

MetLife Auto & Home v Cunningham

2011 NY Slip Op 30706(U)

March 23, 2011

Sup Ct, NY County

Docket Number: 101314/09

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

-----X
METLIFE AUTO & HOME a/s/o EARL FREIMAN and
PAULETTE DOUGLAS,

Plaintiff,

-against-

Index No. 101314/09
Motion Date 12/15/10
Motion Seq. No. 001
Motion Cal. No.

CATHRYN CUNNINGHAM, NICHOLAS
CUNNINGHAM, P.C. RICHARDS & SON, LLC,
P.C. RICHARD & SON SERVICE CO., INC., and LG
ELECTRONICS U.S.A., INC.,

Defendants.

Action No. 5

-----X
ADMIRAL INDEMNITY CO., a/s/o 380 RIVERSIDE
TENANTS CORP.,

Plaintiff,

-against-

Index No. 100837/08

KATHRYN CUNNINGHAM, NICHOLAS
CUNNINGHAM, P.C. RICHARDS & SON LONG
ISLAND CORP., and LG ELECTRONICS U.S.A., INC.,

Defendants.

Action No. 1

FILED

MAR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----X
STATE FARM FIRE & CASUALTY CO., a/s/o
CATHRYN CUNNINGHAM and NICHOLAS
CUNNINGHAM and FARM FAMILY CASUALTY
INSURANCE CO., as Subrogee of NICHOLAS
CUNNINGHAM and CATHRYN CUNNINGHAM,

Plaintiffs,

-against-

Index No. 104197/08

Action No. 2

P.C. RICHARD & SON, INC., and LG ELECTRONICS
USA, INC.,

Defendants.

-----X
FIREMAN'S FUND INSURANCE CO., a/s/o
RICHARD J. HELLER,

Plaintiffs,

-against-

Index No. 114142/08

Metlife v Cunningham

-2-

Index No. 101314/09

KATHRYN CUNNINGHAM, NICHOLAS CUNNINGHAM, P.C. RICHARDS & SON LONG ISLAND CORP., and LG ELECTRONICS U.S.A., INC., Defendants.

Action No. 3

-----X
VIGILANT INSURANCE CO., a/s/o BRONWEN HRUSKA and GRAHAM RAYMAN, Plaintiffs,

Index No. 116430/08

-against-

LG ELECTRONICS USA, INC., P.C. RICHARD & SON, LLC, CATHRYN CUNNINGHAM and NICHOLAS CUNNINGHAM, Defendants.

Action No. 4

-----X
The following papers, numbered 1 to _____ were read on this motion for Summary Jgmt.

NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

| PAPERS

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MAR 25 2011

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These are five consolidated for subrogation actions for joint trial in which insurance companies are seeking to recoup moneys paid to their insureds for property damage resulting from the malfunction of an air conditioner causing a fire.

This motion in Action No. 5 seeks to compel defendant LG Electronics ("LG") to respond to discovery demands or in the alternative to strike its complaint. In addition, it also moves to compel LG to produce a knowledgeable witness for deposition.

In the course of this litigation, one of the plaintiffs, Metlife Auto & Home, served defendant LG with a Notice to Admit. One of the Notice to Admit demands stated that LG was the manufacturer of the refrigerator (See Demand No.4 of Notice to Admit, attached to movant's Order to Show Cause as Exhibit 2). That Notice is dated May 7, 2010. The record does not reveal that there was any response. Movant then demanded discovery of all the documentation submitted to Underwriters Laboratories ("UL"), including test data, test results, plans and specifications for the design, manufacture, etc. for certification for retail sale. Very little documentation has been produced along with a failure to produce a knowledgeable witness.

Movant argues that defendant has failed to abide by CPLR 3101, which requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."

LG maintains that it does not have custody and control over the documentation that movant seeks. It only distributes the products manufactured by its parent corporation which is located in Seoul Korea. Nevertheless, it has attempted to obtain the information requested by the movant and the other plaintiffs, but it is a slow and difficult process. LG states that it is willing to produce a witness, but such a witness while knowledgeable about the distribution and sale of the product will have only limited knowledge about the technical aspects of its manufacture. Everything LG has stated about the relationship between itself

and its parent company has been alleged by its attorney without any indication of personal knowledge. It is, therefore, patent hearsay without any documentary evidence to corroborate his statements.

LG's failure to respond to movant's discovery demands, the Conference Order in which it agreed to produce the requested UL documents and its failure to offer the slightest response to movant's Notice to Admit, represents a cavalier attitude to procedural rules and Court orders that has not gone unnoticed. The issue raised about whether LG is or is not the manufacturer is beside the point in the face of its clear failures. Had it been more forthcoming, this motion would most probably not have been necessary, along with the waste and delay it has caused.

CPLR 3126 gives the Court a variety of options, one of which is the striking of this defendant's answer (See, *Mendez v City of New York*, 7 AD3d, 766, 778 NYS2d 501 [2d Dept 2009]). While that is certainly an option, the Court feels that the recent decision of the First Department is the preferred approach for now. In *Figdor v The City of New York*, in the face of repetitious violations of discovery the Court held at 33 AD3d 557, 560-561, 823 NYS2d 385 [1st Dept 2006].

While discovery has trickled in with the passage of each Compliance Conference, the cavalier attitude of defendants resulting as it has in substantial and gratuitous delay should not escape adverse consequence (citations omitted).

With that admonition, the Court laid down a conditional order which sanctioned the defendants in the sum of \$10,000, unless within 30 days of the service of a copy of the order with Notice of Entry, the full disclosure is served upon the movant.

Following the guidelines of the Appellate division, First Department, it is

ORDERED that the defendant LG USA is dismissed unless within 30 days of the service of a copy of this Order it remits the sum of \$6,500 to movant Metlife as attorney's fees and provides the UL documentation, together with motion costs of \$100.00.

Dated: March 23, 2011

Enter:

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MAR 25 2011

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Louis B. York, J.S.C.

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J.S.C.

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Check if appropriate: DO NOT POST REFERENCE