

O'Brien v Citizens Ins. Co. of Am.

2008 NY Slip Op 33371(U)

December 11, 2008

Supreme Court, Suffolk County

Docket Number: 20049-2003

Judge: Peter H. Mayer

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.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MEMORANDUM DECISION

-----X		
DENNIS A. O'BRIEN, DELORA O'BRIEN,	:	Wilkofsky, Friedman, Karel & Cummins
JENNA O'BRIEN, DENNIS O'BRIEN, JR. and	:	Attorneys for Plaintiffs
ELISSA O'BRIEN, by her parents and natural gdn	:	299 Broadway
DENNIS O'BRIEN and DELORA O'BRIEN	:	New York, New York 10007
	:	
Plaintiff(s),	:	Rivkin Radler
	:	Attys for Deft/Third-Party Pltf Citizens Ins.
- against -	:	825 Third Avenue
	:	New York, New York 10022
	:	
CITIZENS INSURANCE COMPANY OF	:	
AMERICA, ALEXANDER WALL CORP., H2M	:	L'Abbate, Balkan, Colavita & Contini
LABS INC. and HOLZMACHER, McLENDON	:	Attorneys for Defts H2M Labs and
& MURRELL, P.C.,	:	Holzmacher, McLendon & Murrell
	:	1050 Franklin Avenue
Defendant(s).	:	Garden City, New York 11530
-----X		
CITIZENS INSURANCE COMPANY OF	:	Milber, Makris, Plousadis & Seiden, LLP
AMERICA,	:	Attorneys for Deft/Second Third-Party Pltf
	:	Alexander Wall Corp.
Third-Party Plaintiff(s),	:	1000 Woodbury Road
	:	Woodbury, New York 11797-2511
- against -	:	
	:	H. Bruce Fisher, P.C.
RPT ENVIRONMENTAL ASSOCIATES, INC.,	:	Second Third-Party Gloria's Cleaning
	:	45 Rockefeller Plaza
Third-Party Defendant.	:	New York, New York 10111
-----X		
ALEXANDER WALL CORP.,	:	Meticulous Onsite Soot Service
	:	Second Third-Party Deft Pro Se
Second Third-Party Plaintiff,	:	38 Cedar Grove
	:	Lake Grove, New York 11755
- against -	:	
	:	
METICULOUS ONSITE SOOT SERVICE and	:	
GLORIA'S CLEANING,	:	
	:	
Second Third-Party Defendant,	:	
-----X		

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT, after the Sanctions Hearing conducted on August 4, 2008 pursuant to the Order of the Court, dated August 6, 2007, and upon the moving papers set forth therein, the Court finds as follows: it is

ORDERED that as a result of the August 4, 2008 Sanctions Hearing, the Court hereby imposes sanctions upon the defendant, Alexander Wall Corp., as set forth herein; and it is further

ORDERED that counsel for the plaintiff shall promptly serve a copy of this Order upon all parties, or their attorney if represented by counsel, and shall thereafter promptly file a copy of this Order with the County Clerk.

This case commenced with the filing of a Summons and Complaint on August 5, 2003. The defendant Alexander Wall Corp. ("Wall") answered on or about November 6, 2003. The plaintiffs' filed a Notice for Discovery and Inspection which contained, *inter alia*, requests for "copies of contracts, sub-contracts, certificate of insurance letters, correspondence, agreements for construction, remediation or demolition work including, but not limited to, general contracts and sub-contractors agreements, project manager's agreement, and the like concerning the subject project. Also demanded were copies of all documentation concerning chemicals, machinery and any other pertinent data related to the cleaning, remediating and/or otherwise treating the conditions found at the subject premises subsequent to the fire. The time set for response was December 19, 2003.

The defendant H2M also served a Notice of Discovery and Inspection on co-defendant Wall dated October 24, 2003. The defendant Wall responded to the defendant H2M's Notice of Discovery and Inspection. Wall's response to H2M's demand was dated August 24, 2004. Item #15 in H2M's demand called for Wall to produce "true and accurate copies of all written reports, correspondence, memorandums, notes and other written accounts of the August 10, 2002 occurrence and resulting damage." Item #18 in H2M's demand called for Wall to produce "true and accurate copies of all documents that identify the chemicals, solvents, agents, and other substances used during the clean-up, repair and remediation of the premises."

