

Matter of New York City Asbestos Litig.

2010 NY Slip Op 33214(U)

November 8, 2010

Sup Ct, NY County

Docket Number: 190136/10

Judge: Sherry Klein Heitler

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

PRESENT: _____

PART _____

Index Number : 190136/2010

MCDERMOTT, JOSEPH P.

INDEX NO. _____

vs

AIR & LIQUID SYSTEMS

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ORDER OF PROTECTION

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied

*As per the memo
decision of 11.8.10.*

FILED

NOV 16 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

11.8.10

[Signature]
SHERRY KLEIN HEITLER /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X

In Re: New York City Asbestos Litigation

NYCAL

----- X

JOSEPH MCDERMOTT AND ROSALIE
MCDERMOTT

Index No. 190136/10
Motion Seq. 001

Plaintiffs,

DECISION AND ORDER

- against -

ABEX CORP., et al.,

Defendants.

----- X

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, Joseph McDermott and Rosalie McDermott (collectively, "Plaintiffs") move pursuant to CPLR § 3103 for a Protective Order preventing the deposition of Michael Ciron ("Ciron"), as a non-party witness, by defendant Mario & DiBono Plastering Co., Inc. ("Mario & DiBono" or "Defendant") as sought by Defendant's Notice of Deposition and Subpoena *Ad Testificandum* served on Ciron on June 10, 2010. For the reasons set forth below, the motion is granted.

BACKGROUND

Michael Ciron, currently age seventy-nine, worked as a laborer in various construction trades from 1949 until 1994, including a brief period of employment with the Defendant in 1966. He was diagnosed with asbestosis in December of 1998 and commenced a lawsuit against the Defendant and others for his injuries in March of 1999. Ciron was deposed in connection with his own lawsuit twice, first in May of 2005 and later in October of 2007. On November 14, 2008, Ciron provided deposition testimony as a non-party coworker witness in the personal injury action of Peter Zerbo,

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now deceased. Counsel for Defendant was present and had the opportunity to cross-examine Ciron during each of these three depositions. Ciron was questioned about asbestos-containing products to which he was exposed, as well as Mr. Zerbo's exposure in his coworker testimony, the brand name products he could recall, and the manner and location of such exposure. Ciron was also asked to name his co-workers, which he did on several occasions.

Mario & DiBono is named in a separate group of asbestos-related personal injury and wrongful death actions which were filed pursuant to the Case Management Order for New York City Asbestos Litigation, dated February 19, 2003 ("NYCAL CMO"), included in which is Plaintiff's case herein. In each case, the plaintiff claims that Mario & DiBono caused or contributed to their alleged disease as a result of the use of asbestos containing spray-on fireproofing at various buildings in New York City, including Madison Square Garden, the Pan Am Building, New York Plaza, and Penn Plaza. None of the coworkers named during Ciron's three previous depositions are plaintiffs in any of those underlying actions.

On June 10, 2010, Mario & DiBono served Ciron with a Notice of Deposition and Subpoena *Ad Testificandum* which sought to depose him on July 7, 2010. Thereafter Plaintiffs filed the instant motion, alleging that: (1) Mario & DiBono's discovery request is facially defective because it fails to state with the requisite degree of particularity the circumstances requiring his testimony; and (2) Ciron's deposition is not material and necessary to the underlying actions. In opposition, Defendant alleges that: (1) Ciron's testimony should be preserved in admissible form in order to rebut the testimony of numerous plaintiffs who claimed to have been exposed to asbestos-containing materials during construction performed by Mario & DiBono; and (2) Plaintiffs motion is procedurally defective because no good-faith attempt was made to confer with defense counsel with

respect to the basis of the instant motion.

DISCUSSION

Defendant contends that Plaintiffs motion is facially defective for failure to comply with the good-faith provisions of the Uniform Rules for the New York State Trial Courts. Section 202.7(2) requires that, with any motion relating to discovery, counsel must provide an affirmation that it has conferred with counsel for the opposing party “in a good-faith effort to resolve the issues raised by the motion.” See 22 NYCRR § 202.7(a)(2); see also *Molyneaux v City of New York*, 64 AD3d 406 [1st Dept 2009]. The inclusion of such an affirmation concerning discovery matters has been strictly enforced. *Molyneaux, supra*, 64 AD3d at 406; see also *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009].

Plaintiff provided such an affirmation in its reply brief, which details the communications between counsel prior to the filing of the motion. Efforts to settle this issue were also discussed during a status conference with counsel for both parties on September 14th, 2010. Settlement of the issue could not be reached. This Court is satisfied that the parties acted in good faith. See CPLR § 2001.

Plaintiffs argue that the Notice of Deposition and Subpoena *Ad Testificandum* are facially defective because they do not describe the expected area of interrogation. Pursuant to CPLR § 3101(a)(4), a party seeking disclosure from a non-party witness must state in a discovery notice “the circumstances or reasons such disclosure is sought or required.” *Arons v Jutkowitz*, 9 NY3d 393, 417 [2007]. In addition, the NYCAL CMO requires that a party seeking non-party witness testimony state the “area of expected interrogation.” NYCAL CMO § X(A)(6).

