

<b>Seen v 84 Lumber Co.</b>
2019 NY Slip Op 31000(U)
April 8, 2019
Supreme Court, New York County
Docket Number: 190225/2018
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

MUNIR SEEN, INDEX NO. 190225/2018
Plaintiff(s), MOTION DATE 4/3/2019
- against - MOTION SEQ. NO. 002
84 LUMBER COMPANY, et. al., MOTION CAL. NO.
Defendants.

The following papers, numbered 1 to 6 were read on this motion to vacate the order of the NYCAL Special Master:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ... (1-3), Answering Affidavits - Exhibits (4-5), and Replying Affidavits (6).

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that proposed third-party defendant Kaiser Gypsum Company, Inc.'s (hereinafter, "Kaiser Gypsum") motion, pursuant to New York City Asbestos Litigation Case Management Order (hereinafter, "NYCAL CMO") Section III(C), to vacate the NYCAL Special Master, Shelley Olsen's Order granting IPA Systems, Inc.'s (hereinafter, "IPA") filing of a third-party complaint against Kaiser Gypsum is denied. IPA's cross-motion to confirm the Special Master's recommendation is granted.

Plaintiff Munir Seen commenced this suit on August 10, 2018. Plaintiff filed a First Amended Complaint on August 30, 2018 and a Second Amended Complaint on September 11, 2019 against twenty-eight (28) parties, including IPA (see Aff. in Supp., Exh. B). Plaintiff worked as a drywaller for many companies, specifically Dukan Construction and Gus & Brothers, between 1967 and 1980. On November 2, 2018, IPA appeared and answered by way of an Acknowledgement of Receipt of Service and Standard Answer to Simmons Hanly Conroy's Standard Asbestos Complaint (Aff. in Opp., Exh. D). Plaintiff was deposed on September 5, 2018 and in his testimony, he identified Kaiser Gypsum products as a source of his alleged exposure to asbestos (Aff. in Opp., Exh. E). Plaintiff also alleged that he was exposed to asbestos throughout his career from IPA's asbestos-containing joint compound. (see Aff. in Supp., Exh. D). Plaintiff brought this suit to recover for his personal injuries due to asbestos-exposure, but Kaiser Gypsum was not a party named in the initial suit (Aff. in Supp., Exh. B).

On January 30, 2019, about three weeks after the Scheduling Order's deadline, counsel for IPA applied to the Special Master, Shelley Olsen, requesting permission to file a third-party complaint against Kaiser Gypsum pursuant to § XVIII(B) of the NYCAL CMO, alleging that plaintiff also identified Kaiser Gypsum

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

during his deposition (Aff. in Supp., Exh. D). IPA claimed that it could not file a timely third-party complaint because it did not learn of Kaiser Gypsum's potential to be sued (due to its bankruptcy protection) until it saw a Restoration Order dated January 14, 2019 issued by this Court in the *Marian Levin and Mark Levin v. Aerco International, Inc., et al.*, 19025/2016 matter (Aff. in Supp., Exh. D).

In or about mid-January, 2019, IPA Systems did become aware that Kaiser was re-entering asbestos litigation after having been protected by bankruptcy proceedings since 2016. As such, on January 30, 2019, IPA made an application by electronic mail to the Special Master pursuant to NYCAL CMO § XVIII(B), requesting permission to file a third-party complaint against Kaiser Gypsum (Aff. in Opp., Exh. F). This was "untimely" because the deadline to file such a complaint expired January 10, 2019, according to the Scheduling Order.

On February 9, 2019, after counsel for both IPA and Kaiser Gypsum were heard on this matter, IPA obtained permission from the Special Master to file the proposed Third-Party Complaint (Aff. in Opp., Exh. G). As a result of this decision by the Special Master, Kaiser Gypsum filed the instant Order to Show Cause on February 19, 2019.

Defendant, IPA denies all of plaintiff's allegations asserted against it and contends that Kaiser Gypsum is liable to the plaintiff because it manufactured asbestos-containing joint compound to which plaintiff was exposed and suffered injury (see Aff. in Opp., Exh. D). However, Kaiser Gypsum filed for Chapter 11 Bankruptcy with the U.S. Bankruptcy Court, Western District of North Carolina, Charlotte Division (hereinafter, "Bankruptcy Court"), on September 30, 2016. Since that time, Kaiser Gypsum has been under bankruptcy protections and IPA claims that it had been under the belief that it could not comply with the January 10, 2019, Scheduling Order deadline for filing a third-party action against Kaiser Gypsum.

IPA further claims that it was unaware of the Bankruptcy Court issuing an Order on August 9, 2018, lifting the automatic stay as to certain asbestos personal injury claims (Aff. in Opp., Exh. H). Instead, IPA states that its request to join Kaiser Gypsum in the instant action was precipitated by this Court issuing an Order (in a case to which IPA was not a party), dated January 14, 2019 (four days after the Third-Party Complaint Deadline in this matter), in *Levin v Aerco International, Inc., et al.* (Index No.: 190251/16) (Aff. in Opp., Exh. I). *Levin* involved re-instating an action against Kaiser Gypsum, thereby, effectively signifying to IPA that Kaiser Gypsum was re-entering NYCAL (*id.*).

