

**Vantosh v 3M Co.**

2014 NY Slip Op 30709(U)

March 19, 2014

Supreme Court, New York County

Docket Number: 190439/12

Judge: Sherry Klein Heitler

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

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RUTH VANTOSH and HAROLD VANTOSH,

Plaintiffs,

Index No. 190439/12  
Motion Seq. 001, 003

**DECISION & ORDER**

-against-

3M COMPANY, et al.,

Defendants.  
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**SHERRY KLEIN HEITLER, J.:**

Motion sequence Nos. 001 and 003 are consolidated for disposition herein.

In motion sequence 001, defendant Dow Corning Corporation (“Dow Corning” or “Defendant”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there has been no legally sufficient evidence presented to show that the Dow Corning caulking and sealant products identified by plaintiffs ever contained asbestos. In motion sequence 003, plaintiffs move pursuant to Section III, paragraph B of the New York City Asbestos Litigation (“NYCAL”) Case Management Order (“CMO”) to vacate the October 20, 2013 written recommendation of Special Master Shelley Rosoff Olsen that Dow Corning is not required to comply with plaintiffs’ discovery requests (“Recommendation”).<sup>1</sup>

**BACKGROUND**

This action was commenced on September 28, 2012 by plaintiffs Ruth Vantosh, who has mesothelioma, and Harold Vantosh, her husband, against a number of defendants, including Dow Corning, which apparently is a first-time defendant in NYCAL. Issue was joined when Dow Corning interposed its answer on November 6, 2012. Mr. Vantosh was deposed in January and February of

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<sup>1</sup> A copy of the Recommendation is submitted as exhibit 12 to plaintiffs’ motion.

2013.<sup>2</sup> In relevant part he testified that he worked as a glazier from 1954 until he retired in 1994 and that an asbestos-containing silicone caulk manufactured by Dow Corning was one of the products he used throughout the majority of his career. Mr. Vantosh further testified that the caulk got on his work clothes and that his wife was exposed to asbestos by handling the dried caulk when she did his laundry.

The Defendant's summary judgment motion was filed on October 10, 2013. Referencing Mr. Vantosh's deposition testimony, the Defendant asserts that Mr. Vantosh had no personal knowledge whether the Dow silicone caulk he used contained asbestos (see Deposition p. 425):

- Q. Okay. And is it your belief that Dow silicone caulk contained asbestos?
- A. I had no idea in the beginning.
- Q. When did you come to believe that the Dow silicone caulk contained asbestos?
- A. Oh, towards the end of my -- towards the end of my working days.
- Q. And what led you to believe at the end of your working days that the Dow silicone caulk contained asbestos?
- A. I think the fact that it was silicone, had some properties, dangerous properties.
- Q. So this is general information you received at the end of your career that silicone, in general, may have contained asbestos. Is that correct?
- A. Yes, yes.
- Q. Okay. You never learned anything specifically referencing the Dow silicone caulk, though, correct.?
- A. No.

In further support the Defendant submits the affidavit of its Construction Industry Scientist, Lawrence D. Carbary<sup>3</sup>, who states, based on his personal knowledge and a Dow Corning review conducted approximately 25 years ago of the formulations of all of its past sealant products, that Dow Corning has never manufactured or sold an asbestos-containing construction caulk or sealant.

Plaintiffs assert that the Defendant's motion is premature in light of its failure to provide even

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<sup>2</sup> Copies of Mr. Vantosh's deposition transcripts are submitted as exhibit 9, 10, & 11 to Defendant's motion ("Deposition").

<sup>3</sup> Mr. Carbary's affidavit, sworn to September 18, 2013, is submitted as exhibit 12 to Defendant's motion.

basic discovery. Plaintiffs specifically assert that the Defendant has refused to answer plaintiffs' First Standard Set of Liability Interrogatories and Requests for Production of Documents ("Plaintiffs' Standard Interrogatories") and has refused to produce its corporate witness for a deposition or the documents upon which he relied in reaching his conclusions on this motion.

