LoGiudice v American Talc Co.
2016 NY Slip Op 32217(U)
October 27, 2016
Supreme Court, New York County
Docket Number: 190253/2014
Judge: Peter H. Moulton

SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190253/2014
Motion Seq. 015

KERI LOGIUDICE and JOSEPH LOGIUDICE

Plaintiff,

-against-

DECISION & ORDER

AMERICAN TALC CO., *et al.*,

Defendants

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PETER H. MOULTON, J.S.C:

Plaintiff Keri LoGiudice ("plaintiff") was diagnosed with malignant mesothelioma in 2014. She alleges, in part, that her disease was caused by her exposure to asbestos-containing Cashmere Bouquet talcum powder manufactured and distributed by defendant Colgate-Palmolive Co. (hereinafter "Colgate"). The only other defendants in the case are alleged to have supplied asbestos-containing talc to Colgate for its Cashmere Bouquet product. On May 31, 2016, pursuant to Section VIII(B)(3)(c) of the Case Management Order (hereinafter "CMO") that governs New York City asbestos litigation, plaintiff served her First Supplemental Set of Requests for Production of Documents (hereinafter "First Supplemental RFPs") on defendants Colgate, Cyprus Amax Minerals Co, Imerys Talc America Inc., Whittaker Clark & Daniels Inc., and Imerys SA. The same day, plaintiff served a Notice to Admit on Colgate. On August 29, 2016, the Special Master denied all of the requests contained in plaintiff's Notice to Admit and two of plaintiff's First Supplemental RFPs. Plaintiff now moves, pursuant to Section III(B) of the CMO, for relief from the Special Master's August 29, 2016 recommendation, which plaintiff alleges improperly denied her Notice to Admit and limited her First Supplemental RFPs.

In her moving papers, plaintiff states that the following supplemental requests for production are at issue in this motion:

> 11. Produce all notes from conversations between Marie Capdevielle and the approximately 40 persons Dr. Capdevielle testified that she spoke to in preparation for her role as your corporate representative.
>
> 19. Produce all of your annual reports during the years you sold Cashmere Bouquet talcum powder products or the talc therein.

At oral argument on October 18, 2016, plaintiff's counsel, Daron Berquist, stated that RFP 19 was no longer at issue, leaving only RFP 11. In plaintiff's affirmation in further support of the motion, plaintiff states that RFP 19 was withdrawn because Colgate has identified where its large production of documents in its annual reports are located, as required by Section VIII(A)(2)(e) of the CMO. With respect to the remaining RFP at issue, 11, plaintiff avers that it was served upon Colgate because Marie Capdevielle (hereinafter "Dr. Capdevielle"), one of Colgate's designated corporate representatives, has testified that she spoke to and consulted with forty individuals in preparing for her testimony in asbestos cases such as this one. Upon receipt of RFP 11, Colgate avers that it explained to plaintiff that Dr. Capdevielle did not take notes during meetings held in preparation for her role as a corporate representative, and that neither Colgate nor Dr. Capdevielle are in possession of the notes that serve as a basis for plaintiff's request. To be sure, Colgate states that the only notes taken at the meetings Dr. Capdevielle attended were by outside attorneys for the purpose of responding to discovery in pending litigation. Colgate further states that it has already conveyed to plaintiff's counsel that it has nothing to disclose to plaintiff beyond what it has already produced in response to RFP 11.

Beyond RFP 11, plaintiff states that the denial of its Notice to Admit remains at issue in this motion. Plaintiff contends that she served Colgate with a Notice to Admit that was based

principally on prior testimony of Colgate's corporate representatives and document productions in order to eliminate matters that would not be in dispute at trial.

In response, Colgate contends that plaintiff's requests for admission improperly seek discovery that should have been sought through other discovery devices. In addition to being in possession of numerous transcripts of corporate representatives' testimony, Colgate argues that plaintiff has twice taken the deposition of its corporate representative in other cases. Moreover, it contends that prior to the second of those depositions, Colgate offered plaintiff's counsel the opportunity to participate in the deposition and use the transcript for both the *Alfaro v. American Talc. Co.,* Case No. BC583520 (hereinafter "Alfaro") case that was being litigated in California and this one. Plaintiff declined that offer, even though Colgate contends that plaintiff likely could have obtained much of the information it now seeks through a Notice to Admit at the deposition.

Moreover, Colgate contends that several of plaintiff's requested admissions are palpably improper since they do not seek agreement on narrow factual matters, but rather fish for information that could and should have been sought from witnesses. Additionally, Colgate contends that plaintiff's first 47 requests for admission of the 54 that are the subject of this appeal are identical to the requests for admission that were previously served in the *Alfaro* case pending in California.[1] As such, plaintiff has made no showing that the Special Master's Recommendation disallowing the propounding of supplemental, duplicative discovery requests was incorrect. Even if she could, Colgate argues that the discovery plaintiff seeks is duplicative.

DISCUSSION

The CMO that governs the course of discovery in NYCAL proceedings provides, in relevant part as follows: "Any party wishing to propound any discovery on a party in a given case

[1]At oral argument on October 18, 2016, plaintiff withdrew its appeal as to requests 15, 16, 23, 45, 86, 49, 53, and 54.

other than that provided herein may do so only upon application to the Special Master or by stipulation with opposing counsel" (CMO § VIII[C][7]). Recognizing that NYCAL cases frequently involve recurring issues and parties, the CMO dictates that parties should not be subject to duplicative discovery (*see* CMO § II[D]). Section VIII(B)(3)(c) of the CMO emphasizes this notion as it relates to supplemental document requests by instructing that such requests be "non-repetitive" (*see* CMO § VIII[B][3][c]).

Additionally, CPLR § 3123 provides as follows:

> a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.

Hence, requests for admission should concern the authenticity of documents, the correctness of pictures, and "the truth of" factual matters the requesting party "reasonably believes there can be no substantial dispute" (*see* CPLR § 3123; *see also Berg v. Flower Fifth Ave. Hospital,* 102 AD2d 760 [1st Dept. 1984][requests for admission "are intended to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices"]). A court is therefore well within its province under CPLR § 3123 to reject requests for admission that are not "the sort of narrow, limited matters contemplated by the statute but, instead, appear[ ]to be merely a subterfuge for obtaining further discovery" (*see Hodes* v. *City of New York,* 165 A2d 168, 171 [1st Dept. 1991]).

The Special Master's August 29, 2016 recommendation is affirmed as to plaintiff's First Supplemental RFPs, as plaintiff has failed to demonstrate that its supplemental document requests are either not duplicative or "reasonably necessary" (*see* CMO § II).

With respect to plaintiff's First Supplemental RFPs, as previously mentioned the only request at issue here is number 11, which calls for "conversations between Marie Capdevielle and the approximately 40 persons Dr. Capdevielle testified that she spoke to in preparation for her role as your corporate representative." As Colgate has already stated, Dr. Capdevielle did not take notes during meetings held in preparation for her role as a corporate representative. As such, the company avers that neither it nor Dr. Capdevielle are in possession of the notes that serve as a basis for plaintiff's request. Colgate further states that it has already produced any information that it possesses relevant to RFP 11. Consequently, any additional production would be duplicative and therefore superfluous to what Colgate has already produced (*see* CMO §§ II[D], VIII[B][3][c]). The court agrees, and therefore does not believe that the Special Master's recommendation denying plaintiff leave to propound discovery through RFP 11 should be disturbed, as plaintiff has made no showing that the such a course of action would be appropriate under the circumstance.

Similarly, the Special Master's August 29, 2016 recommendation is affirmed as to plaintiff's Notice to Admit, as plaintiff has failed to demonstrate that its request for admissions from Colgate is narrowly tailored "to eliminate from the litigation factual matters which will not be in dispute at trial" (*Berg v. Flower Fifth Ave. Hospital*, 102 AD2d 760, *supra*). Rather than seeking agreement on narrow factual matters, plaintiff's requests seek information that could and should have been sought from witnesses, including Colgate's corporate representative that plaintiff was offered the chance to depose. Additionally, as Colgate highlights in its opposition, plaintiff's requests in many instances "seek to learn Colgate's contentions by offering a series of competing answers on the same issue" (*see* Colgate's Memo of Law at pp. 8-9). For instance, Colgate highlights the following requests contained in plaintiff's Notice to Admit:

- 4.) Admit that you have not identified the source of asbestos that contaminated talc samples sent to McCrone for analysis from 1971 to 1974.
- 5.) Admit that you have identified the source of asbestos that contaminated talc samples sent to McCrone for analysis from 1971 to 1974.
- 25.) Admit that you destroyed McCrone's report of its analysis of the talc sample that was the subject of the 1976 Mount Sinai report
- 26.) Admit that you lost McCrone's report of its analysis of the talc sample that was the subject of the 1976 Mount Sinai report.
- 45.) Admit that you destroyed Herb Ohlmeyer's lab notebooks.
- 46.) Admit that you have not located Herb Ohlmeyer's lab notebooks.

Such requests do not appear to be tailored to eliminate factual issues that are not in dispute, but rather appear to elicit Colgate's characterization of disputed issues. Additionally, the adversarial tone conveyed by these requests strengthens the argument the information sought should have been obtained through discovery devices like oral depositions rather than requests for admission. Even if plaintiff were able to point to "a few proper requests . . . interspersed in the Notice to Admit . . . it is not the court's obligation to prune those pre-litigation devices," and they should be disallowed in their entirety (*see Kimmel v. Paul, Weiss, Rifkind, Wharton & Garrison,* 214 AD2d 453, 453-54 [2d Dept. 1995]).

Finally, plaintiff's Notice to Admit seeks information that plaintiff already possesses. Indeed, as Colgate avers, it has: 1) produced nearly two dozen deposition and trial transcripts of its corporate representative; 2) offered plaintiff's counsel the opportunity to participate in the deposition of its corporate representative; and 3) produced precisely the same requests for admission that plaintiff has attempted to serve here in the *Alfaro* case. As such, the court agrees with Colgate's contention that even if plaintiff's requests were otherwise appropriate, her appeal should be denied on the ground that plaintiff's counsel is already in possession of the information

it seeks through its Notice to Admit. To the extent that requests 50 through 54 seek information that would not have been disclosed in the *Alfaro* case since it pertains specifically to plaintiff's mesothelioma and lymphangioleiomyomatosis (commonly abbreviated as "LAM") diagnosis, Colgate submits that it has already disclosed any information relevant to those requests in its possession in response to plaintiff's supplemental interrogatories.

It is hereby,

ORDERED that plaintiff's motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: October 27, 2016

HON. PETER H. MOULTON
J.S.C.