

**Dul v A.O. Smith Water Prods. Co.**

2014 NY Slip Op 31132(U)

April 25, 2014

Supreme Court, New York County

Docket Number: 190571/12

Judge: Sherry Klein Heitler

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

**DECISION & ORDER**

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EDWARD L. DUL and GLORIA DUL,  
  
Plaintiffs,

Index No. 190571/12  
Motion Seq. 004

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,  
  
Defendants.

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CHARLES F. HILLYER,  
  
Plaintiffs,

Index No. 190132/13  
Motion Seq. 002

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,  
  
Defendants.

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JOHN MURRAY and MARY MURRAY,  
  
Plaintiffs,

Index No. 190554/13  
Motion Seq. 002

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,  
  
Defendants.

----- X  
**SHERRY KLEIN HEITLER, J.:**

Defendant Cleaver-Brooks, Inc. ("CB") moves pursuant to 22 NYCRR § 202.21(e)<sup>1</sup> to vacate the Note of Issue ("NOI") in each of the above-captioned asbestos personal injury actions.

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<sup>1</sup> 22 NYCRR § 202.21(e) provides in part that "any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

Plaintiffs oppose and cross-move for sanctions pursuant to 22 NYCRR 130-1.1. As a matter of efficiency, the court shall herein collectively address CB's applications in all three cases as the issues are virtually identical.

The *Dul*, *Hillyer*, and *Murray* actions were filed on December 12, 2012, April 10, 2013, and November 30, 2012, respectively. All three cases were included in this court's October 2013 NYCAL *In-Extremis* cluster. Plaintiffs' NOI's thereon were filed on May 2, 2013, May 14, 2013, and April 25, 2013, respectively. On November 20, 2013, under the discovery schedule mandated by the NYCAL Case Management Order ("CMO") for the October 2013 *In-Extremis* Cluster, Plaintiffs' counsel requested the Special Master to assign these cases to a trial judge. By letter dated December 6, 2013 CB objected thereto, and on December 12, 2013 Plaintiffs responded in writing to CB's objections.

The within motions were e-filed with the court and e-served on all parties on December 16, 2013. It is important to note that a trial-readiness conference with the Special Master had been scheduled for the next day, December 17, 2013. The within motions were originally made returnable on January 7, 2014, and were fully submitted on February 21, 2014.

The parties appeared for their trial-readiness conference before the Special Master on December 17, 2013 at which time they argued in favor of or against the trial-readiness of these cases. CB argued that these cases were not trial-ready because Plaintiffs had failed to comply with their discovery requests. The Special Master directed Plaintiffs to provide additional discovery. The papers do not include any further information concerning the outcome of the December 17, 2013 conference. Nor does it appear that CB exercised its right to seek a written recommendation

from the Special Master concerning the trial-readiness of these actions.<sup>2</sup> Nevertheless, on February 3, 2014 the Special Master emailed the court recommending that the *Dul*, *Hillyer*, and *Murray* actions, among others, be assigned to a trial judge. The actions in question were transferred to the Hon. Cynthia Kern for trial by order dated February 4, 2014.

CB's demand that all discovery must be completed prior to the filing of the NOI is eclipsed by the provision of the CMO which permits discovery to continue post-NOI. CMO § VIII(C)(9) provides that "[d]iscovery shall continue after the filing of a Note of Issue pursuant to the uniform Rules for the New York State Trial Courts Section 202.21 upon directive of the Court or of the Special Master." As such, CB's assertion that Plaintiffs' counsel improperly and prematurely filed the NOI's in these cases is without merit. In fact, had Plaintiffs not filed their NOI's within CMO § XV(E)(2)(n)'s requirement that "[a]ll Notes of Issue must be filed no later than three months prior to the scheduled trial date", they could have lost their place in the October 2013 NYCAL *In-Extremis* cluster.

CB asks the court to clarify a NYCAL litigant's rights and responsibilities under the CMO and 22 NYCRR § 202.21. Toward that end, let me be clear that under the CMO which controls in all NYCAL cases (see *Ames v Kentile Floors.*, 66 AD3d 600, 600 [1st Dept 2009]), all discovery disputes, whether they arise before or after the filing of a NOI, must in the first instance be brought

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<sup>2</sup> See CMO §§ III(A) & (B), as amended February 14, 2013, which respectively provide that the "Special Master . . . shall supervise compliance with discovery . . . and, when requested, shall promptly make recommended rulings in writing for the Court's consideration on all discovery disputes. . . . No motion to compel discovery from a party may be made without first seeking the assistance of the . . . Special Master to obtain that discovery. . . ." and "[a]ny party objecting to a ruling by the . . . Special Master must notify the Special Master and all other interested parties by email of its intention to raise an objection within three (3) business days of receiving such Special Master's ruling and must request that such Special Master issue a written recommendation. Thereafter, said objection must be raised in writing with the Court within seven (7) days of the receipt of such Special Master's written recommendation. *If notification of a party's intention to challenge the Special Master's ruling is not given within three (3) business days, the Court may adopt the recommended ruling as its order on the disputed issue. . . .*" (Emphasis Added).

to the attention of the Special Master, who after hearing both sides shall address such disputes on a case by case basis and make her recommendations thereon. Guiding the Special Master's determinations is the court's oft-stated position that the CMO comports with 22 NYCRR 202.21(d) which provides the court with the discretion to permit post-note discovery when circumstances call for it.

Plaintiffs argue that Rule 130-1.1 sanctions are warranted under the circumstances because CB's motions are "filed in procedural error, [are] based on an incorrect reading of the law in effect, seek[] unnecessary relief before the wrong forum . . . and seek[] to turn well-established NYCAL practice and procedure on its head."<sup>3</sup> Clearly CB has sought relief through more than one avenue in violation of the long-standing NYCAL rule<sup>4</sup> that all discovery and trial-readiness disputes must be brought before the Special Master in the first instance, and, should the dispute continue, only then by petition to this court. The court is concerned with the fact that CB filed the within motions the day before the trial-readiness meeting with the Special Master, especially because they appear to raise the same discovery issues which were to be discussed with the Special Master at that meeting. The CMO's provisions were designed to efficiently and effectively manage all NYCAL cases. It is important that litigants follow these provisions to avoid inconsistent rulings and a waste of resources. While I decline at this time to impose sanctions against CB, I urge CB to adhere to the provisions of the CMO in the future.

Accordingly, it is hereby

ORDERED that Cleaver-Brooks, Inc.'s motions to vacate the Note of Issue in *Dul* (Index

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<sup>3</sup> Comerford Affirmation, dated December 31, 2013, p. 9.

<sup>4</sup> See n.2, *supra*.

No. 190571/12, Mot. Seq. 004), *Murray* (Index No. 190132/13, Mot. Seq. 002) and *Hillyer* (Index No. 190554/13, Mot. Seq. 002) are denied in their entirety; and it further

ORDERED that Plaintiffs' cross-motion for sanctions is denied.

The Clerk of the Court is directed to e-file a copy of this decision and order under all three of the above-captioned cases.

This constitutes the decision and order of the court.

DATED: 4.25.14

  
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SHERRY KLEIN HEITLER, J.S.C.