Carilli v A.O Smith Water Prods.
2017 NY Slip Op 32101(U)
October 5, 2017
Supreme Court, New York County
Docket Number: 190252/15
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

ROGER J. CARILLI,
Plaintiff

- against -

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

INDEX NO. 190252 /15
MOTION DATE 10-03-2017
MOTION SEQ. NO. 010
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to renew and reargue by non-party NIBCO INC.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	6 - 7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers it is ordered that non-party NIBCO INC.'s motion to renew and reargue the September 21, 2017 Decision and Order of this Court filed under Motion Sequence 005, is granted. The subpoena served by Burnham LLC is quashed. Burnham LLC, may make use of the non-party NIBCO INC.'s interrogatories and deposition testimony at trial, in accordance with the CMO dated June 20, 2017.

NIBCO INC. is not a party to this action. On September 1, 2017 defendant Burnham LLC served on NIBCO INC. a subpoena Ad Testificandum dated August 30, 2017, requiring the appearance of "the individual designated by NIBCO INC. as its corporate representative/person most knowledgeable for the trial in this matter.... to give testimony in this action as a witness at trial with respect to all matters relevant to this action."

Non-party NIBCO INC. moved pursuant to CPLR §§3101 and 2304 to quash the subpoena, and pursuant to CPLR §3103 for a protective order. NIBCO INC. argued that this subpoena was an improper attempt by Burnham LLC to obtain discovery and should not be allowed at this late stage. It also argued that the subpoena is lacking in specificity, over broad, and burdensome, and will create an unreasonable expense and disadvantage to NIBCO INC. as it is being served on the eve of trial. Under these circumstances, it argued, a motion to quash the trial subpoena and/or a protective order precluding Burnham LLC from using deposition testimony or interrogatories in this action from a NIBCO INC. representative is warranted. NIBCO INC. also sought to be awarded costs associated with this matter.

The September 21, 2017 Decision and Order of this Court, filed under Motion Sequence 005, denied the motion and directed NIBCO INC. to produce a witness at trial.

NIBCO INC.'s motion pursuant to CPLR §2221 [d] and [e] seeks to renew and reargue the September 21, 2017 Decision and Order of this Court filed under Motion Sequence 005. NIBCO INC. seeks renewal arguing that the New CMO permits the use of interrogatories without live witness testimony from the non-party's corporate representative. It is also argued that other decisions on motion to quash in Weitz and Luxenberg cases have been granted, warranting the same relief on NIBCO INC's motion to quash to avoid prejudice.

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

Renewal applies to the submission of new evidence not available at the time the original motion was submitted (Laura Vazquez v. JRG Realty Corp., 81 A.D. 3d 555, 917 N.Y.S. 2d 562 [1st Dept. 2011]). A motion that is described as one for leave to renew and reargue may be treated exclusively as a motion to reargue, where it is not based upon new facts unavailable at the time of the prior motion and does not offer a reasonable justification for failure to present the new facts at the time of the original motion (Navarette v. Alexiades, 50 A.D. 3d 873, 855 N.Y.S. 2d 649 [2nd Dept. ,2008] and Onglingswan v. Chase Home Finance, LLC, 104 A.D. 3d 543, 104 N.Y.S. 2d 149 [1st Dept., 2013]).

NIBCO INC. has stated a basis to grant renewal. Although the lifting of the stay of Justice Peter Moulton's June 20, 2017 CMO occurred on September 19, 2017, it was not addressed in the September 21, 2017 Decision and Order of this Court. NIBCO INC. has stated a basis for renewal in reliance on the lifting of the stay and subsequent decisions of this Court that quashed the subpoena and permitted the use of depositions and interrogatories. There is no need to address the remaining arguments made in this motion for reargument.

Upon renewal, NIBCO INC.'s motion to quash the subpoena, and for a protective order is granted.

This court is of the opinion that a non-party should not be forced to produce a witness at the trial of this matter, because it is contrary to the NEW YORK CITY ASBESTOS LITIGATION (NYCAL) CASE MANAGEMENT ORDER (CMO) dated June 20, 2017, slated to take effect on July 20, 2017 and recently implemented on September 19, 2017 by the lifting of the Appellate Division First Department stay.

"The CMO governs various pre-trial and trial procedures in NYCAL....and differs from the CPLR in numerous ways in an attempt to address issues that permeate asbestos litigation....Such as allowing the limited use of hearsay for article 16 purposes."(see decision accompanying CMO dated June 20, 2017, Moulton, J.)

Justice Moulton stated in his decision accompanying the June 20, 2017 CMO with respect to the limited use of hearsay for article 16 purposes..."Given the longevity of asbestos litigation, many corporate representatives with personal knowledge about a company's asbestos-related products, and the warnings, if any, given to the users of such products, have either retired or died. Accordingly, defendants sought to relax hearsay rules to admit some types of information that might otherwise be barred by strict adherence to New York State's rules of evidence. In our discussions defendants argued that they should be allowed to use both interrogatory answers and depositions of non-parties to prove that non-parties should be included on the verdict sheet for article 16 purposes.... Defendants reason these interrogatory answers are sufficiently reliable to be used by other defendants, at least for the limited purpose of demonstrating that a non-party sold a product that contained or used asbestos, and failed to warn about the dangers of asbestos.... The court agrees that this limited article 16 relief is warranted given the age of asbestos litigation and the difficulty defendants face in proving that other non-party entities should be considered by the jury as potential causes of a plaintiff's disease. Interrogatory answers concerning product identification are reliable in that it is against the answering entity's interest to admit that its product contained asbestos, or required that asbestos be used to further the product's purpose. An admission concerning a failure to warn is similarly against interest. Defendants in NYCAL generally are required to answer the standard form interrogatories contemplated by the CMO only once. The interrogatory answers are then used in all NYCAL cases.... The [CMO] signed on today's date allows for the use of interrogatory answers as described above.... Of course, a settled defendant's deposition testimony can be admissible in certain circumstances for Article 16 purposes under CPLR 3117(2). However that section applies only to settled defendants, and contains other requirements...." (see decision accompanying CMO dated June 20, 2017 pp 22-23).

