

Rothlein v American Intl. Indus.
2020 NY Slip Op 30124(U)
January 13, 2020
Supreme Court, New York County
Docket Number: 190374/2016
Judge: Manuel J. Mendez
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ASUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

SHARON ROTHLEIN and JENNIFER D. ROTHLEIN
N/K/A JENNIFER D. ANSELL, as Personal
Representative of the Estate of EDWARD
ROTHLEIN, Deceased,

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

190374/2016
12/18/2019
016

Plaintiffs,

- against -

AMERICAN INTERNATIONAL INDUSTRIES, for its
Clubman and Clubman Brand, et al.,

Defendants.

The following papers, numbered 1 to 10 were read on this motion pursuant to CPLR §3212 for summary judgment by American International Industries:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8 - 10</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Whittaker Clark & Daniels Inc.'s (hereinafter "WCD") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it based on lack of product identification, is granted only as to dismissing plaintiffs' claims against Whittaker Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to Johnson & Johnson and Johnson & Johnson Consumer Inc. (hereinafter "J & J") for use in Johnson & Johnson's Baby Powder, and to Colgate-Palmolive Company (hereinafter "Colgate") for use in Cashmere Bouquet talcum powder products. The remainder of the relief sought in this motion is denied.

On or about October of 2016, plaintiff, Edward Rothlein (hereinafter decedent), was diagnosed with peritoneal mesothelioma, he died on October 17, 2018. Plaintiffs allege the decedent's exposure - as relevant to this motion - is from the talc supplied by WCD for use by Shulton, Inc. in Old Spice talcum powder, The Mennen Company for use in Mennen talcum powder and by Neslemur Company or American International Industries (hereinafter "All") for use in Clubman talcum powder products. Plaintiffs allege that Mr. Rothlein was exposed to the asbestos in the talc supplied by WCD from about 1959 through 1995.

At his deposition the decedent testified that he used Old Spice face powder to shave from about 1959 and used it through 1972. He stated that he started using Old Spice as part of his shaving routine, when he was thirteen or fourteen years old. Decedent stated that he continued using Old Spice while he was still living in his parents house in Queens, New York when he went to college from fall of 1964 through 1968. Decedent stated that he got married in 1969, moved to Forest Hills, New York and gradually stopped using Old Spice between 1972 and 1973. He stated that the Old Spice talcum powder came in an off-white glass dispenser (Mot. Exh. D pgs. 157-166, and 192-193, and Opp. Exh. 2, pg. 31). Decedent stated that the bottle had a picture of a sailing ship on the front of it and said "Old Spice" someplace on it. Decedent testified that he used the Old Spice talcum powder on his face initially once or twice a week and then as the frequency of shaving changed, he used Old Spice talcum powder about five days a week. He

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

did not shave on weekends. He stated that he would sprinkle some powder in his hands and then pat the powder on his face. Decedent testified that the powder would go up in the air and he breathed it in as he applied it (Opp. Exh. 2, pgs. 31-35).

Decedent testified that starting around 1973 through 1982 he used Mennen talcum powder. He described the container as white with a big green label that said "Mennen talc" in block letters and had a sprinkle top. He testified that the bottle said it was "bath talc." Decedent testified that he would apply a dime size amount to his face, then shake a little more on his hand about coin size, as in the size of a dime, a nickel or a quarter, and spread it around on his body. Decedent described Mennen talcum powder as off-white and a little coarser, not silky or smooth. He estimated that one bottle of Mennen bath talcum powder would last about three or four weeks (Mot. Exh. D, pgs. 193-194, 196-199, 201-202, 209-210 and 224 and Opp. Exh. 2, pgs. 54-56).

Decedent stated that he used Clubman talcum powder starting around 1982 until 1995. He described the Clubman talcum powder package as green plastic with a twist shaker top that had holes in it. He stated the Clubman talcum powder package had a picture of a gentleman with a top hat and tails and said "Clubman." He did not know who made the product. Decedent described the Clubman talcum powder as white, very fine and "silky." (Mot. Exh. D, pgs. 202-203, 209-211, 219-221 and 224-225).

Decedent testified that he used a dime sized amount of the Clubman talcum powder on his face and a little more than a quarter sized amount on his body. He stated that after pouring it into his hands he rubbed the talcum powder in his hands together and then patted his face with his hands. Decedent claimed that the process would create "powder dust." He testified that he used the talcum powder on his body after bathing, three to four times a week, and it would take one or two minutes to apply. Decedent stated that he poured it into his hands and then spread it over his body. Decedent had a moustache and he tried not to get the talcum powder in it, but claimed there was dust from the powder because the mustache was always full. He claimed he had to comb or brush out the mustache for a half to a full minute to remove the Clubman talcum powder from it. Decedent claimed he used Clubman talcum powder because the smell reminded him of an old barbershop (Mot. Exh. D, pgs. 202-203 and 210-211 and 214-218 and Opp. Exh. 2, pgs. 58-60).

Plaintiff, Mrs. Sharon Rothlein (surviving spouse), stated at her deposition that she also used Clubman talcum powder on herself and observed the same picture of a man and the words "Clubman Talc" on the package. Mrs. Rothlein testified that she observed her husband use the Clubman talcum powder after shaving (Opp. Exh. 3, pgs. 51, 54, 58, 106, 116, 120 and 142).

Plaintiffs commenced this action on December 8, 2016 to recover for injuries from the decedent's exposure to asbestos from the defendants' products. The complaint was subsequently amended twice to add additional defendants (Mot. Exh. A). WCD served and filed an Acknowledgment of Service to plaintiffs' complaint on January 6, 2017 (Mot. Exh. B).

WCD now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' claims and all cross-claims against it based on lack of product identification.

At oral argument on this motion plaintiffs did not oppose the relief sought by WCD as to J&J and Colgate's talc products. Plaintiffs only oppose summary judgment as to the claims of decedent's exposure to WCD's alleged asbestos containing talc used by Shulton, Inc. in Old Spice talcum powder from 1959 through 1972, The Mennen Company for use in Mennen talcum powder from 1972 through 1982, and in Clubman talc manufactured by Neslemur Company and All

from 1982 through 1995. WCD withdrew the part of the motion applying to asbestos content and causation and only seeks summary judgment on lack of product identification.

Plaintiffs argue that this motion should be denied as untimely and procedurally defective because it has been filed over a year after the Note of Issue was filed on September 27, 2018 (Opp. Exh. 70).

WCD previously filed a motion by Order to Show Cause seeking summary judgment under Motion Sequence 015, the motion was scheduled for oral argument on May 22, 2019 (NYSCEF Doc. # 960), July 24, 2019 and July 31, 2019, and was adjourned at plaintiffs' request (Reply Exhs. D and E). Oral argument was then scheduled for September 25, 2019. The Part was closed due to exigent circumstances on September 25, 2019, the scheduled oral argument date, and pending motions were taken on submission. WCD withdrew the motion filed under Motion Sequence 015 on September 25, 2019, to obtain oral argument when the Part re-opened (Opp. Exh. 67). WCD subsequently filed this motion by Order to Show Cause for summary judgment under Motion Sequence 016, to expedite the submission of papers (NYSCEF Doc. # 1297).

WCD has good cause for re-filing the summary judgment motion due to the prior motion being adjourned on plaintiffs' behalf and the Part being closed. WCD withdrew the prior summary judgment motion (Mot. Seq. 015) and filed this motion to obtain oral argument so that potential liability could be "disposed of without burdening the resources of the court and movants" (*Rotante v. Advance Transit Co., Inc.*, 148 AD 3d 423, 49 NYS 3d 391 [1st Dept. 2017] citing to *Varsity Transit v. Board of Education of City of New York*, 300 AD 2d 38, 752 NYS 2d 603 [1st Dept., 2002]).

Plaintiffs state that WCD has added an additional paragraph and repackaged the motion (Opp. Exh. 70). Plaintiffs' opposition papers address WCD's additional paragraph and the related arguments. Plaintiffs have not shown that they were prejudiced by WCD's withdrawal and re-submission of the motion for summary judgment.

WCD argues that plaintiffs cannot provide evidence or raise an issue of fact as to WCD's liability as a supplier of talc sold to Shulton, Inc. from 1959 through 1972, The Mennen Company from 1973 through 1982, and Neslemur Company or All from 1982 through 1995.

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 non-moving 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]).

WCD claims that there is no evidence of the formulas used to blend the Old Spice, Mennen or Clubman talcum powder used by the decedent during the relevant exposure period of 1959 through 1995. WCD argues that plaintiffs cannot provide evidence or otherwise show that as the supplier of talc to Shulton, Inc., The Mennen Company, and Neslemur Company and All, it's talc was used in Old Spice, Mennen or Clubman talcum powder products during the decedent's relevant exposure period, or that the talc was contaminated.

