facto merger" or a "mere continuation."

CAMC makes a prima facie showing of entitlement to judgment as a matter of law. Cyprus Mines was the party to the 1979 Agreement. CAMC is not the successor of Cyprus Mines but rather a result of a merger between Cyprus Minerals and Amax Inc., and therefore, not a successor to Charles Mathieu.

The Plaintiffs are unable to raise any triable issues of fact. Plaintiffs contention that the talc supplied by the Imerys America's predecessor contained asbestos is unavailing. Even if true, the 1979 Agreement between Charles Mathieu and Cyprus Mines did not include the acquisition of Charles Mathieu's liabilities. None of the four exceptions to New York's aversion to successor liability theory apply here. Furthermore, Plaintiffs fail to contest with any evidence that CAMC is not a proper defendant.

Accordingly, it is ORDERED, that Defendants Imerys Talc America, Inc. and Cyprus Amax Minerals Company's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against them, is granted, and it is further,

ORDERED, that Plaintiffs' Complaint and all Cross-Claims against Defendants Imerys Talc America, Inc. and Cyprus Amax Minerals Company are severed and dismissed, and it is further,

ORDERED, that within fifteen (15) days of entry of this Order, the Defendants Imerys Talc America, Inc. and Cyprus Amax Minerals Company serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 3, 2018

MANUEL J. MENDEZ
*J.S.C.*

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE