

Adler v 3M Co.

2013 NY Slip Op 32796(U)

October 28, 2013

Sup Ct, New York County

Docket Number: 190392/2012

Judge: Sherry Klein Heitler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

JOHN W. ADLER and ELAINE ADLER,

INDEX NO. 190392/12

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 019, 020

3M COMPANY, et al.,

MOTION CAL. NO. _____

Defendants.

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Motion Sequence nos. 019 and 020 are decided in accordance with the annexed memorandum decision dated 10.28.13.

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

Dated: 10.28.13



SHERRY KLEIN HEITLER J.S.C.

Check one: **FINAL DISPOSITION**

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

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

----- X
JOHN W. ADLER and ELAINE ADLER,

Plaintiffs,

-against-

3M COMPANY, et al.,

Defendants.
----- X

Index No. 190392/12
Motion Seq. 019, 020

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Motion Sequence nos. 019 and 020 are consolidated for disposition herein.

Pursuant to Section III, paragraph B of the September 20, 1996 Case Management Order, as amended May 26, 2011 (“CMO”), which governs New York City Asbestos Litigation (“NYCAL”), plaintiffs appeal from and seek vacatur of that part of Special Master Shelley Rosoff Olsen’s September 26, 2013 written recommendation (“Recommendation”) which grants defendant Volkswagen Group of America (“Volkswagen”) permission to depose plaintiff John Adler’s pathologist, Dr. Juan Rosai, in Milan, Italy on the issue of his diagnosis. Volkswagen appeals from that part of the Recommendation which would require it to pay for plaintiffs’ counsel’s travel expenses associated with any such deposition. As set forth below, both motions are denied and the Special Master’s Recommendation is confirmed.

At the time of plaintiff John Adler’s diagnosis, Dr. Juan Rosai worked in New York City for Integrated Oncology as its senior diagnostic pathologist. In March of 2012, the Northport, VA Medical Center sent pathology slides to Dr. Rosai of a tumor found in Mr. Adler’s chest for analysis. The slides indicated that Mr. Adler’s tumor was intravascular, in that it was located inside the lung rather than on the lung pleura where mesothelial cancers are typically located.

Dr. Rosai concluded¹ in relevant part as follows:

My differential diagnosis is between carcinoma and mesothelioma. The immunohistochemical profile is more in keeping with a mesothelioma than a carcinoma, in the sense that all of the mesothelial markers that we evaluated were positive. Remarkably, I saw an almost identical case about two years [ago], which I also interpreted as a sarcomatoid mesothelioma with angiotropic qualities. In searching through the literature I have not found anything quite the same, except for a brief mention to something similar in an article by Colby on malignant conditions of the lung simulating benign processes. . . . Taking everything into consideration, my diagnosis in your case then is that of angiotropic sarcomatoid mesothelioma vs. angiotropic sarcomatoid carcinoma, favor former.

Plaintiffs' expert Dr. James Strauchen of the Mt. Sinai School of Medicine also reviewed Mr. Adler's medical records. While Dr. Strauchen did not conduct tests of his own, he determined that Mr. Adler did in fact have mesothelioma.² Thereafter, joint defense expert Dr. Victor Roggli reviewed Mr. Adler's pathology slides and conducted his own examination. Dr. Roggli determined that plaintiff's tumor was a squamous cell carcinoma, not a mesothelioma.³

On August 5, 2013, the Special Master recommended that Volkswagen be permitted to depose Dr. Rosai so as to clarify his diagnosis (defendant's exhibit G):

After careful review of the pathology and medical reports, as well as counsel's arguments from our meeting in March of this year, it is my conclusion that the defense should be allowed to depose Dr. Rosai, whose medical determination is central to the source of Mr. Adler's exposure, as well as to the etiology of his disease. . . .

In September of 2013 defense counsel was informed that Dr. Rosai had relocated to Milan, Italy and had no intention of returning to the United States. On September 23, 2013, Volkswagen noticed Dr. Rosai's deposition for October 25, 2013 in Italy. After receiving objections from plaintiffs' counsel, the Special Master confirmed on September 26, 2013 that Dr. Rosai's deposition

¹ Dr. Rosai's March 27, 2012 report is submitted as plaintiffs' exhibit 5.

² Dr. Strauchen's November 29, 2012 report is submitted as plaintiffs' exhibit 6.

³ Dr. Roggli's May 24, 2013 report is submitted as plaintiffs' exhibit 3.

should go forward in Italy, and that defense counsel should pay the travel expenses for one of plaintiffs attorneys. These appeals followed. On October 16, 2013, the court heard oral argument on these matters at which time I stayed Dr. Rosai's deposition pending this decision.

DISCUSSION

In Motion Sequence 19, plaintiffs argue that the Recommendation should be rejected because Dr. Rosai explicitly concluded that Mr. Adler suffered from mesothelioma and because Volkswagen is in possession of all the medical information it needs to conduct its own tests as to the source of Mr. Adler's affliction. In opposition, Volkswagen argues that plaintiffs' appeal is untimely because it failed to follow the appeal procedures set forth in the CMO. Further, Volkswagen argues that plaintiffs' appeal is without merit because Dr. Rosai's report is ambiguous on the central issue in this case, i.e., whether plaintiff's disease is asbestos-related or not.