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 the causation of 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]). WCD must unequivocally establish that the decedent was either not exposed to asbestos from the talc it supplied to Shulton Inc., The Mennen Company, Neslemur Company or All for use in talcum powder products used by the decedent during the relevant time periods, or that the levels of asbestos decedent was exposed to was not sufficient to contribute to the development of his 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]).

WCD's arguments that plaintiffs lack evidence, are conclusory and amounts to "pointing to gaps in plaintiff's proof," which fails to state a prima facie basis to obtain summary judgment.

WCD must first meet its prima facie burden before plaintiffs are required to provide any evidence to raise an issue of fact. On WCD's motion seeking summary judgment, it is not the plaintiffs' burden to prove their allegations that decedent was exposed to asbestos contaminated talc supplied by WCD during the relevant time periods. "The fact that some talc might be asbestos-free does not eliminate the possibility that plaintiff was exposed to defendant's asbestos containing product" (*See Feinberg v. Colgate-Palmolive Co. (In re New York City Asbestos Litigation)*, 53 Misc. 3d 579, 39 N.Y.S. 3d 629 [Sup. Ct., New York County, 2016] citing to *Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, supra at 521).

WCD's argument that the specific bottles of their products used by the decedent were not tested and that there is no direct evidence of exposure to asbestos, is unavailing. Plaintiffs are not required to show the precise causes of their damages, but only show facts and conditions from which 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], *Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, supra at pg. 448, and *Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

WCD does not deny that it sold talc to The Mennen Company from 1975 through 1982 (Mot. Exh. S), or that it sold talc to Neslemur from 1982 through August 13, 1987, when the company was purchased by All, and that it sold talc to All from 1987 through 1995 (Mot. Exhs. T and U). WCD states that the talc grades sold to Neslemur and All during the relevant time period of 1982 through 1995 included 123, 128, 1615, 1625, 1745 1748, 4609, 4613, 4619 and 4628. WCD claims that it does not have any sales records prior to 1975, and argues that since the records do not exist, plaintiffs cannot establish that it is the supplier of talc to Shulton Inc., during the period relevant to decedent's exposure of 1959 through 1972, or to Mennen Company for use in Mennen talcum powder from 1973 through 1975.

In opposition plaintiffs provide the testimony of Wilfred Kaezig, a warehouse operator for Shulton, Inc. in Mays Landing, New Jersey from 1963 through 1991. Mr. Kaezig testified that during his employment, Shulton, Inc., had a "blanket purchase order" with WCD covering a one year period, which would be filled-in with the specifics by the purchasing department as each delivery truck dropped off the talc. He testified that there were contingent suppliers that were used very little, for example if something happened at a mine, and that ninety-nine

percent of the talc provided to Shulton Inc., for its various talcum powder products, including Old Spice, were provided by WCD. He stated that he was knowledgeable about WCD's supplying talc to Shulton Inc., because he read the "blanket purchase order" information that was provided to the purchasing department (Opp. Exh. 80, pgs. 79-81).

Plaintiffs also provide the April 11, 2013 testimony of WCD representative Mr. Theodore Hubbard, wherein he states that older records ("data sheets") representing sales from the period of 1960 through 1980 to Shulton were located and he was able to identify WCD's sale of talc grades 1615 from Italy, 2460 from North Carolina, and 141 from Alpine Alabama (Opp. Exh. 77, pgs. 61-62).

Plaintiffs provide The Mennen Company's formula card from 1962 which shows at that time the company was using Italian and North Carolina talc purchased from WCD under grades 1600 and 829 (Opp. Exh. 68). Plaintiffs also provide the February 23, 2016 testimony of Daniella Urbach-Ross, Ph.d., a corporate representative of The Mennen Company, wherein she states that in 1959 the company was using WCD purified talc grades 1600 and 778 from Italy and North Carolina (Opp. Exh. 67, pgs. 229-232). Plaintiffs refer to this Court's November 13, 2019 Decision and Order on The Mennen Company's motion for summary judgment (Mot. Seq. 013), wherein it is noted that The Mennen Company relied on the testing of its supplier WCD (Opp. Exh. 75, pg. 6). Mennen's motion papers refer to Exhs. 18 and 62 as demonstrating the company used mostly Italian talc purchased from WCD during the period relevant to the decedent's exposure (NYSCEF Docs. # 757, pg. 4, #779 and # 822).

