SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190253/2014

IN RE NEW YORK CITY ASBESTOS LITIGATION

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KERI LOGIUDICE and JOSEPH LOGIUDICE,

Plaintiffs,

-against-

AMERICAN TALC CO., et al

Defendants

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Plaintiff Keri Logiudice and her husband brought this action alleging that she contracted mesothelioma through her use of the cosmetic talcum powder Cashmere Bouquet at her home and at her grandmother's home. At issue are cross-motions brought under CPLR §3211 by defendants Cyprus Amax Minerals ("Cyprus") and Imerys Talc America Inc. ("Imerys") to dismiss plaintiffs' cause of action on market share liability.[1] The motion by defendant Whitaker Clark & Daniels was withdrawn on 7/16/15. Both Cyprus and Imerys mined and supplied talc.

The issues are very discrete. Defendants maintain that plaintiffs' Sixth Cause of Action for market share liability was previously dismissed as against co-defendant Colgate-Palmolive Co. ("Colgate") and is now law of the case. Further, they argue that even if it is not law of the case, plaintiffs fail to state a cause of action.

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[1]Cyprus's cross-motion also seeks dismissal of plaintiffs' Second Cause of Action for Breach of Warranty, but plaintiffs have consented to that relief (*see* Shaikh Aff 9/16/15 NYSCEF Doc 151).

Arguments

Cyprus and Imerys argue that they are entitled to dismissal of plaintiffs' market share liability claim based on Judge Heitler's April 16, 2015 decision and order. By dismissing plaintiffs' market share liability claim against Colgate, the manufacturer of Cashmere Bouquet, defendants assert that Judge Heitler necessarily decided the identical issue now before this court. Defendants also assert that plaintiffs have failed to explain why Colgate stands in a different position from Cyprus and Imerys. They further argue that plaintiffs had a full and fair opportunity to litigate this issue.

In opposition, plaintiffs maintain that Judge Heitler's decision is not law of the case because she dismissed plaintiffs' claim for market share liability against Colgate based on plaintiffs' lack of opposition. Moreover, Judge Heitler only noted the reality that the market share theory has been applied to DES cases, but she did not state that it could never be applied under any circumstance to asbestos cases.

If the issue is not law of the case, defendants contend that plaintiffs' claim for market share liability should be dismissed under New York law, citing *Hamilton v Beretta* U.S.A. Corp. (96 NY2d 222 [2001]) and *Brenner v American Cyanamid Co.* (263 AD2d 165 [4th Dept 1999]). Defendants also cite a New York federal court case rejecting several building owners' attempt to apply market share liability to defendants engaged in asbestos mining, manufacturing or distribution where the source of the asbestos-containing products in their buildings could not be traced (*see 210 East 86th Street Corp. v Combustion Engineering, Inc.*, 821 F Supp 125 [SDNY 1993]).[2] Cyprus and Imerys cite state and federal cases outside of New York rejecting the application of market share liability

[2]However, the court also noted that defendants demonstrated that they had not produced the products at issue (*see 210 East 86th Street Corp. v Combustion Engineering, Inc.*, 821 F Supp at 146).

to asbestos cases based on the lack of fungibility (i.e., the varying quantities and toxicity of different types of asbestos). Defendants assert that plaintiffs' complaint concedes a lack of fungibility by alleging that defendants placed "raw asbestos fibers of various kinds and grades" in the stream of commerce. They further note that plaintiffs also concede that samples from Colgate indicate differing amounts of asbestos fibers in talc. Furthermore, Cyprus and Imerys assert that market share liability is not appropriate because Colgate, the manufacturer of the product, is identifiable.

Plaintiffs maintain dismissal is premature because discovery may support the assertion of a market share liability claim. Plaintiffs point out that there is no blanket prohibition on market share liability, citing a case cited by defendants, *Brenner v American Cyanamid Co.*, 263 AD2d 165, *supra* ["[u]nder some circumstances, however, market share liability may provide an appropriate remedy for those plaintiffs who cannot, for various reasons, identify the defendant who manufactured the particular product that allegedly caused harm"]). Further, plaintiffs note that market share liability was applied in an Agent Orange case (*see In re Agent Orange Prdt. Liab. Litig.*, 597 S Supp 740 [EDNY 1984], *aff'd* 818 F 2d 145 [2d Cir 1987]). Plaintiffs also cite a California case where market share liability was applied to manufactures of asbestos-containing brake pads (*see Wheeler v Raybestos-Manhattan*, 11 Cal Rptr. 2d 109 [Ct. Appl., 1st Dist., Div. 4, 1992]). Talc is fungible, plaintiffs argue.

