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SCANNED ON 1/9/2009

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

PRESENT: STALLMAN Justice PART 7

HEINE, AGNES ISABEL

- v -

M+E 336-348 E. 18TH ST, LLC, ET AL.

INDEX NO. 115996/06

MOTION DATE 9/11/08

MOTION SEQ. NO. 05

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for VACATE ORDER

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-E	1-2
Answering Affidavits — Exhibits A-W; A-F	3-4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

FILED
JAN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN J.S.C.

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

Dated: 12/22/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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AGNES ISABEL HEINE,

Plaintiff,

Index No. **115996/06**

- against -

M&E 336-348 E. 18TH ST., LLC, M&E MANAGEMENT CORP., CROMAN REAL ESTATE, INC., CROMAN FAMILY ASSOCIATES, LLC, STEVEN CROMAN, HARRIET CROMAN, HEWLETT-PACKARD COMPANY, HPSHOPPING.COM, SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., CONSOLIDATED EDISON, INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this action sounding in, among other things, negligence, products liability, and breach of warranty, plaintiff Agnes Isabel Heine alleges that she suffered extensive burns during an apartment fire which she claims originated from a Hewlett Packard laptop computer owned by her boyfriend at the time. Another occupant in the apartment, Brian Mahanna, brought a separate action against the same defendants. By order dated October 31, 2007, this Court joined the actions for trial and directed consolidation of pre-trial proceedings.

A compliance conference in both actions was held on March 20, 2008. Directive No. 9 of the compliance conference order dated March 20, 2008 provides as follows: "Plaintiffs must provide a formal discovery response detailing the alleged defective component or components and/or appurtenances of the HP computer and plaintiffs must also state the general nature of the defective condition on or before April 22, 2008." Gersowitz Affirm., Ex A. Directive No. 10 directs that

"Plaintiff Heine must be produced for a deposition at a mutually agreeable date within 21 days, counsel shall fully adhere to the Uniform Rules for the Conduct of deposit[ions]." Ibid.

Heine moves to vacate both directives. She argues that a further deposition is not warranted because she was deposed on January 31, 2008 and again on February 22, 2008. Plaintiff also argues that directive no. 9 is inconsistent with directive no. 19 of the compliance conference order dated February 7, 2008, which directs plaintiffs to supplement their bills of particulars "as it relates to product liability claims & breach of warranty claims with[in] 30 days following EBT of [defendant] Hewlett Packard (viz. BP #s 8, 12, 13, 18, 19, 20, 23, 24, 26, 27 & 28)." Gershowtiz Affirm., Ex D.

DISCUSSION

As a threshold matter, Hewlett-Packard's argument that the motion to vacate the compliance conference order is procedurally improper is without merit. The motion to vacate is appropriate to obtain an order appealable as of right. See Serradilla v Lords Corp., 12 AD3d 279, 280 (1st Dept 2004); see also Sholes v Meagher, 100 NY2d 333, 335-336 (2003).

Heine has shown no basis for the Court to vacate the order directing her to appear for a further deposition. As Hewlett Packard indicates, Heine's counsel disrupted Heine's EBT at several moments at her deposition on February 22, 2008. See Biancanello Affirm., Ex J. In one exchange, Hewlett Packard's counsel asked,

> "The laptop that was on top of the desk, or a different laptop, or something else?
>
> MR. GERSOWITZ: She testified there was only one laptop in the room I thought.
> MR. BIANCANELLO: Okay.
> MR. GERSOWITZ: So why are you asking about another laptop?
> MR. BIANCANELLO: Just being clear.
> MR. GERSOWITZ: You're clear. Was it the elephant in the room, or was it the

giraffe that was in the closet? I believe she testified in response to your previous question from seeing the location of the fire.

* * *

MR. GERSOWITZ: Just note my objection to this line of questioning.

Q. So now when you say the laptop caused the fire, do you mean the laptop itself, just the computer itself, the contained plastic structure, or are you referring to something else that would be part of the computer, or something to that effect?

MR. GERSOWITZ: Mike, she's not an expert witness here on that, you know that. She's only testifying as a fact witness to what she sees. When you ask questions like do you know what caused it and she answers the laptop to you, she's not an expert on that area . . . [speaking objection continues]

* * *

MR. BIANCANELLO: But as to what her belief is to commence the lawsuit, that's a fair question.
MR. GERSOWITZ: I have to disagree with you on that. She's got an attorney here also. Let me just speak to you outside for one second. [A discussion off the record follows]

Biancanello Affirm., Ex J, at 105-107. When questioned about the allegations of the complaint that Heine verified, her counsel interrupted the questioning:

MR. GERSOWITZ: So you're asking her questions about what's in the complaint?
MR. BIANCANELLO: Correct.
MR. GERSOWITZ: By counsel, this is a document prepared by me.

Id. at 141-142. Heine's counsel then proceeded to question his client about the verification of the complaint, interrupting Hewlett Packard's examination, which led an off the record discussion. Id. at 142-143.

Section 221.1 of the Uniform Rules for the Conduct of Depositions provides, in pertinent part:

"(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted

> by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning."

22 NYCRR 221.1. Section 221.2 states,

> "a deponent shall answer all questions at a deposition, except . . . (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person. . . .Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition."