Wall's response to Items #15 and #18 stated "documents produced by co-plaintiff (sic) Citizen's include all materials responsive to this demand in defendant's possession, custody or control." Contrary to the assertion in the response, Citizen's did not produce the materials demanded. Therefore, the assertions by counsel for defendant Wall in the responses #15 - 18 in H2M's demands, were false.

CPLR §3120 requires that a demand for discovery shall specify a time, not less than 20 days for a response to the demand. CPLR §3122 states, in pertinent part, that a party who, in responding to a demand, seeks to withhold documents shall give notice to the party seeking production and inspection that one or more of the documents are being withheld. No such notice was tendered here by the defendant Wall to plaintiff. There is no evidence of a response to plaintiffs' demand before the Court. By order dated April 14, 2005, the Hon. Robert Webster Oliver mandated that defendant Wall was to provide responses to plaintiffs' discovery and inspection by May 15, 2005.

Gary Alexander, a principle of defendant Wall, was deposed on August 19, 2005. At the time of this deposition, the defendant Wall still had not complied with the Order of Justice Oliver. His testimony establishes that the defendant Wall maintained a complete file concerning the remediation of the plaintiffs' residence. Among other items, the file contained the names of the products used in

the clean-up. Although Mr. Alexander recalled that liquid agents were used, he could not remember the names of any of them notwithstanding the fact that he reviewed the file the day before. Plaintiffs' counsel requested the file for purposes of refreshing the witness' recollection, the response to which was a declaration by counsel for the defendant Wall that he did not bring the file to the deposition. Testimony during the examination before trial establishes that the file also contained the names of any subcontractors as well as copies of any agreements plus names of those employees who did the plaintiffs' remediation. The record also established that the witness couldn't remember any of these details.

Not receiving the file, on September 9, 2005 the plaintiffs made a formal demand for the same via letter. On November 3, 2005, a stipulation "So Ordered" by the Hon. Robert Webster Oliver mandated the production, within thirty days, of the file which was the subject of the examination before trial of Gary Alexander, and the letter of September 9, 2005. The file was not produced until January 31, 2006, the day before the first conference with this Court. On February 1, 2006 this Court ordered the disclosure of the complete file along with the names of each employee of defendant Wall present during the remediation of plaintiffs' residence prior to February 14, 2006. This was ordered as neither the plaintiff nor the Court were made aware of the January 31, 2006 tender of the file during the Court proceeding on February 1, 2006.

On February 14, 2006, Jim Cavo of the defendant Wall was deposed. The deposition prompted a letter by plaintiff to defendants dated February 17, 2006 demanding materials and machinery utilized by the defendants' employees and names of outside contractors doing work on behalf of Wall. The witness had disclosed that the defendant maintains such lists. The letter also demanded items referred to in the deposition of Gary Alexander on August 19, 2005 and still not responded to, including the material safety data sheets which contain the chemicals used in restoration work by the defendant as well as a description of their dangers.

Plaintiffs were directed by the Court to tender interrogatories to the defendant Wall in its order of March 8, 2006. The Court directed the interrogatories to expedite the disclosure of information without the necessity of deposing every employee of the defendant Wall. In the Order, the Court specifically directed that the interrogatories ask "who/what was at the O'Brien premises, when they were there and precisely what quantities of chemicals, solvents, and machinery was used." The Order also mandated a response to the plaintiffs' letter of February 17, 2006. They were to be served by March 14, 2006 and responded to no later than April 10, 2006.

Question #3 of the interrogatories requested identification of the names and addresses of subcontractors and names of all individuals who worked at the subject premises for said entities, as well as any contracts, either written or oral and, if oral, the terms. Interrogatory question #4 asked for a specific description of the nature of the work done by the employees of the defendant Wall or any subcontractors. Interrogatory question #5 asked the defendant Wall to state with specificity the date and time that any Alexander Wall employee or subcontractor engaged in any clean-up, fire restoration, or any other work from August 10, 2002 to date. Interrogatory question #6 asked for a specific list of materials, chemicals, solvents, or machinery utilized as well as the function of the materials and the dates these items were used as well as the MSDS for such substance.

Other than identifying the two subcontractors in response to question #3 of the interrogatories, the defendant's responses in interrogatory questions #4 - 6 consisted of objections and to referred the

plaintiff to the depositions of Gary Alexander, James Cavo and Alexander Wall's previous discovery production. The interrogatories were unsworn and submitted by defendant's attorney on information and belief.

