

Luca v American Intl. Indus.
2020 NY Slip Op 31609(U)
May 27, 2020
Supreme Court, New York County
Docket Number: 190317/2016
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

**MARIANN LUCA, Individually and GAETANO LUCA,
As Executor of the Estate of VINCENT LUCA,
Deceased,**
Plaintiffs,

INDEX NO. 190317/2016
MOTION DATE 05/01/2020
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

-against-

AMERICAN INTERNATIONAL INDUSTRIES, et al.,
Defendants.

The following papers, numbered 1 to 10 were read on this motion by Whittaker, Clark and Daniels, Inc. pursuant to CPLR §3212 for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause C Affidavits C Exhibits...	<u>1- 4</u>
Answering Affidavits C 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 and Daniels, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it is denied.

Plaintiff, Vincent Luca (hereinafter decedent), was diagnosed with malignant epithelioid mesothelioma on or about July of 2016 and died on February 9, 2018 (Opp. Exh. 3). Plaintiffs allege that the decedent's exposure to asbestos - as relevant to this motion - is from asbestos containing talc that was supplied by Whittaker, Clark and Daniels, Inc. (hereinafter "WCD") and used in Clubman talcum products. Plaintiffs allege that the decedent was exposed to WCD's asbestos contaminated talc from about 1960 through 2016.

At his deposition the decedent testified that he was born in 1935 and lived in the Maletto part of Sicily, Italy, until about 1960 when he emigrated to the United States. He stated that starting in about 1961 he used Clubman talcum powder while working in barbershops in New Jersey and in New York until 2016 (Mot. Exh. D, pg. 284, Opp. Exh. 1, pgs. 7-8, 11 and 25-28).

Decedent stated that he initially worked in a barbershop in Hackensack, New Jersey, then he went to work at a barbershop in Manhattan, near Macy's Department Store for a few weeks. He testified that in 1962 he started working at Frank's Barbershop on Varick Street and stayed there until about 1975, when he opened his own barbershop in Brooklyn. Decedent stated that although he retired around 2007

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

he continued working in his barbershop part-time, for a few hours per week, through 2016 (Opp. Exh. 1, pgs. 26-27 and 46). Decedent stated that during the relevant period he kept the shop open from 8:00 a.m. through 6:00p.m., six days a week and then five days a week until his retirement in 2007 (Opp. Exh. 1, pgs. 42-43 and 46).

Decedent described how he used Clubman talcum powder at his barbershop to shave and cut his customer's hair. He testified that after shaving he would use a second hot towel to apply lotion to the customer's face, then he would apply Clubman talcum powder to the towel and spread the powder all over the customer's face. Decedent stated that after he cut hair, he would shave the neck and apply Clubman talcum powder to a towel and a brush, then he put it on the customer's neck. Decedent recalled that Clubman talcum powder had a scent he liked and when it was applied to the customer it created a cloud that would fill his nose and mouth. He stated that he also would sweep up and when he swept the floor he observed a cloud of dust that smelled of Clubman talcum powder. He observed this while sweeping and when he dumped the debris into the garbage pail. Decedent testified that at the end of the day he would shake out the jacket he wore at the barbershop making the powder come up, creating a cloud of dust that smelled like Clubman talcum powder (Opp. Exh. 1, pgs. 27-28, 34-35 and 44-46).

Plaintiffs commenced this action on October 20, 2016 to recover for damages resulting from the decedent's exposure to asbestos from the defendants' products. The complaint was subsequently amended five times to add additional defendants and the Fifth Amended Complaint was amended on June 10, 2019 to add a cause of action for wrongful death and survival damages (NYSCEF Doc. No. 1, and Mot. Exhs. A and C). On January 6, 2016 WCD filed an "Acknowledgment of Service" (Mot. Exh. B).

WCD now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Complaint and all cross-claims against it.

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, 89 NY 2d 833, 675 NE 2d 458, 652 NYS 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving 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 NY 2d 525, 571 NE 2d 645, 569 NYS 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 AD 2d 583, 677 NYS 2d 136 [1st Dept. 1998]).

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 Neslemur and American International Industries (hereinafter "American") because there is no evidence of the formula used to blend Clubman talcum powder during part of the relevant exposure period from 1960 through 1987. WCD also argues that plaintiffs cannot provide evidence or otherwise show the decedent had second-hand exposure to WCD's talc in Clubman talcum powder during the relevant exposure period, warranting summary judgment.

WCD argues that plaintiffs' experts rely on mere speculation and conjecture for their conclusion the decedent used Clubman talcum powder that contained trace amounts of asbestos from its talc. WCD further argues that: (1) plaintiffs cannot prove general or specific causation, (2) that there is no scientific evidence establishing the amount, percentage, weight or quantity of asbestos in any container allegedly used by the decedent; and (3) that plaintiffs cannot raise any issues of fact that the decedent was exposed to asbestos contaminated talc or that it is liable for exposure from talc sold and distributed by WCD occurring before 1979 or after 2004.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 AD 3d 516, 38 NYS 3d 797 [1st Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 AD 3d 575, 27 NYS 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 AD 2d 462, 622 NYS 2d 946 [1st Dept., 1995], *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 AD 3d 498, 1 NYS 3d 20 [1st Dept. 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 AD 3d 841, 57 NYS 3d 766 [3rd Dept., 2017]). WCD must unequivocally establish that the decedent was either not exposed to asbestos from the talc it sold that was used to make Clubman talc, or that the levels of asbestos he was exposed to were insufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 AD 3d 520, 997 NYS 2d 381 [1st Dept., 2014]).

WCD's arguments pertaining to plaintiffs' experts alleged reliance on mere speculation and conjecture for their conclusions that the talc sold by WCD contained trace amounts of asbestos, amounts to pointing to gaps in proof and are not a prima facie basis to obtain summary judgment or partial summary judgment on the punitive damages claim. Furthermore, WCD's arguments that plaintiffs lack evidence, also amounts to "pointing to gaps in plaintiff's proof" and fails to make a prima facie case to obtain summary judgment.

WCD's argument that the specific bottles of Clubman talcum powder used by the decedent were not tested and that there is no direct evidence of exposure to asbestos from the talc it sold, is unpersuasive. 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 AD 3d 285, 776 NYS 2d 253 [1st Dept. 2004], *Parker v. Mobil Oil Corp.*, 7 NY 3d 434 at pg. 448, 857 NE 2d 1114, 824 NYS 2d 584 [2006], and *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY 3d 762, 9 NE 3d 884, 986 NYS 2d 389 [2014]).

The burden is on WCD to prove that none of American or Neslemur's Clubman talcum powder products used by the decedent during the relevant time period contained any talc supplied, sold or distributed by WCD, or that the talc sold, distributed or supplied by WCD did not contain asbestos. The burden does not shift to the plaintiffs until WCD makes a prima facie case.

WCD concedes that it sold and distributed talc grade numbers 123, 128, 1615, 1625, 1745, 1748, 4609, 4613, 4619 and 4628 to Neslemur during the relevant period of 1975 to 1987 (Mot. Exh. F). Plaintiffs provide the August 8, 2016 testimony of Mr. Theodore Hubbard, corporate representative of WCD, who explained that grade number 123, produced by American Talc Company, contained talc mined in Alpine Alabama; 1615, produced by Metropolitan Talc, contained talc mined in Val Chisone, Italy; 4619, produced by Clark Minerals, contained talc mined in Montana which was provided by Pfizer; and 4628 came from Metropolitan Talc and contained talc mined from three different ores in Italy and Montana. He was uncertain about the talc graded 4609. Mr. Hubbard, on behalf of WCD, also testified that the sales records show that the 1745 talc, sold to American for use in Clubman talcum powder, was from Barrett's Mineral's Inc. and came from a mine in Montana. He states that WCD first started testing cosmetic talc for asbestos in 1971 (Opp. Exh. 6, pgs. 74-79, pgs. 167-169 and Opp. Exh. 8, pg. 311).

Plaintiffs provide the March 29, 1995 deposition testimony of George Dippold, WCD's corporate representative, who states that talc was purchased from American Talc Company from 1949 through the 1970's (Opp. Exh. 11, pgs. 88-92). Plaintiffs provide the September 8, 2011 deposition testimony of Keith Lehman, an employee of Metropolitan Talc Company (hereinafter "Metropolitan") from 1973 through September of 1979, who states that when he worked for Metropolitan it processed talc and made blends for WCD. Mr. Lehman states that the only source for 1615 Italian talc was Val Chisone, Italy (Opp. Exh. 13, pgs. 19-21, 25-26 and 74).

On August 28, 2015 Mr. Hubbard testified that in May of 1979 WCD sold fifty bags weighing fifty pounds a piece of talc to Neslemur, and that twenty-two of the fifty-pound bags of 1615 talc was sold by WCD to Neslemur in July of 1982. He stated that in December of 1981 forty-four fifty-pound bags of 1615 talc was sold by WCD to Neslemur. He stated that eight hundred bags of 4628 talc were sold to Neslemur in February of 1979 and there were shipments of the 4628 talc from March of 1977 through January of 1979, most of them were of eight hundred fifty-pound bags. Plaintiffs claim that Mr. Hubbard's testimony establishes that WCD supplied eleven tons of cosmetic grade talc to Neslemur (Opp. Exh. 4, pgs. 157-158, 161, 164-165, 171-172 and 174-175). Plaintiffs also provide copies of sales records as further proof of WCD's sales of talc to Neslemur and American (Opp. Exh. 5).

Plaintiffs provide the affidavit of American's Executive Vice-President, Charles Loveless, he states that American was supplied with cosmetic or pharmaceutical grade talc from Whittaker Clark and Daniels ("WCD") starting in 1987 (Opp. Exh. 7). Plaintiffs state that WCD provided talc to American through 2003, who starting in 2004 was known as Brenntag Specialties, Inc. or Brenntag North America, Inc. (hereinafter referred to as "Brenntag") (Opp. Exh. 6, pgs. 77-78).

WCD argues that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and *In the Matter of New York City Asbestos Litigation (Juni)*, 32 NY 3d 1116, 116 NE 3d 75, 91 NYS 3d 784 [2018], because plaintiffs are unable to establish general and specific causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (Parker v. Mobil Oil Corp., 7 NY3d 434, 448, supra).

WCD claims that the expert reports of Mr. Alan M. Seagrave, P.G., Kenneth A. Mundt, Ph.D., FACE, Robert C. Adams MS, CIH, CSP, FAIHA and Michael Graham, M.D., establish that no causal relationship exists between the talc used in Clubman talcum powder and the decedent's development of mesothelioma. WCD argues that the decedent was not exposed to asbestos from talc used in Clubman talc eliminating any general causation. WCD further argues that the decedent's source of exposure to asbestos was from fluoro-edenite that was in the soil and used as building material in Maletto, Italy.

The February 3, 2020 expert report of Mr. Alan M. Seagrave, Professional Geologist (P.G.), assesses the various regions that talc was mined for WCD and the potential asbestos content. He describes four methods of analyzing samples for asbestos: Polarized Light Microscopy (PLM), Transmission Electron Microscopy (TEM), Scanning Electron Microscopy (SEM), and X-Ray Diffraction (XRD). Mr. Seagrave states that none of the Montana talc supplied to American from WCD to make Clubman talcum powder during the relevant period of 1987 through 2016 was contaminated with asbestos (Mot. Exh. H). His report includes "TABLE 2 Clubman Talc Codes, X-Ray Diffraction (XRD) Results, and Mr. Luca;" which shows the results of XRD testing on various talc codes identified by WCD. Table 2 shows that 128 talc is a blend of Montana, Alabama, Italian and SPA talc and was positive for 1% chrysotile and 0.1% tremolite asbestos fibers. Table 2 identifies talc code 1615 as a blend of Montana and Italian talc that was positive for 1% chrysotile asbestos fibers. Table 2 shows that talc code 1625 was a mixture of Montana, North Carolina, California, Korea and Australian talc that was positive for less than 0.5% tremolite fibers. Table 2 identifies one talc code 4609 as a blend of Montana, Alabama, Italian and SPA talc, as testing positive for 1% chrysotile asbestos fibers. There were no asbestos fibers found in WCD's talc codes 123, 4613, 4619 and 4628 (Mot. Exh. G, pgs. 27-30 and 48).

