

Graham v A.O. Smith Water Prods. Co.

2011 NY Slip Op 30710(U)

March 22, 2011

Sup Ct, NY County

Docket Number: 190300/09

Judge: Sherry Klein Heitler

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

George Graham

Plaintiff,

- v -

A.C Smith Water Products, et al

Defendant.

INDEX NO.

190300/09

MOTION DATE

MOTION SEQ. NO.

09

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

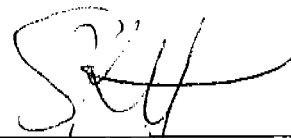
*This motion is decided in accordance
with the memorandum decision dated 3/22/11*

FILED

MAR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/22/11



SHERRY KLEIN HEITLER 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: PART 30

----- X
GEORGE GRAHAM,

Plaintiff,

-against-

A.O. SMITH WATER PRODUCTS COMPANY, et al.,

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190300/09
Motion Seq. 009

DECISION AND ORDER

FILED

MAR 25 2011

NEW YORK
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Pursuant to Section III, paragraph B of the September 20, 1996 Case Management Order, as amended February 19, 2003 ("CMO") which governs New York City Asbestos Litigation ("NYCAL"), defendant Aurora Pump Company ("Aurora") appeals from and seeks a protective order in respect of the November 11, 2010 Recommendation ("Recommendation") of the Special Master, which directs the immediate production of certain microfilm sales records and drawings in such defendant's possession. As more fully set forth below, Aurora's motion for a protective order is denied and the Special Master's Recommendation is confirmed.

Plaintiff George Graham was diagnosed with malignant mesothelioma in June 2009 at the age of 69. He provided approximately 11 days of deposition testimony regarding his exposure to asbestos. In relevant part, he testified that he was employed from approximately 1973 to 1993 by the New York City Housing Police ("HP"). As part of his duties as a Housing Police Officer, he routinely patrolled as a priority and/or worked in the basements of New York City housing developments including, but not limited to, the Gun Hill Houses, Boston Secor Houses, Pelham Houses, Marble Hill Houses, Eastchester Houses, Baychester Houses, and Grant Houses

("Housing Developments"). Plaintiff alleges he was exposed to asbestos-containing products while he worked in the basements of these Housing Developments over the course of his employment with the HP. Specifically, he claims that he was exposed to asbestos from maintenance work being performed in his presence by repairmen on asbestos-containing pumps, compressors, boilers, heating equipment, motors, valves, floor tiles, insulation, and joint compounds.

In 2010 both plaintiff's counsel and defendant's counsel inspected several of the Housing Developments' basements where plaintiff worked. The inspections showed that Aurora pumps were currently installed in the basements of some of the Housing Developments. Because these were newer nonasbestos-containing pumps, plaintiff seeks Aurora's sales records dating back to 1945 to establish whether Aurora had previously supplied asbestos-containing pumps to the Housing Developments.

Defendant objects to the discovery request as overbroad and burdensome, subjecting it to unreasonable annoyance, expense, and prejudice. Defendant contends that neither plaintiff nor any other witness has established that an Aurora pump was installed at any of the Housing Developments during plaintiff's employment with the HP. Defendant further alleges that simply because there are currently Aurora pumps at some of the Housing Developments where plaintiff worked does not mean that new Aurora pumps replaced older ones.

Defendant asserts that a search of nearly 1,000,000 microfilm images and 24,000 pump specification drawings is not reasonably calculated to produce relevant data, and results in unreasonable annoyance and expense. Defendant concedes that the requested microfilm images could contain pertinent information such as to whom sold, to whom shipped, and sale dates, but

claims that its pumps were most likely sold directly to distributors. Defendant argues there is only a remote possibility that the Housing Developments where plaintiff worked would be listed in the microfilm images, unless the pumps were shipped directly to those locations. Defendant asserts that without the serial numbers for the asbestos-containing pumps, it would be nearly impossible to trace Aurora pumps to any of the Housing Developments where plaintiff worked simply by reviewing the microfilm images and drawings.