22 NYCRR 221.2. Counsel's speaking objection was not warranted. The compliance conference order's reference to the Uniform Rules for the Conduct of Depositions clearly indicates that a violation of these rules was the basis for ordering plaintiff's continued deposition. Counsel for Heine argues that he did not prevent plaintiff from answering any "questions of substance," which is not the standard. Not only has counsel not shown that the questions were palpably improper, but he has also not shown that Heine would have suffered significant prejudice by answering the questions posed, within her understanding of the question posed. The cases that Heine cites predate enactment of the Uniform Rules for the Conduct of Depositions, which became effective October 1, 2006. Because Heine's attorney did not permit questioning about the basis of the allegations of the verified complaint, Hewlett-Packard is entitled to complete the remainder of Heine's deposition and to have the opportunity to question Heine about her basis for making the allegations.

In support of directive no. 9, Hewlett Packard principally cites Calbi v General Motors Corp. (204 AD2d 148 [1st Dept 1994]) and Kadan v Volkswagen of America, Inc. (129 AD2d 948 [3d Dept 1987]) and Ferrigno v General Motors Corp., 134 AD2d 479 (2d Dept 1987). In Calbi, which involved an allegedly defective vehicle, the Appellate Division, First Department stated, "Presently

unwilling or unable to identify any specific defect, plaintiffs may not, prior to their deposition, embark on a fishing expedition in the hope that 'something might be caught.'" Calbi, 204 AD2d at 149. In Kadan, the Appellate Division, Third Department stated, "We do not dispute VW's essential premise that it is incumbent upon the proponent of a products liability claim to specifically identify the component of the product claimed to be defective so as to define the issues and prevent unfair surprise at trial." Kadan, 129 AD2d at 949.

However, "[i]t is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus plaintiff need not identify a specific product defect." Ramos v Howard Indus., Inc., 10 NY3d 218, 223 (2008). Calbi and Kadan should not be read to require these plaintiffs to identify any specific product defect before any other discovery may proceed, because that would create unsurmountable obstacles of obtaining proof that may be within defendants' control. The complexity of the technology and the knowledge of the laptop's design, manufacture, operation and battery usage, and any information concerning other fires that may have occurred inside Hewlett Packard laptop computers or their batteries, are uniquely within the knowledge of Hewlett Packard, not plaintiffs.

To balance defendants' concerns of prejudice or unfair surprise, plaintiffs must be directed to respond to defendants' demands to identify any specific product defect.

> "[I]n the event that plaintiff[s] . . . lack sufficient knowledge to furnish particulars with respect thereto, they shall state so under oath and shall promptly serve a further supplemental bill of particulars upon [defendants] if and when the requisite knowledge to answer these items of the demand is acquired."

Pole v Frame Chevrolet, Inc., 126 AD2d 531, 532 (2d Dept 1987); accord Scott v General Motors Corp., 117 AD2d 662, 662 (2d Dept 1986). Thus, Heine's motion to vacate directive no. 9 is granted

only to the extent that directive no. 9 is amended to provide that Heine and Mahanna may respond that they currently lack sufficient knowledge to identify a specific product defect if such is the case.[1]

That plaintiffs may be currently unable to identify a specific product defect does not create an insurmountable obstacle for Hewlett Packard to produce a knowledgeable person for its deposition. The pleadings raise the issue of whether a defect in the laptop computer or the battery caused the fire, notwithstanding a fire marshal's report which indicates that the origin of the fire may be from an external power strip. At a minimum, Hewlett Packard should produce a witness or witnesses with knowledge of the laptop's electrical system, its power supply and power supply requirements, and with knowledge (whether acquired from internal investigation or otherwise) concerning Hewlett Packard laptops or batteries in Hewlett Packard laptops catching fire. Moreover, plaintiffs can clearly set forth in their deposition notices the scope of the factual issues which they want to cover in Hewlett Packard's deposition.

Finally, Sony partially opposed Heine's motion, insofar as Sony did not want its deposition to proceed before plaintiffs identified a defect possibly linking Sony to the cause of the fire. Heine's working theory is that a Sony battery in the laptop was defective and "thought to be compatible with HP Pavilion computer notebooks." See generally Verified Complaint ¶¶ 278-317. At her deposition, Sony's counsel asked Heine if she had any basis to believe that the battery in the laptop was manufactured, sold or distributed by Sony. Heine answered, "No, I don't know." Gersowitz Affirm., Ex C, at 180. Accordingly, directive no. 8 of the March 29, 2008 compliance conference order provides, "Deposition of SONY will not be held as scheduled unless discovery proves that a

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[1] Although Mahanna did not separately move to vacate directive no. 9, it would be unjust for the plaintiffs to be subject to different requirements in responding to the same demands from Hewlett Packard.

SONY battery was involved in incident." Gersowitz Affirm., Ex A. Heine did not seek any relief as to directive no. 8, and so that directive is undisturbed.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff Agnes Isabel Heine's motion, by order to show cause, to vacate certain directives of the Court's compliance conference order dated March 20, 2008 is granted only to the extent that directive no. 9 is modified to provide that Heine and Mahanna may respond that they currently lack sufficient knowledge to identify a specific product defect if such is the case, and the motion is otherwise denied; and it is further

ORDERED that plaintiff Heine shall appear for a further deposition within 35 days.

Dated: December 22, 2008
New York, New York

ENTER:

J.S.C.