

**Babcock v A.O. Smith Corp.**

2019 NY Slip Op 30645(U)

March 18, 2019

Supreme Court, New York County

Docket Number: 190135/2018

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,**

**Plaintiff(s),**  
**-against-**

**INDEX NO. 190135/2018**  
**MOTION DATE 03/06/2019**  
**MOTION SEQ. NO. 001**  
**MOTION CAL. NO. \_\_\_\_\_**

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

The following papers, numbered 1 to 8 were read on CBS Corporation's and General Electric Company'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>1-3</u>
Answering Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>5-8</u>

**CROSS-MOTION       YES       NO**

Upon a reading of the foregoing cited papers, it is Ordered that defendants CBS Corporation's (hereinafter, "CBS") and General Electric Company's (hereinafter, "GE") 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 CBS and GE is granted. CBS's and GE's motion for costs and sanctions pursuant to CPLR § 2308(a) 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 CBS and GE to either accept digitized copies of the pathology materials or arrange to have an expert review the materials at MSKCC is also denied.

This action was commenced by plaintiffs Arnold Babcock and Rosemary Babcock to recover damages due to plaintiff Arnold Babcock's alleged exposure to asbestos (see Mot. Vega, Aff. in Support, Exh. A). CBS filed a responsive pleading in this action (see Mot. Vega, Aff. in Support, Exh. B). GE filed a responsive pleading in this action. (Mot. Vega, Aff. in Support, Exh. C).

This motion concerns MSKCC's refusal to produce material and necessary pathology records despite months of discussions between counsel and MSKCC.

On or about July 28, 2018 RecordTrak demanded pathology materials from MSKCC (see Mot. Vega, Aff. in Support, Exh. D). After receiving the request from

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

RecordTrak, MSKCC stated that they could not produce the requested pathology records without a subpoena.

On or about October 16, 2018 CBS and GE served MSKCC with a subpoena, which was returnable November 5, 2018 seeking pathology materials from MSKCC. (see Mot. Vega, Aff. in Support, Exh. E). After receiving this subpoena, MSKCC responded that they could not produce the requested records without a judicial subpoena.

On or about December 3, 2018 CBS and GE served MSKCC with a judicial subpoena seeking to obtain pathology materials related to plaintiff's treatment for mesothelioma (see Mot. Vega, Aff. in Support, Exh. F).

The subpoena to MSKCC was made returnable on December 21, 2018 but to date, defendants have not received the requested pathology materials. On or about December 21, 2018 counsel for MSKCC responded that they could not produce the requested pathology materials without a HIPPA authorization. (see Mot. Vega, Aff. in Support Exh. G). However, MSKCC was in possession of the HIPPA authorization that RecordTrak had previously provided to them. Indeed, MSKCC produced plaintiff's medical records on three separate occasions in the past. Nevertheless, counsel for CBS and GE again sent counsel for MSKCC a HIPPA authorization. MSKCC has still refused to produce the requested pathology materials.

Since MSKCC has failed to comply with a valid judicial subpoena, CBS and GE seek relief from 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 Mr. 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 CBS and GE should either accept digitized pathology slides as substitutes for the original materials or inspect the materials on site at MSKCC.

MSKCC argues that compliance with the original subpoena would potentially endanger Mr. Babcock's continuity of care and states that the slides must be retained because Mr. 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 Mr. 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 CBS's and GE's experts. MSKCC also cites concerns about being prejudiced in any potential future litigation involving Mr. 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).

CBS and GE oppose the cross-motion arguing that MSKCC's reasons for refusing to produce the pathology materials of Mr. Babcock's treatment are speculative at best. CBS and GE also argue that the regulation cited by MSKCC concerns only the duration for which specimens should be preserved – it does not protect MSKCC from providing discovery.

CBS and GE argue 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]).

MSKCC's arguments are unavailing because CBS and GE have sworn to have their experts exercise due care in examining the slides at issue and to return them promptly after examination as is routine in NYCAL. In fact, to the extent that MSKCC might receive a legitimate request from regulators pursuant to the provisions they cite, CBS and GE have agreed to return the material within 24 hours of MSKCC notifying them of this request. MSKCC also 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.

CBS and GE are entitled to have this Court compel MSKCC to provide the slides for examination. CBS and GE have established that the materials sought are material and necessary and a legitimate subject of inquiry (i.e., the plaintiff's diagnosis) and are not being used to harass, but to ascertain the existence of evidence.

CBS and GE are also entitled to have discovery compelled and the slides at issue surrendered for examination because of MSKCC's failure to comply with CPLR §§ 2308(b) and 3214. CBS and GE have established that the burden of showing that a discovery request is improper or for something irrelevant is on the party from whom discovery is sought, i.e., MSKCC and that MSKCC has not fulfilled this burden (*Velez v Hunts Point Multi-Serv, Ctr. Inc.*, 29 AD3d 104, 112, 811 NYS2d 5, 10 [1st Dept 2006] citing *Gertz v Richards*, 233 AD2d 366, 650 NYS2d 584 [2d Dept 1996]). Therefore, the cross-motion is denied and CBS's and GE's motion to compel is granted.

Finally, CBS and GE seek sanctions and an award of costs for MSKCC's failure to comply with the judicial subpoena at issue. This relief is denied because CBS and GE fail to present evidence that MSKCC has engaged in conduct sufficient to trigger sanctions under CPLR § 2308(a). "Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. If the witness is a party the court may also strike his or her pleadings. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply" (CPLR § 2308[a]). "The court's power to punish for civil and criminal contempt is found respectively in Judiciary Law § 753(A)(3) and § 750(A)(3) ... Any civil penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both" (*Dept. of Env'tl. Protection of City of New York v Dept. of Env'tl. Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987] citing *State of New York v Unique Ideas*, 44 NY2d 345 [1978]).

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, CBS and GE have not shown sufficient evidence for this Court to punish MSKCC or coerce its compliance with the subpoena by issuing a fine or sanctions. CBS's and GE's motion for sanctions and costs is denied. However, this finding does not mean this Court will not revisit the imposition of sanctions if MSKCC fails to comply with this Court's present order.

Accordingly, it is ORDERED that defendants CBS's and GE's motion to compel is granted, and it is further

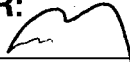
ORDERED that Memorial Sloan Kettering Cancer Center's cross-motion for a protective order barring the disclosure of plaintiff Arnold Babcock's original pathology materials held by MSKCC as well as directing CBS and GE to either accept digitized copies of the pathology materials or arrange to have an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

ORDERED that defendants CBS's and GE's motion for sanctions pursuant to CPLR § 2308(a) is denied, and it is further

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

MANUEL J. MENDEZ  
J.S.C.

ENTER:



MANUEL J. MENDEZ  
J.S.C.

Dated: March 18, 2019

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE