

Calise v Verizon Sourcing LLC
2017 NY Slip Op 33324(U)
June 15, 2017
Supreme Court, Rockland County
Docket Number: 30367/15
Judge: David S. Zuckerman
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Compliance Conf. July 31, 2017, 9:15 a.m.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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The Estate of Yvonne Calise, by FRANK CALISE, as ADMINISTRATOR, The Estate of Barbara A. Calise, by FRANK CALISE, as EXECUTOR, MICHAEL JOHN CALISE and FRANK CALISE, individually,

Plaintiffs,

-against -

DECISION/ORDER

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VERIZON SOURCING LLC, VERIZON NEW YORK INC., MOTOROLA COMMUNICATIONS AND ELECTRONICS, INC., MOTOROLA MOBILITY LLC; and A through Z COMPANIES, JOHN and JANE DOES 1 through 10, being fictitious names of businesses and/or legal entities, and individuals, the names of which and whom are presently unknown, jointly and severally,

Motion Date:
02/03/17

Defendants.

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ZUCKERMAN, J.

The following papers numbered 1 to 6 were considered in connection with this motion by Defendants Verizon Sourcing LLC and Verizon New York Inc. for, *inter alia*, an Order dismissing Plaintiffs' products liability and warranty claims and for a Protective Order; the motion by Defendants Motorola Communications and Electronics, Inc. and Motorola Mobility LLC for a Protective Order; and Plaintiff's cross-motion to compel discovery:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS	1
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS	2
NOTICE OF CROSS-MOTION/AFFIRMATION/EXHIBIT	3
MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION	4

REPLY/AFFIRMATION IN OPPOSITION TO CROSS-MOTION 5
REPLY/AFFIRMATION IN OPPOSITION TO CROSS-MOTION 6

This is an action for wrongful death based on negligence and products liability brought by Plaintiffs' Administrator and Executor Frank Calise ("Decedents") and Michael John Calise and Frank Calise individually (collectively "Plaintiffs") against Defendants Verizon Sourcing LLC, Verizon New York Inc., Motorola Communications and Electronics, Inc., and Motorola Mobility LLC ("Defendants", "the Verizon defendants", and "the Motorola defendants", collectively, and "Sourcing", "Verizon", "Motorola", and "Mobility", respectively). Plaintiffs allege that the decedents died when electronic equipment manufactured, belonging to, and/or installed by Defendants caused a fire at Decedents' home. Following service of the Summons and Complaint, Defendants interposed Answers.

The Verizon defendants now move for, *inter alia*, an Order dismissing Plaintiff's products liability and warranty claims, arguing that they did not manufacture or sell the allegedly defective product into the marketplace and/or the allegedly defective product was incidental to their delivery of service to decedents. Plaintiffs oppose the motion, asserting, *inter alia*, that there are questions of fact suitable for resolution at trial and that Defendants failed to respond to Plaintiffs' first and second sets of interrogatories and first, second, and third notices for discovery and inspection. The Verizon defendants also move for a Protective Order, asserting that a single telephone call in which Defendants requested that Plaintiffs withdraw the products liability claims and related discovery constitutes a good faith effort to resolve the discovery dispute.

The Motorola defendants likewise move for a Protective Order, relying on the assertions by the Verizon defendants that a single call requesting withdrawal of the products liability claims and the discovery related thereto reflects a good faith effort to resolve the pending dispute over discovery. Finally, Plaintiffs cross-move to compel discovery, specifically for failure of Defendants to respond to Plaintiffs' first and second sets of interrogatories and first, second, and third notices for discovery and inspection. Defendants oppose the motion, arguing that they have responded to both interrogatories, annexing copies of their responses to their answering papers.

Plaintiffs' main assertion in opposition to the dismissal motion is that the motion is premature since notices for Discovery and Inspection and depositions are still outstanding. Indeed, their expert avers that he cannot opine on the cause of the fire herein without additional discovery. CPLR §3212(f) provides

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

All parties concede that additional discovery has been requested, and there is some dispute that Plaintiffs' first, second, and third discovery and inspection requests have all been answered. Plaintiffs' expert has arguably shown that proof regarding Defendants' liability may remain to be disclosed through the discovery process. Thus, in the presence of questions of fact with regard to Defendants' respective negligence, the motion to dismiss must be denied.

Defendants' motions for a Protective Order must be denied as well. As noted above, Defendants Motorola Communications and Electronics, Inc. and Motorola Mobility LLC both seek a Protective Order on the assertion that counsel for one defendant made a single telephone call to Plaintiffs in which he requested that Plaintiffs withdraw the products liability claims and related discovery demands. One telephone call, in which only a demand for withdrawal of a claim and discovery requests was made, hardly constitutes a good faith effort to resolve the discovery dispute. Regarding Plaintiff's motion to compel, correspondence among the parties clearly suggests a dispute regarding Defendants' compliance with Plaintiffs' first and second sets of interrogatories and first, second, and third notices for discovery and inspection. Further, Plaintiffs have failed to contest the Notice of Filing Amended Exhibits, dated January 3, 2017, which purports to be the Motorola defendants' compliance with its discovery obligations. Plaintiffs have also not responded to the Verizon defendants' assertion in their papers that they too have complied. The court therefore will deny the portions of the instant motions related to discovery practice, with leave to renew upon a proper showing of good faith, which effort shall include a court conference on the status of discovery.

Based upon the foregoing, it is hereby

ORDERED, that the motion for dismissal is denied, with leave to renew upon the close of discovery; and it is further

ORDERED, that the motions for protective orders, and to compel discovery, are denied, with leave to renew the discovery motions upon a proper showing of good faith, which effort shall include a

court conference on the status of discovery; and it is further

ORDERED, that to insure the prompt completion of discovery with regard to the case, the parties are directed to appear for a Status Conference on July 31, 2017 at 9:15 a.m.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: New City, New York
June 15, 2017



HON. DAVID S. ZUCKERMAN, A.J.S.C.

DARRELL JOHN, ESQ.
Conway, Farrell, Curtin
& Kelly
Attorneys for Verizon Defendants
48 Wall Street, 20th Floor
New York, NY 10005

JOSEPH P. WODARSKI, ESQ.
Wilson, Elser, Moskowitz,
Edelman & Dicker, LLP
Attorneys for Motorola Defendants
1133 Westchester Avenue
White Plains, New York 10604

REGINALD H. RUTTSHAUSER, ESQ.
Kantrowitz, Goldhamer & Graifman, PC
Attorneys for Plaintiffs
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, New York 10977