

Minassian v Brenntag N. Am.
2019 NY Slip Op 32125(U)
July 18, 2019
Supreme Court, New York County
Docket Number: 190399/2018
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

DONALD MINASSIAN and ELAINE MINASSIAN,

INDEX NO. 190399/2018

Plaintiffs,

MOTION DATE 07/10/2019

- against -

MOTION SEQ. NO. 001

BRENNTAG NORTH AMERICA, et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 8 were read on Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion to vacate the Special Master's recommendation:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s (hereinafter individually "J&J" and "JCI," collectively as the "defendants") motion to vacate Special Master Shelley Olsen's June 4, 2019 recommendation permitting deposition of CEO Alex Gorsky, is granted to the extent of limiting the subject of inquiry at the deposition to the items mentioned by Mr. Gorsky at the December 18, 2018 CNBC interview for the periods relevant to plaintiffs alleged exposure. The remainder of the relief sought in this motion is denied.

Plaintiffs commenced this action on October 18, 2018 alleging Donald Minassian, a professor and later in life an actuary, was exposed to asbestos in the defendants' talcum powder products (NYSCEF Doc. # 1). The Second Amended Complaint filed on November 27, 2018 was specifically amended to assert claims against the Moving Defendants (NYSCEF Doc. # 10). The Third Amended Complaint filed on March 21, 2019 asserted additional claims against a different defendant. (NYSCEF Doc. # 44). Defendants filed their Answer to the Second Amended Complaint on December 19, 2018 (NYSCEF Doc. # 23). The parties proceeded with discovery before Special Master Shelley Olsen- including the deposition of J&J's Chief Medical Officer, Dr. Joanne Waldstreicher (Mot. Memo. of Law in Support, "Background," pg. 5).

On December 14, 2018 *The New York Times* published an article, "Johnson & Johnson Feared Baby Powder's Possible Asbestos Link for Years," reporting on concerns within J&J about asbestos being found underground near the talc used for Johnson's Baby Powder (Opp. Exh. 7). On December 14, 2018 *Reuter's* also published an article titled, "Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder," which discussed J&J withholding test results by at least three different labs from 1972 through 1975 that found asbestos fibers in the talc (Opp. Exh. 6). Defendants' stock values went down substantially. On December 18, 2018 Mr. Alex Gorsky, J&J's CEO and Chairman, appeared on Jim Cramer's CNBC show "Mad Money" to clarify the record and provide assurances to shareholders (Mot. Exhs. 2 and 4, Opp. Exh. 1).

On March 21, 2019 plaintiffs applied to the Special Master Olsen for leave, pursuant to CMO Section XI(E), to depose Mr. Gorsky based on the public statements he made on CNBC. Plaintiffs stated that the deposition was material

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

and necessary because Mr. Gorsky held himself out as having unique knowledge regarding the safety of the defendants talc products, that allegedly caused plaintiffs injuries; the testing of those products; the information produced to government regulators; and the ability to recall products prior to plaintiffs exposure. Plaintiffs conceded that there had been a significant exchange of discovery in their case but argued that they had not obtained discovery covering all of Mr. Gorsky's representations (Mot. Exh. 5).

Plaintiff's cited to specific representations made by Mr. Gorsky, including:

"...that's demonstrated in thousands of studies not only conducted by Johnson & Johnson, but studies conducted by independent authorities, well-respected authorities, where we work closely with regulators who are overlooking the methodology. And by the way throughout this process we also not only used the best testing methodologies that were available, but we continued to improve them through the years."

"...here too, what the studies show - and these studies...are independent. They're conduct(ed) by places like Havard Medical School and other bodies. Nearly 100,000 patients involving both men and women over decades. And what these clearly show is that there's no causation between talc, baby powder and ovarian cancer or any type of asbestos-related disease."

"...Well, what's important to remember here,...is that things - these things go back to the 1960s, the 1970s, the 1980s. Even the Reuter's author herself stated that over the past 15 years that there have been no issues related to asbestos and talc or baby powder that's being used. But even if we go back from the very beginning when we've had internal and external teams look at all the documents, what we have found is that they were transparent, they were open, they exchanged information with regulators."

