

**Figueroa v Aerco Intl., Inc.**

2019 NY Slip Op 30126(U)

January 15, 2019

Supreme Court, New York County

Docket Number: 190101/2017

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

EPIFANIO FIGUEROA, Plaintiff, - against - AERCO INTERNATIONAL, INC., et al., Defendants.

INDEX NO. 190101/2017 MOTION DATE 01/09/2019 MOTION SEQ. NO. 012 MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on plaintiffs' motion to compel discovery directed by the Special Master:

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

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion to compel defendant Waukesha Cherry-Burrell (hereinafter "Waukesha") to comply with the Special Master's recommendations dated November 10, 2018, November 28, 2018 and December 4, 2018 and awarding plaintiff sanctions, costs and attorney fees, is granted only to the extent that Waukesha is directed to provide the discovery sought. The remainder of the relief sought on this motion is denied.

Plaintiff, Epifanio Figueroa, was diagnosed with metastatic epithelioid mesothelioma on or about January 9, 2017. He was about sixty-eight (68) years old at the time of his diagnosis (Mot. Shukla Aff., Exhs. 5 and 8). Mr. Figueroa's exposure - as relevant to this motion - is allegedly from his work as a maintenance supervisor at the Devro Company (hereinafter "Devro") in Sommerville, New Jersey, a food company owned by Johnson & Johnson. Mr. Figueroa alleges that over the course of the four years he worked at Devro (1970-1975), he was exposed to asbestos while supervising the repair of pumps manufactured by Waukesha that were used during the manufacturing of sausage casing (Mot. Shukla Aff. Exh. 6, pgs. 300-301 and Exh. 7, pgs. 93-94).

On November 9, 2018 plaintiff's attorney Samuel Meirowitz sent an e-mail to Special Master Shelley Olsen seeking a ruling on limited discovery prior to the deposition of Weukesha's corporate representative and the scheduled trial date (Mot. Shukla Aff., Exh. 14). Mr. Meirowitz sought a spreadsheet or database of Waukesha industrial pumps that contained asbestos and where they were sold. Mr. Meirowitz sought a spreadsheet or database because of prior claims made by Waukesha's representative that a database was compiled of the company's records from the 1950's through the 1990's and it did not manufacture many industrial pumps containing asbestos. Waukesha's corporate representatives and attorneys claim that there were records showing no asbestos pumps were sent to the Devro

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

facility in New Jersey where plaintiff had been employed. On November 10, 2018, Special Master Olsen e-mailed a response: "You would be entitled to that database, prior to the rep. deposition." (Mot. Shukla Aff., Exh. 14). Waukesha stated an objection in an e-mail dated November 13, 2018, but never made a motion or otherwise sought to vacate the November 10, 2018 recommendation of the Special Master (Mot. Shukla Aff., Exh. 14).

Mr. Meirowitz sent e-mails seeking discovery of Waukesha's corporate database on November 15, 2018, November 20, 2018 and November 21, 2018, but did not receive the records (Mot. Shukla Aff., Exh. 14). On November 28, 2018 plaintiff's counsel sought a further recommendation and clarification from the Special Master as to Waukesha's production of all sales records contained in a digital database of Waukesha's asbestos containing pumps (Mot. Shukla Aff., Exh. 14). On the same day, Waukesha objected claiming there is no spreadsheet or database that the corporate representative is relying on. On November 28, 2018, Special Master Olsen sent a response stating: "Plaintiff is entitled to the database of asbestos containing pumps, regardless of whether any defense testimony was based on this." (Mot. Shukla Aff., Exh. 14). Waukesha did not seek to vacate the November 28, 2018 ruling.

On November 30, 2018 Waukesha's counsel sent an e-mail to Mr. Meirowitz stating that there is no database of sales records because the company has historically maintained "product cards" for each of the pumps it has sold. Waukesha's counsel further stated that in the "mid-2000s" a team went through the product cards, pulling and copying any thing that could have been related to asbestos. Waukesha agreed to let Mr. Meirowitz inspect and review the "product cards" and tag them, but would not allow the copying, photographing or recording of the records (Mot. Shukla Aff., Exh. 14).

On December 4, 2018, Mr. Meirowitz sent an e-mail to Special Master Olsen advising that Waukesha had completely ignored her ruling stating: "He refuses to give me a date where he's willing to produce the database (which consists of a bunch of cards showing their asbestos containing pumps) that you ordered him to produce two times already." (Mot. Shukla Aff., Exh. 14). Special Master Olsen responded: "I am not sure what to make of this...I've never encountered a situation in which I can't even get a response from a defendant as to *why* my ruling is being ignored." (Mot. Shukla Aff., Exh. 14). On December 5, 2018 Waukesha's counsel e-mailed Special Master Olsen to advise that Mr. Meirowitz had made misstatements and that it had arranged to allow him to review the "product cards." It was further stated: "It is inherently unreasonable for plaintiff to request records of all sales of potentially asbestos containing pumps nationwide and for all time, when there is only a single location at issue in all of NYCAL and when there are no records at that facility." (Mot. Shukla Aff., Exh. 14). Waukesha agreed to allow an inspection and review by Mr. Meirowitz as stated in the November 30, 2018 e-mail (Mot. Shukla Aff., Exh. 14). On December 5, 2018 Special Master Olsen advised plaintiff's counsel to "make your motions," to compel discovery from Waukesha (Mot. Shukla Aff., Exh. 14).

