

<b>Babcock v A.O. Smith Corp.</b>
2019 NY Slip Op 30634(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 190134/2018
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**

**ARNOLD BABCOCK AND ROSEMARY BABCOCK,**

**INDEX NO. 190134/2018**  
**MOTION DATE 03/06/2019**  
**MOTION SEQ. NO. 003**  
**MOTION CAL. NO. \_\_\_\_\_**

Plaintiff(s),  
-against-

**A.O. SMITH CORPORATION, et al.,**  
Defendant(s).

The following papers, numbered 1 to 9 were read on Central Hudson Gas & Electric Corporation's motion to compel discovery and Memorial Sloan Kettering Cancer Center's cross-motion for a protective order:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 5</u>
Answering Affidavits — Exhibits _____	<u>6-8</u>
Replying Affidavits _____	<u>9</u>

**CROSS-MOTION       YES       NO**

Upon a reading of the foregoing cited papers, it is Ordered that defendant Central Hudson Gas & Electric Corporation's (hereinafter, "Central Hudson") motion pursuant to CPLR §§ 2308(b) and 3124 for an order compelling nonparty Memorial Sloan Kettering Cancer Center (hereinafter, "MSKCC") to comply with the judicial subpoena duces tecum served by Central Hudson is granted. Central Hudson's motion for costs and sanctions pursuant to 22 NYCRR § 130-1.1 is denied. MSKCC's cross-motion for a protective order barring the disclosure of original pathology materials of plaintiff Arnold Babcock (hereinafter, "Babcock") and directing Central Hudson to either accept digitized copies of the pathology materials or arrange to have an expert review the materials at MSKCC is denied.

This action was commenced by plaintiffs Arnold Babcock and Rosemary Babcock to recover damages for personal injuries sustained due to plaintiff Arnold Babcock's alleged exposure to asbestos (see Mot. McElhenny, Aff., Exh. A). On or about July 27, 2018 RecordTrak, on behalf of Central Hudson, issued a request, accompanied by a HIPAA authorization, for production of pathology materials relating to Mr. Babcock's treatment at MSKCC (see Request by RecordTrak dated July 27, 2018, Exh. C of Aff. in Support). On or about October 16, 2018 Recordtrak notified defense counsel of MSKCC's refusal to honor the request for production of pathology materials (see Mot. McElhenny, Aff., Exh. D).

On or about December 5, 2018 counsel for Central Hudson obtained a judicial subpoena to be issued to MSKCC seeking all pathology materials related to

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

**MSKCC's treatment of Mr. Babcock (Exh. E of Aff. in Support). On or about December 12, 2018 MSKCC was served with the Judicial Subpoena (see Exh. F of Aff. in Support).**

**On December 18, 2018 Jenine Olaya, in house counsel for MSKCC, informed the attorneys for Central Hudson in a telephone call that MSKCC would not honor the Judicial Subpoena because MSKCC does not have enough pathology material to provide re-cuts. However, she offered to arrange an on-site inspection of the materials by Central Hudson's expert (see Email thread dated December 21, 2018 annexed to the Aff. in Support as Exh. G).**

**On December 21, 2018 the attorneys for Central Hudson emailed Ms. Olaya informing her that based on MSKCC's pathology reports, MSKCC possesses a paraffin block and 13 stained tissue slides. Attorneys for Central Hudson suggested that MSKCC produce the 13 slides for evaluation by Central Hudson's expert, and that Central Hudson would reserve its right to demand the paraffin block, or re-cuts of the slides, only if its expert determined that the slides were inadequate to perform a proper review (see *id.*).**

**Ms. Olaya responded to Central Hudson's email on December 21, 2018 stating that no action could be taken by MSKCC without a HIPAA authorization. However, a few hours later, counsel for Central Hudson received a phone call from defendant General Electric's (hereinafter "GE") counsel, Dennis Vega, who stated that MSKCC had agreed to release the pathology slides to GE if Central Hudson consented (see *id.*).**

**Central Hudson's Counsel emailed Ms. Olaya and provided Central Hudson's consent to have the pathology slides produced to GE's counsel in satisfaction of the Judicial Subpoena (see *id.*). On January 7, 2019 counsel for Central Hudson communicated with Mr. Vega and learned that MSKCC had not yet provided the slides. On January 9, 2019 Mr. Vega learned that MSKCC had reneged on its agreement and was again refusing to produce the slides. On January 11, 2019 GE filed a motion to compel MSKCC's compliance with its judicial subpoena in Babcock's parallel state court action (Index No. 190135/2018).**

**MSKCC has offered no objections regarding the relevance or scope of the Judicial Subpoena, the jurisdiction of this Court, the applicability of any privilege, or any other justification for its failure to comply with the Judicial Subpoena. It is alleged that the materials at issue are clearly essential for Central Hudson to evaluate Babcock's diagnosis and prepare its defenses.**

**In its motion to compel, filed January 18, 2019, Central Hudson demonstrated that discovery of Babcock's pathology materials is necessary for Central Hudson to evaluate Babcock's diagnosis and that such materials were duly requested pursuant to both a HIPAA authorization executed by Babcock and a Judicial Subpoena issued by this Court.**

**MSKCC's Cross-Motion for a protective order:**

**MSKCC cross-moves for a protective order. MSKCC claims that it cannot and will not produce the original pathology materials because Babcock is currently being treated at MSKCC and because disclosure may violate a New York State Department of Health regulation governing clinical laboratories' retention of specimens. As such, MSKCC argues that Central Hudson should either accept digitized pathology slides as substitutes for the original materials or inspect the materials on site at MSKCC.**

