

Matter of New York City Asbestos Litig.

2014 NY Slip Op 33705(U)

June 11, 2014

Supreme Court, New York County

Docket Number: 190441/12

Judge: Sherry Klein Heitler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

NYSCEF DOC. NO. 377

RECEIVED NYSCEF: 06/13/2014

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

MARY ANNE McCLOSKEY, as Administratrix of the Estate of PATRICK McCLOSKEY,

INDEX NO. 190441/12

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 019

- v -

MOTION CAL. NO. _____

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

Defendants.

(CLEVER-BROOKS)

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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

This motion is decided in accordance with the annexed memorandum decision dated 6-11-14.

Dated: 6-11-14

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

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

----- X
 MARY ANNE McCLOSKEY, as Administratrix
 of the Estate of PATRICK McCLOSKEY,

Index No. 190441/12
 Motion Seq. No. 019

Plaintiff,

DECISION AND ORDER

- against -

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

Defendants

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

In this asbestos personal injury action, defendant Cleaver-Brooks, Inc. (“CB”) moves pursuant to Section III(B) of the New York City Asbestos Litigation (“NYCAL”) Case Management Order (“CMO”)¹ for a protective order against the November 9, 2013 written recommendation of Special Master Shelley Rosoff Olsen (“Recommendation”) which directs CB to produce, for all boilers it manufactured and/or sold, all documents in its possession that “reference or otherwise mention asbestos or asbestos containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers.” (Recommendation, p. 2).² As set forth below, CB’s motion for a protective order is denied and the Special Master’s Recommendation is confirmed.

¹ CMO § III(B) provides that “[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. . . .”

² A copy of the Special Master’s recommendation is submitted as defendant’s exhibit A.

BACKGROUND

This motion is the culmination of a series of disputes between CB and plaintiffs' counsel, Weitz & Luxenberg, P.C. ("W&L" and/or "Plaintiff"), concerning the scope of CB's discovery obligations in NYCAL. While this issue has apparently gone unresolved for several years over several cases, the current dispute began in or about April 2013 when W&L asked the Special Master to address what it asserted were deficiencies in CB's responses to Plaintiffs' First Standard Set of Liability Interrogatories and Requests for Production of Documents ("Interrogatories")³ as they applied to cases then on trial before Justice Joan Madden of this court. Finding that CB's disclosure obligations under the Interrogatories are to be broadly interpreted, on May 2, 2013 the Special Master required CB to supplement its responses. CB appealed that recommendation to this court, and after argument on the record on May 13, 2013, this court upheld the Special Master's recommendation⁴. Thereafter CB provided partial responses to W&L's document requests on a rolling basis. In the meantime, the matters before Justice Madden were settled and discovery was not completed.

These issues again arose approximately six months later in connection with several cases then on trial before Justice Barbara Jaffe of this court. The issues were again debated before the Special Master, who issued the Recommendation herein which, in relevant part, provides:

Given that CB does, in fact, intend to raise a Berkowitz⁵ no-duty defense, plaintiffs are entitled to broad discovery in order to rebut that defense. This is consistent not only with both the spirit of the CMO and the CPLR, but with numerous decisions of this Court, and its

³ See Exhibit D to the CMO, at www.nycal.net.

⁴ See Defendant's exhibit E.

⁵ See *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 (1st Dept 2001) (defendant has an affirmative duty to warn consumers against the hazards associated with asbestos because it recommended the use of asbestos in conjunction with its products); see also *Sawyer v A.C. & S., Inc.*, Index No. 111152/99, 32 Misc. 3d 1237(A) (Sup. Ct. NY Co. June 24, 2011).

