

Adams v Electrolux Home Prods., Inc.

2019 NY Slip Op 33191(U)

October 25, 2019

Supreme Court, New York County

Docket Number: 155591/2013

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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FRANK ADAMS and LAURA ADAMS,

Index No. 155591/2013

Plaintiffs

- against -

ELECTROLUX HOME PRODUCTS, INC.,
ELECTROLUX HOME PRODUCTS, INC., OF
AUGUSTA, GA., and 1210 ONLINE SALES,
LLC d/b/a APPLIANCE SHOWROOM,

Defendants

-----x
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DECISION AND ORDER

1210 ONLINE SALES, LLC d/b/a APPLIANCE
SHOWROOM,

Third Party Plaintiff

- against -

TOP DIGITAL APPLIANCES, HARP HOME
SERVICES, LLC, and JOHN DOE 1,

Third Party Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendants Electrolux Home Products, Inc., and Electrolux Home Products, Inc., of Augusta, Ga., move to quash and for a protective order against plaintiffs' notice of the deposition of Salim Kafiti Esq., an attorney employed by these defendants. C.P.L.R. §§ 2304, 3103(a). The notice also demands attorney Kafiti's production of documents at the deposition. C.P.L.R. § 3111. While Electrolux Home Products rightfully complains that

the subjects on which plaintiffs seek to depose attorney Kafiti and to obtain documents are overbroad, because plaintiffs are to file a note of issue by November 15, 2019, the court grants the motion to the extent of narrowing the subjects, rather than permitting further delay by requiring plaintiffs to re-serve an acceptable notice. C.P.L.R. § 3103(a).

Plaintiffs sue for exposure to carbon monoxide from an Electrolux Home Free Standing Range, Model Number E30GF74HBS, due to incomplete combustion. The same model was recalled due to a similar defect, but the recall ended with ranges manufactured approximately six weeks before Electrolux Home Products manufactured the range that plaintiffs purchased and that they claim injured them. Plaintiffs seek to ascertain how this recall in 2009 originated; the number, nature, and processing of the complaints that led to the recall; who initiated it; how the period of the recall was determined; by whom; and why it did not encompass their range. Plaintiffs also seek to ascertain whether defendants complied with their obligations to report to the federal Consumer Product Safety Commission (CPSC) continuing defects or deficiencies in the model, which might have extended the period of the recall, and to ascertain any relevant details concerning a revision of the recall in 2011.

II. PRIOR DISCLOSURE PROCEEDINGS

Electrolux Home Products has produced three witnesses for depositions, its former Manager of Product Safety for Cooking Products, its Manager of Product Safety, and its Service

Technician who communicated with plaintiff Laura Adams about plaintiffs' range. Plaintiffs never sought the deposition of attorney Kafiti by name, but they repeatedly sought the deposition of a witness knowledgeable about the recall, and Status Conference Orders repeatedly ordered Electrolux Home Products to produce a witness knowledgeable about the recall. None of the three witnesses Electrolux Home Products produced, however, was knowledgeable about the recall.

After the parties deposed Electrolux Home Products' third witness, a Status Conference Order dated January 17, 2018, specifically required the "Deposition of an Electrolux employee involved in the recall of the Icon 30 inch gas range and if no longer employed the names & addresses of all previous Electrolux employees involved in the recall process and their date of separation from Electrolux, within 45 days." Aff. of Jeffrey R. Brecker Ex. I, at 4. Electrolux Home Products finally responded via Supplemental Responses dated July 9, 2018, listing employees involved in the recall, all of which, except for attorney Kafiti, were no longer employed by Electrolux Home Products. A Status Conference Order dated March 28, 2019, then ordered:

Electrolux to present a witness w/ personal knowledge as to the issues and facts related to the recall of the Model Icon Line on or before May 13, 2019, pursuant to prior court orders, or if no such witness is under D's control, D to provide affidavit so stating, . . . and D to make good faith effort to produce such a witness in any event.

III. ATTORNEY KAFITI'S DEPOSITION AND PRODUCTION OF DOCUMENTS

Electrolux Home Products concedes that it employed attorney Kafiti during the recall in 2009, that he is knowledgeable about

the recall, and that he remains under Electrolux Home Products' control, but that Electrolux Home Products has not produced him for a deposition, nor produced any other witness for a deposition since the March 2019 order. Plaintiffs thus have met their burden to show the inadequacies in defendants' previous witnesses' knowledge about relevant issues pertaining to the recall and to require the Electrolux Home Products to produce attorney Kafiti, the witness who is most likely to know more about the recall than the previous witnesses who knew little about that subject. Best Payphones, Inc. v. Guzov Ofsink, LLC, 135 A.D.3d 585, 585 (1st Dep't 2016); Alexopoulos v. Metropolitan Transp. Auth., 37 A.D.3d 232, 233 (1st Dep't 2007); Gomez v. State of New York, 106 A.D.3d 870, 872-73 (2d Dep't 2013); Trueforge Global Mach. Group v. Viraj Group, 84 A.D.3d 938, 939-40 (2d Dep't 2011).

