

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

2014 NY Slip Op 33614(U)

October 29, 2014

Supreme Court, New York County

Docket Number: 190212/2013

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

Index Number : 190212/2013
ESPOSITO, FRANK D.
vs
A.O. SMITH WATER PRODUCTS CO
Sequence Number : 004
VACATE (BALDOR ELECTRIC)

INDEX NO. 190212/13

MOTION DATE

MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the annexed memorandum decision;

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

Dated: Oct. 29, 2014

[Signature], J.S.C.
HON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

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

LISA WONG, as Administratrix for the Estate of  
FRANK D. ESPOSITO,

Index No. 190212/13  
Mot. Seq. 004

Plaintiff,

**DECISION & ORDER**

-against-

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

Defendants.  
-----X

**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury and wrongful death action, defendant Baldor Electric Company (“Baldor”) moves pursuant to CPLR 3103 and Section III(B) of the New York City Asbestos Litigation (“NYCAL”) Case Management Order (“CMO”) for a protective order against the May 6, 2014 written recommendation of Special Master Shelley Rosoff Olsen which directs Baldor to produce deposition transcripts of its corporate representative from unrelated asbestos personal injury actions.<sup>1</sup> For the reasons set forth below, Baldor’s motion is denied.

This action, which plaintiff’s decedent Frank Esposito commenced before his death, arises from his alleged exposure to asbestos throughout his long career as an electrician. Mr. Esposito was deposed<sup>2</sup> regarding such allegations over ten days in August of 2013. With respect to the defendant, Mr. Esposito testified that he worked with Baldor motors at the Brooklyn Navy Yard from 1959 to 1966.

<sup>1</sup> Defendant’s exhibit 3.

<sup>2</sup> Portions of Mr. Esposito’s deposition transcripts are submitted as defendant’s exhibit 3.

On August 29, 2013 plaintiff's counsel propounded Standard NYCAL Liability Interrogatories and Requests for Production of Documents upon Baldor. As is relevant here, Question 63 provides:

If any of your employees or officers have testified at trial or by deposition in any litigation or before any Congressional Committee or administrative agency concerning asbestos exposure, pulmonary or asbestos-related diseases or industrial hygiene relating to asbestos use, state:

- a. The name, address and title of each person who testified;
- b. The date, location and forum of such testimony;
- c. Whether the defendant has a copy of such testimony;
- d. Whether the defendant will voluntarily produce a copy of such testimony.

Baldor's answer to Question 63<sup>3</sup> was non-responsive:

Objection. This interrogatory is vague, ambiguous, overly broad, unduly burdensome and seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, but not limited to, because it is not limited to the relevant time period, the allegations of exposure at issue in this matter or Plaintiff's alleged injury. Baldor further objects that this interrogatory seeks information which is protected by the attorney-client privilege and/or the work product doctrine. Baldor also objects that this interrogatory seeks information concerning third parties which invades such third parties' right to privacy. . . .

On or about February 3, 2014 plaintiff sought the intervention of the Special Master, asserting that "Baldor refuses to provide a response as to whether any corporate representative of Baldor has ever testified; who, when; and whether the testimony will be produced."<sup>4</sup> While Baldor did eventually supplement its interrogatory responses, no answer to Question 63 was ever tendered.<sup>5</sup>

Plaintiff then specifically inquired whether Baldor's corporate representative had been previously deposed and whether transcripts of such depositions would be produced.<sup>6</sup> The same day the Special Master wrote that plaintiff should "expect to receive them by the end of this

<sup>3</sup> Defendant's exhibit 4, p. 40.

<sup>4</sup> Defendant's exhibit 5, p. 5

<sup>5</sup> Plaintiff's exhibit C, pp. 55-56.

<sup>6</sup> Defendant's exhibit 5, pp. 3-4.

week, or have a date set up by Friday [March 21, 2014] for the deposition of Baldor's corporate rep[resentative]."<sup>7</sup> After learning that Baldor had not complied with her directive, the Special Master held a conference during which Baldor revealed that its corporate representative had in fact been deposed on several occasions. The Special Master directed Baldor to "turn over any prior party statements, in the form of corporate witness deposition testimony . . . . During your search for prior transcripts, if you find material that you feel is privileged, I will review it in camera, and make a ruling."<sup>8</sup> Baldor agreed to produce two of the seven transcripts in its possession outright but tendered the remaining five to the Special Master, who, after reviewing them *in-camera*, found that "[t]hey are relevant from a NYCAL-wide perspective. And I'm guessing plaintiff's counsel will find them useful at the Esposito trial, as well. The transcripts should be turned over this week please . . . ."<sup>9</sup>

Several days later Baldor timely notified the Special Master of its intent to appeal from her recommendation, and this motion followed.

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 . . . ." 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). "Pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof,' including material which might be used in

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<sup>7</sup> *Id* at 3.

<sup>8</sup> Defendant's exhibit 5, p. 1.

<sup>9</sup> Defendant's exhibit 8, p. 1.

cross-examination.” *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 (1st Dept 2007) (quoting *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1983]). “The test is one of usefulness and reason.” *Allen v Crowell-Collier Publ. Co.*, *supra*, at 406. The courts possess wide discretion to decide whether information sought is material and necessary to the prosecution or defense of an action. *Id.*<sup>10</sup>

CPLR 3103(a) provides that the “court may . . . 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.” The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome. *See Sage Realty Corp. v Proskauer Rose, LLP*, 251 AD2d 35, 40 (1st Dept 1998).

The court has conducted its own *in camera* review and disagrees with Baldor’s assertion that the transcripts are not relevant insofar as they only concern components of its motors not at issue in this case. To the contrary, in addition to general information about Baldor motors and their various components, the transcripts cover a wide range of relevant topics, including, but not limited to, Baldor’s corporate and manufacturing history, its document maintenance procedures, and product sales and distribution. The transcripts further inquire into Baldor’s knowledge of the hazards associated with asbestos and related issues.

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<sup>10</sup> Consistent therewith, discovery in NYCAL cases is governed by the CMO under which there is full authority in the court to order broad discovery pertaining to ongoing NYCAL litigation. *Ames, supra*; *see also In re New York City Asbestos Litig. (Georgia-Pacific)*, 109 AD3d 7 (1st Dept 2013).

The defendant's application for a protective order is therefore denied. The requested discovery is plainly relevant to plaintiff's claims, but not overly broad or unduly burdensome, and no showing has been made that the production of such transcripts would in any way prejudice the defendant. *Sage Realty Corp., supra.*

Accordingly, is it hereby

ORDERED that Baldor's motion is denied in its entirety; and it is further

ORDERED that the Special Master's recommendation is confirmed; and it is further

ORDERED that Baldor produce the transcripts at issue to plaintiff's counsel within ten days.

This constitutes the decision and order of the court.

DATED: Oct. 29, 2014

  
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SHERRY KLEIN HEITLER, J.S.C.