Pacheco v JPW Indus., Inc.
2016 NY Slip Op 32789(U)
December 21, 2016
Supreme Court, Bronx County
Docket Number: 20208/2015E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM
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ANTHONY PACHECO,

Plaintiff,

- against -

JPW INDUSTRIES, INC. f/k/a WALTER MEIER MANUFACTURING, INC., GLOBAL EQUIPMENT COMPANY, INC., JAMESTOWN 47TH AVENUE, LP and JASMIN EDUCATIONAL ENTERPRISES, INC.,

Defendants.
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DECISION AND ORDER

Index No. 20208/2015E

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated November 15, 2016 and the affirmation and exhibits submitted in support thereof; plaintiff's supplemental affirmation dated November 30, 2016; the affirmation in opposition dated November 30, 2016 of defendant JPW Industries, Inc. and the exhibits and memorandum of law submitted therewith; plaintiff's reply affirmation dated December 5, 2016 and the exhibit submitted therewith; and due deliberation; the court finds:

Plaintiff commenced this action seeking damages for personal injuries sustained while using a Model No. 66 Powermatic Saw bearing Serial No. 8468283. He moves pursuant to CPLR 3126 for an order striking the answer of defendant JPW Industries, Inc. f/k/a Walter Meier Manufacturing, Inc. ("JPW") or for an order compelling discovery under CPLR 3124. Contrary to JPW's argument, the recent compliance conference order granted plaintiff permission to move for relief. Although he did not submit an affirmation of good faith, *see* 22 NYCRR § 202.7, the proceedings at the compliance conference gave the court sufficient indication of plaintiff's good faith efforts to resolve the issues.

CPLR 3126 allows the court to sanction a party that fails to obey a discovery order. Repeated noncompliance with discovery orders and court directives warrants striking defendant's answer. *See*

Ithilien Realty Corp. v. 176 Ludlow, LLC, 139 A.D.3d 58, 33 N.Y.S.3d 182 (1st Dep't 2016). Plaintiff has not shown that JPW's conduct was willful, contumacious or in bad faith. *See Pezhman v. Department of Educ. of the City of N.Y.*, 95 A.D.3d 625, 944 N.Y.S.2d 128 (1st Dep't 2012).

CPLR 3101 calls for full disclosure of all evidence material and necessary in the prosecution or defense of an action and pursuant to CPLR 3124, the court may compel a party to provide discovery. "The test of whether matter should be disclosed is 'one of usefulness and reason.'" *City of New York v. Maul*, 118 A.D.3d 401, 402, 987 N.Y.S.2d 326, 328 (1st Dep't 2014), quoting *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). Plaintiff seeks more complete responses to items 6, 7, 8, 11, 12, 13, 14, 18, and 19 in his September 28, 2015 Notice for Discovery and Inspection. In item 6, he requests the names of all employees and independent contractors hired by JPW from DeVleig-Bullard, Inc.'s ("DBI") Powermatic Division. Items 7 and 8 demand the location where the saw was manufactured and designed. Items 11, 12, 13, and 14 demand manufacturing, design and quality assurance records for a Model No. 66 Powermatic Saw or a Model No. 66 Powermatic Saw with Serial No. 8468283. Items 18 and 19 seek documents related to incidents involving injuries to a person using a Model No. 66 saw and any complaints regarding the Model No. 66 saw. JPW submits, and plaintiff now concedes, that the incident involved a Model No. 68 saw.[1] Because they related to a different model, JPW objected to these demands as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Despite the error, plaintiff has not withdrawn his requests and has set forth demands related to the Model No. 68 saw in a supplemental affirmation.

Plaintiff has not shown that additional discovery on items 6, 7 and 8 is warranted. *See Oorah, Inc. v. Covista Communications, Inc.*, 139 A.D.3d 444, 30 N.Y.S.3d 626 (1st Dep't 2016); *Fernandez*

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[1] The serial number remains unchanged.

v. HICO Corp., 24 A.D.3d 110, 804 N.Y.S.2d 246 (1st Dep't 2005). He claims disclosure is necessary for successor liability, and continuity of management, personnel and location is an element of a *de facto* merger. *See Fitzgerald v. Fahnestock &* Co., 286 A.D.2d 573, 730 N.Y.S.2d 70 (1st Dep't 2001). JPW, though, purchased DBI's Powermatic assets at a bankruptcy auction in 1999. The court order approving the sale of DBI's Powermatic assets stated that the purchase was made free and clear of all liens, encumbrances and interests, that JPW was not a successor of DBI, and that JPW and its affiliates were not responsible for DBI's liabilities or obligations after the closing date. The saw identified in the complaint was manufactured in 1984, and JPW replied it did not know where the saw was manufactured and designed.

Ordinarily, plaintiff may be entitled to discovery on other models of products that are substantially similar to the product at issue. *See McKeon v. Sears Roebuck & Co.*, 190 A.D.2d 577, 593 N.Y.S.2d 519 (1st Dep't 1993). Items 11, 12, 13, 14, 18 and 19 all seek discovery related to the Model No. 66 saw. Plaintiff, though, has not adequately demonstrated that the two models are the same or substantially similar in design. *See Cirineo v. Pepsi Cola Bottling Co. of N.Y.*, 260 A.D.2d 341, 687 N.Y.S.2d 674 (2d Dep't 1999); *Wilcox v. County of Onondaga*, 132 A.D.2d 984, 518 N.Y.S.2d 514 (4th Dep't 1987). He merely stated upon information and belief and without elaboration that the Model No. 66 saw was a replacement for the Model No. 68 saw. His requests for documents related to other incidents is not limited in time or limited to incidents similar in nature to plaintiff's incident. Further responses for items 11, 12, 13, 14, 18, and 19 related to the Model No. 66 saw are denied. His request to compel discovery on the Model No. 68 saw is also denied. The demands were not made in conformity with CPLR 3102 and 3120, and JPW has not had an opportunity to object or respond to them.

Plaintiff also seeks further responses to items 6 and 7 in his May 4, 2016 Notice for Discovery and Inspection related to Splitter and Guard Assembly Model 72A Serial 2250154 and 10Rear Splitter

Assembly Model 72A/74A Serial No. 2787008. JPW responded that it would produce documents responsive to item 6 "subject to entry of a suitable protective order." Plaintiff has submitted an undated protective order signed by the parties. As to item 7 seeking quality assurance records, JPW's response is insufficient. JPW manufactured and sold the splitter and guard assembly to plaintiff's employer, and both products were identified in the purchase order. JPW's argument that the documents are irrelevant lacks merit. A plaintiff claiming that a product was defectively designed must show that the design defect was a substantial factor in the accident and that it was possible for the product to be designed in a safer manner. *See Bendel v. Ramsey Winch Co.*, 2016 NY Slip Op 08310 (1st Dep't Dec. 8, 2016). Even if the guard was not designed to remain permanently affixed to the table, this does not foreclose plaintiff from seeking discovery on the issue.

Accordingly, it is

ORDERED, that plaintiff's motion for an order striking the answer of defendant JPW Industries, Inc. f/k/a Walter Meier Manufacturing, Inc. is denied; and it is further

ORDERED, that plaintiff's motion for an order compelling defendant JPW Industries, Inc. f/k/a Walter Meier Manufacturing, Inc. to provide discovery is granted to the extent that within sixty (60) days after the date of this order, defendant JPW Industries, Inc. f/k/a Walter Meier Manufacturing, Inc. shall provide complete responses to items 6 and 7 of plaintiff's May 4, 2016 Notice for Discovery and Inspection subject to the terms of the stipulated protective order signed by all parties.

This constitutes the decision and order of the court.

Dated: December 21, 2016

Lucindo Suarez, J.S.C.