

Penn v Jaros, Baum & Bolles, Kidde PLC Inc.

2005 NY Slip Op 30173(U)

January 7, 2005

Supreme Court, New York County

Docket Number: 0105782/2001

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon Doris Ling-Cohan
Justice

PART 62

0105782/2001

PENN, SAMANTHA
VS
JAROS, BAUM, & BOLLES

SEQ 15
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion to/for reverse the report of Special Referee

Notice of Cross-Motion
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

1, 2, 3, 4

Answering Affidavits – Exhibits _____

5, 6, 7

Replying Affidavits _____
7/7/04 Interim order

8

9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff pursuant to CPLR § 3104(d) for an order reversing the Report + Recommendation of the Special Referee dated Feb. 23, 2004 + defendant Skidmore, Owings + Merrill, LLP to confirm such report, are decided in accordance with the attached memo-andum decision.

FILED
JAN 19 2005
NEW YORK COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 1/13/05



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

-----X
SAMANTHA PENN, as Administratrix of the
ESTATE OF ESTHER PENN,

Plaintiff,

-against-

JAROS, BAUM & BOLLES, KIDDE PLC INC.,
KIDDE-FENWAL INC., SKIDMORE, OWINGS &
MERRILL LLP, S&S FIRE SUPPRESSION SYSTEMS,
NEW WATER STREET CORPORATION, THE CITY
OF NEW YORK, JOHN and JANE DOES # 1-10 (NYFD
PERSONNEL), JOHN and JANE DOES # 11-20
(OTHER CITY PERSONNEL), NORCON
ELECTRONICS, INC. and URIS BUILDING
CORPORATION (a/k/a KINNEMET CORPORATION),

Defendants,

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

THE DEPOSITORY TRUST & CLEARING
CORPORATION, THE DEPOSITORY TRUST
COMPANY and NATIONAL SECURITIES
CLEARING CORPORATION,

Third-Party Defendants,

-----X
NEW WATER STREET CORPORATION,

Second Third-Party Plaintiff,

-against-

THE DEPOSITORY TRUST COMPANY ,
Second Third-Party Defendant.

-----X
JAROS, BAUM & BOLLES,

Third Third-Party Plaintiff,

-against-

THE DEPOSITORY TRUST COMPANY ,
Third Third-Party Defendant.

DECISION/ORDER

Index No.: 105782/01

Motion Sequence No. 15

Third-Party Action

Index No.: 590592/01

Second Third-Party Action

Index No.: 590159/02

Third Third-Party Action

Index No.: 590961/03

-----X
S&S FIRE SUPPRESSION SYSTEMS, INC.,
Fourth Third-Party Plaintiff,
-against-

Fourth Third-Party Action
Index No.: 591015/03

TYCO INTERNATIONAL d/b/a FIREMASTER and
MASTER PROTECTION CORPORATION d/b/a
FIREMASTER,
Fourth Third-Party Defendants.

-----X
SKIDMORE, OWINGS & MERRILL LLP,
Fifth Third-Party Plaintiff,
-against-

Fifth Third-Party Action
Index No.: 591461/03

THE DEPOSITORY TRUST COMPANY ,
Fifth Third-Party Defendant.

-----X
S&S FIRE SUPPRESSION SYSTEMS, INC.,
Sixth Third-Party Plaintiff,
-against-

Sixth Third-Party Action
Index No.: 590056/04

THE DEPOSITORY TRUST COMPANY,
Sixth Third-Party Defendant.

-----X

HON. DORIS LING-COHAN, JSC:

Plaintiff's motion for an order pursuant to CPLR §3104(d) reversing the Report and Recommendation of the Special Referee¹ dated February 23, 2004, is granted and defendant Skidmore, Owings & Merrill's ("Skidmore") cross-motion to confirm such report in part and reject such report in part, is denied.

Background

Plaintiff commenced this action for wrongful death, negligence, strict products liability and premises liability based upon the following. On July 27, 2000, plaintiff's decedent, Esther Penn (Penn), died in an accident while she was working overtime. Penn had been employed as a clerk for second third-party defendant Depository Trust Company (DTC). DTC's place of business consists of several floors of commercial office space, located at 55 Water Street, which DTC

¹ After numerous discovery disputes with respect to both documentary discovery and deposition issues, by order dated August 11, 2003, this Court referred this case to a Special Referee to supervise discovery.

leases from the premises' owner, co-defendant New Water Street Corporation (NWS). DTC's leasehold covers a sub-basement vault, which is where Penn was engaged in copying stock certificates as part of her job. Penn inadvertently became locked in that vault, and no one responded when she telephoned from inside to request that it be opened. When Penn thereafter pulled the fire alarm to draw attention to her presence, she was asphyxiated by the vault's carbon dioxide fire suppression system. She was dead by the time the Fire Department was able to gain access to the vault. Defendant Skidmore, a New York State limited partnership, was the architectural firm which the New York Stock Exchange hired, in 1971, to design the vault in the basement of the 55 Water Street building.

Specifically at issue in the motion and cross-motion before this Court, are defendant Skidmore's 152 interrogatories (including sub-parts) dated September 17, 2003 (consisting of 19 pages of questions), which were served upon plaintiff following the completion of sixteen depositions, which resulted in over 6,000 pages of deposition testimony, accumulated over the course of 32 days.

In a response dated October 6, 2003, plaintiff rejected the interrogatories on CPLR §3130 grounds and on the ground that, *inter alia*, such interrogatories are "abusive, oppressive and in violation of well-settled law". [Exh. D, Notice of Motion]. The Special Referee, however, directed plaintiff to respond to the interrogatories by November 14, 2003.

On November 14, 2003, plaintiff supplied a response to Skidmore's interrogatories which contained objections to, *inter alia*, specific interrogatories which demanded that plaintiff "identify each excerpt of deposition testimony" and "explain for each excerpt of deposition testimony...how it supports the allegation[s]". [Exh. F, Notice of Motion].

At the November 20, 1999 conference before the Special Referee, the Referee rejected plaintiff's objections to the interrogatories and directed plaintiff to serve full and complete responses to the interrogatories at issue by December 5, 2003.

On December 4, 2003, the parties appeared before this Court at a discovery compliance conference and plaintiff again raised objections to Skidmore's interrogatories. The Court

suggested that plaintiff respond to the interrogatories to the extent possible and move to reconsider the issue before the Special Referee. By letter dated December 4, 2003 to the Special Referee, plaintiff requested reconsideration of the Special Referee's order which required that plaintiff further respond to Skidmore's interrogatories. [Exh. H, Notice of Motion].

At a conference before the Special Referee on December 18, 2003, the Referee determined that plaintiff had failed to provide "full, appropriate and complete responses to the interrogatories propounded by Skidmore" and afforded the parties the "opportunity to...submit...a post hearing memorandum of law regarding the issue of whether plaintiff had engaged in sanctionable conduct by reason of its alleged failure to comply with the [Referee's] direction relative to discovery". [Exh. A, at 3-4, Notice of Motion].

On February 23, 2004, the Special Referee issued his Report and Recommendation. Citing no case law, the Special Referee concluded that plaintiff "deliberately, willfully and wantonly" violated the Special Referee's rulings. [Exh. A, at 4, Notice of Motion]. The Special Referee ordered that plaintiff "fully and completely" respond to the interrogatories within thirty days and recommended that if plaintiff failed to timely comply, the Court "should preclude the plaintiff from offering proof, testimony or evidence at trial" with regard to this matter as per CPLR §3126. The Special Referee also recommended that "upon confirmation of the instant report and recommendations, the court impose a sanction in the form of costs in the amount of \$10,000 upon plaintiff's counsel by reason of the frivolous conduct described in [the] report." [*Id.* at 5].

Thereafter, plaintiff timely filed the within motion for an order to reverse the Report and Recommendation of the Special Referee dated February 23, 2004 and Skidmore cross-moved for an order to confirm such report in part, and reject such report in part.

Prior to the issuance of the within decision/order, this Court issued an Interim Order dated July 7, 2004, requiring Skidmore to supply an affirmation and/or memorandum of law: (1) detailing the need and relevancy of each of the subject interrogatories, given the circumstances and posture of the discovery proceedings in this case; specifically given that at least sixteen (16) witnesses have been deposed by the parties including Skidmore, over the course of thirty-two days, with deposition testimony consisting of approximately 6,237 pages; (2) explaining how the subject

depositions did “not adequately disclose all evidence material and necessary to [their] defense of the action” thus necessitating these specific interrogatories, by referring to (by page and line) and attaching the deposition transcript it alleges is inadequate. *Katz v. Posner*, 23 AD2d 774 (2nd Dept 1965); (3) listing which of the interrogatories it contends has not been adequately responded to by plaintiff, with specific details. Plaintiff was given an opportunity to respond to such submission, and Skidmore was given a right to reply. Both sides provided the Court with additional submissions.

Discussion

The purpose of interrogatories is “*supplementation of discovery, not duplication*”. *Wagner v. NFS Financial Services, Inc.*, 96 Misc 2d 134, 136 (Sup Court, New York County 1978)(emphasis supplied). Interrogatories should be limited to the “disclosure of evidence material and necessary to the defense of the action *which was not covered or was inadequately covered on...prior examinations*”. *Katz v. Posner*, 23 AD2d 774 (2nd Dept 1965)(emphasis supplied). Generally, “interrogatories are useful for the purpose of determining the existence of documents to set the stage for meaningful deposition[s]”. *Brandon v. Chefetz*, 101 AD2d 786 (1st Dept 1984)(citation omitted); see also *L.K. Comstock & Co. v. City of New York*, 80 AD2d 805 (1st Dept 1981). It is an “unreasonable annoyance to grant further disclosure of matters already fully disclosed in...extensive oral pretrial examinations.” *Katz v. Posner*, 23 AD2d at 774. Interrogatories which are “patently burdensome, oppressive and improper” should be stricken by the Court. *Roberts v. Modica*, 459 NYS2d 315 (2nd Dept 1983).