Appellate Division. Moreover, compliance with the standard NYCAL discovery is not optional, nor is it contingent on defense counsel's opinion (or that of its appellate counsel), as to relevance. In any event, CB's general knowledge and/or recommendation of the use of asbestos insulation on and in its boilers, and the use of asbestos packing, gaskets and tape is relevant to plaintiffs' ability to rebut the Berkowitz defense.****CB's discovery obligations are broad, continuing and are not extinguished by virtue of resolving the particular matter in which CB was first ordered to produce standard NYCAL responses. See, generally, *In re New York City Asbestos Litigation (Kentile)*, 2009 NY App Div, LEXIS 7546.****CB is directed to comply fully with the standard NYCAL discovery requests within one week of the date of this Recommendation. For all boilers it manufactured and/or sold, CB is directed to produce all documents, to the extent not previously exchanged, including, but not limited to all design drawings, blueprints, diagrams, specifications and recommendation that reference or otherwise mention asbestos or asbestos containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers. (Recommendation, pp. 1-2).

CB's argument on this motion is not unlike its position taken in prior cases in NYCAL and in other courts that complying with the recommended discovery will be unduly burdensome and very expensive.⁶ Apparently CB's archives use outdated methods and are difficult to navigate. CB's Technical Services manager, John Tornetta, describes how the search for information relative to a single boiler requires a search of multiple locations, starting with a compendium of 80,000 index cards organized alphabetically by job site. These cards include the job site name, city and state, and boiler unit number. CB will then examine microfilms for further information, which can only be read on a microfiche reader. It is alleged that it takes an experienced CB employee 40-50 hours just to

⁶ See, e.g., transcript of proceedings in *McCormick v Cleaver-Brooks, Co., Inc., et ano.*, 04-CV-2405 (JBW), USDC, EDNY, dated Jan. 22, 2013 before Hon. Jack B. Weinstein, Senior District Judge, Plaintiff's exhibit D: "THE COURT: . . . I want you to give them everything you have, commercial and non-commercial. MS. HALBARDIER: The problem is, your Honor, is that in addition to commercial records there are large blueprints and that's something we can't turn over easily because it takes a long time. . . . THE COURT: . . . What do you want? MR. SHAMBERG: We ask for all records related to the boilers, your Honor. And, specifically, in the letter that I filed yesterday, we asked for those drawings. . . . THE COURT: Then you give it to them. MS. HALBARDIER: But, your Honor, it could take the whole week to get them to him. It takes a long time to produce those records because they're huge drawings. THE COURT: Get it to him as soon as you can. *You should have given it to him earlier.* MS. HALBARDIER: *Your Honor, will all due respect, I assume you can appreciate the fact that there are hundreds of asbestos cases and that these records take a long, long time.* . . . THE COURT: *Give it to them . . . they're entitled to them.* (Emphasis Added.)

locate and copy documents for a single boiler.⁷ CB argues that the Recommendation is unduly burdensome in that, under its system of record keeping, production of CB's entire 12 million document repository would taken an inordinate amount of time and would be prohibitively expensive. A sampling of commercial records, drawings, and specifications for boiler units and sites previously identified by NYCAL plaintiffs would suffice. CB further argues that:

- It has already produced 11,000 pages representing manuals for all of its boilers manufactured since the early 1940's, and has also produced commercial records for numerous sites throughout New York State;
- Plaintiff's discovery requests amount to nothing more than a fishing expedition.

CB seeks to vacate the Recommendation in its entirety, asserting that it has already fully complied with its discovery obligations. CB alternatively proposes that it be deemed to have satisfied its discovery obligations by offering samplings of representative documents and information.

In light of CB's position that it had no duty to warn consumers of the hazards associated with asbestos-containing components manufactured by other companies, Plaintiff seeks disclosure of all CB documents referencing the use of asbestos. Plaintiff specifically asserts that:

- CB's motion is part of an ongoing pattern in NYCAL and other courts to delay the production of relevant information. CB's offer to produce a sampling of documents is just another delaying tactic;

