

Routh v Steinvurzel
2017 NY Slip Op 30799(U)
March 28, 2017
Supreme Court, Queens County
Docket Number: 703971/15
Judge: Peter J. O'Donoghue
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, PETER J. O'DONOGHUE IAS PART MD
Justice

Subash Routh and Anita Routh,

Plaintiffs,
-against-

Index No.: 703971/15

Motion Date: 01/04/17

Motion Seq. No.: 2

Joshua N. Steinvurzel, M.D., et. al.,

Defendants.

FILED
MAR 31 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered as set forth below on this O.S.C. by defendants Biomet Inc. and Biomet Orthopedics, LLC for an Order (1) compelling Joshua Steinvurzel, M.D., and Orthopaedic Associates of Great Neck, LLP and plaintiffs Subash and Anita Routh to execute the Joint Stipulated Confidentiality Agreement and Order; and cross motion by plaintiffs for an Order (1) pursuant to CPLR 3126 striking the Answer of Biomet defendants; and/or (2) pursuant to CPLR 3120 directing that Biomet defendants comply with the outstanding discovery demands as ordered by this Court; and/or (3) pursuant to CPLR 3126 precluding the Biomet defendants from offering evidence at trial regarding the items demanded in the various discovery demands to which reference has been made; and cross motion by defendants Joshua Steinvurzel, M.D., and Orthopaedic Associates of Great Neck, LLP for an Order (a) pursuant to CPLR 3126 and this Court's Order dated October 13, 2016, striking the Biomet defendants' Answers; (b) pursuant to CPLR 3120, 3124, 3126 and the Order dated October 13, 2016 directing the Biomet defendants to provide Biomet documents demonstrating the elemental breakdown for the subject Biomet prosthesis by a date certain; (c) pursuant to CPLR 3126 precluding the Biomet defendants from presenting any evidence or testimony at trial regarding the elemental composition of the subject prosthesis; (d) denying the Biomet defendants request for an order compelling the parties to execute a joint confidentiality order and agreement.

PAPERS
NUMBERED

O.S.C.-Affidavits-Exhibits	60-73;83;84
Notices of Cross Motion-Affidavits-Exhibits.	95-107;117-121
Answering Papers-Affidavits-Exhibits.....	108-116;124
Reply Papers-Affidavits-Exhibits.....	122-123

Upon the foregoing papers and oral argument it is ordered that the O.S.C. by defendants Biomet Inc. and Biomet Orthopedics, LLC for an Order (1) compelling Joshua Steinvurzel, M.D., and Orthopaedic Associates of Great Neck, LLP and plaintiffs Subash and Anita Routh to execute the Joint Stipulated Confidentiality Agreement and Order is denied.

While the Court will not compel these parties to agree to the terms of a Confidentiality Agreement the terms of which were prepared solely by the movants, the Court may grant a protective order limiting disclosure of information and documents which contains confidential, proprietary and trade secret information. When determining whether or not the information and documents sought contain confidential, proprietary and trade secret information, the Court will consider the following four factors: (1) whether the documents are not known by those outside the business; (2) whether the documents are kept under lock and key; (3) whether the documents are the product of substantial effort and expense; and (4) whether or not the documents can not be easily acquired or duplicated. (See Terwilliger v Max Co., 64 AD3d 1232 [2009]). Movants provided copies of documents to the Court, at the Court's direction, for an *in camera* review. These documents include Bills of Materials; Device History Records; Operation Routers; Raw Materials Certifications; Customer Invoice Inquiry; Invoices; Product Order Form and Elemental Breakdown of Components. The Affidavit of Bradley Durcholz, Development Associate Director of Knee Project Management, annexed to the O.S.C. as Exhibit L, describes the essence of these documents. Mr. Durcholz's Affidavit establishes that the information and documents sought herein concerning Biomet's internal processes for ordering, testing, and inspecting raw materials used by Biomet to manufacture medical devices; the manufacturing, testing, and packaging of the Biomet medical devices; and

customer information and pricing (1) are not known by those outside the business; (2) are kept under lock and key; (3) are the product of substantial effort and expense; and (4) can not be easily acquired and duplicated. However, plaintiffs and defendants Joshua Steinvurzel, M.D., and Orthopaedic Associates of Great Neck, LLP have established that these documents are "indispensable to their case and [are] otherwise unavailable if they could not be obtained from defendants [Biomet]" (see Terwilliger, id.). Therefore, these documents are entitled to the issuance of a protective order. Consequently, it is

ORDERED that Plaintiffs and co-defendants Joshua Steinvurzel, M.D. and Orthopaedic Associates of Great Neck, LLP shall be provided with a copy of the documents provided to the Court for its *in camera* inspection which documents contain the marking "For In Camera Review Only Confidential-Subject To Confidentiality Order" at the next Court conference scheduled for April 6, 2017 and the Court shall provide these copies; and it is further

ORDERED, that these documents shall remain confidential, and shall not be disclosed in any fashion, nor be used for any purpose other than the analysis and preparation for trial of this action; and it is further

ORDERED, that these documents may be disclosed to the parties, their attorneys, their retained experts, consultants, officers of the court and any court supervising disclosure (see Terwilliger, id.); Whalen v Kawasaki Motors Corp., 175 AD2d 667 [4th Dep't 1991]; and Tymko v K-Mart Discount Stores, Inc., 75 AD2d 987 [4th Dep't 1980]); and it is further

ORDERED, that within 90 days after final conclusion of all aspects of this litigation, these documents and all copies of same (other than exhibits of record) shall be returned to the producing party except the Clerk of the Court may return to counsel or destroy any of these documents in its possession.

Branches (a) and (c) of the cross motion by defendants Joshua Steinvurzel, M.D., and Orthopaedic Associates of Great Neck, LLP are denied. Branches (b) and (d) of the cross motion regarding discovery of Biomet documents demonstrating the elemental breakdown for the subject Biomet prosthesis are granted as set forth above.

Branches (1) and (3) of plaintiffs' cross motion are denied. Branch (2) compelling responses from defendants Biomet, Inc. and Biomet Orthopedics, LLC to various demands served by plaintiffs, other than a Notice to Admit dated 08/25/16, is denied with leave to renew after (a) plaintiffs' counsel has obtained and reviewed the documentation discussed above which is now the subject of a protective order and (b) the completion of Biomet's deposition. With respect to the Notice to Admit, to the extent that no response appears to have been interposed pursuant to CPLR 3123, these matters are deemed admitted.

Dated: March 28, 2017

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Hon. Peter J. O'Donoghue, J.S.C.

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