Mr. Seagrave states that the Occupational Safety and Health Administration (OSHA) definition of "asbestos fibers" changed over the years from 1972 and 1986 to 1992. He cites to the United States Environmental Protection Agency (EPA) 1992 Health Assessment that did not find any serpentine or amphibole accessory minerals in talc. He also states that a 2010 report by the International Agency for Research on Cancer (IARC) published by the World Health Organization (The WHO) states that there were no reports of serpentine tremolite, or anthophyllite asbestos in Montana talc, as further establishing that the WCD talc from mines in Montana was not contaminated. Mr. Seagrave states that testing done in 2010 by the Food and Drug Administration (FDA) of cosmetic talc used for various products, including Clubman talcum powder, found no asbestos (Mot. Exh. G, pgs. 7, 22-24 and 44-45).

Mr. Seagrave discusses his 2009 visit to Bianca villa, Sicily and observations he made at asbestos containing fluoro-edenite basalt quarries that were used to provide road fill and building material in the surrounding area, including Maletto, Sicily, where the decedent lived from 1935 until 1960. Mr. Seagrave states that the area is known to have a higher incidence of mesothelioma and that Maletto is close in

proximity to the deposits found in Biancavilla, which is the likely cause of the decedent's pleural mesothelioma, not the use of Clubman talcum powder (Mot. Exh. G, pgs. 39-43 and 67-68).

The February 25, 2020 report of Kenneth A. Mundt, Ph.D., FACE, an epidemiologist, discusses the principles of epidemiological methods and perspective. He refers to the IARC 2006 report's approach for classifying carcinogens. He also cites to IARC 2010 report as stating that talc is not an amphibole mineral or a form of asbestos, but that it may co-exist with accessory minerals such as serpentine and amphibole (Mot. Exh. H, pgs. 5 and 7). Dr. Mundt provides an overview of the epidemiology of malignant mesothelioma and the characteristics and toxicity of asbestos fibers. He cites to the IARC 2012 report in support of his statement that "silicate minerals can also occur in non-fibrous or non-asbestiform habit, including cleavage fragments which are not asbestos" (Mot. Exh. H, pgs. 8-11). Dr. Mundt relies on Mr. Seagrave's report for his conclusion that the decedent's exposure to fluoro-edenite from 1935 through 1960 in Italy is the most likely cause of his pleural mesothelioma, and not the use of Clubman talcum powder (Mot. Exh. H, pgs. 15 and 21-22).

The February 19, 2020 report of Robert C. Adams MS, CIH, CSP FAIHA, an industrial hygienist, summarizes the decedent's life, work and exposure history to Clubman talcum powder. He discusses potential exposure to asbestos in talc, and various studies measuring talc particulates and fiber concentrations in cosmetic talcum powder use. Mr. Adams cites the National Institute for Occupational Safety and Health (NIOSH) report from 2011, which states that "due to analytical difficulties in differentiating between asbestiform and non-asbestiform habits and the inability to assign a risk factor to non-asbestiform analogs of asbestos, there is continued emphasis to apply conservative exposure estimates for asbestos air sampling." Mr. Adams also cites to NIOSH's 1972 report finding that twenty seconds after the application of talc containing baby powder, exposures to fibers diminished rapidly. He states that recent testing by the FDA found no asbestiform minerals but stated that the results "do not prove that most or all talc or talc containing products currently marketed in the United States are likely to be free of asbestos contamination" (Mot. Exh. P).

Mr. Adams discusses the decedent's potential exposure during the time he resided in Maletto, Italy. He states that fluoro-edenite fibrous amphiboles are considered a confirmed carcinogen by IARC, and that cases of mesothelioma in the nearby Biancavilla, Italy area have been linked to environmental exposures to fluoro-edenite (IARC, 2014). Mr. Adams concludes that the decedent's cumulative use of talc, assuming trace amounts of regulated asbestiform minerals associated with Clubman talcum powder, would be within the range of cumulative background concentrations of asbestos associated with the environment. Mr. Adams relies on the report of Alan Seagrave and further concludes that the decedent's exposure to fluoro-edenite in Maletto, Italy, increased the risk and was the cause of decedent's pleural mesothelioma (Mot. Exh. P).