The CMO, in its section XIII "Use at trial of Nonparty Interrogatories and Depositions," states:

"(A) Use of Nonparty Interrogatories. Answers by non-parties of NYCAL standard sets of interrogatories may be used at trial to prove: 1) that a product or products of the nonparty contained asbestos, or that asbestos was used in conjunction with the nonparties' product or products, and/or 2) any failure to warn by the nonparty concerning an asbestos-containing product and/or the use of asbestos in association with a product.....for purposes of this section a non-party shall include a settled party.

(B) Use of Non-party Depositions. Nonparty depositions may be used where allowed by the CPLR..."

Justice Moulton's decision accompanying the CMO, and the CMO, clearly allow the use by defendants in a NYCAL action of non-party and settled party interrogatories, and deposition of settling defendants (under certain circumstances). This use is allowed due to the age of asbestos litigation and the difficulty defendants face in proving that other, non-party and settling, entities should be considered by the jury as potential causes of a plaintiff's disease. The use of non-party and settling defendants' interrogatories also serves to streamline the trial process, by allowing the defendants to prove the culpability of these entities without the need of producing a witness for this purpose. In essence following the CMO obviates the need to subpoena witnesses from non-parties and settling defendants in order to establish their equitable share of culpability.

The Trial Court in its discretion determines the admissibility of deposition testimony used as evidence. Deposition testimony used pursuant to CPLR §3117[a][2], must be admissible under the rules of evidence (Novas v. Zuckerman, 93 A.D. 3d 585, 941 N.Y.S. 2d 84 [1st Dept., 2012] and Rivera v. New York City Transit Authority 54 A.D. 3d 545, 863 N.Y.S. 2d 201 [1st Dept., 2008]).

In this case the deposition testimony of a witness or the use of interrogatories provided on behalf of NIBCO INC. may be admissible evidence and may be used for the limited purpose of determining liability. To the extent there is an admission to the knowledge of the hazards of asbestos, the manufacture of asbestos related products, and failure to warn, that is admissions against interest, it is admissible evidence of the facts (See Rivera v. New York City Transit Authority 54 A.D. 3d 545, supra and GJF Const., Inc. v. Sirius America Ins. Co., 89 A.D. 3d 622, 934 N.Y.S. 2d 697 [1st Dept., 2011], facts admitted in a deposition are informal judicial admissions (Richter, J., concurring, at pgs. 626-627).

The use of interrogatories is governed by the language of CPLR §3131, and the answers "may be used to the same extent as the depositions of a party" (McKinney's Consolidated Laws of New York Annotated CPLR §3131). The Court agrees that limited article 16 relief is warranted given the age of asbestos litigation and the difficulty defendants face in proving that other non-party and settling entities should be considered by the jury as potential causes of a plaintiff's disease. Interrogatory answers concerning product identification are also reliable in that it is against the answering entity's interest to admit that its product contained asbestos, or required that asbestos be used to further the product's purpose. An admission concerning a failure to warn is similarly against interest. Defendants in NYCAL generally are required to answer the standard form interrogatories only once.

It is no secret that these NYCAL cases have a large number of defendants, most of which settle prior to or even during the trial. It takes weeks to select a jury and months to complete a trial of one of these cases; this is without the need for the production by a non-party or settling defendant of a witness at trial. These already complicated, lengthy trials would become even lengthier. The mechanism for the defendant to meet its Article 16 burden through interrogatories, and at times through depositions, without the need of producing witnesses will streamline the trial, and saves time by reducing the number of

witnesses called at trial, while affording the defendant the opportunity to meet its CPLR Article 16 burden. In sum it promotes judicial economy and efficiency.

Accordingly, it is ORDERED that non-party NIBCO INC.'s motion to renew and reargue the September 21, 2017 Decision and Order of this Court filed under Motion Sequence 005, is granted, and it is further,

ORDERED that the Decision and Order of this Court dated September 21, 2017, filed under Motion Sequence 005, is vacated, and it is further,

ORDERED that upon renewal, the motion by NIBCO INC., filed under Motion Sequence 005, to quash a subpoena Ad Testificandum served upon it by defendant Burnham LLC, and for a protective order and for costs, is granted, and it is further ,

ORDERED that the subpoena is quashed, and it is further,

ORDERED that Burnham LLC may make use of the non-party NIBCO INC.'s, interrogatories and deposition testimony at trial in accordance with the CMO dated June 20, 2017, and it is further,

ORDERED that the remainder of the relief sought in Motion Sequence 005, is denied, and it is further,

ORDERED that within twenty (20) days of entry a copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol upon the parties, the Trial Support Clerk located in the General Clerk's Office (Room 119) and the County Clerk (Room 141B), who are directed to mark their records accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 5, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE