

**Blackburn v Wysong and Miles Co.**

2002 NY Slip Op 30041(U)

August 6, 2002

Supreme Court, Suffolk County

Docket Number: 1002800/1999

Judge: Thomas F. Whelan

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART33 - SUFFOLK COUNTY**

**COPY**

**P R E S E N T :**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 4/11/02  
ADJ. DATES 5/16/02  
Mot. Seq. # 003 - Mot D

-----X  
PAUL BLACKBURN, :  
: Plaintiff, :  
-against- :  
WYSONG AND MILES CO., H. WEISS & CO., :  
AR MACHINERY CO. and STEIN INDUSTRIES, :  
INC., :  
Defendants. :  
-----X  
WYSONG & MILES COMPANY, :  
: Third-party Plaintiff :  
-against- :  
STEIN INDUSTRIES, INC., :  
: Third-party Defendant. :  
-----X

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Upon the following papers numbered 1 to 16 read on this motion for an order for open commissions to take oral depositions from out-of-state witnesses; Notice of Motion/Order to Show Cause and supporting papers 1-6; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 7-11; 12-14; Replying Affidavits and supporting papers 15-16; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff for an order:

- (1) pursuant to CPLR 3101 and CPLR 3108, to take open commissions of nonparty witnesses, Ray Heitner, Scott Bancroft, Dick Stein, Eck Faulconer, Robert Butchert and Don Hege, and to request the Superior Court of the State of North Carolina to issue a subpoena

<sup>1</sup> His full name is Richard Martin Stein.

for the aforementioned persons to appear for and submit to oral depositions at a time, date and place: to be set by said Court;

(2) compelling defendant, Wysong and Miles Co., to provide the last known address of Dick Stein, so that **an** open commission may be taken;

(3) pursuant to CPLR 3101, compelling defendant, Stein Industries, Inc., to provide outstanding discovery in response to plaintiffs Notice of Discovery and Inspection, dated November 29, 2001 and compelling defendant, Wysong and Miles Co., to provide outstanding discovery in responses to plaintiffs Notice of Discovery and Inspection, dated December 4, 2001, regarding present and/or former employees of Wysong and Miles Co.;

(4) compelling defendant, Wysong and Miles Co., to provide outstanding discovery in response to plaintiffs Notice of Discovery and Inspection, dated January 14, 2002, regarding the testimony of Russell F. Hall, III, on pages 38-40, 92, 96-97 and 142-143 of his deposition transcript;

(5) if said discovery cannot be produced, directing said defendant to provide affidavits from a person with personal knowledge stating that a search for the documents was done, what the search actually consisted of, and indicating what could not be located;

(6) permitting plaintiff to amend his response specifically to paragraphs 63 through 67 of the interrogatories served by defendant, Wysong and Miles Co.; and

(7) permitting the plaintiff to amend specifically paragraph number "104" of his complaint, dated May 4, 2000,

is granted to the following extent:

(1) plaintiff shall take the open commissions of the nonparty witnesses, Ray Heitner, Scott Bancroft, Eck Faulconer, Robert Butchert and Don Hege, in the State of North Carolina;

(2) defendant, Wysong and Miles Co., is directed to provide responses to plaintiffs Notice of Discovery and Inspection, dated December 4, 2001, within thirty (30) days of the date of entry of this Order;

(3) plaintiff is directed to serve his amended response to defendant's, Wysong and Miles Co., interrogatories specifically **as** to paragraphs 63 through 67 within thirty (30) days of the date of entry of this Order; and

(4) plaintiff is directed to serve his amended complaint, specifically **as** to paragraph No. "104" of the original complaint, dated May 4, 2000, within thirty (30) days of the date of entry of this order;

and it is further

**ORDERED**, that the remainder of plaintiffs motion is decided **as** follows:

(1) plaintiffs request to take the open commission of Dick Stein and provide his home address, **is** denied;

(2) plaintiffs request regarding the Notice of Discovery, dated November 29, 2001, served

upon Stein Industries, is denied as moot as said defendant has provided the affidavit of Andrew Stein, Vice President of Stein Industries, dated May 13, 2002, in response to said discovery demand with defendants' affirmation in opposition to this motion;

(3) plaintiffs request regarding the Notice of discovery, dated January 14, 2002, served upon Wysong and Miles Co., pertaining to the deposition testimony of Russell E. Hall, III on pages 92 and 96-97, is denied as moot, as said defendant has provided the affidavit of Russell F. Hall, III, dated April 18, 2002 in response to said discovery demand with defendants' affirmation in partial opposition to this motion;

(4) plaintiffs request regarding the Notice of Discovery, dated January 14, 2002, served upon Wysong and Miles Co. pertaining to the deposition testimony of Russell F. Hall, III on pages 38-40, is denied as moot as said defendant has provided the affidavit of Russell F. Hall, III, dated April 18, 2002, and the affidavit of Joan S. Bryon, dated April 18, 2002, in response to said discovery demand with defendants' affirmation in partial opposition to this motion;

(5) plaintiffs request that defendants be compelled to respond to the Notice of Discovery and Inspection, dated January 14, 2002, regarding the deposition testimony of Russell F. Hall, III on pages 142-143, is denied without prejudice with leave to renew upon the completion of discovery; and

(6) plaintiff's request that if said discovery cannot be produced, the Court should direct said defendants to provide affidavits from a person with personal knowledge stating that a search for the documents was done, what the search actually consisted of, and stating what could not be located, is denied as moot;

and it is further

**ORDERED** that movant shall serve a copy of this Order with Notice of Entry upon counsel for defendants within twenty-five (25) days of the date hereof pursuant to CPLR 2103(b)(2) or (3) and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

**ORDERED** that within twenty (20) days of the date of Notice of Entry of this Order, movant shall submit to this Court for signature the Commissions to take the oral depositions of Ray Heitner, Scott Bancroft, Eck Faulconer, Robert Butchert and Don Hege in the form as annexed as Exhibits "M" in his motion and said commissions shall each be separately placed in a blueback cover identifying the nonparty to be deposed; and it is further

**ORDERED** that movant's failure to timely submit the Commissions to the Court for signature shall constitute a waiver of his right thereto; and it is further

**ORDERED** that, within twenty (20) days of the signing of the open Commissions by this Court, movant shall serve upon the Clerk of the Superior Court of the State of North Carolina the Commissions to take the oral depositions of Ray Heitner, Scott Bancroft, Eck Faulconer, Robert Butchert and Don Hege as nonparty witnesses; and it is further

**ORDERED** that movant shall give twenty (20) days notice, by express, overnight mail, of the time and place of the depositions to the attorneys for defendants, pursuant to CPLR 2103(b)(2) or (3); and it is further

**ORDERED** that any expenses incurred in connection with the open commissions are to be paid by the respective parties and said expenses may be taxed as disbursements by the prevailing party (see *Goldblatt*

Blackburn v Wysong & Miles Co.  
Index No. 28002-99  
Page 4

*v Avis Rent A Car Sys., Inc.*, 233 AD2d 670, 637 NYS2d 188 [2d Dept 1996]; *Wiseman v American Motors*, 103 AD2d 230, 479 NYS2d 528 [2d Dept 1984]; and it is further

**ORDERED** that all counsel are authorized to attend the depositions and to orally examine and cross-examine the nonparty witnesses; and it is further

**ORDERED** that plaintiffs proposed amended complaint, attached to the plaintiff's moving papers and unopposed by defendants, is deemed served as of the date of service of this Order with Notice of Entry upon the respective defendants to this consolidated action and any responsive pleadings by the respective defendants to the amended complaint shall be served upon plaintiff, pursuant to CPLR 2103(b)(2) or (3), within thirty (30) days from the date of Notice of Entry of this Order; and it is further

**ORDERED** that plaintiffs proposed amended answer to defendant's, Wysong and Miles Co., interrogatories Nos. 63 through 67, attached to the plaintiffs moving papers and unopposed by said defendant, is deemed served as of the date of service of a copy of this Order with Notice of Entry upon the respective defendants to this consolidated action and any responsive interrogatories by Wysong and Miles Co. to the amended interrogatories answers shall be served upon plaintiff, pursuant to CPLR 2103(b)(2) or (3), within thirty (30) days from the date of Notice of Entry of this Order; and it is further

**ORDERED** that pursuant to the Preliminary Conference Stipulation and Order, dated July 24, 2002, a compliance conference is presently scheduled for February 19, 2003, at 9:30 a.m. in ~~Part~~ 33 at the Courthouse located at 235 Griffing Avenue, Riverhead, New York, 11901.

This action, sounding in products liability and breach of warranty, arose from an industrial accident in which plaintiff, Paul Blackburn, alleges that he sustained personal injuries while operating a Press Brake Machine (hereinafter "Press"). Plaintiff now moves to compel defendants to respond to various Notices of Discovery and Inspection, served by him to (i) amend his complaint; (ii) serve amended interrogatories; and (iii) to take the open commissions of nonparty witnesses, Ray Heitner, Scott Bancroft, Dick Stein (hereinafter "Stein"), Eck Faulconer, Robert Butchert and Don Hege in the State of North Carolina. All of the foregoing individuals are former employees of Wysong and Miles, Co. (hereinafter "Wysong") at one time or another. In support of his motion, plaintiff submits the affidavit of its expert witness, Neil A Growney, dated January 4, 2002.

Although defendant Wysong has no objections to the taking of open commissions of Ray Heitner, Scott Bancroft, Eck Faulconer, Robert Butchert and Don Hege, Wysong does oppose the taking of an open commission of Dick Stein, whom Wysong has designated as its expert witness. Plaintiff claims that the open commission deposition of Stein is necessary.

While CPLR 3101(a)(3) permits a party to obtain disclosure from a person outside the state or residing more than a 100 miles from the place of trial and is readily granted, under CPLR 3101(d)(iii), to depose a party's expert, the party seeking further disclosure must demonstrate a showing of special circumstances. Additionally, since the term "special circumstances" is not defined in the statutory language of the CPLR, special circumstances may be shown by establishing that the information sought cannot be obtained from any other sources (*see Lanzello v Lakritz*, 287 AD2d 601, 731 NYS2d 763 [2d Dept 2001]; *Bostram v William Life Ins. Co. of New York*, 285 AD2d 482, 727 NYS2d 160 [2d Dept 2001]; *O'Neill v Oakgrove Constr.*, 71 NY2d 521, 528 NYS2d 1 [1988]). Furthermore, the existence of "special circumstances" is not established merely upon a showing that the information sought might be relevant (*see Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 359 NYS2d 1 [1974]). Therefore, since Stein is a nonparty to this action, plaintiff must demonstrate special circumstances for this Court to issue an open commission (*see Clark v New York City Health and Hosp. Corp.*, 157 AD2d 817, 551 NYS2d 802 [2d Dept 1990]).

Plaintiff seeks to depose Stein because of his membership in The American National Standards

Institute (hereinafter “ANSI”) where he was on the “press brake committee.” In his reply, plaintiff hypothetically states that Wysong will claim it conformed with the standards set forth by the ANSI when it designed, manufactured and distributed the machines in the mid-1970’s and that Wysong will state Stein was a member of the ANSI “press brake committee” in (*allegedly*) claiming to conform to ANSI’s standards. Plaintiff claims that no other person possesses the unique information possessed by Mr. Stein because of his committee membership; “[t]hat Mr Stein can inform plaintiff as to what ANSI’s members considered relevant, practical, and available when he was a committee member; that Mr Stein can inform the plaintiff as to what he told Mr. Heitner and/or other Wysong engineers when they were designing its press brake machines-i.e., Mr Stein is a direct link between ANSI and Wysong engineers and no other person can provide such information to plaintiff.”

However, plaintiff’s premise that Stein is an indispensable party and possesses information because of his unique status of being both an employee of Wysong and a member of a committee of ANSI at the time of Wysong’s manufacture of the “press brake machine,” is dispelled by the affidavit of Richard Martin Stein. In support of its opposition to plaintiff’s demand for an open commission of Stein, Wysong submits the affidavit of Richard Martin Stein, whom plaintiff has named as Dick Stein. In his affidavit, Richard Martin Stein states that he is not now an employee of Wysong; that he was employed at Wysong from 1988 through 1992 as Vice President in the Engineering Department; that at the time of his employment, Wysong was no longer in the business of manufacturing the Press having ceased its manufacture of same sometime in the mid 1980’s; that this was before he was employed at Wysong; that the machine in question, which is the basis of this products liability action, was manufactured and shipped by Wysong some twelve years before his employment; that while the genesis of plaintiff’s argument that, should he be deposed because of his membership on the ANSI “press brake committee” and that he is the only one with the information sought, the committee he served on while a member of ANSI had absolutely nothing to do with any safety issues or with regard to the safe design and/or manufacture of press brake machines; that his membership on the committee was from 1990 through 1993; and that as his employment with Wysong was not at the time frame in which the subject machine was manufactured, he could not have any input whatsoever regarding any safety issues concerning the press brake machine; that his testimony in this case would be based upon his review of the relevant documents, testimony of the parties, and examination of the Press, based upon his many years of experience as an engineer (affd Richard Martin Stein, 4/18/02).

The Court finds that the affidavit of Richard Martin Stein effectively defuses plaintiff’s contention that Stein was an active party as both an employee of Wysong and a member of the ANSI committee during the time frame when Wysong manufactured the press brake machine. Plaintiff, having failed to sustain his burden of special circumstances, is denied his application for an open commission of Stein and his request for Stein’s home address is denied as moot based upon the denial of the open commission.

