

Hansen v Gehl Co.
2007 NY Slip Op 31566(U)
June 8, 2007
Supreme Court, Rensselaer County
Docket Number: 0211110/2007
Judge: George B. Ceresia
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF RENSSELAER

PETER HANSEN,

Plaintiff,

-against-

Index No.: 211110

RJI No.: 41-0612-2004

GEHL COMPANY and SALEM
FARM SUPPLY, INC.,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The instant action seeks recovery for serious injuries sustained when plaintiff became entangled in the drive belts and rollers of a round bale hay baler manufactured by defendant Gehl Company (hereinafter defendant). Plaintiff has moved for an order striking defendant's objections to discovery and compelling further responses to interrogatories, responses to notices to produce, granting leave to conduct depositions of

other victims of entanglement accidents, granting leave to renew the motion for an open commission of the former safety engineer for defendant and granting an extension of time to complete discovery. Defendant Gehl has cross-moved for an order compelling plaintiff to respond to discovery demands concerning modifications to the baler performed by plaintiff's expert witness.

A party seeking to compel disclosure has the initial burden of establishing that the items sought are material and relevant to the issues raised in the litigation (see Carp v Marcus, 116 AD2d 854 [3d Dept 1986]).

“The party seeking to prevent disclosure has a heavy burden, especially where the materials sought are relevant. Under CPLR 3101 (a), ‘[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof’. Moreover, ‘trial courts are clothed with broad discretion in supervising the scope of disclosure’ (Bloss v Ford Motor Co., 126 AD2d 804, 805). ‘The words, “material and necessary”, are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason’ (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406). If immunity or privilege are raised, the party challenging disclosure ‘bears the burden of establishing that the information sought is immune from disclosure’ (Bloss v Ford Motor Co., *supra*, at 805; see, Central Natl. Bank v Thorington, 115 AD2d 829, 830).” (Marten v Eden Park Health Servs., 250 AD2d 44, 46-47 [3d Dept 1998]; see also Salzer v Farm Family Life Ins. Co., 280 AD2d 844 [3d Dept 2001]).

Plaintiff seeks to compel further responses to interrogatory number 72 of the first set of interrogatories which sought all documents related to entanglement accidents involving round balers manufactured by defendant. He also seeks to compel further responses to interrogatory number 82 of the first set of interrogatories, which sought all

inquiries, claim letters, complaints or reports concerning persons who have had a body part trapped between any moving belt or roller of a round baler manufactured by Gehl. This Court in its Decision/Order dated December 12, 2006 has already found that documents concerning such accidents may be relevant. Defendant has submitted only an attorney's affidavit in opposition with respect to these issues merely which refers to privilege logs served by defendant.

The privilege logs contain cursory descriptions of various documents and thereafter assert that the accidents are not substantially similar, that some of the material is privileged as material prepared for litigation, and that some of the material is privileged as attorney work product. As noted above, the Court has already determined that the accidents are sufficiently similar to warrant discovery. Moreover, the privilege associated with material prepared for litigation is limited and may only be raised in the litigation for which the material was prepared (see Marten v Eden Park Health Servs., 250 AD2d at 47; Milone v General Motors Corp., 84 AD2d 921 [4th Dept 1981]; Bennett v Troy Record Co., 25 AD2d 799, 800 [3d Dept 1966]). Clearly, none of the materials were prepared for this litigation. As such, the objection is without merit.

While the privilege for attorney's work product is not limited to the same litigation (see Beasock v Dioguardi Enters., 117 AD2d 1016 [4th Dept 1986]),

“the mere assertion that items constitute attorney's work product or material prepared for litigation will not suffice’ (Graf v Aldrich, *supra*, at 824). With respect to the attorney work product exception, the case law makes clear that such exception is ‘very narrowly construed * * * including only materials prepared by

an attorney, acting as an attorney, which contain his analysis and trial strategy' (*id.*, at 824; see, Central Buffalo Project Corp. v Rainbow Salads, *supra*, at 944). Materials or documents that could have been prepared by a layperson do not fall within the attorney work product exception (see, Bloss v Ford Motor Co., 126 AD2d 804, 805; Lamitie v Emerson Elec. Co.--White Rodgers Div., 208 AD2d 1081, 1083 [third-party investigation does not constitute attorney work product]).” (Salzer v Farm Family Life Ins. Co., 280 AD2d 844, 845-846 [3d Dept 2001]).

The privilege logs do not indicate who authored the documents or that they were in fact prepared by an attorney. There is also no meaningful description of the content. Most of the documents are merely described as having originated in defendant's legal department. However, the record shows that defendant's safety engineer is employed by defendant's legal department. Certainly, his work is not subject to any privilege. The privilege log also claims attorney work product for numerous documents prepared by defendant's insurer. The Court also notes that the privilege log is not sworn to by anyone, let alone a person with knowledge of the facts. As such, defendant has failed to meet its burden of showing that the documents are privileged. Accordingly, defendant shall be required to provide copies of such documents within 30 days of the date hereof.

Plaintiff also seeks to compel compliance with interrogatory 23 of his fifth set of interrogatories, which sought the number of units of products in 13 categories of equipment manufactured and sold in 1995, 2000 and 2002. Plaintiff contends that this is relevant to the degree of attention which defendant paid to the safety of its round balers because it had only one person designated as a safety engineer. However, the number of units manufactured and sold does not establish how many different new products were

designed during such periods. The number of units sold does not appear to have any relevance to the work load of the safety engineer. Moreover, it would be entirely speculative to assume that the safety engineer paid less attention to the safety of round balers because other products were also designed and manufactured. Furthermore, the subject baler was placed in production in 1994, and must have been designed before such year. Sales in subsequent years have little or nothing to do with the design of this baler. In any event, whether the safety engineer paid considerable or minimal attention to round balers is irrelevant to whether the design of the particular baler actually was or was not reasonably safe. As such, plaintiff has not shown that the interrogatory seeks information which is material or relevant to the issues in this litigation. That portion of the motion shall be denied.

Plaintiff further seeks to compel production of numerous items contained in an August 22, 2006 notice to produce. Most of the items involve books, articles, and materials which defendant's current safety engineer considered to be authoritative literature concerning safety issues, as mentioned in his deposition. Plaintiff has not submitted a copy of the complaint or bill of particulars served herein. As such, the Court can not ascertain whether there is a cause of action for negligent hiring of the safety engineer. His background, instruction, education and training are clearly irrelevant to whether the subject baler was in fact not reasonably safe as manufactured. Moreover, he was not employed by defendant until three years after the subject baler went into

production and the record indicates that safety issues were not his sole bailiwick. Rather, they were discussed and determined by numerous engineers and other employees. To the extent that plaintiff is seeking discovery of such information on the ground that the safety engineer will be called as an expert witness, CPLR § 3101 (d) (1) (i) only requires reasonable detail as to an expert's qualifications. The level of detail sought herein far exceeds any reasonable inquiry as to such issue. Plaintiff has therefore failed to show that items numbered 1, 3, 5, 6, and 17 of the demand seek documents which are material and relevant.

Plaintiff seeks the full name and caption of an action in which the safety engineer testified. There is no indication that the action involved a round baler. As above, plaintiff contends that such information is relevant because the safety engineer likely testified as to his background, education and training. For the reasons stated above, the information sought in demand numbered 18 is neither relevant nor material.

Plaintiff also seeks documents concerning the development and testing of a newer model of round baler, as well as the preparation, evaluation and review of its operator's manual on the ground that such information is no longer available for the model baler involved herein. However, it would be pure speculation to assume that defendant followed exactly the same procedures in designing and producing such baler many years after the design and production of the subject model baler. Plaintiff has therefore failed to show that item numbered 21 of the demand seeks documents which are material and

relevant.

Item 31 of the demand sought copies of the complaints in five different actions against defendant involving entanglement accidents. Plaintiff's motion papers indicate that plaintiff would accept the caption, index number and court for two of the cases. Defendant has provided such information, rendering that portion of the motion moot. Accordingly that portion of the motion seeking to compel compliance with the August 22, 2006 notice to produce shall be denied. It further appears that defendant has complied with the September 5, 2006 notice to produce. Such relief shall also be denied.

Plaintiff seeks to compel compliance with a June 23, 2006 notice to produce which sought information with respect to all product safety lectures given by defendant's current safety engineer. Defendant responded indicating that the safety engineer never gave any lectures concerning round balers. As above, plaintiff has failed to show that such information is material or relevant to whether the subject baler was or was not reasonably safe or to any other issue in this litigation. Accordingly the motion to compel a response to demands numbered 9 and 10 of the June 23, 2006 notice to produce shall be denied.

Plaintiff also seeks leave to conduct depositions of non-party witnesses who were injured in entanglement accidents involving round balers manufactured by defendant. Defendant objects that plaintiff had sufficient opportunity to conduct such depositions before the court ordered close of discovery, and further that the accidents were not similar. The latter objection has already been determined by the Court. It further appears

that plaintiff did not get sufficient information to be able to contact the witnesses until January, 2007, little more than one month before discovery was to be complete.

Defendant has not shown any prejudice from such minimal delay. Accordingly, leave to conduct the depositions shall be granted.

Plaintiff has also moved to renew a prior application for an open commission to examine Larry Long, defendant's former safety engineer who was employed when the subject baler model was developed and initially produced. Mr. Long retired in 1997 and has submitted an affidavit indicating that he has no present recollection of any relevant facts. As a result, plaintiff has withdrawn that portion of the motion. However, by reply, plaintiff requests that the Court order defendant to produce Mr. Long's curriculum vitae or other documentation of his qualifications. Such information has never been the subject of a proper discovery demand pursuant to article 31 of the CPLR and a reply is not an appropriate means of seeking judicial relief. Accordingly, that portion of the motion addressed to Mr. Long shall be denied without prejudice to service of a proper discovery demand.

Finally, plaintiff seeks an extension of time to complete discovery. Based upon the foregoing, there is outstanding discovery to be completed. Accordingly, the parties shall have until August 22, 2007 to complete all discovery.

Defendant has cross-moved to compel compliance with demands addressed to certain modifications made to the baler involved in plaintiff's accident by an engineer

retained by plaintiff. It appears that an electrically operated clutch system was installed. It is unclear what other modifications were performed. Plaintiff contends that the requested information is privileged as material prepared for litigation and challenges the entirety of the interrogatories and demand for production without addressing specific demands. It is alleged that the modifications were made to demonstrate the feasibility of various alternative safety features. However, the privilege for material prepared for litigation is limited to material which is prepared solely and exclusively for litigation (see Claverack Co-op. Ins. Co. v Nielsen, 296 AD2d 789 [3d Dept 2002]; State of New York v Sand and Stone Assocs., 282 AD2d 954 [3d Dept 2001]; Agovino v Taco Bell 5083, 225 AD2d 569 [2d Dept 1996]). Conclusory assertions that material was prepared solely for litigation do not meet the burden of establishing the privilege (id.). In the instant action, plaintiff has failed to allege or establish that the modifications were performed solely and exclusively for litigation, and not also to have a safer baler for continued use on plaintiff's farm.

Furthermore, the privilege for material prepared for litigation is qualified and may be overcome by a showing of substantial need and that the substantial equivalent of the material can not be obtained without undue hardship (see CPLR § 3101 (d) (2); Martino v Kalbacher, 225 AD2d 862, 863 [3d Dept 1996]). In determining whether a product is reasonably safe, the trier of fact will consider numerous factors including "the usefulness of the product to the consumer as designed as compared to a safer design and the

functional and monetary cost of using the alternative design.” (Scarangella v Thomas Built Buses, 93 NY2d 655, 659 [1999]). Plaintiff had moved for leave to perform the modifications so that he could not be accused of spoliation of evidence. At such time he alleged that the modifications were intended to test the feasibility of alternative safer designs. Issues concerning the extent of modifications, the cost thereof and how well the product performs with the modifications are clearly material and relevant. It further appears that defendant would be required to disassemble the entire piece of complex machinery to verify all of the changes that have been made. The baler would then have to be completely reassembled and then field tested to see if the modifications impacted the usability of the product. It is clear that such effort would be extremely costly and time consuming.

It further appears that defendant is entitled to most of the information pursuant the requirement of disclosure of the basis for expert witness opinion. Given the nature of the expert’s testimony, significant detail with respect to the specific modifications forming the factual basis for his opinion must be disclosed (see e.g. Cramer v Englert, 289 AD2d 617, 618 [3d Dept 2001]; Karney v Arnot-Ogden Mem. Hosp., 251 AD2d 780, 783-784 [3d Dept 1998]; Brossoit v O'Brien, 169 AD2d 1019, 1020-1021 [3d Dept 1991]).

Therefore, the cross-motion shall be granted.

Accordingly it is

ORDERED that plaintiff’s motion to compel compliance with discovery demands

is hereby granted to the extent that defendant is hereby directed to provide further responses to interrogatories numbered 72 and 82 of the first set of interrogatories within 30 days of the date hereof; and it is further

ORDERED that the plaintiff is granted leave to conduct deposition of non-party witnesses Houck, Johnston and Rodriguez; and it is further

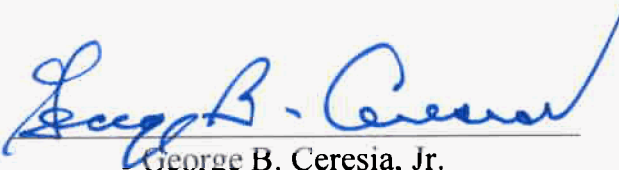
ORDERED that the time for completion of discovery is hereby extended until August 22, 2007; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that defendant's cross-motion to compel compliance with discovery demands is hereby granted. Plaintiff shall serve responses to defendant's fourth interrogatories and third demand for discovery and inspection within 30 days of the date hereof.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiff, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
June 8, 2007


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated February 27, 2007; Affirmation of Michael Kolb, Esq., dated February 26, 2007; Affirmation of James Alexander Burke, Esq., dated February 27, 2007 with Exhibits A-L annexed;

Affidavit of Gregory J. Rodriguez, Esq. sworn to March 21, 2007 with Exhibits 1-6 annexed; Affidavit of Lawrence P. Lang sworn to March 20, 2007; Memorandum of Law dated March 21, 2007;

Notice of Cross-Motion dated March 21, 2007; Affidavit of Gregory J. Rodriguez, Esq. sworn to March 21, 2007 with Exhibits A-F annexed; Affidavit of John B. Severt sworn to May 23, 2005; Memorandum of Law dated March 21, 2007;

Affirmation of James Alexander Burke, Esq. dated March 29, 2007 with Exhibits A and B annexed.