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

ANN ZOAS and CHRISTOS ZOAS,
Plaintiff[s],

- against -

BASF CATALYSTS, LLC (as successor to Engelhard Corp., Engelhard Minerals & Chemicals Corp., and Minerals & Chemicals Corp.), *et al*,
Defendants.

INDEX NO.	190162/2017
MOTION DATE	08/29/2018
MOTION SEQ. NO.	010
MOTION CAL. NO.	

The following papers, numbered 1 to 9 were read on plainiff's motion for relief from the Special Master's recommendation:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers it is Ordered that plaintiff's motion pursuant to Case Management Order ("CMO") Section III (C) seeking relief from Special Master Shelley Olsen's July 25, 2018 recommendation granting defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (hereinafter referred to jointly as "Defendants") a limited deposition of the plaintiffs' expert Sean Fitzgerald, P.G., is denied.

Plaintiff Ann Zoas, a New York resident her entire life, was diagnosed with mesothelioma in 2017. Plaintiffs allege Ms. Zoas was exposed to asbestos through asbestos-containing talcum powder (Mot. Exh. 1). Ms. Zoas claims she was exposed to Defendants' talcum powder regularly from approximately 1940 to 1960. On May 22, 2017, plaintiffs commenced this action to recover for damages resulting from Ms. Zoas' exposure to asbestos.

On April 5, 2018 plaintiff filed a note of issue and certificate of readiness for trial stating that all discovery was complete (NYSCEF Doc. #127). Plaintiffs' case was assigned to the April 2018 In Extremis trial group and transferred to this Court as trial ready on June 5, 2018 (NYSCEF Doc. #153).

Plaintiffs' CPLR 3101(d) expert witness disclosure dated February 15, 2018 identified Sean Fitzgerald, P.G. as an expert expected to testify at trial on their behalf (Mot. Exh. 2). On June 20, 2018 plaintiffs served a copy of Mr. Fitzgerald's 77 page report dated June 15, 2018 which describes the asbestos content of talc, asbestos exposure resulting from the use of talcum powder, including products manufactured by the Defendants, and the presence of asbestos in various talc mines (Opp. Exh. A).

Defendants sent an email to Special Master Olsen on July 13, 2018 requesting leave to conduct a limited deposition of Mr. Fitzgerald to obtain details on how the testing was conducted and the underlying data that resulted in the conclusions reached. Defendants specifically identified from Mr. Fitzgerald's report: (1) pages 58 - 60 describing an air release study opining that it is highly likely that Ms. Zoas inhaled asbestos from her use of defendants' talc; (2) pages 54-57 stating that asbestos was found in seven (7) bottles of defendants' talc that

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

were tested, but there was no information about how many fibers were identified or their specific characteristics; and (3) on page 35 opining that talc mined from Guangzi China is "likely to contain asbestos" with no stated basis for that conclusion (Mot. Ex. 5). Defendants further stated that because the June 15, 2018 report was not previously exchanged, including in other actions where depositions were pending, a brief deposition was needed to determine the factual basis of independent testing of additional products (Mot. Exh. 5).

By e-mail dated July 18, 2018 plaintiffs objected to Defendants' application, arguing that there was "no showing of special circumstances" for the deposition as required under CPLR §3101 [d][iii]. Plaintiffs claimed that Mr. Fitzgerald's opinions about subjects that he has not yet testified about do not constitute "special circumstances," warranting denial of the discovery sought (Mot. Exh. 6).

Special Master Olsen issued her Recommendation on July 25, 2018 (Mot. Ex. 8). She ordered that a deposition be conducted of Sean Fitzgerald limited in scope to the articulated areas of inquiry raised by the Defendants. In rendering her determination Special Master Olsen noted that the cases cited by the plaintiffs in support of CPLR §3101 [d][iii] relief were distinguishable as applying to non-NYCAL cases (Mot. Exh. 8).

Plaintiffs' motion pursuant to the CMO Section III (C), seeks relief from Special Master Shelley Olsen's July 25, 2018 recommendation granting Defendants a limited deposition of the plaintiffs' expert Sean Fitzgerald, P.G..

Plaintiffs claim Justice Moulton's "new" CMO filed on June 20, 2017 eliminated the provisions in the prior CMO dated May 26, 2011 under Section XV(E)(2)(I) that stated: "Any previously undeposed (in whole or in part) expert who does not submit to deposition pursuant to timely notice in accordance with the discovery order shall be precluded from testifying in that case. " Plaintiffs argue that as result of the elimination of the provisions of Section XV(E)(2)(I), the June 20, 2017 CMO's silence on this topic now requires that the provisions of CPLR §3101 [d][iii] be applied, requiring defendants to show "special circumstances" for the discovery sought. Plaintiff's further argue that Defendants have failed to show there are "special circumstances" because trial preparation, novelty, or a claim that a report is unsupported are insufficient, and the written report clearly states the nature of Mr. Fitzgerald's testimony.

