

Matter of Morgan v American Home Assur. Co., Inc.
2019 NY Slip Op 30595(U)
March 8, 2019
Supreme Court, New York County
Docket Number: 190063/16
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

-----X
SEVAL MORGAN a/k/a SEVAL HILDEBRAND,
Individually and as Personal Representative of the
Estate of BERNARD HILDEBRAND,

Plaintiff

INDEX NO. 190063 /16

MOTION DATE 02-20-2019

- Against-

AMERICAN HOME ASSURANCE COMPANY, INC.,
et al.,

MOTION SEQ. NO 004

MOTION CAL. NO

Defendant.

The following papers, numbered 1 to 4 were read on this motion by plaintiff to compel compliance with Special Master's discovery order and for sanctions.

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

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

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion by plaintiff to compel defendant Port Authority to comply with the Special Master's order dated September 13, 2018 and provide discovery in the nature of :

- 1- Providing answers to interrogatories with specific attention to JFK Airport;
- 2- Providing a true copy of the Lease Agreement between Pan Am and the Port Authority;
- 3- Providing copies of deposition transcript from the Port Authority's case against all asbestos products manufacturers;
- 4- Providing documents responsive to plaintiff's document requests, including but not limited to suppliers, personnel, contracts and insurance policies between the Port Authority and Pan Am;
- 5- Providing a Port Authority Corporate Representative for deposition,

and for sanctions for failure to provide these items in a timely manner, is granted solely to the extent of ordering that defendant Port Authority provide a sworn affidavit from the Port Authority custodian of records or from the person or persons that performed the search, detailing the items for which a search was made, the places searched, the times searched, the results of the search and the reason for not producing the document. The portion of the motion requesting sanctions is denied.

Plaintiff brings this action to recover against the defendants for personal injuries sustained by Plaintiff's decedent, Bernard Hildebrand, from exposure to asbestos at the Pan Am Terminal at JFK Airport, which is owned by defendant Port Authority of New York and New Jersey (Hereinafter "Port Authority"). It is alleged that Plaintiff served discovery requests on the Port Authority and that the Port Authority failed to respond. In August 2018 plaintiff requested the Special Master's intervention. The Special Master ordered a discovery conference to take place on September 13, 2018. On that day the Special Master ordered that the Port Authority provide:

- 1- Answers to interrogatories with specific attention to JFK Airport;
- 2- A true copy of the Lease Agreement between Pan American Airlines and the Port Authority;
- 3- Deposition Transcripts from the Port Authority's previous cases against asbestos products manufacturers;
- 4- Documents responsive to specific requests made in an April 26, 2018 letter;
- 5- A Port Authority Corporate Representative Deposition.

Plaintiff alleges that the Port Authority has failed to comply with the Special Master's September 13, 2018 order and makes this motion to compel discovery and for sanctions for the Port Authority's failure to provide the discovery.

Defendant Port Authority opposes the motion on the grounds that it has substantially complied with the Special Master's order. It argues that it has substantially complied with all of the items by providing over 3000 pages of documents, answers to interrogatories, a true copy of the Lease Agreement between the Port Authority and Pan Am, Deposition Transcripts from corporate representatives and documents responsive to Plaintiff's April 26, 2018 letter. It argues that since it has provided 14 transcripts of the depositions of six(6) of its witnesses in the Allied case, there is no need for plaintiff to depose, and for them to produce, another corporate representative.

At oral argument plaintiff does not deny that the Port Authority has provided responses, documents and transcripts, but alleges that certain specifications requested of the construction of the Pan Am building at JFK airport have not been produced. The Port Authority answered that these are some of the documents it has not been able to locate because they were lost in the September 11 attack on the World Trade Center. Plaintiff requests that the court order the Port Authority to produce their custodian of records for a deposition to ascertain the particulars of any search that may have been made.

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..." CPLR § 3124 grants the court the power to compel a party to provide discovery demanded CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.

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 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 grounds addressed by prior depositions. Plaintiff has not made this showing before the Special Master after receipt of the 14 deposition transcripts of the six Port Authority's witnesses.

"Under the rules of the Chief Administrative Justice, the court in its discretion may award to any party or attorney in a civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees resulting from frivolous conduct." [22 NYCRR § 130-1.1(a)].

"Conduct is frivolous if :

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

**(3) it asserts material factual statements that are false."
(22 NYCRR 130-1.1[c])**

Generally, a sanction for failure to comply with a discovery order should be commensurate with the nature and extent of the disobedience (Christian v. City of New York, 269 A.D.2d 135, 703 N.Y.S.2d 5 [1st. Dept. 2000]). The authority to award sanctions and costs is within the court's sound discretion (De Ruzzio v. De Ruzzio, 287 A.D.2d 896, 731 N.Y.S.2d 775 [3d. Dept. 2001]). In assessing whether to award sanctions, the court must consider whether the attorney adhered to the standards of a reasonable attorney (Principe v. Assay Partners, 154 Misc.2d 702, 586 N.Y.S.2d 182 [Sup. Ct. New York County 1992]). Substantial, albeit tardy, compliance with court-ordered discovery is not grounds for sanctions (Myung Sum Suh v. Jung Ja Kim, 51 A.D.3d 883, 858 N.Y.S.2d 324 [2nd. Dept. 2008]; Manko v. Lenox Hill Hospital, 44 A.D.3d 1014, 844 N.Y.S.2d 414 [2nd. Dept. 2007]; Cambry v. Lincoln Gardens, 50 A.D.3d 1081, 857 N.Y.S.2d 225 [2nd. Dept. 2008]; Commerce & Industry Ins. Co., v. Lib-Com, Ltd., 266 A.D.2d 142, 699 N.Y.S.2d 16 [1st. Dept. 1999]).

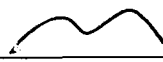
The Port Authority has substantially complied with the Special Master's September 13, 2018 order. The behavior of the Port Authority's attorneys has not been frivolous or contumacious and has not been undertaken to delay or prolong this litigation. Defendant's attorney has adhered to the standards of a reasonable attorney in responding to plaintiff's discovery demands. However, as to the items that the Port Authority has not produced because it claims they cannot be located, plaintiff is entitled to a sworn affidavit from the Port Authority's custodian of records, or the person or persons that performed the search, describing in detail the document for which a search was made, the places and times where a search was made and the reasons the documents were not located.

Accordingly, plaintiff's motion is granted solely to the extent of ordering the Port Authority to provide an Affidavit from its custodian of records, or the person or persons that performed the search, describing in detail the documents for which a search was made, the places where a search was made, the manner in which the search was made, the time and date when and where a search was made and the reasons for failing to locate the documents subject of the search, and it is further

ORDERED that plaintiff's motion for sanctions is denied.

ENTER:

Dated: March 8, 2019



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

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