NYCAL CMO § XVIII, titled, "Third Party Complaints," states in relevant part:

(B) Untimely Third Party Complaint. Third party complaints not filed on or before the filing deadline set forth in the discovery order may only be e-filed upon motion and with permission of the Special Master or the Court after appeal of a ruling by the Special Master. Any such motion to e-file a third party complaint after the

filing deadline shall be made upon notice to all remaining parties and putative third parties. The motion must include an affidavit stating when the information used to substantiate the filing of the third party complaint became available and that such information was not available upon reasonable effort prior to the filing deadline.

(NYCAL CMO § XVIII[B])

Kaiser Gypsum brings this motion arguing that the Special Master's order should be reversed because it claims that IPA's counsel had actual timely knowledge of the ability to join Kaiser Gypsum as a third-party defendant. There was, therefore, no proper reason for IPA's delay in joining them because they claim their counsel, McGiveny Kluger & Cook, would have garnered knowledge of such ability to join them due to their participation as counsel in other cases involving Kaiser Gypsum. During these cases, the bankruptcy stay at issue was lifted; however, it should be noted that IPA was not a party to any of the cases. Lastly, it is Kaiser Gypsum's position that the Special Master did not exercise proper discretion in extending the deadline (by 20 days) for IPA to file a third-party complaint against it.

IPA opposes the motion and cross-moves for joinder of Kaiser Gypsum, claiming that its joinder is mandatory under CPLR § 1001(a). "CPLR § 1001(a) mandates joinder of a party in two situations: (1) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action; or (2) where the unnamed party might be inequitably affected by a judgment in the action." *Lindkvist v Honest Ballot Assn.*, 932 NYS2d 761 (NY Sup 2011) citing *Castaways Motel v CVR Schuyler*, 24 NY2d 120 (1969) (non-parties are "indispensable" where the determination of the court will adversely affect their rights). IPA claims that neither the plaintiff, nor Kaiser Gypsum will be prejudiced if Kaiser Gypsum is joined in this action. This is because there still has been no trial date set for this matter and the discovery schedule is ongoing. On the other hand, IPA argues that if Kaiser is not joined, it will be materially prejudiced (*see id.*).

IPA argues that the Special Master's order granting permission for it to file an untimely third-party complaint is consistent with the NYCAL CMO and should be affirmed. This is because the decision was not made arbitrarily or capriciously; rather, it was rendered after weighing all sides' arguments in response, the language of the bankruptcy order, and the language of the NYCAL CMO.

Moreover, IPA presents evidence of extenuating circumstances for any delay in having joined Kaiser Gypsum, which is a scenario contemplated by § XVIII(B) of the NYCAL CMO, *supra* (Untimely Third Party Complaints).

Kaiser Gypsum counters that there were no such extenuating circumstances. Instead, presenting evidence which attempts to establish that because certain lawyers from McGiveny Kluger & Cook were involved in separate

cases with Kaiser Gypsum, IPA should also have been apprised earlier of the ability to join them in this matter.

IPA was not a party to any of those cases and Kaiser Gypsum's argument is unavailing. This is because the language of the Bankruptcy Order states that the stay and protections are not simply lifted by the granting of the Order alone; rather they are lifted after a party follows the steps enumerated in the Order. To this effect, paragraph 2 of the Bankruptcy Order states: "the automatic stay is hereby lifted, effective as of October 29, 2018 (the 'Effective Date'), pursuant to section 362(d) of the Bankruptcy Code, to permit only those Asbestos Personal Injury Claimants who first satisfy the requirements set forth in paragraph 3 below..." (Aff. in Opp., Exh. H, at ¶ 2).

Paragraph 3 of the Bankruptcy Order then outlines the prerequisites for getting around the automatic stay on proceedings against Kaiser Gypsum:

3. As to each Asbestos Personal Injury Claimant, the automatic stay shall not be lifted as provided in paragraph 2 unless and until the claimant or his or her authorized representative has (a) executed one of the forms of acknowledgment and release (each, an "Acknowledgement and Release") attached hereto...providing that (i) any settlement or judgment in respect of the claimant's Asbestos Personal Injury Claim may not be enforced against the assets of the Debtors...and (ii) the claimant waives and releases all claims for uninsured...in which case the claimant waives and releases such claims, and (b) sent a copy of the executed Acknowledgment and Release by electronic mail to Debtors' counsel at Jones Day...

(*Id.* at ¶ 3)

In light of the language above, it is evident that IPA first needed to see/obtain the Bankruptcy Order above and follow a variety of specific steps to bring Kaiser Gypsum in as a party to this action. Moreover, Kaiser Gypsum has failed to provide sufficient evidence that this Order or information about such steps was readily capable of being discovered earlier by IPA such as to make the delay by IPA unreasonable. The contested Special Master's recommendation is, therefore, confirmed.

Accordingly, it is ORDERED that the proposed third-party defendant Kaiser Gypsum Company, Inc.'s motion, pursuant to New York City Asbestos Litigation Case Management Order § III(C), to vacate the NYCAL Special Master Shelley Olsen's Order granting IPA Systems, Inc.'s untimely filing of a third-party complaint against Kaiser Gypsum Company, Inc. is denied, and it is further,

ORDERED, that IPA Systems, Inc.'s cross-motion to confirm the Special Master's recommendation is granted, and it is further

**ORDERED** that the Special Master's recommendation allowing IPA Systems, Inc. to file a third-party complaint against Kaiser Gypsum Company, Inc. is confirmed.

ENTER:

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

Dated: April 8, 2019

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

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