In New York City Asbestos Litigation ("NYCAL") the Court has "full authority under the controlling CMO to issue its discovery order." The CMO is recognized as a controlling factor for all cases and states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring that parties comply with discovery, and as a result, recommends rulings on all discovery disputes (Ames v A.O. Smith Water Products, et al., 66 AD3d 600, 887 NYS2d 580 [1st Dept. 2009]). Pursuant to CMO Section III(C) the Special Master's recommendations are appealable to this court.

Plaintiffs correctly argue that after removal of CMO Section XV(E)(2)(I) there are no specific provisions applying preclusion sanctions for failure to provide expert depositions. The June 20, 2017 CMO creates more generalized discovery rules including Section XI titled, "Depositions" and Section XIX titled "Discovery Sanctions." The revised provisions were approved by the Appellate Division, First Department "even where they do not strictly conform to the CPLR"(See In re New York City Asbestos Litigation, 159 A.D. 3d 576, 74 N.Y.S. 3d 180 [1ST Dept. 2018]).

This In Extremis case is part of an Accelerated Trial Cluster, and subject to the model discovery order annexed as Exhibit B to the June 20, 2017 CMO. Section XV titled, "Accelerated Trial Clusters," under subsection (E), of the June 20, 2017 CMO, provides that failure to meet a deadline in accordance with the discovery order, may result in sanctions as provided in Section XIX. Defendants correctly argue that the model discovery order annexed as Exhibit B to the June 20, 2017

CMO allows for deposition of plaintiff's expert witness, Mr. Fitzgerald, two months before trial. Plaintiff is supposed to exchange the expert witness report 2¾ months before trial or risk sanctions including preclusion under Section XIX.

It is within the court's full authority and discretion under the controlling CMO to issue discovery orders. The sudden introduction of an expert's report and conclusions on the eve of trial, under the principles of fairness as well as the spirit of the CMO, requires discovery of "the data, protocols, process, conduct, discussion and analyses underlying the studies," to the extent a ruling limits discovery to these items it is proper to avoid prejudice and to avoid any affect on the veracity of expert conclusions (Matter of New York City Asbestos Litig., 109 A.D. 3d 7, 966 N.Y.S. 2d 420 [1st Dept. 2013]).

By restricting Mr. Fitzgerald's deposition testimony, Special Master Olsen properly concluded defendants are entitled to a deposition to determine the process he used in forming his opinions.

Arguendo, the Court will address the merits of plaintiffs' CPLR §3101[d][1][iii] argument as to "special circumstances."

CPLR §3101[d][1][iii] allows that "further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances." (McKinneys Consolidated Laws of New York Annotated CPLR §3101). Special Circumstances or hardship requires more than a summary of the expert's opinion when the discovery sought cannot be obtained through other means (Ames v A.O. Smith Water Products, et al., 66 A.D. 3d 600, supra at pgs. 600-601). Special circumstances exist where discovery sought is limited to an expert's factual observations and data, or procedures, excluding any inquiry regarding the actual expert's opinion or conclusions (McDonald v. Finley's Inc., 20 A.D. 3d 900, 798 N.Y.S. 2d 628 [4th Dept., 2005] and Commerce an Industry Ins. Co. v. S.H. Laufer Vision World, Inc., 225 A.D. 2d 313,, 639 N.Y.S. 2d 8 [1st Dept. 1996]).

Defendants have shown that information about the process used by plaintiffs' expert, Mr. Fitzgerald, on three limited items are missing in the report and that special circumstances exist because they will otherwise be unable to replicate or otherwise obtain this discovery. Special Master Olsen correctly determined that a limited deposition of plaintiffs' expert was needed, warranting denial of this motion.

Accordingly, it is ORDERED that plaintiff's motion pursuant to Case Management Order ("CMO") Section III (C) seeking relief from the Special Master Shelley Olsen's July 25, 2018 recommendation granting defendants Johnson & Johnson and Johnson & Johnson Consumer Inc., a limited deposition of the plaintiffs' expert Sean Fitzgerald, P.G., is denied, and it is further,

ORDERED that Special Master Shelley Olsen's July 20, 2018 Decision and Recommendation is confirmed.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 30, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
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