Plaintiffs also refer to the November 20, 2014 testimony of All's corporate representative, Mr. Charles Loveless. He testified that WCD was the only supplier of the talc to All for use in Clubman talcum powder from August 13, 1987 through 2003, and that the same was true prior to August 13, 1987 (the period Neslemur manufactured Clubman talcum powder) (Opp. Exh. 6, pgs. 18-20). Plaintiffs provide the August 8, 2016 testimony of WCD's corporate representative, Theodore Hubbard, wherein he states that the sales records show that the 1745 talc, which plaintiffs allege was sold to All, was used in Clubman talcum powder during the period relevant to decedent's use, came from a mine in Montana (Opp. Exh. 7, pgs. 77-79). Plaintiffs argue that WCD's own sales records reflect that it supplied talc grades 1616 - Italian talc, 4619 - North Carolina talc, 4609 Willow Creek blend talc, and 123 Alpine Alabama talc to Neslemur from 1979 through 1985 (Opp. Exh. 10).

"In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant's product" (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff need "only show facts and conditions from which defendant's liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (Oken v A.C. & S. (*In re N.Y.C. Asbestos Litig.*), 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Plaintiffs, as the non-moving party, are entitled to the benefit of all favorable inferences regardless of WCD's argument that they are unable to provide sufficient proof of their allegations of decedent's exposure to asbestos contaminated talc it supplied to Shulton Inc., The Mennen Company, Neslemur and All. To the extent the decedent provided contradictory testimony, as to the use of the Old Spice, Mennen and Clubman talcum powder products, that presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1st Dept., 1999]).

There remain issues of fact as to decedent's exposure to asbestos contaminated talc sold by WCD to Shulton Inc., The Mennen Company, Neslemur and All for use in Old Spice, Mennen and Clubman talcum powder products during the relevant time period. Plaintiffs have sufficiently raised credibility issues and issues of fact as to product identification, warranting denial of summary judgment.

Plaintiffs have also raised issues of fact on their claim for punitive damages. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent WCD argues it has closed its traditional business operations effective 2004 and does not sell minerals, that does not preclude the imposition of punitive damages as a deterrent.

Plaintiffs' state that WCD conducted testing and found both asbestos in its talc throughout the 1970's and continued to advocate for the use of its talc as uncontaminated and for the use of XRD testing that would not be able to find any asbestos. Plaintiffs have raised an issue of fact related to whether WCD placed corporate profits and reputation above the health and safety of the decedent, which together with WCD's continued insistence that there is no asbestos in its talc, requires that the decision to give the jury a charge on punitive damages be determined by the trial judge after submission of all evidence.

ACCORDINGLY, it is ORDERED that Whittaker Clark & Daniels Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, based on lack of identification, is granted only as to dismiss plaintiffs' claims against Whittaker Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to Johnson & Johnson and Johnson & Johnson Consumer Inc. for use in Johnson & Johnson's Baby Powder, and to Colgate-Palmolive Company for use in Cashmere Bouquet talcum powder products, and it is further,

ORDERED that plaintiffs' claims asserted against Whittaker Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to Johnson & Johnson and Johnson & Johnson Consumer Inc. for use in Johnson & Johnson's Baby Powder, and to Colgate-Palmolive Company for use in Cashmere Bouquet talcum powder products are severed and dismissed, and it is further,

ORDERED that the motion pursuant to CPLR §3212 to dismiss the claims asserted against Whittaker, Clark & Daniels for the sale, distribution or supply of asbestos contaminated talc to Shulton, Inc. for the use in Old Spice talcum powder from 1959 through 1972, Mennen Company for the use in Mennen talcum powder from 1973 through 1982, and Neslemur and American International Industries for the use in Clubman talcum powder from 1982 through 1995 is denied, and it is further,


ORDERED that the remainder of plaintiffs' claims asserted against Whittaker Clark & Daniels, including for the sale, distribution or supply of asbestos contaminated talc to Shulton, Inc. for use in Old Spice talcum powder from 1959 through 1972, Mennen Company for use in Mennen talcum powder from 1973 through 1982, Neslemur and American International Industries for use in Clubman talcum powder from 1982 through 1995 remain in effect, and it is further,

ORDERED that Whittaker, Clark & Daniels is directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the remaining parties, the General Clerk's Office and the County Clerk's Office, who are directed to mark their records accordingly, and it is further,

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

Dated: January 13, 2020



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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