

Matter of Yang-Ning Pi Chen v Aerco Intl., Inc.
2018 NY Slip Op 31143(U)
June 6, 2018
Supreme Court, New York County
Docket Number: 190133/2017
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
YANG-NING PI CHEN, Individually, and as Independent
Executrix for the Estate of CHI-CHUNG CHEN,
Plaintiff,

INDEX NO. 190133/2017

MOTION DATE 05/23/2018

MOTION SEQ. NO. 013

MOTION CAL. NO.

- against -

AERCO INTERNATIONAL, INC., et al.,

Defendants.

The following papers, numbered 1 to 6 were read on Nissan North America, Inc. and Volkswagen Group of America, Inc.'s motion to vacate the special master's discovery ruling:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Nissan North America, Inc. and Volkswagen Group of America, Inc.'s ("Nissan" and "Volkswagen," collectively the "Moving Defendants") motion to vacate Special Master Shelley Olsen's April 8, 2018 Jurisdictional Discovery Recommendation ("Recommendation") is denied.

Plaintiff-deceased Chi-Chung Chen passed away on January 21, 2018 after being diagnosed with mesothelioma. Mr. Chen testified at his deposition that he was exposed to asbestos-containing products while working in New York, Texas, and Taiwan. Mr. Chen alleges he was exposed to asbestos-containing Nissan and Volkswagen products while doing various types of automobile-related jobs on the Moving Defendants' vehicles in a New York body shop.

Plaintiffs served discovery requests by letter to all Defendants on June 23, 2017 demanding standard responses to court mandated interrogatories and discovery, including jurisdictional interrogatories (Opposition Papers Ex. 5). Plaintiffs sent an email to Special Master Olsen on March 5, 2018 requesting that Defendants be ordered to produce outstanding discovery (Id at Ex. 9).

Special Master Olsen issued her Recommendation on April 8, 2018 (Id at Ex. 21). She ordered that: (i) there was no stay in this action due to CPLR §3124 or the death of Plaintiff-decedent, (ii) Defendants [including the Moving Defendants] shall respond to the personal jurisdiction interrogatories, (iii) Nissan shall produce at least three deposition transcripts of its corporate representative, (iv) Volkswagen shall inform Plaintiffs if Neal Palmer was ever deposed, and if so, to provide the transcript, (v) Volkswagen to provide Neal Palmer's reliance materials, (vi) Volkswagen to provide Neal Palmer's curriculum vitae, and (vii)

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

Volkswagen and Nissan to provide answers to Plaintiffs' Standard NYCAL Liability Interrogatories" (*Id* at Ex. 21).

Special Master Olsen reasoned that: “[a]t this juncture, the applicable standard is simply whether plaintiff’s demands may lead to relevant evidence regarding jurisdiction over defendant,” and that “the issue at hand concerns specific jurisdiction.” Special Master Olsen determined that the Plaintiffs “must be permitted to pursue discovery under CPLR §302 in order to establish specific jurisdiction if, in fact, it exists herein.”

None of the Defendants notified Special Master Olsen or the Plaintiffs by email within the three (3) days time frame mandated by the Case Management Order (“CMO”) that they objected to the Recommendation.

The Moving Defendants now move for an Order to vacate Special Master Olsen’s Recommendation. The Moving Defendants’ motion to vacate is premised upon: (i) discovery was automatically stayed pursuant to CPLR §3214[b]; and (ii) Special Master Olsen erred in ordering the Moving Defendants to respond to Plaintiffs’ jurisdictional discovery.

Plaintiffs oppose the motion contending: (i) the CMO mandates that there is no stay in this action, (ii) New York has a well-established strong presumption in favor of discovery, (iii) the Moving Defendants failed to follow the procedures of the CMO, and (iv) New York’s law regarding jurisdictional discovery requires confirmation of the Recommendation.

In New York City Asbestos Litigation (“NYCAL”) the CMO states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring the parties comply with discovery, and as a result, recommends rulings on all discovery disputes (*Ames v A.O. Smith Water Products, et al.*, 66 AD3d 600, 887 NYS2d 580 [1st Dept. 2009]). Pursuant to CMO Section III(C), the Special Master’s recommendations are appealable to this court.

CPLR §3214[b] states that “service of a notice of motion under §3211, §3212, or §3213 stays disclosure until determination of the motion unless the court orders otherwise” (CPLR §3214[b]). Pursuant to the CMO, when its provisions differ from the CPLR, the CMO governs (CMO §VI). However, the CPLR governs if the CMO is silent. With the Special Master directed to supervise discovery, the CMO empowers her to lift any stay and order disclosure after a motion under §3211, §3212, or §3213 is made (*Arazosa v. 3M Co.*, 2018 NY Slip Op 30326(U), ¶ 2 (Sup. Ct.)).

While the CMO states that there “will be a presumption [of] no stay due to the death of the plaintiff” to maintain its objective in encouraging expeditious and inexpensive resolution to NYCAL actions, the CMO does not mention or contradict CPLR 3214[b]. Therefore, the CMO does not trump CPLR §3214[b] in regards to an automatic stay when motions are made under §3211, §3212 or §3213 (CMO, CPLR §3214). However, the Special Master can lift the automatic stay. This is what she did when her Recommendation directed the Defendants to respond to Plaintiffs’ discovery demands.

The “CMO §III(C) required [the Moving Defendants] to notify Special Master Olsen by email of any objection to her recommendation within three (3) business days after receiving the recommendation. The Special Master then must reduce the ruling to writing” (CMO §III(C)). “[The Moving Defendants] then must present any objection to the written recommendation to the Coordinating Judge by an order to show cause within seven (7) business days after receiving the Special Master’s written recommendation” (*Arazosa, supra*).

The Moving Defendants failed to follow CMO procedures prior to making this joint motion to vacate the Special Master's Recommendation. Special Master Olsen stated that the Defendants failed to "notify [her] by email and all other interested parties within three business days of receiving the Special Master's ruling," that they intended to object to the Recommendation, suggesting that the Plaintiffs need not even submit a substantive opposition to Defendants' [including the Moving Defendants] motions (Opposition Papers Exs. 28, 30). The Moving Defendants' motion to vacate Special Master Olsen's Recommendation is denied due to their failure to follow the CMO standard.

Arguendo, the Court will address the merits of the jurisdictional discovery demands sought by Plaintiffs.

CPLR §3101[a] allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." It is within the court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (Roman Catholic Church of the Good Shepherd v Tempco Systems, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994]). The applicable standard at this stage of litigation is whether plaintiff's demands may lead to relevant evidence regarding jurisdiction over a defendant (CPLR §3101[a]; SNI/SI Networks LLC v DIRECTV, LLC, 132 AD3d 616, 18 NYS3d 342 [1st Dept. 2015]; Matter of Steam Pipe Explosion at 41st St. & Lexington Ave., 127 AD3d 554, 8 NYS3d 88 [1st Dept. 2015]).

A plaintiff must make a "sufficient start" to obtain jurisdictional discovery (HBK Master Fund L.P. v Troika Dialog USA, Inc., 85 AD3d 665, 925 NYS2d 829 [1st Dept. 2011]; Benifits By Design Corp. v Contractor Mgmt. Servs., LLC, 75 AD3d 826, 905 NYS2d 340 [3rd Dept. 2010]). In NYCAL litigation, a plaintiff's specific identification of a defendant's product during depositions is a sufficient start to obtain jurisdictional discovery (Cerutti v A.O. Smith Water Prods., Co., 2017 NY Slip Op 31117(U), ¶ 5 (Sup. Ct.)).

Plaintiffs made a sufficient start when Plaintiff-decedent identified both Nissan and Volkswagen-made products during his deposition. Mr. Chen testified that he was exposed to Nissan products in New York while removing and installing an asbestos-containing clutch associated with Nissan vehicles and did bodywork with asbestos-containing bondo on Nissan-manufactured vehicles (Opposition Papers Ex. 4). Plaintiff also testified that he was exposed to Volkswagen products in New York when performing work on a valve associated with a Volkswagen rabbit, when he did bodywork with asbestos-containing bondo on Volkswagen-manufactured vehicles, and removing and installing asbestos-containing brakes on Volkswagen vehicles (*Id*). The Court concurs with Special Master Olsen's opinion that the jurisdictional discovery demands sought by Plaintiffs are relevant and reasonably calculated to lead to admissible evidence to support Plaintiffs' claim that personal jurisdiction may exist. The Moving Defendants' motion to vacate the Special Master's Recommendation is denied.

Accordingly, it is ORDERED, that Defendants Nissan North America, Inc. and Volkswagen Group of America, Inc.'s motion to vacate Special Master Shelley Olsen's April 8, 2018 Jurisdictional Discovery Recommendation, is denied, and it is further,


ORDERED, that Special Master Shelley Olsen's April 8, 2018 Jurisdictional Discovery Recommendation is confirmed, and it is further,

ORDERED, that within thirty (30) days from the date of service of a copy of this Order with Notice of Entry upon Defendants Nissan North America, Inc. and Volkswagen Group of America, Inc., Defendants Nissan North America, Inc. and Volkswagen Group of America, Inc. shall respond to the discovery demands sought by Plaintiffs that are expressly laid out in Special Master Shelley Olsen's April 8, 2018 Jurisdictional Discovery Recommendation.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**

Dated: June 6, 2018



**MANUEL J. MENDEZ
J.S.C.**

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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