To substantiate that Cyprus's and Imery's talc presents an equivalent risk of harm, plaintiffs point to their allegation that any amount of Cashmere Bouquet talc causes injury. Market share liability, plaintiffs assert, will enable them to presume that one bottle of Cashmere Bouquet used by Ms. LoGiudice during the relevant period was comprised of talcum powder from Cyprus, Imerys, WCD and other companies with percentages equal to the share of the national market of Colgate's

talc suppliers. Plaintiffs contend that they satisfied all the relevant factors necessary to sustain market share liability: the action involves a fungible product (the same two types of asbestos fibers chrysotile and /or tremolite are found in all talc in this action); plaintiffs sued most, if not all, of Colgate's suppliers of talc; plaintiffs identified a narrow time period; Colgate had exclusive control of the talc and Ms. Logiudice's injury (mesothelioma) is linked to an asbestos-containing product.[3]

Discussion

A. Law of the Case

On April 16, 2015, Judge Heitler dismissed plaintiffs' Sixth Cause of Action for market share liability against Colgate. Judge Heitler stated the following:

> Plaintiffs do not oppose that portion of Colgate's motion which seeks to dismiss the Sixth Cause of Action against it for market-share liability. In New York, such theory of liability has only been applied to diethylstilbestrol (DES) cases. *See Hymowitz v Eli Lily & Co.*, 73 NY2d 487, 502, 508 (1989). Accordingly, plaintiffs' Sixth Cause of Action as against Colgate is dismissed.

The doctrine of law of the case applies to various stages of the same litigation and not to different litigations (*see Matter of McGrath v Gold*, 36 NY2d 406 [1975]). Under the law of the case doctrine, parties are "preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (*Briggs v Chapman*, 53 AD3d 900,902 [3rd Dept 2008]). The doctrine can be applied by a co-defendant in an "identical position" to the other defendants (*see Avalon, LLC v Coronet Props. Co.*, 16 AD3d 209, 210 [1st Dept 2005] ["prior holding constitutes the law of the case that is binding upon plaintiff and applicable to D&M and Doyle because they are in the identical position as defendant Gordon (against whom this Court

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[3]Where the injury is one linked to asbestos, it is known as a signature injury (*see Brenner v American Cyanamid Co.*, 263 AD2d at 174, *supra*).

dismissed the same claims)"]). Further, law of the case only applies to legal determinations that were necessarily resolved on the merits in the prior decision (*see Baldasano v Bank of N.Y.*, 199 AD2d 184 [1st Dept 1993] ["Plaintiffs' cause of action based upon that prior determination and the 'law of the case' doctrine is devoid of merit, as this Court did not reach the substantive issue of the appellants' status with respect to the notes and since the doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision"]; *see also Sudarsky v City of New York*, 247 AD2d 206 [1st Dept 1998]).

Here, law of the case does not apply because Cyprus and Imerys are not in the same "identical" position as Colgate. Plaintiffs did not need to assert a market share liability claim against Colgate (and presumably, that is why they did not oppose the prior motion on that issue). Market share liability is employed when, among other things, the identity of the defendant is impossible or difficult to trace. The identity of Colgate is known from the Cashmere Bouquet bottle. However, unlike Colgate, Ms. Logiudice could not identify Cyprus and Imerys from the bottle. Furthermore, it is not clear that Judge Heitler actually made a substantive ruling on the issue when she noted that the theory has only been applied in New York only to DES cases. She also had no reason to make a substantive ruling given plaintiffs' lack of opposition to the dismissal. Accordingly, the doctrine of law of the case is inapplicable.

B. Market Share Liability

In a products liability action, identification of the exact defendant whose product injured the plaintiff is generally required (*see Hymowitz v Eli Lilly & Co.*, 73 NY2d 487, 504 [1989]). Market share liability provides an exception to the general negligence rule that a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury (*Hamilton v Berretta*, 96 NY2d at 240,

supra; *see also Brenner v American Cyanamid Co.*, 263 AD2d 165, *supra* ["market share liability is indeed a seldom used exception to the general rule in products liability actions that a plaintiff 'must establish by competent proof ... that it was the defendant who manufactured and placed in the stream of commerce the injury-causing defective product'"]). However, it cannot be said that market share liability can never apply beyond DES cases (*Hamilton*, 96 NY2d at 242, *supra* [although market share liability was not properly applied to the manufacturers of guns, "[w]hether, in a different case, a duty may arise remains a question for the future"]).

In *Hymowitz* the Court applied market share liability because DES was a fungible product and the identification of the actual manufacturer that caused the injury to a particular plaintiff was impossible. When products are fungible "[m]arket share was an accurate reflection of the risk they posed" because defendants create "the same risk to the public at large by manufacturing the same defective product" (*id.* at 241). The doctrine was inapplicable in *Hamilton* because "[d]efendants engaged in widely-varied conduct creating varied risks. Thus, a manufacturer's share of the national handgun market does not necessarily correspond to the amount of risk created by its alleged tortious conduct" (*id.*). Further, market share liability was inappropriate in *Hamilton* given that "it is often possible to identify the caliber and manufacturer of the handgun that caused injury to a particular plaintiff" (*id.* at 240-241). In any event, the "[i]nability to locate evidence . . . does not alone justify the extraordinary step of applying market share liability" (*id.*). A compelling policy reason is needed (*id.* at 242).

Furthermore, because market share liability is based on a defendant's percentage of the market, a plaintiff must join a substantial share of the relevant market; in the DES context, the relevant market was a national market of 300 known manufacturers (*see Brenner v American*

Cyanamid Co., 263 AD2d at 171, *supra*). Identifying the relevant market is often difficult, adding to a court's reluctance to apply the doctrine (*id.*).

Lack of discovery may be a basis to deny a motion seeking to dismiss a market share liability claim (*see City of New York v Lead Indus. Assn.*, 275 AD2d 669 [1st Dept 2000] ["motion was properly denied on the ground that further discovery is warranted on such matters as whether and to what extent white lead carbonate is present in the Williamsburg Houses development, whether the manufacturer of the particular white lead carbonate present, if any, can be identified, and whether NYCHA suffered any actual harm in that it would be entitled to use the Federal funds currently applied to lead abatement to some other purpose"]).

In the absence of any evidence, the court will not presume that talc is not fungible. Cyprus and Imerys could have, but did not, provide affidavits substantiating that their products are not fungible and therefore do not present an equivalent risk of harm. While defendants point to plaintiffs' allegations regarding the asbestos-content of talc, defendants have not demonstrated that the content of their talc differed in any meaningful way.[4] Plaintiffs also allege that any amount of asbestos-containing talc is sufficient to cause injury and no evidence has been submitted to dispute this allegation. Nor has evidence been submitted demonstrating that plaintiffs did not join the relevant market of Colgate's suppliers of talc.

However, the motion is granted because the manufacturer of Cashmere Bouquet is

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[4]Cases rejecting the application of market share liability to asbestos cases have noted that asbestos is not a generic product made from one formula, is manufactured from different minerals mined in different locations, and contains different toxicity and asbestos content. However, this action is specific to asbestos contained in talc and the court is not prepared to assume that talc is not fungible when defendants have submitted no evidence.

identifiable. Unlike in *Hymowitz,* plaintiffs are not left without a "remedy for injuries" (73 NY2d at 507, *supra*) because they could recover one hundred percent of their damages from Colgate.[5] Although it will be more difficult, or even impossible, for plaintiffs to demonstrate the liability (if any) of Cyprus and Imerys, market share liability does not afford potential recovery from each and every defendant. It was applied in *Hymowitz* because, among other things, plaintiffs would be left without any recourse whatsoever. While the potential for a full recovery against Colgate is preclusive of the application of market share liability here, it is also notable that plaintiffs may still be able to prove that Cyprus and Imerys are liable. Plaintiffs themselves note that "[a]dditional discovery from the filing defendant and its co-defendants may provide pertinent information as to whether Colgate mixed talc from several suppliers or whether each bottle was manufactured from one particular talc supplier" (Shaikh Aff 9/16/15, fn. 3, NYSCEF Doc 151).

It is hereby

ORDERED that cross-motions by defendants Cyprus Amax Minerals and Imerys Talc America Inc. to dismiss plaintiffs' Sixth Cause of Action for market share liability is granted; and it is hereby

ORDERED that Cyprus Amax Minerals 's cross-motion to dismiss plaintiffs' Second Cause of Action for Breach of Warranty is granted on plaintiffs' consent; and it is further

ORDERED that plaintiffs' Sixth Cause of Action for market share liability is hereby dismissed as against Cyprus Amax Minerals and Imerys Talc America Inc. and plaintiffs' Second

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[5]Plaintiffs also asserted at oral argument their concern that Colgate could escape liability if it did not know of the asbestos content in the talc or its dangers. However, Colgate could also be found liable if it should have known of the dangers of talc which proximately caused Ms. Logiudice's illness, and plaintiffs' complaint reflects this.

Cause of Action for Breach of Warranty is hereby dismissed on plaintiffs' consent as against Cyprus Amax Minerals.

This constitutes the Decision and Order of the Court.

Dated: February 8, 2016

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE