SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **13**

Justice

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INDEX NO. 190165/2019

MOTION DATE 01/11/2021

MOTION SEQ. NO. 003

MERRITT ELLIS GOLD AND PAULA THERESE NEARY, AS CO-EXECUTORS OF THE ESTATE OF VICTORIA KAYE, DECEASED,

Plaintiff,

- v -

AVON PRODUCTS, INC.,BLOOMINGDALES, INC.,BRENNTAG NORTH AMERICA, INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO MINERAL PIGMENT SOLUTIONS, INC.,AS SUCCESSOR IN INTEREST TO WHITTAKER, CLARK & DANIELS, INC.,BRENNTAG SPECIALTIES, INC. F/K/A MINERAL PIGMENT SOLUTIONS, INC. AND AS SUCCESSOR IN INTEREST TO WHITTAKER, CLARK & DANIELS, INC.,CHANEL CO., CHANEL, INC.,COTY INC.,COTY INTERNATIONAL INC.,GLAXOSMITHKLINE, LLC,INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO YARDLEY OF LONDON, INC.,YARDLEY OF LONDON, LTD., AND YARDLEY OF LONDON (U.S.), LLC,MACYS, INC.,MINERAL AND PIGMENT SOLUTIONS, INC.,F/K/A WHITTAKER, CLARK & DANIELS, INC.,PFIZER INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO COTY INC. AND COTY INTERNATIONAL INC.,REVLON, INC.,THE PROCTOR & GAMBLE COMPANY, AS SUCCESSOR IN INTEREST TO THE SHULTON COMPANY AND AS SUCCESSOR IN INTEREST TO YARDLEY OF LONDON, INC.,YARDLEY OF LONDON, LTD., AND YARDLEY OF LONDON (U.S.), LLC,WHITTAKER, CLARK & DANIELS, INC.

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 162, 163, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the instant motion for summary judgment seeking dismissal of this action, pursuant to CPLR §3212, is denied for the reasons set forth below.

Here, defendant Revlon, Inc. ("Revlon") moves to dismiss this asbestos action on the grounds that plaintiff decedent (Ms. Kaye) was not exposed to asbestos from any Revlon product during her use of Charlie talcum powder from approximately 1968-1976. Defendant Revlon primarily argues that they did not create a "Charlie" brand until 1974, and that this should be dispositive as to whether Ms. Kaye's contested Charlie talcum powder was manufactured by Revlon. *See* Memorandum of Law in Support of Defendant Revlon's Motion for Summary Judgment, p. 6. Revlon also argues that there is no evidence their talc contained asbestos, and that talc itself does not cause mesothelioma. *Id.* Plaintiff opposes, noting that Ms. Kaye unequivocally identified Revlon as the manufacturer of Charlie body powder, and that testing exists which has concluded that the talc used in the body powder contained asbestos. *See* Memorandum of Law in Opposition to Revlon's Motion for Summary Judgment, p. 4-5;9-10. Defendant Revlon replies, reiterating their claim that Charlie body powder was not manufactured during the time of Ms. Kaye's use and refuting the talc studies cited by plaintiff.

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *See id.* at 853.

Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). The court's role is "issue-finding, rather than issue-determination". *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979). Furthermore, the Appellate Division, First Department has held that on a motion for summary judgment, it is moving defendant's burden "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury". *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dep't 1995).

Here, Defendant Revlon's primary evidence for disclaiming the Charlie powder used by Ms. Kaye is the deposition of Michael Helman, Revlon's corporate representative. Mr. Helman's deposition does not display the requisite personal knowledge to dispel with certainty any questions of fact. He did not appear to work in Revlon manufacturing or product development and did not work at Revlon during the time period relevant herein. Further, upon initially being deposed, he "[didn't] have a lot of familiarity with" Revlon's Charlie brand. *See* Memorandum of Law in Support, Exh. O, Deposition Transcript of Michael Helman dated Oct. 4, 2018, p. 17, ln. 24-25. Mr. Helman had no knowledge regarding the time frame Revlon's Charlie powder was sold or when it was first manufactured. *See id.*, Exh. O at p. 19. After consultation with an employee who was employed at Revlon during the 1970s, Mr. Helman testified that the Charlie

body powder had begun manufacturing in 1973-1974 but confirmed that his source was also unaware of the exact manufacturing scope and had no other references as to the relevant details. *See id.*, Exh. P, Deposition Transcript of Michael Helman dated Jan. 6, 2021, p. 57. Plaintiff notes that Ms. Kaye offered clear and unequivocal testimony identifying Revlon as the manufacturer of Charlie powder, even identifying the label and color of the box, and that she used the powder until 1976. This is sufficient to raise issues of fact.

Furthermore, Defendant Revlon failed to offer any evidence that their product could not have contained asbestos or contributed to Ms. Kaye's mesothelioma. They attempt to dispel with plaintiff's studies by criticizing the methodologies used but do nothing to establish an affirmative prima facie case that their product could not have contained asbestos and could not have contributed to Ms. Kaye's mesothelioma. Thus, defendant Revlon has failed to meet its burden on summary judgment. Moreover, plaintiff has adequately established that issues of fact exist regarding Revlon's liability for Charlie brand body powder, the possible asbestos-contamination of talc used in such powder, and the extent of Ms. Kaye's exposure to such asbestos.

Accordingly, it is

ORDERED that defendant Revlon's motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

09/06/2023
DATE

ADAM SILVERA, J.S.C.