Plaintiff's counsel, to avoid motion practice, inspected, reviewed and tagged Waukesha's "product cards." On December 7, 2018 Mr. Meirowitz sent an e-mail

seeking production of the tagged documents so that he could review and organize them prior to the deposition of Waukesha's corporate representative (Mot. Shukla Aff., Exh. 14). In a December 8, 2018 e-mail Waukesha's counsel re-stated his objection to producing copies of any of the "product cards" stating that the answers to the interrogatories and other document production would provide the same information (Mot. Shukla Aff., Exh. 14).

The video deposition of Waukesha's corporate representative, Tom Rosenthal, was taken by plaintiff on December 13, 2018. Plaintiff reserved the right to re-depose Mr. Rosenthal after production of documents sought, specifically, the tagged "product cards." (Mot. Shukla Aff., Exh. 15, pgs. 4-5). Mr. Rosenthal testified that he reviewed the "product cards" and the type of information that is found in them. He further testified that in about 2006 an effort was made to go through the records and identify those that were industrial pumps or specifically packing style pumps that might contain asbestos and that the amount was so small that those "product cards" were just copied and kept together instead of creating a database (Mot. Shukla Aff., Exh. 15, pgs. 14-17, 51-58).

Plaintiffs' motion seeks an Order compelling defendant Waukesha to comply with the Special Master's recommendations dated November 10, 2018, November 28, 2018 and December 4, 2018 and awarding sanctions, costs and attorney fees against Waukesha for failure to comply.

In New York City Asbestos Litigation ("NYCAL") the Court has "full authority under the controlling Case Management Order (CMO) to issue its discovery order." The CMO is recognized as a controlling factor for all cases and states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring that 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 [1<sup>st</sup> Dept. 2009]).

Pursuant to CMO Section III ( C), titled "Resolution of Discovery Disputes," states in relevant part:

"...Any party objecting to a ruling by the Special Master shall notify by e-mail the Special Master and all other interested parties within three business days of receiving the Special Master's ruling. Upon receipt of this e-mail, the Special Master shall promptly reduce the recommended ruling to writing. The objecting party shall present its objections by Order to Show Cause to the Coordinating Judge within seven business days of receipt of the the Special Master's written ruling, unless this time is extended by the Coordinating Judge or the Special Master. In the absence of a motion by Order to Show Cause to the Coordinating Judge, the Special Master's ruling will stand."

Waukesha's counsel did timely object by e-mail to the Special Master's rulings of November 10, 2018, November 29, 2018 and December 4, 2018. Waukesha's argument that the Special Master did not address product cards is unavailing. Plaintiff's e-mail dated December 4, 2018 specifically referenced the "database" as a "bunch of cards" (See Mot. Shukla Aff., Exh. 14). There is no evidence that Waukesha advised Special Masters Olsen of the intent to seek

vacatur of her recommendations or rulings. Waukesha did not seek to vacate the Special Master’s recommendations or rulings within the seven (7) business days required under the CMO. Accordingly, the Special Master’s Recommendations and rulings of November 10, 2018, November 29, 2018 and December 4, 2018, “will stand.”

Pursuant to 22 NYCRR 130-1.1, sanctions are applied to conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party (Emery v. Parker, 107 A.D. 3d 635, 968 N.Y.S. 2d 480 [1<sup>st</sup> Dept., 2013]). Evidence that the defendant attempted to comply with discovery obligations and that the actions were not willful, contumacious or in bad faith is sufficient to deny the application for sanctions (See Scher v. Paramount Pictures Corp., 102 A.D. 3d 471, 958 N.Y.S. 2d 122 [1<sup>st</sup> Dept., 2013]).

Waukesha complied with all other discovery demands and made attempts to provide the documents sought by plaintiff’s counsel by allowing review of the product cards for purposes of tagging those that are deemed relevant. Plaintiff has not established that Waukesha’s actions were willful or contumacious and they do not warrant sanctions.

ACCORDINGLY, it is ORDERED that plaintiffs’ motion to compel defendant Waukesha Cherry-Burrell to comply with the Special Master’s recommendations dated November 10, 2018, November 28, 2018 and December 4, 2018 and awarding plaintiff sanctions, costs and attorney fees, is granted only to the extent of Ordering that Waukesha Cherry-Burrell be directed to provide the product cards, and it is further,

ORDERED that Waukesha Cherry-Burrell is directed to serve copies of the production cards tagged by plaintiff’s attorney after review of all of them, within five (5) days of the date of this Order, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

Dated: January 15, 2019

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST     REFERENCE