"...What I can tell you is from all the documents that have been reviewed, internally and externally, what I can tell you is we believe that the employees of Johnson & Johnson acted in a professional and appropriate way throughout this period."
(Mot. Exh. 5)

Plaintiff's claimed that even if Mr. Gorsky did not have personal knowledge they were entitled to his deposition as probative on determining the extent to which false or misleading statements were made about material facts at issue in the case (Mot. Exh. 5).

The parties argued and submitted documentation in support of their respective positions to the Special Master.

In an April 3, 2019 e-mail letter in reply to defendants' argument that Mr. Gorsky lacked personal knowledge, plaintiffs stated that they still had a right to depose him because his statements amounted to the conduct and admissions of a party in litigation. Plaintiffs stated that Mr. Gorsky's statements speak to their claims of recklessness and for punitive damages. Plaintiffs distinguished the cases cited by the defendants as not applying to situations where the CEO appears on national television to make public comments on fact issues in a pending lawsuit. They stated that New York does not strictly follow the "Apex Doctrine" established by the Federal Courts and further distinguished New Jersey precedent relied upon by the Moving Defendants (Mot. Exh. 3).

In the April 3, 2019 e-mail letter, plaintiffs sought Mr. Gorsky's deposition based on his first hand knowledge of material issues underlying their claims, or that he falsely represented that he has such knowledge. Plaintiffs argued that Mr.

Gorsky's affidavit, provided by the defendants, stating he had no direct involvement with, nor had he participated in any decisions concerning research, development, safety, or marketing of talcum powder products was made for an unrelated action on October 9, 2018, two months before his December 18, 2018 appearance on CNBC. Plaintiffs further argued that Mr. Gorsky's affidavit "must be relevant to the suit in which it is being submitted and it must address the discovery that is actually being sought" (Mot. Exh. 3).

On June 4, 2019, Special Master Shelley Olsen issued a recommendation in plaintiff's favor stating, "Notwithstanding J&J's position that 'Plaintiffs' reply grossly mischaracterizes and/or obfuscates the facts relevant to the analysis of this issue' (4/3 email by Thomas Kurland), I am ruling in Plaintiffs' favor, for the reasons stated in that very same April 3, 2019 e-mailing reply letter (by plaintiffs)." (Mot. Exh. 6).

On June 10, 2019 plaintiffs served a "Notice of Deposition of Alex Gorsky" on the moving defendants. The Notice of Deposition included "Rider 'A'" consisting of "Definitions and Instructions" and "Documents to be Produced." Plaintiffs requested that Mr. Gorsky produce thirty (30) items, with item 5 having an additional twenty-six (26) subcategories labeled "a" through "z." (Mot. Exh. 7).

On June 13, 2019 counsel for the defendants notified Special Master Olsen that they were served with plaintiffs' June 10, 2019 notice of deposition and that on its face the document violated the CMO Section XI E, by seeking to obtain information from Mr. Gorsky that is substantially beyond that initially requested and allowed. Defendants advised the Special Master of the pending appeal of the June 4, 2019 recommendation and sought a ruling that the June 10, 2019 notice of deposition is overly broad and improper (Mot. Exh. 10). On June 13, 2019 Special Master Olsen suggested the parties argue the parameters of the notice of deposition at the same time as the appeal of her June 4, 2019 recommendation (Mot. Exh. 10).

Defendants now appeal and move for an Order vacating Special Master Olsen's June 4, 2019 Recommendation that allowed plaintiffs to depose Alex Gorsky. To the extent the June 4, 2019 Recommendation is not vacated, defendants seek a modification of the notice of deposition setting parameters on Mr. Gorsky's testimony.

In New York City Asbestos Litigation ("NYCAL") the CMO states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring the parties comply with discovery, and as a result, recommends rulings on all discovery disputes (*Ames v A.O. Smith Water Products, et al.*, 66 AD3d 600, 887 NYS2d 580 [1st Dept. 2009]). Pursuant to CMO Section III(C), the Special Master's recommendations are appealable to this court.