**MSKCC argues that such compliance would potentially endanger Babcock's continuity of care and states that the slides must be retained because Babcock is still under MSKCC's care. MSKCC claims that the slides are necessary to ensure that his treatment is appropriate and there might be a delay in treatment if Babcock decides to switch treatment centers and a re-evaluation of the original slides suddenly becomes necessary. MSKCC cites concerns that the original slides might be destroyed or damaged in the care of Central Hudson's experts. MSKCC also cites concerns about being prejudiced in any potential future litigation involving Babcock. Lastly, MSKCC states that it is complying with New York State Rules by holding onto the pathology slides and would not want to be liable for a violation of 10 CRR-NY-58- 1.11(d)(1).**

**These arguments are unavailing because Central Hudson's experts have sworn to exercise due care in examining the slides at issue and to return them promptly after examination as is routine in NYCAL. MSKCC has not provided evidentiary support concerning how they would be materially prejudiced in future litigation if they were to surrender the pathology slides in accordance with the original subpoena.**

**Central Hudson opposes the cross-motion arguing that MSKCC's reasons for refusing to produce the pathology materials of Babcock's treatment are wholly speculative and unsupported by evidence from a witness with personal knowledge. Central Hudson also argues that the regulation cited by MSKCC concerns only the duration for which specimens should be preserved – it does not protect MSKCC from providing discovery.**

**In opposition to MSKCC's cross-motion, Central Hudson argues that MSKCC's reasons for refusing to produce the pathology materials are completely speculative and unsupported by evidence from a witness with personal knowledge.**

**Central Hudson argues that 10 CRR-NY-58-1.11 only concerns the duration for which specimens should be preserved and does not pose a threat of liability or an obstacle to MSKCC's ability to comply with the subpoena. 10 CRR-NY-58-1.11 is a section from the New York Codes, Rules and Regulations that pertains to reports and record keeping. MSKCC has failed to provide proof that the overall provisions of this section would prevent it from complying with the subpoena without incurring liability.**

**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.” Pursuant to CPLR §3124, the court may compel compliance upon failure of a party to provide discovery.

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 words ‘material and necessary’ as used in section 3101 must be interpreted liberally to require disclosure” (*Kapon v Koch*, 23 NY3d 32, 11 NE3d 709, 988 NYS2d 559 [2014]). The trial court is given broad discretion determining the scope and breath of discovery and must set reasonable terms and conditions (*Diaz v City of New York*, 117 AD3d 777, 985 NYS2d 695 [2nd Dept. 2014]). “Unlimited disclosure is not mandated, and the court may deny, limit, condition, or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (*Diaz v City of New York*, 117 AD3d 777, 985 NYS2d 695 [2nd Dept. 2014]).

Upon failure to comply with a non-judicial subpoena, CPLR §2308(b) permits the moving party to file a motion in the supreme court to compel compliance. It is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 811 NYS2d 5 [1st Dept. 2006] citing *Matter of Terry D.*, 81 NY2d 1042, 619 NE2d 389, 601 NYS2d 452 [1993]).

Central Hudson is entitled to have this Court compel MSKCC to provide the slides for examination. Central Hudson has established that the materials sought are material and necessary and a legitimate subject of inquiry and are not being used to harass, but to ascertain the existence of evidence.

MSKCC’s cited concerns for Babcock’s medical care lacks evidentiary support as to the current state of his condition. Mr. Babcock explicitly authorized the release of the pathology specimens via a HIPPA authorization (see Ex. C to Moving Aff.). MSKCC’s argument is further undermined by the medical records pertaining to Babcock that have been produced by MSKCC in response to the HIPPA authorization. The medical records reveal that MSKCC has already determined that Mr. Babcock is “not a surgical candidate as he has bilateral lung disease” and his cancer is “inoperable.” (see, Mot. McElhenny, Aff. in Opp., Ex. B at 6). There is no indication in the medical records received from MSKCC to date that Babcock seeks a second review or that he has requested that his case be transferred to another facility. MSKCC’s argument that its interest in retaining the original pathology slides outweighs Central Hudson’s interest in saving money because of the risk of harm to its patient (Mr. Babcock) is unavailing. Mr. Babcock also authorized the surrender of the pathology slides at issue which further warrants denial of the cross-motion. Therefore, the cross-motion is denied and Central Hudson’s motion to compel is granted.

Finally, Central Hudson seeks sanctions and an award of costs for MSKCC’s failure to comply with the judicial subpoena at issue. This relief is denied because Central Hudson fails to present evidence that MSKCC has engaged in conduct

sufficient to trigger sanctions under 22 NYCRR §130-1.1. 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 AD3d 635, 968 NYS 2d 480 [1st 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 AD3d 471, 958 NYS2d 122 [1st Dept 2013]).

There is no evidence that MSKCC's actions in relation to the subpoena at issue were willful or motivated by something other than a desire to raise a good faith objection to compliance with the subpoena. Therefore, the motion for sanctions and costs is denied.

Accordingly, it is ORDERED that defendant Central Hudson's motion to compel is granted, and it is further

ORDERED that Memorial Sloan Kettering Cancer Center's cross-motion for a protective order barring the disclosure of plaintiff Arnold Babcock's original pathology materials held by MSKCC as well as directing Central Hudson to either accept digitized copies of the pathology materials or arrange to have an expert review the material at MSKCC is denied, and it is further

ORDERED that defendant Central Hudson's motion for sanctions pursuant to 22 NYCRR § 130-1.1 is denied, and it is further

ORDERED that respondent Memorial Sloan Kettering Cancer Center shall produce to the experts designated by the attorneys for defendant Central Hudson Gas & Electric Corporation on or before March 30, 2019 pathology tissue, block, and slides of Arnold Babcock in the possession of Memorial Sloan Kettering Cancer Center.

ENTER: MANUEL J. MENDEZ  
J.S.C.

Dated: March 13, 2019

MANUEL J. MENDEZ  
J.S.C.

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