

<b>Matter of New York City Asbestos Litig.</b>
2014 NY Slip Op 31801(U)
July 10, 2014
Supreme Court, New York County
Docket Number: 190060/13
Judge: Sherry Klein Heitler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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  
COUNTY OF NEW YORK: PART 30

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

-----X  
PATRICK CARMODY and NORA CARMODY,

Index No. 190060/13  
Mot. Seq. 001

Plaintiffs,

**DECISION & ORDER**

-against-

AMCHEM PRODUCTS, INC., *et al.*,

Defendants.

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

On the ground that plaintiffs Patrick and Nora Carmody have already provided defendant DAP, Inc. (“DAP”) with their proof of claim (“POC”) documentation, plaintiffs move pursuant to CPLR 2304 and 3103<sup>1</sup> to quash a March 12, 2014 subpoena *duces tecum* (“Subpoena”)<sup>2</sup> served by DAP on non-party Manville Personal Injury Settlement Trust (“Manville Trust”) which seeks discovery and inspection of documents filed by plaintiffs in support of their claim that Mr. Carmody was exposed to asbestos from Johns-Manville Corporation (“Johns-Manville”) products.

<sup>1</sup> CPLR 2304 provides that a “motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court; except that such motion with respect to a child support subpoena issued pursuant to section one hundred eleven-p of the social services law shall be made to a judge of the family court or the supreme court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

CPLR 3103(a) provides that the court “may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

<sup>2</sup> Although the Manville Trust is located in Virginia, it represents that it will comply with subpoenas pertaining to non-parties which comply with the law of the jurisdiction in which they are issued (see defendant’s exhibit F, ¶ 1[e][f][3]).

In the alternative plaintiffs request that the court conduct an *in camera* inspection of any subpoenaed documents to prevent the disclosure of privileged and/or confidential information. In opposition DAP contends that the Manville Trust is in possession of relevant documentation which plaintiffs have not already produced to it, and which would have been necessary for plaintiffs to have produced to the Manville Trust in order to receive a settlement offer therefrom. For the reasons set forth below, plaintiffs' motion to quash the Subpoena is granted only to the extent that the court will examine the subpoenaed documents *in camera*, and is otherwise denied.

The Manville Trust was approved by the Bankruptcy Court for the Southern District of New York in 1986 as part of the Johns-Manville reorganization plan.<sup>3</sup> Trust Distribution Procedures ("TDP") were established *inter alia* to determine the qualifications claimants had to meet to obtain compensation. The POC form is the vehicle by which claimants seek such compensation.<sup>4</sup> The POC's often provide specific factual details regarding a claimant's employment, exposure, and medical history.

In a prior order, this court confirmed the NYCAL Special Master's recommendation that all NYCAL plaintiffs must disclose POC-related documents to NYCAL defendants, including but not limited to affidavits (including those signed by plaintiffs, plaintiffs' family members, and non-parties), sworn statements, proofs of diagnosis, extraordinary claim certificates, and signature/certification pages. *See Matter of New York City Asbestos Litig.*, 37 Misc 3d 1231(A); 2012 NY Misc. LEXIS 5646 (Sup. Ct. NY Co. Nov. 15, 2012, Heitler, J.)<sup>5</sup>. The POC Order also

---

<sup>3</sup> *Matter of Johns-Manville Corp.*, 68 BR 618 (SDNY Dec. 18, 1986), *aff'd* 78 BR 407 (SDNY 1987), *aff'd sub nom. Kane v Johns-Manville Corp.*, 843 F2d 636 (2d Cir. 1988).

<sup>4</sup> *Id.*

<sup>5</sup> Defendant's exhibit B ("POC Order"). Therein the court outlined the history of asbestos bankruptcy trusts and addressed the discoverability of POC-related materials.

directed the redaction of any non-party affiant's personal information prior to any such production, but acknowledged the defendants' right to "avail themselves of the discovery provisions of the CPLR and CMO, by, for example, commissioning their own investigations."

*Id.* at \*27.

The Manville Trust's TDP requires that a claimant "demonstrate meaningful and credible exposure to asbestos or asbestos containing products supplied or manufactured by Manville" (2002 Manville TDP, January 2012 Revision, at E[2][c]<sup>6</sup>) before it remits a settlement. This meaningful and credible exposure "may be established by affidavit of the claimant, by an affidavit of a co-worker or the affidavit of a family member in the case of a deceased claimant, by invoices, construction or similar records, or by other credible evidence." *Id.*

In this case, plaintiffs' submissions to DAP consist only of a pre-printed POC form,<sup>7</sup> Mr. Carmody's diagnosing pathology, and an expert report which states that Mr. Carmody's occupational exposure to asbestos caused his mesothelioma. DAP asserts that "other supporting documents must have been submitted to the Manville Trust which were improperly withheld" during discovery.<sup>8</sup> DAP alleges that such withholding is especially troublesome in light of Mr. Carmody's undisputed testimony<sup>9</sup> that he did not recall working around products manufactured by Johns-Manville.<sup>10</sup>

DAP served the Manville Trust with the Subpoena on March 13, 2014 and made it returnable on April 1, 2014. Plaintiffs thereafter filed this motion to quash on March 27, 2014.

---

<sup>6</sup> Defendant's exhibit B.

<sup>7</sup> Defendant's exhibit A.

<sup>8</sup> Affirmation of Carol Tempesta, Esq., dated April 2, 2014, ¶ 5.

<sup>9</sup> Mr. Carmody was deposed on March 15, 2013. His deposition transcript is submitted as defendant's exhibit C ("Deposition").

<sup>10</sup> Deposition p. 313.

Plaintiffs not only assert that they have fully complied with this court’s POC Order, but also that “defendants should not be permitted to circumvent [the POC Order] by seeking unredacted documents directly from the trusts.”<sup>11</sup>

The New York Court of Appeals recently reiterated that a motion to quash a non-party subpoena “should be granted ‘[o]nly where the movant demonstrates the “futility of the process to uncover anything legitimate is inevitable or obvious’ . . . or where the information sought is ‘utterly irrelevant to any proper inquiry.’” *Kapon v Koch*, 23 NY3d 32, 2014 NY Slip Op 02327, at \*4 (2014). “It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances . . .” *Id.* In this regard, the *Koch* court has determined that CPLR 3101(a)(4)’s<sup>12</sup> notice requirement is satisfied by utilizing the “material and necessary” standard as articulated by the Appellate Division, First and Fourth Departments.

Prior to *Koch*, New York’s Appellate Divisions were split on this issue. The First and Fourth Departments adopted the “material and necessary” framework, i.e., the party seeking discovery only had to show that the requested discovery was relevant to the prosecution or defense of the action. The Second and Fourth Departments, however, required something more. In *Kooper v Kooper*, 74 AD3d 6, 16-17 (2d Dept 2010), a matrimonial action in which the wife subpoenaed the husband’s financial documents from third parties, the court held it was not enough that the disclosure was material and necessary; the subpoenaing party also had to show, for example, that the information could not be obtained from other sources. *Id.* This heightened standard was

---

<sup>11</sup> Affirmation of Thomas Comerford, Esq., dated April 10, 2014, ¶ 4.

<sup>12</sup> CPLR 3101(a)(4)’s notice requirement “obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, ‘the circumstances or reasons such disclosure is sought or required.’ The subpoenaing party must include that information in the notice in the first instance . . .” *Id.* at 4 (citations omitted).

adopted by the Third Department in *Matter of Troy Sand & Gravel v Town of Nassau*, 80 AD3d 199 (3d Dept 2010).

In *Koch*, the Court of Appeals ultimately agreed with the First and Fourth Departments, and concluded that the material and necessary standard “is in keeping with this state’s policy of liberal discovery. The words ‘material and necessary’ as used in section 3101 must be ‘interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.’” *Koch, supra*, at \*4 (citing *Allen v Crowell – Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The Court further concluded that CPLR 3101(a)(4) “imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. So long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.” *Id* at \*4.

Here, plaintiffs have failed to show that the discovery sought is “utterly irrelevant” to the action or that the “futility of the process to uncover anything legitimate is inevitable or obvious.” *See Koch, supra*. Notwithstanding, it is clear that plaintiffs’ alleged submissions to the Manville Trust are relevant and should therefore be produced. As DAP points out, “POC disclosures enable all NYCAL defendants to learn whether the factual representations being made in a given action are consistent with, and as complete as, those representations being made to the bankruptcy trusts.”<sup>13</sup> These representations “may contain information concerning product identification, [a] claimant’s work history and exposure to asbestos, causation and apportionment of fault.” *Drabczyk v Amchem Prods.*, Index No. 1583/2005 (Sup Ct. Erie Co. Jan. 18, 2008, Lane, J.).<sup>14</sup>

---

<sup>13</sup> Affirmation of Carol Tempesta, dated April 2, 2014, ¶ 7.

<sup>14</sup> A copy of the *Drabczyk* decision is submitted as defendant’s exhibit D.

The court rejects plaintiffs' contention that DAP failed to comply with CPLR 3101(a)(4)'s notice requirement which obligates the subpoenaing party to state "the circumstances or reasons such disclosure is sought or required." As set forth in *Koch, supra*, "the subpoenaing party's notice obligation was never intended by the legislature to shift the burden of proof on a motion to quash from a nonparty to the subpoenaing party, but, rather, was meant to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required." *Id.* at 4. The Subpoena at issue indicates that the "circumstances and reasons why the disclosure required by this Subpoena *Duces Tecum* is sought from you are that you possess material and necessary evidence and/or information pertaining to the material issues in the above-captioned action pending in the Supreme Court of the State of New York in New York County."<sup>15</sup> In light of the fact that the Manville Trust's purpose is to administer the distribution of settlement monies to the victims of asbestos exposure nationwide, it would come as no surprise to this court if it received numerous disclosure requests of this nature each year. At the very least there can be no dispute that the Manville Trust's administrators are familiar with the issues that arise in asbestos personal injury actions. Accordingly I find that the Subpoena satisfies CPLR 3101(a)(4)'s notice requirement. *Koch, supra*.<sup>16</sup>

Plaintiffs' argument that "it is not the province of this court to authorize the issuance of a subpoena to the federally administered bankruptcy trust" is diluted by the clear language of the Manville Trust's TDP which provides that "other information and documents can be obtained based

---

<sup>15</sup> Plaintiffs' exhibit A, p. 2.

<sup>16</sup> Even if DAP's notice were, as plaintiffs suggest, too broad to comply with the CPLR, the mere failure to provide proper notice is a non-fatal defect which can be corrected. See *Veeze v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 (1st Dept 2006); *Mills v Terence Cardinal Cooke Health Care Ctr.*, 2011 NY Misc. LEXIS 7106, at \*12-13 (Sup. Ct. NY Co. Apr. 25, 2011, Edmead, J.).

upon . . . a subpoena that complies with procedural requirements in the jurisdiction in which it is issued."<sup>17</sup>

In sum, plaintiffs have not shown that the discovery sought by DAP is irrelevant to this action or that DAP is on a fishing expedition. Again, while the Manville Trust purports to remit settlements only if a claimant demonstrates meaningful and credible exposure to asbestos from a Johns-Manville product, none of the documents submitted to the court even refer to a Johns-Manville product. Given this discrepancy, the defendant should be permitted to look into this matter further.

The court will however entertain plaintiffs' request that the court inspect the subpoenaed documents *in camera* prior to disclosure. This will ensure that personal information contained in non-party affidavits, settlement figures, and any other non-discoverable information is kept confidential in accordance with this court's POC Order.

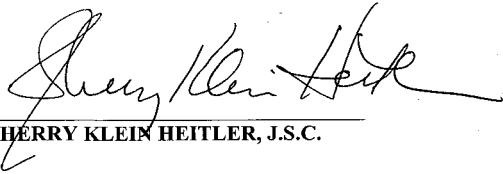
Accordingly, it is hereby

ORDERED that plaintiffs' motion to quash DAP's March 12, 2014 Subpoena is granted to the extent that the Manville Trust shall produce its response thereto directly to this court (**Hon. Sherry Klein Heitler, New York State Supreme Court, 60 Centre Street, Room 412, New York, NY 10007**) for an *in camera* inspection. In all other respects plaintiffs' motion is denied.

This constitutes the decision and order of the court.

DATED:

7-10-14

  
 SHERRY KLEIN HEITLER, J.S.C.

<sup>17</sup>

Defendant's exhibit F, ¶ 1[e][f][3].