⁷ See Affidavit of John Tornetta, sworn to Nov. 12, 2013 ("Tornetta Affidavit"), defendant's exhibit F. Mr. Tornetta's affidavit describes CB's antediluvian system: ". . . in order to compile all of the drawings for a particular boiler, it is necessary for a trained and experienced employee of C-B to go to a matrix of approximately 12 million documents, all on microfilm in some manner, in order to find the first drawing number referenced on the high-level drawing. It is then necessary to review the various iterations of that drawing number in order to determine the specific iteration that was used in the construction of the particular boiler in question. The number of iterations can vary widely depending on the particular part. When the iteration is correctly identified, it will provide reference to one or more further drawing numbers. This process must be repeated over and over again until several hundred drawing parts descriptions have been correctly identified and located. This process takes a trained and experienced CB employee over 35-40 hours to complete. If copies of the drawings are to be made from the microfiche, the process takes well over 50 or more hours to complete for each particular boiler shipment. Of the hundreds of drawings used to construct a particular boiler, only a handful even potentially reference an asbestos-containing component, though it is impossible to determine if there is any such reference without undergoing this lengthy search of all drawings for every boiler." Tornetta Affidavit ¶ 12.

- W&L is willing to work with CB to alleviate the burden of production by, for example, being given access to CB's repository and/or meeting with CB's document custodian to discuss the most efficient way to locate and copy relevant documents;
- Plaintiff does not seek every document in CB's document repository. Rather, as the Special Master's Recommendation made clear, Plaintiff seeks only those documents which refer to the use of asbestos.
- The Special Master's Recommendation comports with the CPLR and the CMO.

While the *McCloskey* case underlying this motion was tried to verdict several weeks after oral argument, the parties have expressed their intention to proceed with this motion. In any event, the court notes that it has ongoing authority to address such issues. *See Ames v Kentile Floors.*, 66 AD3d 600, 600 (1st Dept 2009) (settlement of a single NYCAL matter does not moot order requiring production of information relevant to ongoing NYCAL matters involving the same defendant); *see also In Re Blackmer Pump Company*, Index No. 040000/1988, 2013 NY Misc. LEXIS 2557 (Sup. Ct. NY Co. June 19, 2013).

DISCUSSION

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). 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. 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).

In the facts and circumstances of this case, I again find Plaintiff's requested discovery to be material and necessary and capable of production. So long as CB continues to raise a "no duty" defense in NYCAL matters, which this court does not refute its right to assert, NYCAL plaintiffs must be given the ability to present evidence encompassed within the duty issue, i.e., whether CB specified and/or recommended the use of asbestos insulation, packing, gaskets, tape, and rope in and on its boilers, and whether CB knew that its boilers would use original and replacement asbestos-containing components.

There really can be no dispute that navigating through CB's vast archives may be an arduous task. But the court cannot allow CB to hide behind its own document retrieval system to avoid its discovery obligations, especially since, case after case, they have had advance notice of this court's and the Special Master's approval of the document requests at issue. In addition, W&L has offered to share in the time and expense associated with CB's document retrieval for the purposes of identifying the responsive documents.

CB's proposal that it be permitted to disclose only a representative sampling of information and documents is not a suitable alternative. This puts CB in the role "gatekeeper, deciding what information plaintiffs need or should have. It also shapes the case for the plaintiffs, a role [CB] should not have." *Dabrowski v ABAX Incorporated*, 2009 N.Y. Misc. LEXIS 5640, at *8 (Sup. Ct. NY. Co. Apr. 16, 2009).

Accordingly, the Recommendation is confirmed. The parties are directed to consult with the Special Master within fourteen business days from the date hereof. The court urges the parties to work together with the Special Master to arrange a production schedule which is efficient and cost-effective.

CONCLUSION

The court has considered CB's remaining contentions and finds them to be without merit, and it is hereby

ORDERED that Cleaver-Brooks Inc.'s motion to vacate the Special Master's November 9, 2013 Recommendation is denied; and it is further

ORDERED that CB's application for a protective order limiting the scope of the Recommendation is denied; and it is further

ORDERED that the Recommendation is confirmed.

This constitutes the decision and order of the court.

ENTER:

DATED:

June 11, 2014



SHERRY KLEIN HEITLER, J.S.C.