

Suneson v NWL Holdings, Inc.

2007 NY Slip Op 33783(U)

November 15, 2007

Supreme Court, Nassau County

Docket Number: 0054-06/

Judge: Ute W. Lally

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCAN

SHORT FORM ORDER

MOD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

LISA SUNESON,

Plaintiff(s),

MOTION DATE: 9/6/07
INDEX No.10054/06
MOTION SEQ NO. 3

-against-

NWL HOLDINGS, INC. d/b/a National Wholesale
Liquidators, NATIONAL WHOLESALE LIQUIDATORS
BUYING, INC., d/b/a National Wholesale
Liquidators, et al.,

Defendant(s).

The following papers read on motion to compel and motion to amend
complaint:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4-10
Replying Affidavits.....	11,12

Upon the foregoing papers, it is ordered that the motion by
plaintiff for (1) an order pursuant to CPLR 3124 compelling
defendant PACTIV Corporation to comply with plaintiff's notice for
discovery and inspection dated March 1, 2007 and (2) an order
pursuant to CPLR 3025(b) granting leave to serve an amended
complaint are disposed of as follows.

This is an action to recover money damages for personal
injuries allegedly sustained by plaintiff while she was using an
aluminum cooking pan manufactured by defendant PACTIV Corp.
(hereinafter "PACTIV") and allegedly sold by defendants NWL
HOLDINGS, INC. d/b/a National Wholesale Liquidators, NATIONAL
WHOLESALE LIQUIDATORS BUYING, INC., d/b/a National Wholesale
Liquidators, NATIONAL WHOLESALE LIQUIDATORS, INC., NATIONAL
WHOLESALE LIQUIDATORS OF SPRING VALLEY, INC. d/b/a National

Wholesale Liquidators, NWL OF NANUET, INC. (hereinafter collectively "NWL"). On January 30, 2004 plaintiff was using the aluminum pan when the contents of the pan spilled on her causing the alleged injuries.

On March 1, 2007 plaintiff served upon PACTIV a notice for discovery and inspection. Plaintiff demanded copies of all reports pertaining to PACTIV's sales and shipments of the allegedly defective aluminum cooking pan for the period of November 30, 2002 through November 30, 2003. On April 16, 2007 PACTIV served a response objecting to the demand and stating that it was overly broad and irrelevant.

If a party objects to demands contained within a notice for discovery and inspection the party must serve a response objecting to the demands within twenty days of being served with the initial notice (CPLR 3122). "The failure of a party to challenge the propriety of a notice for discovery and inspection pursuant to CPLR 3120 within the time prescribed by CPLR 3122 forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR 3101, or requests that are palpably improper. PACTIV contends that the reports plaintiff demand contain trade secrets which are privileged pursuant to CPLR 3101 and, therefore, not discoverable.

"Although the scope of discovery under CPLR 3101 is to be construed liberally, where discovery of trade secrets is sought, the party seeking disclosure of trade secrets must show that the information demanded appears to be indispensable to the ascertainment of truth and cannot be acquired in any other way: (CareCore National, LLC v New York State Association of Medical Imaging Providers, Inc., 24 AD3d 488 489; see also Deas v Carson Products Company, 172 AD2d 795). The party asserting that the information is not discoverable bears the initial burden of establishing the existence of trade secrets within the information sought (Xand Corporation v Reliable Systems Alternatives Corp., 25 AD3d 795). Customer lists may be treated as trade secrets where it is shown that the lists cannot be readily ascertained by the public and the lists were compiled through the expenditure of substantial time and money (Gifford Oil Co., Inc., v Wild, 106 AD2d 610).

PACTIV claims that the reports plaintiff seeks to discover contain their customer lists. PACTIV has submitted an affidavit from Rudy Cellar, a business manager employed by said defendant, who states that the cooking pan at issue is a commercial pan not sold to retail outlets and, therefore, the lists of the customers who buy the pan are not readily ascertainable by the public. He further states that PACTIV expends substantial time and money to develop and maintain client relationships. He claims that only authorized employees have access to the lists and it would be detrimental if these lists were disclosed.

