

<b>DeRozieres v ABB, Inc.</b>
2018 NY Slip Op 32862(U)
November 7, 2018
Supreme Court, New York County
Docket Number: 190350/17
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

JOHN DeROZIERES and BARBARA DeROZIERES,  
his wife,

Plaintiff

- Against-

ABB, INC., et al.,

Defendant.

INDEX NO. 190350 /17

MOTION DATE 10-24-2018

MOTION SEQ. NO 002

MOTION CAL. NO

The following papers, numbered 1 to 5 were read on this motion by defendant JOHN CRANE INC. to vacate the Special Master's recommendation that denied its request for case specific discovery of the defendants.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits \_\_\_\_\_

3-4

Replying Affidavits \_\_\_\_\_

5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion by defendant John Crane Inc., (hereinafter "JCI") to vacate the Special Master's recommendation that denied its request for case specific discovery of the co-defendants is granted. The Special Master's recommendation is vacated. Defendant JCI may obtain case specific discovery from the co-defendants that would allow JCI to offer evidence to support apportionment of fault against these co-defendants . Any deposition is limited to questions in the following areas: (1) the products co-defendants manufactured or sold, (2) the asbestos content of the products, (3) whether or not warnings were placed on the products during the relevant period and, if so, the wording, and (4) the trade associations the entity was a member of, and its activities with those associations. The party taking the deposition shall bear the expense thereof ( CPLR § 3116(d)). The deposition of a co-defendant shall not delay the trial. Any ruling on the use at trial of the transcript of a co-defendant's deposition is reserved for the trial judge.

Plaintiffs bring this action to recover against the defendants for personal injuries sustained from exposure to asbestos from the defendants' products. Defendant JCI requested from the Special Master permission to obtain case specific discovery from the co-defendants, in the nature of an examination before trial, to obtain evidence that would assist it in meeting its burden of proving the co-defendant's share of fault ( see CPLR Article 16). The Special Master denied the request. JCI now moves for an order vacating the Special Master's recommendation and, upon vacatur, an order granting its request for limited case specific discovery from the co-defendants.

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

JCI alleges that it has been placed in a very difficult position by the Case Management Order (CMO) and rulings from judges of the court relying on CPLR § 3117(a)'s strictures on the use of depositions at trial. The CMO at Section XI-E states:

**"The parties shall make every effort to use depositions, as well as other discovery, obtained from defendants in other cases as if taken in NYCAL. No other depositions shall be taken of defendants except upon stipulation of the parties or application to the Special Master. Such application shall specify the areas sought to be covered by an additional deposition, and demonstrate that the proposed lines of questioning will not be repetitive or cover ground already adequately addressed in prior depositions of the defendant in question."**

CMO Section XIII-A allows for the use of non-party (and settled party) interrogatories at trial to prove **"(1) that a product or products of the non-party contained asbestos, or that asbestos was used in conjunction with the non-parties' product or products, and/or (2) any failure to warn by the non-party concerning an asbestos-containing product and/or the use of asbestos in association with a product."**

CMO Section XIII-B states **" non-party depositions may be used where allowed by the CPLR."**

CMO Section XI-E in essence only allows for a second deposition of a defendant by stipulation or permission of the special master, and only after a showing by the defendant that the line of questioning will not be repetitive or cover ground addressed by prior depositions. CMO Section XIII-A in essence allows for the use of interrogatories. CMO Section XIII-B allows for the use of depositions only when permitted by the CPLR.

JCI argues that these sections have negatively impacted its ability to meet its burden of proof for apportionment of fault. JCI argues that the CMO prevents it from deposing co-defendants that have previously been deposed without a stipulation from the parties, or without obtaining permission from the Special Master. The CMO further prevents it from inquiring into issues that have been previously explored or that have been addressed in a previous deposition. However, some judges, applying CPLR§3117(a), prevent defendants from using these previous depositions of co-defendants at trial, in essence denying the ability to meet their burden of proof when seeking to apportion fault. JCI argues that without the ability to obtain case specific discovery, in the nature of limited depositions of the co-defendants, it is prejudiced and prevented from proving apportionment of fault of the co-defendants at trial.