The Notice of Deposition, dated June 10, 2010, provides that Defendant seeks to depose

Ciron “on all relevant issues, as authorized by Article 31 of the CPLR.” Defendant could have drafted the notice with greater detail. However, the Subpoena *Ad Testificandum*, also dated June 10, 2010, seeks Ciron’s testimony “in connection with alleged personal injuries sustained by [the injured parties] due to [their] exposure to various asbestos-containing products.” This language is sufficient to put Ciron on notice of the expected area of interrogation, thereby satisfying the provisions of the CPLR and the NYCAL CMO.

Plaintiffs also argue that Ciron’s testimony is necessary to its defense of the underlying actions. CPLR § 3101(a) provides for “full disclosure of all evidence material and necessary in the prosecution or defense of an action.” Section 3101 is to be construed to permit discovery of testimony “which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable.” 3 Weinstein-Korn-Miller, *N. Y. Civ. Prac.*, par. 3101.07, p. 31-13. The courts are given wide discretion in determining whether the information sought is in fact “material and necessary.” *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968].

While the First Department has emphasized that “[t]he scope of disclosure provided by CPLR 3101 is generous, broad, and is to be construed liberally,” *Mann ex ret. Akst v Cooper Tire Co.*, 33AD3d 24, 29 [1st Dept 2006], the court must also limit discovery to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.” *Pomeranz v Pomeranz*, 99 AD2d 407, 407 [1st Dept 1984]. Discovery must be “relevant to a legitimate subject of inquiry” and cannot be “used as a tool of harassment or for the proverbial ‘fishing expedition’ to ascertain the existence of evidence.” *Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 342 [1st Dept 1997]. In an asbestos related dispute, the parties are to avoid “unnecessary and repetitive questioning of witnesses.” NYCAL CMO § X(A)(3).

Plaintiffs contend that Defendant cannot meet its burden given the exhaustive nature of Ciron's previous testimony. Specifically, counsel points out that Ciron has already been deposed twice by Mario & DiBono, first in his own personal injury action, and later in Mr. Zerbo's action. According to Plaintiffs, the transcripts show that Ciron has exhausted his recollection as to the asbestos containing products to which he was exposed, his memory regarding his employers, work-sites, and the identities of any co-workers. In essence, Plaintiffs argue that all the questions which Mario & DiBono could conceivably ask at a discovery deposition have been answered.

Defendant argues that Ciron's deposition testimony is "of the utmost importance" to its defense because it will directly contradict the identification of Mario & DiBono as the contractor at specific buildings at issue in the underlying actions and establish percentage liability shares for use at trial pursuant to CPLR Article 16. For example, plaintiff James McDermott, who is allegedly suffering from mesothelioma, identified Mario & DiBono as the contractor responsible for applying asbestos containing spray-on fireproofing during the construction of Madison Square Garden. According to Ciron, on the other hand, the contractor responsible for the fireproofing was Empire Pyro-Spray, not Mario & DiBono. Similarly, plaintiff Jay Ebinger identified Mario & DiBono as the contractor responsible for installing asbestos containing spray-on fireproofing during the construction of the Pan Am building. In his 2005 deposition, Ciron testified that he installed asbestos containing fireproofing during the same construction period while employed by a company called Jamboy. This same basic discrepancy, according to Defendant, exists for each of the plaintiffs in the underlying action, thereby making Ciron's testimony essential to its defense.

Notwithstanding that the information sought may be "material" to the case, it is not "necessary" as required by Article 31. Defendant is not seeking to *discover* any additional

information; it is seeking to *preserve* Ciron's testimony in admissible form for trial. This case therefore turns on whether Defendant should be permitted to conduct a deposition for preservation purposes alone. Preservation may be permitted where the party to be deposed is unable to testify because of his age or health. *See Morley v Morley*, 191 AD2d 372 [1st Dept 1993]. To meet this burden, a party must show that the non-party witness is "so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial, or that some other special circumstances exist requiring his examination in advance." *W. P. Davis Mach. Co. v Robinson*, 42 Misc 52, 54 [NY Sup Ct 1903]; *see also Wood v Flagg*, 121 AD 636, 638 [1st Dept 1907] (denying a party from preserving the testimony of a non-party witness where it was not alleged that he was sick or infirm).

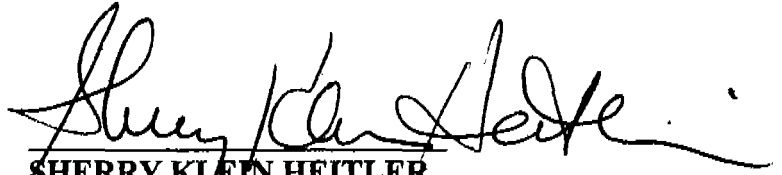
Although Ciron is seventy-nine years old and does suffer from asbestosis, he is not currently in an *in extremis* condition, nor has it been shown that he suffers from any other ailments. Given the circumstances, there is no reason to believe that Ciron will be unavailable for trial. Therefore, Defendant may not depose Ciron at this time. If Defendant is able to provide additional evidence which demonstrates Ciron's infirmity or Ciron's condition deteriorates in the future, the Court will reconsider this Order.

Therefore, it is hereby

ORDERED that the motion to quash the Subpoena *Ad Testificandum* be granted.

This constitutes the Decision and Order of the Court.

DATED: November 8, 2010


SHERRY KLEIN HEITLER
J.S.C.

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