The August 26, 2019 report of Michael Graham, MD, a pathologist, discusses decedent's medical history and the records establishing his pleural mesothelioma, residence in Maletto, Italy and work history. Dr. Graham states that "the weight of the current scientific information does not establish, to a reasonable degree of medical

certainty, a causal relationship between cosmetic talc exposure and the development of human pleural malignant mesothelioma.” Dr. Graham states that he is unaware of any epidemiologic study demonstrating that barbers have an increased incidence of mesothelioma as a result of the exposure to cosmetic talc. He does not refer to any studies, reports or testing but concludes that the decedent’s mesothelioma was most likely not caused using cosmetic talc (Mot. Exh. GG).

Plaintiffs rely on the March 8, 2018 report of Dr. Murray M. Finkelstein, Ph.D., M.D.C.M., C.C.F.P., a medical doctor and epidemiologist, reviews of the decedent’s medical records and pathology information, and reports of testing done by the FDA that found tremolite in Clubman talc. Dr. Finkelstein states that the asbestos containing fluoro-edenite found in Biancavilla, Italy was 29.1 kilometers away from Maletto, Italy where the decedent lived. He cites to studies done by Bruni in Italy in 2006 and 2014 which state that the amphibole fiber diffusion in the Biancavilla environment had been maximum during the sixties and the seventies-after the decedent left Italy- with the uncontrolled development of the local building industry. He provides a map showing the area of potential exposure from Biancavilla to further demonstrate that Maletto was outside of the area of potential exposure. Dr. Finkelstein discusses the human health effects of exposure to Clubman talcum powder, which contained trace amounts of fibrous amphibole, and concludes that it is the cause of decedent’s mesothelioma. (Opp. Exh. 61).

The July 5, 2017 expert report of Dr. Jacqueline Moline, MD, Msc, FACP, FACOEM, a specialist certified in Occupational and Internal Medicine, assesses decedent’s medical and exposure history, past medical history, cigarette history, and occupational and environmental history. Dr. Moline states that asbestos is a well-known cause of mesothelioma and talc has been reported to contain asbestos fibers for decades. Dr. Moline relies on studies, testing and reports assessing talcum powder exposure. She also relies on reports of agencies, including the FDA and IARC that have established that talc contaminated with asbestos is carcinogenic. Dr. Moline concludes that the decedent’s cumulative exposure to asbestos contaminated Clubman talcum powder, which he used for decades on a regular and frequent basis when taking care of his barbershop customers, caused his mesothelioma (Opp. Exh. 62).

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 NY 2d 57, 268 NYS 2d 18, 215 NE 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 AD 3d 538, 12 NYS 3d 35 [1st Dept., 2015]). “It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (*Vega v. Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). The conflicting expert reports raise credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 AD 3d 439, 922 NYS 2d 70 [1st Dept. 2011], *Almonte v. 638 West 160 LLC*, 139 AD 3d 439, 29 NYS 3d 178 [1st Dept., 2016] and *Doumbia v. Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept., 2018]).

WCD's experts rely on studies, reports and agency findings to establish that there is no asbestos in Clubman talcum powder during the relevant time period and that it is not the cause of decedent's mesothelioma. Plaintiffs' experts, Drs. Finkelstein and Moline also rely on studies and reports and in part on the same agencies, FDA and IARC, to establish that the decedent's exposure to asbestos in the talc used in Clubman talcum powder exposed the decedent to asbestos and caused his mesothelioma. Dr. Moline and Dr. Finkelstein rely on scientific studies and reports to reach their conclusions and WCD has not discredited the research or entities that are relied upon in their reports. Dr. Finkelstein and Dr. Moline's extrapolation from case studies, not necessarily specific to barbers but related to talc miners or millers, sufficiently raises issues of fact on general causation as WCD's experts also relied on case studies related to talc miners and millers (*Nemeth v. Brenntag North America*, 2020 NY Slip Op. 1705445 [1st Dept. 2020]). There is also conflicting expert testimony as to whether the decedent was exposed to fluoro-edenite when he lived in Italy. These conflicting expert reports raise credibility issues, and issues of fact on general causation.