CPLR §3101 (a) allows for **"full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof..."** In conformity with this rule, the rule in our department is that **"full pre-trial examinations of co-defendants should be allowed, inter sese, with respect to all evidence which is material and necessary, even in the absence of a cross-claim by the moving co-defendant against the co-defendant sought to be examined (Schneider v. Doyle, 6 A.D.2d 122, 175 N.Y.S.2d 595 [1<sup>st</sup>. Dept. 1958]; Henshel v. Held, 17 A.D.2d 806, 233 N.Y.S.2d 14 [1<sup>st</sup>. Dept. 1962]; Lombardo v. Pecora, 23 A.D.2d 460, 262 N.Y.S.2d 201 [2<sup>nd</sup>. Dept. 1965]; Snyder v. Parke, Davis & Company, 56 A.D.2d 536, 391 N.Y.S.2d 579 [1<sup>st</sup>. Dept. 1977]).**

**JCI is not seeking full depositions of co-defendants. JCI only seeks limited case specific discovery of information that would allow it to meet its burden of proving the co-defendants' share of fault, in a way that would allow it to use at trial the transcript of the deposition containing the co-defendants' answers. The plaintiffs in this action take no position as to whether the court should vacate the Special Master's recommendation and allow this case specific deposition of co-defendants to take place. The plaintiffs' only concern is that these deposition not delay the trial.**

**JCI is entitled under the CPLR and case law to depose co-defendants. However, this must be done in a way that does not further delay plaintiffs' ability to bring their case to trial. Permission to conduct any deposition of a co-defendant must be requested during the discovery phase of the case, before there is a final trial readiness conference with the Special Master. At no time shall a co-defendant's deposition be an impediment to plaintiff filing a note of issue and stating that the case is ready for trial. At no time shall this discovery among co-defendants preclude the plaintiff from obtaining from the court a trial date and from proceeding to trial.**

**Any deposition of a co-defendant should be limited in nature, so as to comply with the CMO directive of "not covering ground already adequately addressed in prior depositions," to questions in the following areas: (1) The products co-defendants manufactured or sold, (2) the asbestos content of the products, (3) whether or not warnings were placed on the products during the relevant period and, if so, the wording, and (4) the trade associations the entity was a member of and its activities with those associations. The party taking the deposition shall bear the expense thereof ( CPLR § 3116(d)). Any rulings on the use at trial of the transcript of co-defendant's deposition is reserved for the trial judge.**

**Accordingly, it is ordered that the motion by defendant John Crane Inc. to vacate the Special Master's recommendation that denied its request for case-specific discovery of the co-defendants is granted, and it is further**

**ORDERED that the Special Master's recommendation is vacated, and it is further**

**ORDERED that defendant John Crane Inc. may obtain case specific discovery from the co-defendants that would allow John Crane Inc. to offer evidence to support apportionment of fault against these co-defendants , and it is further**

**ORDERED that any deposition is limited to questions in the following areas: (1) The products co-defendants manufactured or sold, (2) the asbestos content of the products, (3) whether or not warnings were placed on the products during the relevant period and, if so, the wording, and (4) the trade associations the entity was a member of and its activities with those associations, and it is further**

**ORDERED that the party taking the deposition, John Crane Inc. shall bear the expense thereof, and it is further**

**ORDERED** that the deposition of any co-defendant shall not delay the trial of this case, and it is further

**ORDERED** that any ruling on the use at trial of the transcript of a co-defendant's deposition is reserved for the trial judge.

ENTER:

Dated: November 7, 2018

**MANUEL J. MENDEZ**  
\_\_\_\_\_  
Manuel J. Mendez  
J.S.C.

Check one:    **FINAL DISPOSITION**         **NON-FINAL DISPOSITION**

Check if appropriate:     **DO NOT POST**                       **REFERENCE**