English v Avon Prods., Inc.

2019 NY Slip Op 31402(U)

May 17, 2019

Supreme Court, New York County

Docket Number: 190346/2018

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
LINDA ENGLISH and PATRICIA RASSO,

Plaintiff(s),

- against -

AVON PRODUCTS, INC., *et al.*,

Defendants.

INDEX NO.	190346/2018
MOTION DATE	5/1/2019
MOTION SEQ. NO.	001
MOTION CAL. NO.	

The following papers, numbered 1 to 7 were read on this motion to vacate the Special Master's Recommendation and transfer this case from the In-Extremis cluster to the FIFO Docket:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: Yes X No

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

Upon a reading of the foregoing cited papers, it is ordered that defendant Colgate Palmolive Co.'s (hereinafter, "Colgate") motion to vacate the Special Master's Recommendation and transfer this case from the *In-Extremis* cluster to the FIFO docket is denied.

In February 2018, plaintiff-Linda English was diagnosed with peritoneal mesothelioma (*see* Aff. in Opp., Exh. A at 39, 43, 54, 57-8, 268). Plaintiffs allege that Ms. English was exposed to asbestos from the talc contained in Desert Flower and Cashmere Bouquet products which Ms. English used for many years. In August 2018, Ms. English and her wife, Ms. Rasso, filed suit in NYCAL seeking to hold various producers of cosmetic talcum powder products liable for the alleged presence of mesothelioma-causing asbestos in those products (*see* Aff. in Opp., Exh. E). In October 2018, plaintiffs amended their complaint to assert the same allegations of negligence and strict products liability against Colgate for the asbestos contained in Cashmere Bouquet (*see* Aff. in Opp., Exh. E). Given that Ms. English is alive and suffering from terminal mesothelioma and that the record indicates that a significant portion of her exposure occurred in New York, this case was granted trial preference and placed in the April 2019 *In-Extremis* group.

In February 2019, Colgate applied to the NYCAL Special Master to remove this case from the *In-Extremis* group and place it in a FIFO cluster, arguing that the case lacked a sufficient and requisite nexus to New York. (*see* Aff. in Opp., Exh. F). Plaintiffs opposed the request, asserting that the evidence reflected that Ms. English was exposed many times in New York City to products alleged to contain asbestos. Therefore, under case law and prior rulings of the NYCAL Special Master, there was enough preliminary evidence to support this case's inclusion in the *In-Extremis* group. (Aff. in Opp., Exh. F). Ultimately, the Special

Master found in favor of the plaintiffs and rejected Colgate's application to remove the case from the *In-Extremis* group and place it in a FIFO cluster.

The record also provides in relevant part that Ms. English testified that from about 1950-2006 she used a variety of cosmetic talcum powder products on a regular and frequent basis as part of her daily personal care routine (*see* Aff. in Opp., Exh. A, at 71-73, 82, 86-88, 90, 101-3, 214-21, 230, 233, 236, 240, 244, 249). Ms. English stated that from 1963 until about 1984 she used Cashmere Bouquet and Desert Flower every day after she showered and before she went out. (Aff. in Opp., Exh. A at 121-2).

In 1966, Ms. English began her thirty-three-year career as a flight attendant for Delta Airlines (Aff. in Opp., Exhs. B, C, and A at 22). From 1966 to 1984, Ms. English flew exclusively domestic routes to cities across the United States. (Aff. in Opp., Exh. A, at 135, 254-5). From 1984 until her retirement, Ms. English flew international flights around the world (Aff. in Opp., Ex. A at 137). Over the course of the eighteen-year period Ms. English was flying domestic routes, she frequently staffed flights in and out of New York City (Aff. in Opp., Exh. A at 119, 253, 256). Ms. English could not recall a flight to New York ever being a "turnaround flight" and, thus, she found herself on a one or two-night layover in New York City three to four times per month for eighteen years. (Aff. in Opp., Exh. A at 118-9, 256-7, 270). At her deposition, Ms. English testified that she spent so many nights in New York, she could not count them all. (Aff. in Opp., Exh. A at 118-9). On one additional occasion when Ms. English started flying international routes with Delta, she spent a three-day layover in New York. (Aff. in Opp., Exh. A at 137). Ms. English stated that she used Colgate's Cashmere Bouquet and Desert Flower, alternately, as well as Johnson's Baby Powder every day she was in New York City from 1966 to 1984, and again during the three-day layover from the international flight. (Aff. in Opp., Exh. A at 119, 137-42, 269).

Ms. English stated that ever since her high school graduation these products were integral components of her daily routine. (Aff. in Opp., Exh. A at 103, 257-8, 269). She stated that she followed the same personal care routine when she was on the road as when she was at home (Aff. in Opp., Exh. A at 258). Throughout the years, there was very little variation in this routine. (Aff. in Opp., Exh. A, 230-48). Any variation to the routine essentially consisted of using Cashmere Bouquet when she was not otherwise using Desert Flower; in addition to one of these two products she also always used Johnson's Baby Powder. (Aff. in Opp., Exh. A, at 269). Ms. English stated that she never tried different brands or generic versions of the talcum powder products she had been accustomed to using (Aff. in Opp., Exh. A, at 247). With regard to Cashmere Bouquet specifically, she testified to using Colgate's talc products "all the time." (Aff. in Opp., Exh. A, at 276). Lastly, on each of the days that Ms. English spent on an overnight layover in New York City, she testified that she had and used Cashmere Bouquet or Desert Flower, as well as Johnson's Baby Powder. (Aff. in Opp., Exh. A at 269-70).