Plaintiff also seeks to amend ¶ 104 of his complaint and has attached a copy of the proposed amended complaint to his moving papers. It is well settled that leave to amend pleadings is freely given, absent prejudice or surprise (CPLR 3025[b]; *see Perfak v Sollin*, 291 AD2d 540, 737 NYS2d 660 [2d Dept 2002]; *Fahey v County of Ontario*, 44 NY2d 934, 408 NYS2d 314 [1978]; *Murry v City of New York*, 43 NY2d 400, 401 NYS2d 773 [1977]). The decision whether to grant leave to amend rests with the sound discretion of the trial court and is made on a case by case basis (*see Monello v Sottlie, Megna, PC.*, 282 AD2d 463, 722 NYS2d 41 [2d Dept 2001]; *Sherman v Claire Mfg. Co.*, 239 AD2d 487, 657 NYS2d 453 [2d Dept 1997]; *Matter of Goggins*, 231 AD2d 634, 647 NYS2d 804 [2d Dept 1996]; app dis., leave to app den. 89 NY2d 973, 655 NYS2d 886 [1997]). Plaintiff also seeks leave, pursuant to CPLR 3133(c), to amend his answer to the interrogatories served by Wysong with regard to interrogatories Nos. 63 through 67 (*see Baker v Micro Switch*, 197 AD2d 933, 602 NYS2d 485 [4 Dept 1993]; *DiChira v A.J. McNulty & Co.*, 158 AD2d 366, 550 NYS2d 899 [1st Dept 1990]). Plaintiff has submitted a copy of the amended interrogatories and also in support of the proposed changes, submits the affidavit of Paul Blackburn, dated February 8, 2002. Here, the Court finds there will be no prejudice or surprise to defendants by the proposed amendments to plaintiff’s complaint and to Wysong’s interrogatories. It is noted that Wysong does not

Blackburn v Wysong & Miles Co.  
 Index No. 28002-99  
 Page 6

oppose the amendments and lack of opposition is tantamount to consent.

Further, in plaintiff's motion, he states that defendant Wysong has not been responsive to his various Notice for Discovery and Inspection and requests that Wysong provide affidavits from persons with personal knowledge that it conducted a search for the documents and set forth the details of the search and indicate which documents could not be located during that search. In opposition, Wysong states that, to date, it has been responsive to plaintiff's discovery demands.

CPLR 3101(a) requires a party to make full disclosure upon request of "all evidence material and necessary in the prosecution of an action regardless of the burden of proof." Discovery in this matter is far from being completed and Wysong is reminded that it is under a continuing obligation and duty, pursuant to CPLR 3101(h), to amend and/or supplement its response(s) promptly upon obtaining information that the documents requested do actually exist (*see* 2 Weinstein-Korn-Miller at 3101.61). Therefore, that branch of plaintiff's motion requesting an order to compel Wysong to provide affidavits from persons with personal knowledge regarding the search for the documents sought by plaintiff, is denied.

Wysong, in response to ¶¶ 11A, 11B and 11C of plaintiff's motion and the various Notices of Discovery and Inspection, dated January 14, 2002, submits the affidavit of Russell F. Hall, III, which responds specifically to the issues raised in the motion (affd. of Hall, 4/18/02). Plaintiff's discovery demands, addressed by Hall's affidavit, were formulated directly as the result of questions asked of Hall at his deposition held on November 21, 2001. Additionally, the affidavit of Joan S. Bryan, the Secretary of Wysong & Miles and Assistant to the President, also submitted by Wysong, specifically addresses plaintiff's Notice of Discovery and Inspection, dated January 14, 2002, regarding the minutes of meetings of Wysong & Miles, Co. and which was also formulated directly from questions asked of Hall at his deposition (affid. of Byron, 4/18/02). A review of the deposition transcript of Hall indicates that the affidavits of Hall and Bryan are responsive to the discovery requests on this motion (*see, Feeley v Midas Properties*, 168 AD2d 416, 562 NYS2d 543 [2d Dept 1991]) and, therefore, that branch of plaintiff's motion is denied as moot. However, the Court in its discretion, will allow plaintiff to renew his request for information regarding the four other lawsuits as against Wysong pertaining to hydraulic press brake machines.

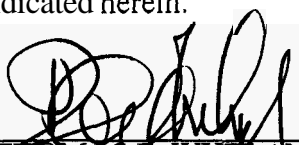
In response to plaintiff's Notice of Discovery and Inspection, dated November 29, 2001, defendant, Stein Industries, Inc., submitted the affidavit of Andrew Stein, Vice-President of Stein Industries, which is responsive to the demands set forth both in the Notice of Discovery and plaintiff's motion. Therefore, that branch of plaintiff's motion is denied as moot.

Lastly, in his reply affirmation, plaintiff seeks to have the Court conduct an in camera review of minutes of Wysong's Board of Directors' minutes from the late 1960's to the mid 1980's. The Court *very* politely declines to even consider the plaintiff's preposterous request and strongly reminds plaintiff that Article 31 of the CPLR is the vehicle for discovery and sets forth quite explicitly by its statutory language how discovery is to be conducted between the parties.

Accordingly, the motion is granted to the extent as indicated herein.

DATED: \_\_\_\_\_

8/6/02

  
 \_\_\_\_\_  
 THOMAS F. WHELAN, J.S.C.