The defendant's response to plaintiffs' February 17, 2006 letter, which is part of the defendant's response to interrogatories, was not adequate, resulting in the Order of April 11, 2006 mandating the defendant Wall "to provide the lists and other documents demanded in plaintiffs' February 17, 2006 letter." A separate entry was contained in the Order that the Court would strike the defendant's answer on the separate ground of failing to properly respond to the letter of February 17, 2006, as well as a mandate that the answer be stricken if the defendant Wall did not properly respond to interrogatories #3 - 6 by May 2, 2006. The February 17, 2006 letter demanded five (5) items including "seminar materials, license numbers, MSDS book with articles, MSDS books, and names of subcontractors." These items had been previously referred to by Gary Alexander, President of Alexander Wall Corp., albeit without specificity, during his deposition of August 19, 2005 and demand for same was made at that time.

The defendant's initial April 10, 2006 response did not disclose any seminar materials, or license numbers, but contained a declaration that MSDS books with articles had already been provided and that the names of the subcontractors were provided in the interrogatories. The defendant also announced the commencement of a third-party action against the subcontractors, Meticulous Onsite Soot Service and Gloria's Cleaning.

Rule 3133(b) of the CPLR requires that answers to interrogatories shall be answered in writing under oath by the party served . . . if the party served is a corporation, by an officer, director, member, agent or employee having the information (emphasis added) . Each question must be answered separately and fully, and each answer must be preceded by the question to which it responds. The form of the defendant's responses violated Rule 3133(b) of the CPLR in that they were unsworn, not tendered by the party and based upon information and belief of counsel to the party. Responses to interrogatories that are unsworn by a non-party referring the party tendering the query to deposition transcripts of others violates Rule 3133(b), as well as the specifics of the March 8, 2006 Court Order. The defendant Wall also violated the Court's Order of March 8, 2006 in that the answers to interrogatories #4 - 6 were non-responsive. These violations resulted in the Court's Order of April 11, 2006, the content of which is outlined above. The defendant responded to this Order by submitting unsworn answers to the interrogatories, prompting the plaintiffs to write again on May 9, 2006 objecting to the vague, conclusory and unsworn answers.

The defendant responded in a letter dated June 9, 2006 and agreed to remove, "upon information and belief" from the introductory paragraph and to have Gary Alexander, President of Wall, execute a verification. It also alleges that the plaintiff had knowledge of the sub-contractors "for more than six months." Thus, the defendant admits there was no disclosure of the existence of the sub-contractors for more than three years.

Various continuances of the matter occurred subsequent to the April 11, 2007 and April 17, 2007 conferences until August 7, 2007, after which the Court completed its Decision on the Summary Judgment motions filed by all defendants. As part of its Decision, the Court ordered a Frye Hearing (*Frye v United States*, 54 App DC 46, 293 F 1013 [1923]) to determine the admissibility of Multiple Chemical Sensitivity Syndrome (MCSS). In addition to the Summary Judgment motions, plaintiffs

filed a motion seeking to strike the defendant Wall's answer pursuant to CPLR 3126 for flagrant discovery violations.

The Court has reviewed the depositions of Gary Alexander, President of defendant Wall and Jim Cavo, an employee of Wall who worked on the O'Brien restoration as project manager. Mr. Alexander's deposition took place on August 19, 2005 and Mr. Cavo's deposition took place on February 14, 2006. Mr. Alexander revealed during his deposition that ammonia was used as a cleaning agent at the O'Brien house. He stated that a subcontractor named Airco cleaned the HVAC duct work with a product called Foster Sanitizer. Beyond this, Mr. Alexander could not identify any products or types of products used during the cleaning project at plaintiffs' residence. He acknowledged that the project file he reviewed the day before his deposition contained the names of those products he could not recall during the deposition. The decision to not bring the file to the deposition was made by counsel to Wall, Mr. Braunstein, as he admitted this fact during colloquy with plaintiffs' counsel. Further, Mr. Alexander could not state with any specificity the names of any other subcontractors who did work at the O'Brien house.

During Mr. Cavo's deposition, plaintiff had access to the project file previously tendered by the defendant on or about January 31, 2006. Mr. Cavo specifically identified Meticulous OnSite Soot Cleaning Service and Gloria's Cleaning as two subcontractors who worked on this project. This was the first specific disclosure that two subcontractors had been utilized for this remediation project.

Notably, the witness did not know why two subcontractors were used when normally one is used. He apparently went to Las Vegas in the middle of the job and thought supervision of the remediation was taken over by Gary Alexander. He also stated he had no specific memory of what cleaning agents or materials were used or in what quantities. Further, he stated that this was the case, even though the defendant Wall distributes their recommended list of cleaning agents to all subcontractors. The file used during Mr. Cavo's deposition did contain various Material Safety Data Sheets (MSDS), which contain information about particularly identified cleaning agents. These sheets contained information regarding the chemical constituents of the products, including disclosures concerning health hazards. From the presence of these sheets in the file, the witness opined as to what cleaners may have been used, but was not able to assert what substances were actually used.

Finally, the file included a document that listed three names under a Wall Job Cost Journal with a heading labeled "PRCLN" for August 16, 2002. The witness explained these would have to be employees of the defendant A. Wall for work done on the O'Brien project. He had no memory of what they did as he was in Las Vegas. Thus, the first disclosure of names of employees came on February 16, 2006.

The Court concludes that the disclosure of the material demanded by the plaintiff was inordinately delayed by Wall. This delay was extremely significant as it related to the plaintiffs' claim of injuries sustained by the introduction of toxic substances into the plaintiffs' household by the defendant during the cleaning process. The defendant never disclosed the names of subcontractors, or employees, until at least January 31, 2006, the date the project file was finally tendered. The information in this file had no real meaning, however, until the testimony of Jim Cavo on February 14, 2006. The actual chemicals used have never been specifically disclosed. Although the defendant claims this information may be under the control of subcontractors, the defendant did not disclose the existence of the subcontractors until January 31, 2006. Given the history and timing of these

disclosures, the Court concludes the delay by the defendant was wilful and contumacious.

The Court is disturbed by the fact that counsel for defendant Wall saw fit not to bring the project file to the deposition of Gary Alexander on August 19, 2005. A review of the deposition transcript of Mr. Alexander reveals an astonishing lack of memory of any details regarding the O'Brien project. For example, although he knew that Mr. Cavo was the project manager, he did not know any of the names of any of the people who worked this project. He could only opine as to what cleaning agents might have been used, even though all this information was in the file. He did not know why ozone machines were used, although he opines Mr. Cavo brought them in to alleviate odors. The balance of the testimony is replete with a claimed lack of memory, notwithstanding a review of the project file the day before. Many of these problems would have been alleviated, therefore, had the file been produced at the deposition. The decision not to bring the file was intentional. This decision was made by Mr. Braunstein, counsel to the defendant.

Based on these facts, the Court must impose a penalty pursuant to CPLR §3126. The nature and degree of the penalty to be imposed on a motion pursuant to CPLR §3126 rests with the sound discretion of the Court (*see, Carbajal v Bobo Robo, Inc.*, 38 AD3d 820, 833 NYS2d 150 [2d Dept 2007]). The violations here resulted in extended judicial intervention in order to obtain proper responses from the defendant to the plaintiff. The plaintiff had to make a motion and the Court took time to conduct a hearing regarding this issue. The defendant's actions resulted in a waste of judicial resources.

Although the Court concludes that the defendant's discovery violations are wilful and contumacious, the Court declines to strike the defendant's answer as requested by plaintiff. Pursuant to 22 NYCRR 130-1 the Court finds the conduct of the defendant Wall and its counsel, Milber, Makris, Plousadis & Seiden, LLP, to be frivolous in that its delayed discovery responses were violative of Court orders and were designed to "primarily delay or prolong the resolution of the litigation." (*See*, 22 NYCRR 130-1[c][c2]). The delay precluded the plaintiff from learning the actual chemicals used during the remediation, which are alleged to have proximately caused respiratory injuries to the O'Brien family.

Based on the foregoing, the Court will award reasonable attorneys' fees upon presentation of proper proof, in admissible form, of the fees incurred related to the making of the motion and the conduct of the sanction hearing. Plaintiffs' counsel is directed to submit proof as to fees no later than January 13, 2009.

The Court imposes a financial sanction upon Milber, Makris, Plousadis & Seiden, LLP, in the amount of \$3,000.00. In addition, the Court imposes a financial sanction on the defendant Wall in the amount of \$3,000.00. These sanctions shall be paid in accordance with 22 NYCRR 130-1.3.

This constitutes the Decision of the Court.

Submit Judgment.

Dated: December 11, 2008


PETER H. MAYER, J.S.C.