Defendant now moves to vacate the Special Master's Recommendation and transfer this case from the *In-Extremis* cluster to the FIFO docket, essentially arguing that NYCAL and CMO procedures were not properly followed when the Special Master assigned the case to the *In-Extremis* group. Plaintiff opposes the motion claiming that NYCAL and CMO procedures were properly followed and that the evidence on record so far sufficiently supports having this case assigned to the *In-Extremis* group.

The current NYCAL CMO defines the proper necessary criteria for placing an action on the "Accelerated Docket" or the so-called "*In-Extremis* group": "the Accelerated Docket is comprised of actions brought by plaintiffs who are terminally ill from an asbestos-related disease with a life expectancy of less than one year or who have a diagnosis of mesothelioma" (NYCAL CMO § XIV[B]).

On the other hand, defendant argues that the CMO has, in conjunction with case law, instead established the following fundamental criteria for being placed on the *In-Extremis* calendar:

> "(1) the plaintiff must be terminally ill; and (2) his/her claim must have a sufficient nexus with New York City."

An objection based on these criteria is colloquially referred to as a "forum objection" which simply refers to an objection to a case being included in an *In-Extremis* Trial Cluster instead of the FIFO group.

Colgate also argues four main points to show that these two previously mentioned criteria are not met in this case and more generally advocates that special-new criteria should be developed for deciding "forum objections" in cosmetic talc cases. First, Colgate contends that talc cases are not asbestos cases because the products in talc cases were not formulated to contain asbestos. Second, Colgate argues that unlike in traditional asbestos and Brooklyn Navy Yard cases where there are ways to independently verify whether a plaintiff was really in New York State, it will not be able to do so in this case. Third, Colgate claims that the length of time and quality of exposure test that has historically been used in traditional asbestos cases cannot be translated to a cosmetic talc case. Fourth, Colgate maintains that unlike in a traditional asbestos or navy case, where the products at issue served to benefit New York City in some way, here the City has never derived benefit from the personal care routine through which Ms. English claims to have suffered asbestos exposure.

Lastly, Colgate argues that to allow this case to have *In-Extremis* preference simply because Ms. English carried the product at issue with her into New York City during her visits would be detrimental to the processes and procedures of NYCAL. More specifically it would open the door to trial preference for virtually any visitor, tourist, or individual who happened to come New York for a vacation, business trip, conference, school event, or many other such reasons.

Plaintiffs reject defendant's reasons for advocating that a new test should be developed for deciding "forum objections" in cosmetic talc cases because

they claim that defendant's reasons for advocating for such a new test are deeply flawed. More specifically, plaintiffs respond to defendant's first claim that talc cases are not asbestos cases by stating that Colgate misses the point entirely by making such a claim. This is because plaintiffs seek to hold Colgate liable under a negligence and strict products liability theory precisely because the Cashmere Bouquet powders that Ms. English used are alleged to have contained asbestos when they were not supposed to contain it.

Plaintiffs refute Colgate's second claim that it cannot verify the frequency with which Ms. English was in New York, let alone if and when she was there and used the powders at issue. Specifically, plaintiffs counter that a plaintiff's testimony about the asbestos exposures he or she experienced is evidence of those exposures. Moreover, the strength of such evidence may be challenged at trial by a defendant based on whether the testimony can be corroborated.

Plaintiffs put forth that Colgate's third argument regarding the length of time and quality of exposure test evinces a misunderstanding of the NYCAL case law and recommendations regarding the forum objection test. Notably, plaintiffs claim that Colgate's view of the forum objection analysis in NYCAL appears to be rooted in the incorrect assumption that just because each distinct application of asbestos-containing talc occurs over a short period of time, the overall resulting asbestos exposure is insignificant. Even so much that even with 800 distinct uses in New York, the required "nexus" would not be established.

Plaintiffs challenge Colgate's fourth argument regarding New York City not having derived benefit from the personal care routine through which Ms. English claims to have suffered asbestos exposure. Plaintiffs state that this contention appears to be a misstatement of the law and legal analysis at play here. Specifically, plaintiffs contend that the contention seems to be loosely based on arguments normally raised in motions to dismiss on grounds of forum non conveniens where a State's interest in subject litigation could actually be relevant to a court's decision to maintain jurisdiction over the case.

Lastly, plaintiffs argue that allowing this case to be in the *In-Extremis* group will not lead to a flood of litigation being placed in the *In-Extremis* group. This is because plaintiffs claim that this contention grossly exaggerates and fails to recognize that placement of this case on the Accelerated Docket and any other case like it will hinge upon the facts of the specific case in question. Also, plaintiffs contend that the rules which allow this case a trial preference have existed in NYCAL for decades without completely overrunning the Accelerated Docket with claims by tourists.

A plain reading of the previously mentioned, relevant CMO provision shows that the following criteria must be met for a case to be placed on the *In-Extremis* calendar: (1) plaintiff must be terminally ill from an asbestos-related disease with a life expectancy of less than one year; or (2) he/she must have a diagnosis of mesothelioma (*see* NYCAL CMO § XIV[B]). The above preliminary criteria are sufficiently met based on the evidence on record thus far (discussed, *supra*) and CMO and NYCAL procedures have, therefore, been properly followed in assigning this case to the *In-Extremis* group.

Accordingly, defendant Colgate Palmolive Co.'s motion to vacate the Special Master's Recommendation and transfer this case from the *In-Extremis* cluster to the FIFO docket is denied, and it is further

ORDERED that the Special Master's recommendation allowing this case to be on the *In-Extremis* cluster is confirmed.

ENTER:

Dated: May 17, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **x NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**