At the outset the defendants' Order to Show Cause filed on June 20, 2019 (See NYSCEF Doc. # 56 - 68), is untimely and Special Master Olsen's June 4, 2019 recommendation should stand. CMO Section III C, specifically states in relevant part: "...The objecting party shall present its objections within seven business days of receipt of the Special Master's written ruling, unless this time is extended by the Coordinating Judge or the Special Master. In the absence of a motion by order to show cause to the Coordinating Judge, the Special Master's ruling will stand." Defendants have stated and provided proof that the written ruling was on June 4, 2019 (Mot. Exh.6). They did not seek any extension of time to make this motion and provided no proof showing that an application for an extension was either made, or granted, by the Special Master.

Defendants also did not provide the entire record before the Special Master on this appeal. They only provided the record of plaintiffs' arguments made to Special Master Olsen. The lack of a full record, without the arguments made by the

defendants annexed as exhibits to any of their papers, limits the Court's understanding of the basis for their appeal.

Alternatively, addressing the merits of the defendants arguments appealing the Special Master's recommendations, they claim that the plaintiffs have not shown that there is a need for the deposition of Mr. Gorsky as a corporate executive under New York Law and the CMO.

Defendants cite to CMO Section XI(E) requiring that the parties use depositions and other discovery obtained from other cases as if taken in NYCAL. They argue that the plaintiffs' application to the Special Master failed to demonstrate that the questions will not be repetitious or cover ground adequately addressed in prior depositions, and the deposition of Mr. Gorsky would not cover any new ground. Defendants' generalized statements that discovery obtained in other actions could be used as a substitute for Mr. Gorsky's deposition, without addressing the specific testimony sought by plaintiffs is not a basis to vacate the recommendation.

Defendants also state that pursuant to CPLR §3101(a) the plaintiffs, in seeking to depose Mr. Gorsky as a high ranking corporate officer, must demonstrate that he has unique knowledge of underlying facts that are unavailable through discovery of lower level employees, and that this knowledge renders his deposition necessary. Defendants argue that plaintiffs' application to the Special Master failed to make the necessary showing. Defendants state that the three arguments advanced in plaintiffs' April 3, 2019 e-mailed letter adopted by the Special Master were: (1) Mr. Gorsky's affidavit pre-dated the December 18, 2018 interview at CNBC; (2) the plaintiffs are entitled to understand the basis for Mr. Gorsky's representations on the CNBC program; and (3) Mr. Gorsky's statements speak directly to plaintiff's claims of recklessness and for punitive damages. They argue that plaintiffs arguments to the Special Master have no merit and are unsupported.

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." 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] and Allen v. Crowell-Collier Publ. Co., 21 NY 2d 235 NE 2d 430, 288 N.Y.S. 2d 449 [1968]). The applicable standard is whether plaintiff's demands may lead to relevant evidence (CPLR §3101[a]; SNI/SI Networks LLC v DIRECTV, LLC, 132 AD3d 616, 18 NYS3d 342 [1st Dept. 2015]; Matter of Steam Pipe Explosion at 41st St. & Lexington Ave., 127 AD3d 554, 8 NYS3d 88 [1st Dept. 2015]).

The initial burden is on the defendants to establish that Mr. Gorsky, as Chairman and CEO of J&J, possesses no relevant information. Only then does the burden shift to the plaintiffs to establish that the deposition of Mr. Gorsky is material and necessary, because it is unique, and as such relevant (Kapon v. Koch, 23 NY 3d 32, 11 NE 3d 709, 988 NYS 2d 559 [2014], Rosenhaus Real Estate, LLC v. S.A.C. Capital Management, Inc., 100 AD 3d 512, 953 NYS 2d 855 [1st Dept. 2012] and Barnwell v. Emigrant Savings Bank, 81 AD 3d 518, 916 NYS 2d 506 [1st Dept., 2011]).

Defendants cite to Mr. Gorsky's multiple affidavits - the one from two months before the CNBC interview and the one submitted for the first time on this motion - and "generalized statements" he made in them. They state that Mr. Gorsky has never had any direct involvement with any decisions concerning the research, development, safety or marketing of talcum powder products and he does not have first-hand knowledge regarding those topics. Defendants claim that the statements made in Mr. Gorsky's affidavits establish that he lacks any unique personal knowledge of the substance of plaintiffs allegations and only stated the company's long-standing and public position on causation during the interview at

CNBC. Defendants argue that any questions plaintiffs seek to ask Mr. Gorsky related to their claims of recklessness and punitive damages would be better directed to other lower level employees that many have already been deposed.

Plaintiffs have shown that the “generalized statements” made by Mr. Gorsky in his affidavits - including one prepared two months before the CNBC interview - at least partially conflict with the public statements he made on CNBC on December 18, 2018 (Mot. Exhs. 2 and 4 and Opp. Exh. 1). Although Mr. Gorsky claims he has no first hand knowledge, he has also stated or implied he was familiar with, and had reviewed, J&J records - including those relevant to Mr. Minassian’s period of exposure - at the CNBC interview (Opp. Exh. 1). The subsequent conclusory and “generalized statements” made in Mr. Gorsky’s affidavits do not establish that he lacks personal knowledge or that his testimony would be irrelevant. Defendants have not identified any specific testimony that could be substituted for that of Mr. Gorsky. The generalized statements do not establish that Mr. Gorsky’s deposition is not relevant and material. Plaintiffs have shown that Mr. Gorsky is informed and has directed the dissemination of information from J&J to the public (Opp. Exh. 8). The Special Master was correct in determining that Mr. Gorsky’s knowledge of J&J’s records during the period relevant to plaintiff’s exposure is both relevant and unique, warranting his deposition.

The Special Master further correctly determined that the Mr. Gorsky’s statements at the CNBC interview should be subjected to a deposition because of the continuing post-sale duty to warn, and they amount to an admission by the defendants (See *Newman v. Vetrano*, 283 AD 2d 264, 724 NYS 2d 414 [2001], *Cover v. Cohen*, 61 NY 2d 261, 461 NE 2d 864, 473 NYS 2d 378 [1984] and *In re New York City Asbestos Litigation (Dummit)*, 27 NY 3d 765, 59 NE 3d 458, 37 NYS 3d 723 [2016]).

Defendants claim that Mr. Gorsky as CEO and Chairman of J&J, a holding company, is responsible for broad oversight of 264 operating businesses in 60 countries (Mot. Exh. 4). They argue that plaintiffs’ thirty item notice of deposition which only contains one item (#30) about the “Mad Money” interview at CNBC, is extremely burdensome, amounting to harassment, further warranting vacature of the Special Master’s recommendation ordering Mr. Gorsky’s deposition. Alternatively, defendants seek to limit Mr. Gorsky’s deposition testimony to his statements made at the CNBC interview.

Plaintiffs have established that the Special Master correctly determined that they are entitled to a deposition based on statements made by Mr. Gorsky at the CNBC interview pertaining to the period relevant to their period of exposure. Plaintiffs have conceded that a substantial amount of discovery has been provided by the defendants - including deposition testimony of other executive employees. Plaintiffs are not entitled to make additional hypothetical speculations or to use Mr. Gorsky’s deposition as a “fishing expedition” for relevant discovery (See *AQ Asset Management LLC v. Levine* 138 AD 3d 635, 31 NYS 3d 32 [1st Dept. 2016]).

Although the plaintiffs argue that they are entitled to the deposition of Mr. Gorsky for the period relevant to their exposure, the thirty item plus additional 26 subcategories of “Documents to Be Produced” in the notice of deposition have no time period limitations. Only item 30 in the notice of deposition seeks discovery related to Mr. Gorsky’s December 18, 2018 CNBC interview. To the extent item 30 seeks the basis for all statements made in the CNBC interview, plaintiffs are only entitled to a deposition based on statements made by Mr. Gorsky at the CNBC interview that pertain to the period relevant to their alleged exposure.

Accordingly, it is ORDERED, that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.’s motion to vacate Special Master Shelley Olsen’s June 4, 2019 recommendation permitting the deposition of CEO Alex Gorsky, is granted only to the extent of limiting the subject of inquiry at the

deposition to the items mentioned by Mr. Gorsky at the December 18, 2018 CNBC interview for the periods relevant to their alleged exposure, and it is further,


ORDERED, that Special Master Shelley Olsen's June 4, 2019 recommendation permitting a deposition of Johnson & Johnson's CEO and Chairman, Alex Gorsky is confirmed, and it is further,

ORDERED, that the parties shall schedule a deposition of Johnson & Johnson CEO Alex Gorsky within thirty days (30) from the date of service on defendants of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that the remainder of the relief sought in this motion, is denied.

ENTER:

Dated: July 18, 2019



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

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