The procedure for both parties to follow concerning a Special Master's written Recommendation is set forth in CMO § III(B), which provides:

Any party objecting to a ruling by the Special Master on discovery issues must notify the Special Master and all other interested parties of its intention to raise an objection (by fax) within three (3) business days of receiving the Special Master's written recommendation. Thereafter, said objection must be raised with the Court within seven (7) days of the receipt (by fax) of the Special Master's recommendation. If notification of a party's intention to challenge the Special Master's written recommendation is not given within three (3) business days, the Court may adopt the recommended ruling as its order on the disputed issue. . . .

It is undisputed that the Special Master initially ruled by email on Volkswagen's request to depose Dr. Rosai on August 5, 2013 in the United States and that plaintiffs did not then file an objection thereto. Thereafter plaintiffs learned that Dr. Rosai had relocated to Italy and would not return to the United States, and that his deposition would go forward notwithstanding. The Special Master's formal written recommendation was sent to the parties at 9:30pm on Thursday, September 26, 2013 and was posted on the NYCAL website on Friday, September 27, 2013. Plaintiffs timely noticed their appeal therefrom on Monday, September 30, 2013.

Substantively, however, the plaintiffs' appeal is denied. While it is true that the First Department generally does not look favorably on attempts to depose treating physicians, *see Ramsey v N.Y. Univ. Hosp. Ctr.*, 14 AD3d 349, 350 (1st Dept 2005), there has arisen an exception in NYCAL cases where the accuracy of the plaintiff's diagnosis is at issue, *see Bernard v Colgate-Palmolive Co.*, 87 AD3d 467 (1st Dept 2011). In *Bernard*, the pathologists hired by the plaintiff differed as to whether she suffered from ovarian cancer or peritoneal mesothelioma. Because the precise nature of the plaintiff's tumor was central to the case, the First Department allowed the defendants to depose the pathologists (*id.* at 469):

While the pathologists' records and the tissue samples upon which they are based may constitute an adequate alternative to deposing the pathologists, the precise nature of Bernard's affliction appears central to the resolution of this dispute. In view of the particular circumstances of this matter, we exercise our discretion in favor of further disclosure into a potentially dispositive issue.

I find that this case similarly presents unusual circumstances requiring Mr. Adler's treating pathologist to be deposed. In his own words, Dr. Rosai described Mr. Adler's tumor as an "extraordinary case" that, if reported, would be only the second of its type ever reported. The basis for Dr. Rosai's conclusion is not entirely clear. Accordingly, in this regard the Special Master's Recommendation is adopted and confirmed.

With respect to the defendant's appeal from the Special Master's award of travel costs to plaintiffs (Motion Sequence 020), the CMO provision most on point is Section X(A)(9), which provides that "plaintiff's counsel may be required to pay the travel expenses incurred by one, but no more than two, defense counsel in attending any deposition noticed to be taken outside of the New York City area." I agree with the Special Master that the case at bar is sufficiently analogous to require defense counsel to pay the travel expenses of one of plaintiffs' attorneys.⁴

⁴

The court recognizes that parties typically pay for their own litigation expenses (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]; *214 Wall St. Assoc., LLC*

Accordingly, Dr. Rosai's deposition may go forward in Milan as directed by the Special Master and defense counsel shall bear the reasonable travel expenses of one of plaintiffs' counsel. The court will issue a Commission hereon for the purpose of asking Dr. Rosai to respond to narrowly tailored questions.⁵

In light of the foregoing, it is hereby

ORDERED that plaintiffs' motion to partially vacate the Special Master's September 26, 2013 Recommendation (Motion Seq. 019) is denied; and it is further

ORDERED that Volkswagen's motion to partially vacate the Special Master's September 26, 2013 Recommendation (Motion Seq. 020) is denied; and it is further

ORDERED that the Recommendation is confirmed in its entirety.

Settle Commission within 10 days from the date of this decision and order.

This constitutes the decision and order of the court.

DATED: 10-28-13


 SHERRY KLEIN HEITLER
 J.S.C.

v Medical Arts-Huntington Realty, 99 AD3d 988 [2d Dept 2012]), but under the CMO, which is controlling (*c.f. In re New York City Asbestos Litig.*, 109 AD3d 7 [1st Dept 2013]; *Ames v Kentile Floors, Inc.*, 66 AD3d 600 [1st Dept 2009]), I find the award of travel expenses to plaintiffs to be appropriate in the circumstances of this case.

⁵ Should the parties so stipulate, they may seek a Commission for the purpose of taking Dr. Rosai's deposition upon written questions or to appear for his deposition via video conference (i.e. Skype). This would eliminate the burden of traveling for both sides and relieve defense counsel from having to bear travel expenses for plaintiffs' counsel.