

Matter of New York City Asbestos Litig.
2014 NY Slip Op 31704(U)
July 2, 2014
Supreme Court, New York County
Docket Number: 100988-2004
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER
Justice

PART 10
100988/04
111940/03

Angel Lambert

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
A.O. Smith Water Products Co.

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

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

JUL 03 2014

COUNTY CLERK'S OFFICE
NEW YORK

JUL 02 2014

Dated: _____

George J. Silver
J.S.C.

GEORGE J. SILVER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
IN RE NEW YORK CITY ASBESTOS LITIGATION
-----X

	INDEX NUMBER
ANGEL LAMBERTY	100988-2004
ROBERT D. FREEMAN	100867-2004
FRANCIS MARINO	116830-2003
THEODORE PENDERGAST	104850-2004

Plaintiffs, **FILED**

-against-

JUL 03 2014

DECISION AND ORDER

A.O. SMITH WATER PRODS.
CO., et al.,

COUNTY CLERK'S OFFICE
NEW YORK

MOTION SEQUENCE 001

Defendants.

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause, Affidavits & Exhibits Annexed.....	1
Notice of Cross-Motion, Affirmation & Exhibits.....	2
Affirmation in Opposition to Cross-Motion & Exhibits.....	3
Affirmation in Further Support of Cross-Motion.....	4

The four above-captioned matters are asbestos-related personal injury actions that were joined for trial by order of this court dated November 26, 2013. Defendant Cleaver Brooks, Inc. (CB) now moves by order to show for an adjournment of the joint trial. Plaintiffs Angel Lamberty (Lamberty), Carmen Lamberty, Jason D. Freeman, as Executor of the Estate of Robert D. Freeman (Freeman) and Judith Freeman¹ (collectively plaintiffs) oppose the order to show cause and cross-move for an order striking CB's 18th affirmative defense and precluding the

¹ The Freeman matter was resolved after the filing and oral argument of this motion.

reports and testimony of CB's expert witnesses.

CB's Order to Show Cause

The grant or denial of a motion for an adjournment for any purpose is a matter resting within the sound discretion of the trial court (*Matter of Steven B v Makeba S.*, 6 NY3d 888, 889, 850 NE2d 646, 817 NYS2d 599 [2006]). CB's order to show cause is dated February 11, 2014, and was signed by this court on February 26, 2014. As it is now July 2, 2014, the matter has, for all intents and purposes, been adjourned for more than 4 months. Thus, based upon the representation by CB's counsel that CB would need an additional 60 days to complete and review all relevant discovery, including plaintiffs' employment and medical records, CB's application should now be moot and CB should be fully prepared to proceed with jury selection and trial. However, even if more than the requested 60 days had not elapsed, CB's application for an adjournment would still be denied as it appears from the parties' submissions that CB's claimed need for further discovery is the result of CB's failure to diligently conduct discovery in the first instance (*compare Zysk v Bley*, 24 AD3d 757, 758 [2d Dept 2005]). Accordingly, CB's order to show cause is denied.

Plaintiffs' Cross-Motion

Pursuant to section VIII (A) (2) (d) of the amended case management order, plaintiffs are permitted to submit to individual defendants standard product identification interrogatories with respect to particular worksites. Defendants objections to such interrogatories are to be brought before the Special Master within seven days after receipt of the proposed product identification interrogatories (*id.*). The amended case management order requires the Special Master to issue rulings on the objections in an omnibus manner, if possible (*id.*). Defendants are thereafter required to answer the interrogatories in full according to the CPLR unless a further ruling is sought from the court (*id.*). Section VIII (A) (2) (e) of the amended case management order reiterates that product identification interrogatories must be fully and substantially answered by defendants and that answers simply objecting to the interrogatories, stating that the interrogatories are too broad or voluminous or mere reference to the existence of a document repository are not acceptable. A defendant's failure to comply with section 2 (e) may lead to sanctions as deemed appropriate by the Court, including, but not limited to, the preclusion of evidence.

Section XV (E) provides that FIFO trial clusters and discovery schedules will be published by the Special Master. Each case in each FIFO trial cluster will be prepared strictly in accordance with the discovery order entered for those cases and any failure to comply with a deadline in the discovery order for a FIFO trial cluster, unless excused by the Special Master for good cause shown or agreed to by liaison counsel and plaintiff's counsel shall be deemed to be a willful failure to disclose within the meaning of CPLR 3126 (Section XV (E) (2)). Unless good cause is shown, a defendant's failure to answer a plaintiff's standard and case specific product identification interrogatories within the deadlines imposed by the discovery order shall result in that defendant having all of its defenses stricken as to each plaintiff for whom it fails to provide said discovery (Section XV (E) (2) (g)). Pursuant to the August 2102 FIFO Cluster discovery schedule, defendants were required to serve answers to plaintiff's product identification

interrogatories no later than May 14, 2012. Plaintiffs’s counsel contends that CB’s 18th affirmative defense, that Lamberty and Freeman were not injured by exposure to CB’s products, should be stricken because CB did not respond to the product identification interrogatories for the Lamberty action until February 18, 2014 and never responded to the product identification interrogatories for the Freeman action. Plaintiffs contend that this discovery was material and relevant and that they have been severely prejudiced by CB’s failure to provide the documents demanded by the product identification interrogatories. With respect to Lamberty, CB, in opposition, argues that three worksites were identified in the product identification interrogatories but plaintiffs’ counsel produced only one of Lamberty’s co-workers for a deposition and did so on August 14, 2012, well after the April 6, 2012 deadline for producing fact witnesses for depositions. CB claims it was left with the long and arduous task of locating witnesses and proof regarding the other worksites identified by plaintiff. With respect to Freeman, CB contends that it did respond to the product identification interrogatories on March 6, 2014. CB further contends that plaintiffs’ counsel did not produce Freeman’s co-workers for deposition until July 31, 2012 and September 13, 2012, and that these witnesses did not testify regarding the majority of worksites listed in product identification interrogatories. CB also claims that it did not receive Freeman’s resume until March 11, 2014.

The Court of Appeals has repeatedly emphasized that “the court system is dependent on all parties engaged in litigation abiding by the rules of proper practice” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81, 942 NE2d 277, 977 NYS2d 68 [2010]). “The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent” (*id.*). Here, plaintiffs ask this court to ignore their failure to comply with the discovery order by timely producing fact witnesses for depositions and, in the Freeman case, their admitted failure to timely serve product identification interrogatories, and to impose upon CB the harsh sanction of striking one of its affirmative defenses because of CB’s similar failure to abide by the terms of the discovery order. While CB’s failure to comply with the discovery order’s deadlines may be more egregious than plaintiffs’, neither plaintiffs nor CB comes before the court with clean hands with respect to their compliance, or lack thereof, with the discovery order and the amended case management order. Since both appear to have violated the terms of the discovery order, a unilateral sanction against CB is inappropriate (*DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581 [1st Dept 2011]; *Anderson v Ariel Servs., Inc.*, 93 AD3d 525 [1st Dept 2012]) and the proper course is to leave the parties where they stand and allow the matter to be decided on the merits by a jury (*see Scher v Paramount Pictures Corp.*, 102 AD3d 471 [1st Dept 2013]).

Plaintiffs also move to preclude the reports and testimony of CB’s expert witnesses, David Galbraith, M.D., Michael Fishbein, M.D., Michael Levine, M.D. and John L. Henshaw, M.D. Plaintiffs contend CB failed to comply with the August 2012 FIFO cluster discovery order, which required CB to serve expert witness reports on or before July 23, 2012, by serving the expert disclosures and reports of Drs. Galbraith, Fishbein and Levine on March 4, 2014 and the disclosure and report of Dr. Henshaw on March 14, 2014 and that the mandatory language of section Section XV (E) (2) (h) of the amended case management order requires preclusion of CB’s experts. Plaintiffs claim they will suffer severe prejudice is CB is permitted to ambush

them with the untimely expert disclosures because plaintiffs will have to convene their testifying and consulting experts and undertake the requisite and precise analyses of the reports proffered by CB. Plaintiffs also claim that they and their experts will be forced to hastily prepare for the possible deposition of CB's experts and that they maybe forced to retain and prepare new rebuttal experts.

In opposition, CB argues that plaintiffs served the report of their expert, Harvey Spector, on August 13, 2013, well beyond the April 13, 2012 deadline set forth in the discovery order for plaintiff to serve expert witness reports. CB also contends that it would be prejudiced if it were not permitted to contest plaintiffs' mesothelioma diagnoses.

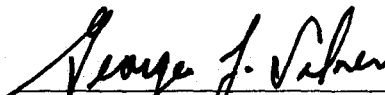
For the same reasons the court did not strike CB's 18th affirmative defense the court will not preclude CB's experts or their reports. It appears from the parties' submissions that both plaintiffs and CB have failed to comply with the deadlines set forth in the 2012 FIFO discovery order for the exchange of expert reports. Thus, because the delays in discovery were occasioned by the actions of both parties, the drastic and unilateral sanction of precluding CB's expert witnesses and reports is unwarranted (*Gross v 141-30 84th Rd. Apt. Owners Corp.*, 85 AD3d 447, 448 [1st Dept 2011]). Moreover, since it is now July 2, 2014, it can no longer be said that CB's expert disclosure was made on the eve of trial (*see Ramsen A. v New York City Hous. Auth.*, 112 Ad3d 439 [1st Dept 2013]). Further, because a contested diagnosis of mesothelioma in the Lamberty case and a claim that Freeman's disease was caused by exposure to asbestos-containing products other than those manufactured by CB do not present novel medical or scientific issues never before raised in asbestos litigation, plaintiffs will not be heard to argue that CB's untimely disclosure has unfairly burdened them and their retained and testifying experts. In light of the foregoing, it is hereby

ORDERED that CB's order to show cause and plaintiffs' cross-motion are denied; and it is further

ORDERED that the parties are to appear for a pre-trial conference on July 29, 2014 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007. At said conference a final trial date will be scheduled and the parties are to know in advance the schedules and availability of all trial counsel and all witnesses; and it is further

ORDERED that CB is to serve a copy of this order, with notice of entry, upon all parties to the joint trial within 20 days of entry.

FILED


George J. Silver, J.S.C.

Dated: **JUL 02 2014**
New York County

JUL 03 2014

GEORGE J. SILVER

COUNTY CLERK'S OFFICE
NEW YORK