The Defendant raised these discovery issues before the Special Master. On October 20, 2013 the Special Master denied plaintiffs' discovery requests and issued her Recommendation as follows:

While I am not deciding the summary [judgment] motion, I think the standard is similar, given the posture of this discovery request. As Justice Heitler has stated in numerous decisions:

In asbestos-related litigation, the moving defendant must make a prima facie showing of entitlement to judgment as a matter of law before plaintiffs must demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for plaintiffs to show facts and conditions from which the defendant's liability may be reasonably inferred (*Reid v Georgia Pacific*, 212 AD2d 462, 463 [1st Dept 1995]) and all reasonable inferences should be resolved in plaintiffs' favor (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). . . .

Based on the above testimony, standing alone, it does not appear as if the instant plaintiffs can "show facts and conditions from which the defendant's liability may be reasonably inferred".

After hearing plaintiffs' request for reconsideration, which the Defendant opposed, on October 31, 2013 the Special Master informed the parties that she was adhering to her Recommendation. On November 1, 2013, plaintiffs noticed their intent to appeal therefrom pursuant to CMO § III(B), and thereafter filed motion sequence No. 003 herein to vacate the Recommendation.

### DISCUSSION

This is a discovery-based dispute. The Recommendation hinges on standards applied to summary judgment motions instead of the disclosure provisions of the CPLR and the CMO. Under those liberal discovery standards, I find the Defendant is required to respond to plaintiffs' discovery requests.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary

in the prosecution or defense of an action, regardless of the burden of proof, by . . . a party, or the officer, director, member, agent or employee of a party. . . .” The words “material” and “necessary” have been “interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 (1968); *see also Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 (1st Dept 2006). The courts possess wide discretion to decide whether information sought is material and necessary to the prosecution or defense of an action. *Allen v Crowell-Collier Publ. Co.*, *supra*, at 406.

CPLR 3101(a) requires disclosure “regardless of the burden of proof” which renders immaterial, in the posture of this discovery dispute, the Recommendation’s concern that plaintiffs did not show facts and conditions from which the Defendant’s liability may be reasonably inferred. Consonant therewith, CMO § VIII(A)(2)(b), which controls in NYCAL cases (*see Ames v Kentile Floors.*, 66 AD3d 600, 600 [1st Dept 2009]), plainly and unambiguously requires first-time NYCAL defendants to respond to Plaintiffs’ Standard Interrogatories, to wit:

To the extent not previously done, each defendant shall file in the NYCAL Master File under index number 40000 a single set of responses which shall be applicable to all coordinated actions. Responses by defendants to this set of interrogatories shall be served on plaintiffs’ Liaison Counsel and when so served shall be deemed served in each case. *In the event that a defendant not previously named in these actions is named by the plaintiff, the plaintiff’s counsel will so inform plaintiffs’ Liaison Counsel, who will serve a set of standard interrogatories on such defendant. Response by such defendant shall be due within thirty (30) days of service.* If plaintiffs’ Liaison Counsel agrees, defendants may designate and serve interrogatories and their answers to such interrogatories which have been filed in other actions as their standard interrogatory answers pursuant to this section. (emphasis added).

In light of the statute’s liberal discovery standards and the NYCAL CMO’s directive with respect to first-time defendants, Dow Corning should serve answers to Plaintiffs’ Standard Interrogatories. It is also evident that Dow Corning should produce a corporate representative with

knowledge of the facts for a deposition at a time and place convenient to all parties. Any documents which are responsive to plaintiffs' disclosure notices as to which the Defendant asserts a privilege shall be designated on a privilege log and submitted to the Special Master for *in-camera* review. Any issue that may arise regarding such discovery proceedings shall immediately be raised with the Special Master.

Accordingly, it is hereby

ORDERED that the Special Master's October 20, 2013 Recommendation is hereby vacated; and it is further

ORDERED that Dow Corning respond to Plaintiffs' Standard Interrogatories within 45 days from the date hereof; and it is further

ORDERED that Dow Corning produce a corporate representative with knowledge of the facts for a deposition at a time and place convenient to all parties; and it is further

ORDERED that Dow Corning's summary judgment motion is denied without prejudice to renew upon the completion of discovery.

This constitutes the decision and order of the court.

DATED: 3.19.14

  
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SHERRY KLEIN HEITLER, J.S.C.