Plaintiff states in her reply that she does not dispute PACTIV's customer lists contain trade secrets. This court finds that PACTIV has sustained its initial burden of demonstrating that their customer lists contain trade secrets (see Curtis v Complete Foam Insulation Corp., 116 AD2D 907). The burden now shifts to plaintiff to show that the information appears to be indispensable to the ascertainment of truth and cannot be acquired in any other way (CareCore National, LLC v New York State Association of Medical Imaging Providers, Inc., supra; see also Deas v Carson Products Company, supra).

Plaintiff contends that the information she seeks may possibly identify a third party who bought the pan at issue from PACTIV and sold it to NWL.

Chad Chatterton, an employee of PACTIV, testified at an examination before trial that the cooking pan at issue was sold to commercial users only and would not be sold to a retail outlet such as NWL. He also stated that there was no way to tell when the pan was manufactured. Gerald Schultz, an employee of NWL testified at an examination before trial that the defendants had never purchased aluminum cooking pans manufactured by PACTIV. He examined the pan at issue and stated that it was not consistent with the pans sold by NWL.

Plaintiff seeks discovery of documents that would require disclosure of PACTIV's customer lists from November 30, 2002 through November 30, 2003, however she has offered no evidence that the pan at issue was sold during this time period. She claims that it is a possibility, but makes no showing as to why it is likely

that the pan was purchased during this time period, or how it could be established that it was. She also offers no evidence that she has attempted to ascertain this information in any other way that does not require PACTIV to disclose trade secrets. The court finds that plaintiff has failed show that the information appears to be indispensable to the ascertainment of truth and cannot be acquired in any other way (Curtis v Complete Foam Insulation, Inc., supra; Bartl v Robert Half of Long Island, Inc., 150 AD2d 747).

Accordingly, so much of this motion to compel PACTIV to comply with the notice for discovery and inspection dated March 1, 2007 is denied.

Plaintiff seeks leave to amend the complaint. She has amended the complaint previously and now seeks to do so a second time. Non-party witness Dolores Buckenberger, plaintiff's mother-in-law, testified at an examination before trial that she purchased the cooking pan at National Wholesale Liquidators in Nanuet, New York. Plaintiff wishes to amend the complaint to reflect the actual store where the pan was purchased and the date of purchase as established by the testimony of her mother-in-law.

"A party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences at any time by leave of court or by stipulation of all parties" [CPLR 3025(b)]. Leave to amend a pleading shall be freely granted where no prejudice or surprise has resulted directly from the delay (McCaskey v New York City Health and Hospitals Corp., 59 NY2d 755; see also Glaser v County of Orange, 20 AD2d 506). It would be an improvident exercise of discretion to deny leave absent an inordinate delay and a showing of prejudice (Sclafani v City of New York, 271 AD2d 430; see also Banff Products Corp. V Gentile, 236 AD2d 348).

PACTIV contends that plaintiff's motion must fail as she has not submitted an affidavit of merit from Dolores Buckenberger alleging the facts sought to be incorporated in the second amended complaint.

The plaintiff has submitted a transcript of the testimony of Dolores Buckenberger taken at an examination before trial on April

27, 2006. Ms. Buckenberger testified that she was the individual who purchased the pan. She gave testimony as to where the pan was purchased and on what date. Plaintiff seeks to amend the complaint to incorporate these facts. The plaintiff has provided sworn testimony of an individual with personal knowledge of the facts she seeks to assert in the second amended complaint. Under these circumstances this court finds that the lack of an affidavit of merit from Ms. Buckenberger is not fatal to plaintiff's motion (see English v Ski Windham Operating Corp., 263 AD2d 443).

NWL claims they will be prejudiced if plaintiff is granted leave to amend the complaint. They contend that they will suffer delay if the complaint is amended for a second time, but they make no showing of prejudice that will result from that delay. It is insufficient for them to merely claim they will suffer prejudice. NWL must make a showing of the prejudice that will arise from the delay (see Sclafani v City of New York, supra).

Accordingly, plaintiff's motion for leave to amend the complaint is granted.

The amended complaint in the form annexed to the moving papers as Exhibit "H" shall be deemed served five (5) days after service of a copy of this order with notice of entry upon the attorneys for defendants.

Dated: NOV 15 2007

W. Hall
J.S.C.

ENTERED

NOV 20 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**