Upon review of the submissions before the Court, the Court finds defendant Skidmore’s interrogatories dated September 17, 2003 to be improper, as detailed below.

Such interrogatories, which require, *inter alia*, plaintiff to search all of the deposition testimony consisting of over 6,000 pages of transcript, the locating and explanation of specific sections of such testimony, as well as the locating of exhibits, which have been previously supplied to the parties during the course of discovery, are unduly burdensome, oppressive and serve no relevant purpose but to unduly burden plaintiff. See *L.K. Comstock & Co. v. City of New York*, 80 AD2d at 806; *Barouh Eaton Allen Corp v. International Business Machines Corp.*, 76 AD2d 873 (2nd Dept 1980). The subject interrogatories which demand identification and reiteration of deposition

testimony, clearly do not “supplement” discovery, but rather require plaintiff the unduly burdensome task of sifting through discovery documents which are readily available to all of the parties in this case. Skidmore certainly does not seek information which was not adequately questioned at the depositions; they instead seek that plaintiff comb through thousands of pages of deposition testimony, to identify the information and explain the testimony which was elicited at the parties depositions; such is not the purpose of interrogatories. Such burdensome interrogatories underscore Professor Siegel’s comment “[A] suspicious legislature, fearful that wealthy litigants with a battery of lawyers could bury their poorer adversaries in a blizzard of paper, restricted their use in certain tort actions”. Siegel, NY Prac § 361 at 562 [3d ed].

Skidmore’s argument that such interrogatories were “designed in part to enable Skidmore to address any specific facts concerning its alleged conduct in its moving papers [on its summary judgment motion], thereby making it easier for the Court to decide Skidmore’s motion, is moot, as this Court has rendered a decision on the numerous summary judgment motions and cross-motions made by the parties.² Furthermore, such an argument is baseless as Skidmore is solely responsible for preparing its summary judgment motion, not plaintiff.

Further, the Court notes that, prior to serving the subject interrogatories, defendant Skidmore deposed plaintiff Samantha Penn (the then 19 year old daughter of the decedent Esther Penn), as well as Samantha Penn’s 16 year old brother.

CPLR §3130(1) provides, in relevant part, that

“[i]n the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause of action or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court”.

Here, plaintiff’s wrongful death action is based upon negligence, as well as other theories. However, many of the interrogatories posed by Skidmore focus on the negligence aspect of the case, rather than the other theories of liability, and are therefore improper, as leave of court was not sought prior to their service. *See O’Hara v. New York City Transit Auth.*, 248 AD2d 138 (1st Dept 1998)(ruling that CPLR §3130(1) precludes the service of interrogatories where depositions

² Such decision by this Court was rendered on January 6, 2005.

were conducted of the party, without leave of court, where plaintiffs case was based upon causes of action for negligence and nuisance).

As it is not the Court's duty to "prune" interrogatories, for the reasons stated above, Skidmore's interrogatories dated September 17, 2003, to the extent that they have not been responded to by plaintiff, are hereby vacated. See *L.K. Comstock & Co. v. City of New York*, 80 AD2d at 807; *Vancek v. International Dynetics Corp.*, 78 AD2d 842 (1st Dept 1980); *Barouh Eaton Allen Corp v. International Business Machines Corp.*, 76 AD2d at 874; *Brandon v. Chefetz*, 101 AD2d at 786; *Roberts v. Modica*, 92 AD2d 563 (2nd Dept 1983).

Accordingly, based upon the above, it is

ORDERED that plaintiff's motion for an order pursuant to CPLR §3104(d) reversing the Report and Recommendation of the Special Referee dated February 23, 2004 is granted and such report is hereby vacated; it is further

ORDERED that defendant Skidmore's cross-motion to, *inter alia*, confirm the Report and Recommendation of the Special Referee dated February 23, 2004, is denied; it is further;

ORDERED that Skidmore's interrogatories dated September 17, 2003, to the extent that they have not been responded to by plaintiff, are vacated; and it is further

ORDERED that within 30 days of entry of this decision/order, plaintiff shall serve a copy of this order upon all parties with notice of entry.

This constitutes the order of the Court.

Dated: New York, New York
January 7, 2005

HON. DORIS LING-COHAN

Hon. Doris Ling-Cohan, JSC

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