

**Gelfond v Fortune Brands, Inc.**

2008 NY Slip Op 30244(U)

January 23, 2008

Supreme Court, New York County

Docket Number: 0107616/1998

Judge: Charles E. Ramos

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

PRESENT: CHARLES E. RAMOS  
*Justice*

PART 53

Gelfand, Max  
- v -  
Fortune Brands, Inc.

INDEX NO. ea 107616/1998  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 011  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JAN 29 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

IS DISPOSED OF  
IN ACCORDANCE WITH THE ACCOMPANYING  
MEMORANDUM DECISION

IS DISPOSED OF  
IN ACCORDANCE WITH THE ACCOMPANYING  
MEMORANDUM DECISION

Dated: 1/23/08

**HON. CHARLES E. RAMOS** 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: COMMERCIAL DIVISION

-----X  
MAX GELFOND, individually and on behalf  
of the Estate of BELLE GELFOND,

Plaintiff,

-against-

Index No.  
107616/98

FORTUNE BRANDS, INC. f/k/a AMERICAN  
BRANDS, INC., THE AMERICAN TOBACCO  
COMPANY, BROWN & WILLIAMSON, INC., BROWN  
& WILLIAMSON TOBACCO CORPORATION,  
Individually and as Successor by Merger of  
FORTUNE BRANDS, INC., and THE AMERICAN  
TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC.,  
and THE COUNCIL FOR TOBACCO RESEARCH-U.S.A.,  
INC.

Defendants.

**FILED**  
JAN 29 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**Charles Edward Ramos, J.S.C.:**

Defendants Brown & Williamson Holdings, Inc., f/k/a Brown & Williamson Tobacco Corporation, sued individually and as successor to merger to Brown & Williamson Industries, Inc., Fortune Brands, Inc., f/k/a American Brands, Inc., The Tobacco Institute, Inc., and The Council for Tobacco Research-U.S.A., Inc. (defendants), move for the issuance of a Commission authorizing subpoenas to take the out-of-state depositions of three non-party witnesses.

**Background**

Plaintiff Max Gelfond sues individually and on behalf of the estate of his deceased wife, Belle Gelfond, for compensatory and punitive damages from defendants, comprising tobacco companies that manufacture, distribute, and sell cigarettes. Mrs. Gelfond smoked cigarettes from 1941 until 1994, and later died of lung cancer, allegedly caused by cigarettes.

Subsequent to Mrs. Gelfond's death, plaintiffs instituted this action. They asserted causes of action for failure to warn, fraud, negligence and defective design, strict products liability, breach of express warranty, and breach of implied warranty of merchantability, based upon allegations that defendants misrepresented and concealed that cigarette smoking was both addictive and caused serious illness.

Since the onset of discovery, defendants have deposed seven witnesses: Mr. Gelfond, Mrs. Gelfond, Adele Gerber, Mrs. Gelfond's sisters, and three of Mrs. Gelfond's children (Transcript of July 16, 2007 at 4:14-18).

The three witnesses that Defendants seek to depose are Mollie Fettner, Mrs. Gelfond's sister, Phoebe Gelfond, Mrs. Gelfond's sister-in-law, and Harriet Greenberg, Mrs. Gelfond's cousin. These three non-parties are elderly, and reside in Florida.

#### **Discussion**

Defendants argue that the information sought from these witnesses, is material and necessary, and may lead to admissible proof regarding Mrs. Gelfond's initiation of smoking. According to defendants, a ten-year gap of time exists concerning Mrs. Gelfond's initiation of smoking from 1941, when Mrs. Gelfond began smoking, to 1951, when Mrs. Gelfond met Mr. Gelfond, that Mr. Gelfond cannot testify to. Consequently, defendants seek to depose the non-party witnesses about this ten-year period in time when Mrs. Gelfond began smoking.

\* 4 ]

Plaintiffs contend that defendants have abused discovery practices in this case. According to plaintiffs, without notifying plaintiffs' counsel, defendants interviewed the same family members of Mrs. Gelfond that they now seek a commission to depose. Plaintiffs assert that subjecting these same elderly family members to depositions will only result in duplicative fact-gathering that has already been obtained from questioning these witnesses, and from the depositions already taken. Additionally, plaintiffs allege that the issuance of a commission will only result in increased expense and delay.

While the CPLR permits a party to obtain discovery of non-privileged matter that is relevant to a claim or defense (CPLR 3101), discovery, like all matters of procedure, has ultimate and necessary boundaries. Subjecting Mrs. Gelfond's elderly relatives to depositions regarding their recollection of Mrs. Gelfond's initiation to smoking in 1941, crosses these boundaries, and appears to be designed to bury these plaintiffs in unreasonable discovery demands.

First, defendants have not demonstrated that the information they seek from non-party Phoebe Gelfond, Mrs. Gelfond's sister-in-law, is relevant. In light of the fact that Mrs. Gelfond did not meet Phoebe Gelfond until 1951, she will likely not offer probative testimony concerning Mrs. Gelfond's initiation of smoking in 1941.

Moreover, since 2000, defendants have already deposed five of Mrs. Gelfond's relatives, including Mrs. Gelfond's sister, on

the very same issue that defendants now seek additional depositions. Defendants presumably became aware of the purported need to depose these witnesses in 2000, when plaintiffs first produced witnesses for deposition. Inexplicably, defendants waited nearly seven years to depose these elderly relatives about events that occurred more than 65 years ago.

Additionally, defendants do not dispute that without notice to plaintiffs, they already interviewed the same witnesses that they now seek a commission to depose. Rather than expediting the discovery process, these practices, combined with expensive and voluminous discovery demands already served upon plaintiffs, appear to be designed to prejudice the plaintiffs. Ultimately, these unreasonable discovery demands have the potential of dissuading future plaintiffs from bringing these actions, and exacerbate the obvious economic disparity between plaintiffs and defendant-tobacco companies. To grant defendants' motion for open commissions to conduct oral depositions of these elderly, out-of-state witnesses, whose recollection of events at issue will likely be dubious and unproductive, at best, would be to sanction these discovery practices (*Deutsche Bank Securities, Inc. v Montana Bd. of Investments*, 7 NY3d 65, 74 [2006]; *Ulico Casualty Co. v Wilson, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1<sup>st</sup> Dept 2003]).

Therefore, in order to assure that the information they seek is material and necessary to their defense, and to decrease the burden to plaintiffs, defendants may take depositions of Mollie

Fettner and Harriet Greenberg on written questions only (CPLR 3108). The depositions on written questions shall be limited in scope, to the issue of Mrs. Gelfond's initiation of smoking, and limited in number, to twenty-five questions.

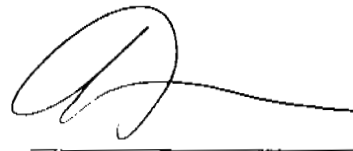
Accordingly, it is

ORDERED that the motion by defendants for the issuance of a Commission authorizing subpoenas to take the out-of-state depositions is denied; and it is further

ORDERED that defendants may seek the issuance of a commission authorizing depositions on written questions to non-party witnesses Harriet Greenberg and Mollie Fettner, by submitting a proposed order to Part 53.

Dated: January 23, 2008

ENTER:



J.S.C.

**HON. CHARLES E. RAMOS**

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