Generally, “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action....” CPLR 3101(a). The courts have “wide discretion to decide whether information sought is ‘material and necessary’ to the prosecution or defense of an action....” *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]. The phrase “material and necessary” is “to be interpreted liberally to require disclosure of any facts bearing on the controversy” and turns on whether the information sought is relevant, useful, and within reason. *Id.* at 406-07; *see also Mann ex ret. Akst v Cooper Tire Co.*, 33AD3d 24, 29 [1st Dept 2006]. “[T]he demander must tender a description of each item or category in a sufficiently accurate manner to enable the adverse party to identify it readily.” *Theodoli v 170 East 77TH 1 LLC, et al.*, 24 Misc.3d 1103, 1107 [Sup. Ct., N.Y. County, 2009] [quoting Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3120:4, at p. 224].

This court recognizes that 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]. However, “[i]f the disclosure sought is of relevant material and does not come under any of the immunities of the CPLR 3101 (b), (c), or (d)(2), it will be the rare case in which CPLR

3103 is applied to deny disclosure altogether.” Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3103:1, at p. 555.

Section V of the CMO directs that the “Civil Practice Law and Rules and the Local Rules of the Supreme Court of the State of New York, New York County together with the express provisions of this Order shall govern all proceedings herein.” *Id.* at p. 6. Compliance with the CMO’s standard discovery provisions is not discretionary, but required. The standard request for production of documents demands that a defendant produce “[a]ll records of sales and deliveries of...asbestos-containing products to any company or worksite in New York City...” Exhibit D to CMO, at p. 28. The standard document request aids the court’s objective to “encourage and bring about the fair, expeditious, and inexpensive resolution of these cases.” CMO § II, p. 1.

Defendant’s allegations that plaintiff is embarking on a “fishing expedition” are unfounded. The information sought by plaintiff is material and necessary to this controversy. Plaintiff’s request neither exceeds the scope of the CMO, nor lacks reasonable particularity in describing the documents requested therein. Plaintiff’s request strictly adheres to the CMO’s standard discovery provisions and is limited to information about “any asbestos containing product sold, shipped, distributed and/or manufactured [that] was present during the time period specified at any job sites listed below....” Defendant’s Exh. C, p 1. This request is not overbroad as it properly seeks only those documents reasonably necessary to its case. *See* CMO § II, p. 1; *Allen v Crowell-Collier Pub. Co.*, *supra*, 21 NY2d at 406. In this regard, defendant’s corporate representative, Leroy Franklin, has testified to the fact that relevant information could be contained in the requested microfilm images and drawings (*See* Defendant’s Exh. I, “Franklin deposition,” pp. 60, 76-77):

Q: As you scan through, are you able to see packing slips . . . which indicate sold to, ship to, and dates?

A: If I landed on the right image, yes. If I landed on another image that didn't give me a serial number, it was kind of in the middle of it, I would go forward or back until I found one that would say the serial number. And it would have dates on it, yes.

Q: And so you're also able to review the image on the page to focus on who it was sold to, correct?

A: If I was looking for that, yes.

* * * *

Q: Is there on any of the drawings, to your knowledge, which pertain to the commercial drawings of equipment manufactured by Aurora Pumps information of a customer name or information pertaining to a ship-to name?

A: There could be. Generally it's not, but on a drawing a customer could request that their name be put on the drawing.

Plaintiff is entitled to this information if in fact it does exist, even if a search through all the images and drawings sought to be produced amounts to a time and resource consuming endeavor. While such a search might be difficult, defendant will not necessarily be subjected to unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice thereby. Mr. Franklin, who himself conducted a similar type of search, testified that if the documents were examined uninterrupted, "[i]t could be days, [i]t could be weeks" to find the information sought by plaintiff. (Franklin deposition, p. 78). He further testified that "if you have the time and the money," locating such shipping destination information as may exist in respect of defendant's pumps on the microfilm images, and the customer names from the drawings is physically possible. (Franklin deposition, p. 78).

On this level, defendant's argument against disclosure as overly burdensome is fatally undercut by plaintiff's counsel's offer during oral argument to bear the time and expense of this


document review such that there is a much lesser burden imposed on defendant than is contemplated by it. Moreover, if defendant is concerned that plaintiff's counsel is on a general fishing expedition, then defendant's remedy is to screen and redact any information beyond the scope of plaintiff's request.

Accordingly, it is hereby

ORDERED that defendant's motion for protective order is denied, and the Special Master's Recommendation is confirmed and adopted in all respects.

This constitutes the decision and order of the court.

DATED: March 22, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED

MAR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE