

Peterson v Occidental Chem. Corp., Ind.,
2019 NY Slip Op 30999(U)
April 5, 2019
Supreme Court, New York County
Docket Number: 190169/18
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

STANLEY PETERSON and DEBBIE PETERSON,
Plaintiff,
-against-

INDEX NO. 190169/ 18
MOTION DATE 03-20-2019
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

OCCIDENTAL CHEMICAL CORPORATION,
IND., and as suc. To DIAMOND SHAMROCK
AND RUBBER CORP., OF AMERICA, et al.,

Defendant.

The following papers, numbered 1 to 5 were read on this motion to quash subpoenas.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1 - 2,</u>
Papers in Opposition	<u>3-4</u>
Replying Affidavits	<u>5</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant PFIZER, INC.'s motion to quash the subpoena dated January 11, 2019 served by plaintiffs on non-party Mineral Technologies, Inc., for the production of samples and documents in its possession, or in the alternative for a protective order is denied.

Plaintiffs are plaintiffs in asbestos personal injury actions pending in various jurisdictions, including New York. Plaintiffs issued to non-party Mineral Technologies, Inc., (hereinafter "MTI) subpoenas for the production of samples and documents pertaining to testing of defendant Pfizer, Inc.'s talc for asbestos content. The subpoena requested five (5) specified talc samples and three (3) types of documents. Defendant Pfizer, Inc., moves to quash the subpoena on the grounds that it is defective, overly broad in time and scope and seeks documents that are not reasonably calculated to lead to the discovery of admissible evidence.

Plaintiffs claim Stanley Peterson was exposed to asbestos containing products when he worked at Quadee Rubber from approximately 1972 to 1979, and when he was employed by or helping plaintiff Debby Peterson at her business, Lakeside Ceramics, from 1980 to 2000. Non-party MTI (who is a successor to Mineral Pigments & Metals, a former division of Pfizer, Inc.) is in possession of samples and information relating to Pfizer Inc.'s past talc operations. Pfizer, Inc., claims that the subpoena is defective because it does not provide the circumstances or reasons that disclosure is sought. it also claims that the subpoena is broad in scope because it seeks information on testing of talc samples by Pfizer before 1993, including samples tested in 1984, 1985 and 1986, which is beyond Stanley Peterson's period of exposure; the subpoena is not appropriately limited in time or place, and will not lead to the discovery of admissible evidence.

Plaintiff opposes the motion on the grounds that defendant Pfizer, Inc., has no standing to contest the subpoena served on a non-party; the materials sought are relevant and will lead to discovery of admissible evidence. Furthermore, plaintiffs claim that any facial defect in the subpoena has been cured by the affidavit of its expert which sets forth the circumstances and reasons why this disclosure is being sought. Finally,

plaintiffs argue that the subpoena is not overbroad because the samples tested in 1984-1986 come from the same location and vein as the talc to which plaintiff Stanley Peterson was exposed from 1972-1979.

The subpoena dated January 11, 2019 directs MTI's custodian of records to produce:

- 1- Physical samples of talc mined by Pfizer, Inc., prior to 1993 for non-destructive testing or analysis for asbestos content (and to be returned immediately thereafter):
 - a) 1985 CB 98-30 4th quarter,
 - b) 1985 CP 44-31,
 - c) June 1984 CP 38-33,
 - d) June 1984 CP 97-27 and
 - e) 1986 CP 14-35 1st quarter.

(These samples were referred to in the deposition of MTI's witness dated august 21, 2017 in the Cheryl Booker v. BASF, case, superior Court of the State of California).

- 2- All documents pertaining to the sampling and/or testing by Pfizer, Inc., prior to 1993 of its California talc and or talc products for the presence of asbestos, including without limitation :
 - a) Documents which related to the testing by X-Ray diffraction, polarized light microscopy, scanning electron microscopy, SAED and/or transmission electron microscopy for the presence of tremolite asbestos and/or
 - b) Documents which are, or pertain to, logbooks, note and/or analyses discussing and/or referring to such testing.
- 3- All documents which are, or pertain to, micrographs, photomicrographs and/or images of Pfizer, Inc.'s California talc and/or talc products.
- 4- All documents pertaining to testing protocols, testing procedures, counting criteria and/or calibration curves for counting bulk weight used or employed by Pfizer, Inc. in analyzing its California talc and/or talc products for asbestos content prior to 1993.

Plaintiffs' counsel states that he has informed MTI that plaintiff will (1) conduct non-destructive testing and that the samples will be returned, (2) provide MTI beforehand the protocols for testing by accredited professionals to ensure no contamination of the samples during testing, and (3) provide chain of custody information. The samples are relevant because Pfizer, Inc., admits that its talc contained fibrous tremolite or tremolite fibers but claims it did not exhibit certain morphological characteristics to qualify as asbestos. The subpoena is limited because it only seeks five samples of the 47 samples of Pfizer's talc in MTI's possession, and its expert, Sean Fitzgerald states the reasons why the testing of these samples is needed in helping him form his opinions.

Mr. Fitzgerald, Plaintiffs' expert Geologist, states that the requested materials will assist him in forming his opinion, that these samples although from different years and location remain relevant because the talc samples requested come from the same geological formation as the talc Mr. Peterson was exposed to; Geologists, Microscopists and other scientists routinely and reasonably rely on data from talc samples taken from the same geologic formations but different mines; Qualified experts reasonably rely on testing from different mines within the region and different dates as data to assist in forming their opinions about the presence or absence of asbestos in talc from the

region. Finally, the testing of five (5) CP talc samples mirrors the strategy that Pfizer, Inc., employed in evaluating the asbestos content in its CP talc.

CPLR §3101 (a) mandates full disclosure of all matter material and necessary in the prosecution or defense of an action and the person seeking to quash a subpoena bears the burden of establishing that the requested documents and records are utterly irrelevant. A non-party subpoena is required to include notice stating the reason that the disclosure is required (*Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D. 3d 104, 811 N.Y.S. 2d 5 [1st Dept., 2006]). The purpose of a subpoena is to compel discovery that is not otherwise discoverable but that is relevant and material to the facts at issue in the action (*Matter of Terry D.*, 81 N.Y. 2d 1042, 601 N.Y.S. 2d 452, 619 N.E. 2d 389 [1993]). A subpoena may not be used as a discovery device or to condone a fishing expedition to determine the existence of evidence (*Law Firm of Ravi Batra v. Rabinowich*, 77 A.D. 3d 532, 909 N.Y.S. 2d 706 [1st Dept., 2010]).

The party subpoenaing the non-party must first “sufficiently state the circumstances or reasons underlying the subpoena” (*Matter of Kapon v. Koch*, 23 N.Y.3d 32, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014]). The non-party witness must then “establish either that the discovery sought is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious” (*Id.*). If the non-party witness meets this burden, then the subpoenaing party “must then establish that the discovery sought is material and necessary to the prosecution or defense of an action, i.e., that it is relevant” (*Id.*; *Ledonne v. Orsid Realty Corp.*, 83 A.D.3d 598, 921 N.Y.S.2d 249 [1st dept. 2011]).

The party issuing a subpoena on a non-party satisfies the notice requirement by either serving the subpoena with a cover letter stating the reasons such disclosure is sought, or submitting a showing of circumstances and reasons such disclosure is sought in opposition to a motion to quash (*In re Aerco International, Inc.*, 40 Misc.3d 571, 964 N.Y.S.2d 900 [Supreme Ct. Westchester County, 2013]). A motion to quash a subpoena is addressed to the sound discretion of the court (*Korambylum v. Medvedovsky*, 19 A.D.3d 651, 799 N.Y.S.2d 73 [2nd. Dept. 2005]).

CPLR § 3103(a) allows “the court on its own initiative, ‘or on motion of any person from whom or about whom discovery is sought’, to make a protective order denying, limiting, conditioning or regulating the use of any disclosure devise...” Defendant Pfizer, Inc., is the party about whom discovery is sought, therefore it has standing to contest Plaintiffs subpoena.

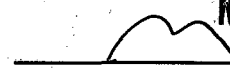
Defendant Pfizer, Inc., has not met its burden of showing that the discovery sought is utterly irrelevant to the action. Plaintiffs have sufficiently stated the circumstances and reasons underlying the subpoena and that the discovery sought is material and necessary to the prosecution of this action. They have done this through the affidavit of their expert Sean Fitzgerald and through the affirmation of their attorneys in opposition to the motion. The samples and documents being requested are necessary in order to aid Mr. Fitzgerald in forming his opinions regarding the asbestos content of the samples in the talc mined by Pfizer, Inc.’s division during Mr. Peterson’s period of exposure. Additionally, the subpoena is not overbroad because it only seeks 5 samples out of 47 in the non-party’s possession, and only seeks documents related to the testing of the California Platy talc.

Accordingly, it is ORDERED that defendant PFIZER, INC.’s motion for an order quashing plaintiffs’ subpoena dated January 11, 2019 served on non-party Mineral Technologies, Inc., is denied, and it is further,

ORDERED, that within thirty (30) days from the date of service of this Order with Notice of entry non-party MINERAL TECHNOLOGIES, INC., comply with the subpoena by providing plaintiffs with the requested materials and documents.

ENTER:

Dated: April 5, 2019


MANUEL J. MENDEZ
J.S.C.
MANUEL J. MENDEZ
J.S.C.

FINAL DISPOSITION

X- NONFINAL DISPOSITION

Check if appropriate:

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REFERENCE