Specific Causation:

The Court of Appeals has enumerated several ways an expert might demonstrate specific causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin." The "comparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, *supra* at 448]). In turn, the Appellate Division in the case *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Mr. Seagrave states that there are six events that are needed to have asbestos in a finished talc product: (1) asbestos must exist in the area where the talc is mined; (2) non-talc rocks containing asbestos must be adjacent to the talc; (3) amphibole/asbestos-containing rock must survive the beneficiation process, including hand-sorting, mechanical screening, milling, flotation, and density separation; (4) among the talc sold, the portion of talc with asbestos contamination must reach the manufacturer of the product and be used in the specific product; (5) a portion of the contaminated talc must be placed into the actual container purchased and used by the plaintiff; and (6) the process would have to be repeated over and over for extended periods of time for the plaintiff to have cumulative exposure to talcum powder contaminated with asbestos. He concludes after review of literature concerning the geology of the talc deposits, his own field assessment of the Talc mining areas (Val Chisone, Italy; Murphy, North Carolina; southwest Montana; and Alpine, Alabama) that the talc is generally void of amphiboles. Mr. Seagrave states that other mines known to be of hydrothermally based dolomite such as Korea would also meet these criteria. He states that it would be impossible for the decedent to be exposed to levels of contaminated talc sufficient to cause his mesothelioma. Mr. Seagrave further concludes that the most likely cause of decedent's mesothelioma is exposure to fluoro-edenite asbestos fibers from dry unpaved roads and loose soils upslope from Maletto, Italy in the 1950's and 1960's (Mot. Exh. G, pgs. 65-68).

Dr. Mundt makes a comparison analysis citing to 2009 and 2016 reports on studies of barbers and hairdressers in Denmark, Finland, Iceland, Norway and Sweden that were gathered as part of the NOCCA study, and states that although there was a finding of mesothelioma, the percentages are not greater than the general exposed population (Motion Exh. H, pg. 15). Dr. Mundt cites to various studies of talc miners and millers in various locations including New York and Italy and states that there was no significant risk of malignant mesothelioma (Mot. Exh. H, pgs. 16-19). Dr. Mundt concludes that a synthesis of the body of epidemiological evidence on exposure to cosmetic talc clearly demonstrates no risk of mesothelioma, and that the decedent's use of Clubman talcum powder products containing talc supplied by WCD did not cause or contribute to his pleural mesothelioma. He further concludes that the decedent's mesothelioma was most likely caused by exposure to fluoro-edenite while living in Maletto, Italy (Mot. Exh. H, pgs. 21-22).

Mr. Adams relies on Mr. Seagrave's report in estimating the decedent's exposure to asbestos from talc based on respirable dust associated with the direct use of American's Clubman talcum powder products. Mr. Adams estimated that the decedent typically performed between ten and twenty haircuts per day, and each haircut took between twenty to thirty minutes, additionally, it was estimated that the decedent commonly swept the floor four to five times per day. Mr. Adams assumed decedent had a daily exposure time of 90 minutes/day for applying talcum powder during a typical day, including time to perform sweeping tasks, his estimated 8-hour Time Weighted Average (TWA) exposure would be 0.004 f/cc. He states that the current Occupational Safety and Health Administration (OSHA) Permissible Exposure Limit (PEL) is 0.1 f/cc. Mr. Adams concludes that the decedent's cumulative exposure to asbestos in Clubman talcum powder is less than 10% of the current permissible OSHA PEL if regulated asbestiform mineral was present in the same amount in every application of talcum powder the decedent made. He further concludes that the decedent's exposure to asbestos from the cumulative use of talc associated with Clubman talcum powder is extremely low in intensity and within the range of cumulative background concentrations of asbestos associated with the environment. He states that decedent's exposure to talc at ambient levels is generally not known to be associated with the risk of mesothelioma in the general population. Mr. Adams opines that the decedent's mesothelioma was most likely caused by exposure to fluoro-edenite while living in Maletto, Italy (Mot. Exh. P, pgs.14-16).

Dr. Graham states that he is unaware of any epidemiologic study demonstrating that barbers have an increased incidence of mesothelioma as a result of the exposure to cosmetic talc. He does not refer to any studies, reports or testing but concludes that the decedent's mesothelioma was most likely not caused using cosmetic talc (Mot. Exh. GG).

Plaintiffs' expert, Dr. Finkelstein, refers to Dr. Compton's testing using a Transmission Electron Microscope (TEM) equipped with a Thermo Scientific Noran System 7 energy dispersive x-ray spectrometry (EDS) analysis system and capable of selected area electron diffraction (SAED). Dr. Finkelstein states that testing was performed on four historic samples of Clubman talcum powder in September of 2017 and the tests identified anthophyllite fibers in all four samples. The anthophyllite fiber concentration for all four samples ranged from approximately eleven to fifty-one million fibers per gram (Opp. Exh. 61).

Dr. Finkelstein cites to Dr. Ann Wylie, Professor of Geology (2016), on the size of asbestos fibers and the distinction between cleavage fragments and actual asbestos fibers. He states that the asbestos fibers and not cleavage fragments were detected by Dr. Compton. Dr. Finkelstein determines that Clubman retail products

contained trace amounts of fibrous amphibole. He cites to his analysis, performed with Dr. Andre Dufresne, of the fiber burden in the lungs of miners and millers in the Province of Quebec, Canada (Finkelstein and Dufresne 1999) and states that the chrysotile ores of Quebec are contaminated with trace amounts of tremolite and other fibrous amphiboles (McDonald et al. 1997). Dr. Finkelstein cites to findings that anthophyllite fibers have caused mesothelioma in Finnish miners. He also cites to other findings that tremolite is an established cause of mesothelioma in humans (Luce et al., 1994; Luce et al., 2000). Dr. Finkelstein concludes that exposure to asbestos fibers in the talc supplied by WCD, and used by the decedent in Clubman talcum powder, was a substantial contributing cause of his malignant mesothelioma (Opp. Exh. 61).

Dr. Moline relies on published studies and reports of testing done on talcum powder that found asbestos fibers. She cites to a 2007 report that found small amounts of talcum powder (0.1 gram) released thousands of asbestos fibers. She also cites to a paper by Gordon, et.al., that evaluated the mineralogical constituents of commercial talcum powder and its ability to release asbestos fibers into the breathing zone of the direct user and bystanders, which measured 18 million anthophyllite asbestos fibers per gram in the talcum powder. She states that air measurements were done by both Phase Contrast Microscopy (PCM) and TEM, that these revealed significant levels of anthophyllite and tremolite with some chrysotile asbestos fibers noted in the breathing zone of the individual applying the powder as well as a bystander. Dr. Moline specifically refers to the results from an experiment showing that personal measurements from the shaker container test showed a measurement by PCM of 4.8 f/cc, with an actual asbestos fiber measurement of 1.8 f/cc. She states that bystander measurements showed an exposure of 1.35 f/cc by PCM and 0.5 f/cc of actual asbestos fibers. Dr. Moline states that the decedent used Clubman talcum powder in an analogous fashion to that described by Gordon, et.al., in his daily work as a barber. She concludes that the decedent suffered from malignant mesothelioma as a result of his cumulative exposures to asbestos-contaminated talc in talcum powder (Opp. Exh. 62).

Plaintiffs' experts, Drs. Finkelstein and Moline, did not precisely quantify the decedent's exposure to asbestos contaminated talc. Their conclusions, based upon the decedent's testimony concerning his exposure- including the timing, frequency and duration of his use of American's Clubman talcum powder – and the testing of historical samples quantifying the amount of asbestos fibers released in a simulated setting (resulting in an extrapolation of exposure levels), are sufficient to create an issue of fact on specific causation (Nemeth v. Brenntag North America, 2020 NY Slip Op. 1705445 [1st Dept. 2020]).

Plaintiffs are only required to show “facts and conditions from which defendant's liability may be reasonably inferred.” Summary judgment must be denied when the plaintiff has “presented sufficient evidence, not all of which is hearsay, to warrant a trial” (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]).

Plaintiffs as the non-moving party, are entitled to the benefit of all favorable inferences. The opposition papers have raised issues of fact as to specific causation from the decedent's exposure to asbestos in the talc sold and distributed by WCD. Plaintiffs have sufficiently raised credibility issues and issues of fact as to general and specific causation, 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 chrysotile and tremolite asbestos 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 detect 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 public and the decedent, which requires that the decision to give the jury a charge on punitive damages be determined by the trial judge after submission of all the evidence.

ACCORDINGLY, it is ORDERED that defendant Whittaker Clark and Daniel's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, alternatively for partial summary judgment dismissing the plaintiffs' claims for punitive damages, is denied.

ENTER:

Dated: May 27, 2020



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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