The notice of attorney Kafiti's deposition, however, seeks testimony on (1) "all relevant facts and circumstances in connection with the occurrence," the installation of an ICON gas range in plaintiffs' home November 22, 2009, before and after that date, and (2) "facts and circumstances in connection with the ICON gas range recall." Aff. of Paul E. Svensson, Esq., Ex. A, at 1. The notice also requests production of all documents pertaining to this action. Electrolux Home Products' three witnesses and production of documents throughout disclosure have provided plaintiffs ample opportunity to obtain testimony and documents pertaining to all the circumstances surrounding the

installation of the range in plaintiffs' home other than evidence pertaining to the recall. While the ordinary remedy for plaintiffs' blatantly overbroad requests is to place the burden on plaintiffs to prune their requests, in the interest of concluding disclosure the court takes on that burden. Matter of Souza, 80 A.D.3d 446, 446 (1st Dep't 2011). See Blau v. Blau, 3 A.D.3d 167, 171 (1st Dep't 2004); Pascual v. Rusic Woods Homeowners Assn., Inc., 173 A.D.3d 757, 758 (2d Dep't 2019); Stepping Stones Assoc., L.P. v. Scialdone, 148 A.D.3d 855, 856 (2d Dep't 2017); Berkowitz v. 29 Woodmere Blvd. Owners', Inc. 135 A.D.3d 798, 799 (2d Dep't 2016).

The inquiry of attorney Kafiti by any parties other than Electrolux Home Products shall be limited to "facts and circumstances in connection with the ICON gas range recall," Svensson Aff. Ex. A, at 1, unless Electrolux Home Products opens the scope of inquiry to other subjects, in which event the other parties may inquire about those subjects as well. C.P.L.R. § 3103(a). The document production by attorney Kafiti shall be limited to documents pertaining to the recall that Electrolux Home Products has not already produced. Id. Plaintiffs have not demonstrated that the attorney's duplicative production of documents is necessary to plaintiffs' prosecution of this action. Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d 401, 405 (1st Dep't 2018); DeLeonardis v. Hara, 136 A.D.3d 558, 558 (1st Dep't 2016); Equitable Life Assur. Socy. of U.S. v. Rocanova, 207 A.D.2d 294, 296 (1st Dep't 1994); Kripke v.

Benedictine Hosp., 222 A.D.2d 764, 765-66 (3d Dep't 1995). See EIFS, Inc. v. Morie Co., 298 A.D.2d 548, 549 (2d Dep't 2002); Pedone v. Schlotman, 249 A.D.2d 526, 526 (2d Dep't 1998).

Attorney Kafiti is employed to provide legal advice and services to Electrolux Home Products. Therefore his answers to deposition questions and his production of documents may include privileged attorney-client communications or protected attorney work product, C.P.L.R. § 3101(c) or (d)(2), in which event he may claim the privilege or protection and serve a privilege log. C.P.L.R. § 3122(a)(1) and (b). E.g., Stephen v. State of New York, 117 A.D.3d 820, 820-21 (2d Dep't 2014); Ural v. Encompass Ins. Co. of Am., 97 A.D.3d 562, 566-67 (2d Dep't 2012). The mere potential that such communications or work product may be implicated is not grounds to bar the deposition or the document request altogether. Attorney Kafiti must wait until a question is posed to him or he finds a document responsive to plaintiffs' request before he invokes a privilege or protection. Beach v. Shanely, 62 N.Y.2d 241, 248 (1984); Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 407. Likewise, the court must wait until he invokes a privilege or protection, and a party seeks to compel a response, before ruling on the permissibility of a question not yet asked or requiring a document not yet found or reviewed to be produced. Beach v. Shanely, 62 N.Y.2d at 248; Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 407; K.S. v. City of New York, 56 A.D.3d 527, 528 (2d Dep't 2008).

Surely attorney Kafiti's communications with the CPSC, the information the attorney received from members of the Electrolux Home Products' committee on the recall on which he served, or the over 600 pages of his email correspondence that Electrolux Home Products already produced and about which he may be questioned do not implicate his legal advice or services to his employer. Although attorney Kafiti provides legal advice and services to Electrolux Home Products, it does not suggest that he has done so in this action. Therefore his deposition does not implicate most of the concerns that caution against depositions of attorneys who represent parties in the litigation where the deposition is to be conducted. 22 N.Y.C.R.R. pt. 1200.0 R. 3.7(a); S & S Hotel Ventures Ltd. Partnership v. 77 S. H. Corp., 69 N.Y.2d 437, 443-44 (1987); Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 405-406; Equitable Life Assur. Socy. of U.S. v. Rocanova, 207 A.D.2d at 296.

Even had attorney Kafiti appeared in this litigation, plaintiffs show not only that the information sought from him is material and necessary to their prosecution of the action, Forman v. henkin, 30 N.Y.3 656, 661 (2018), but also that Electrolux Home Products itself provides plaintiffs a good faith basis to believe that he is its only available source of information about the recall. Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 406; Equitable Life Assur. Socy. of U.S. v. Rocanova, 207 A.D.2d at 296. Electrolux Home Products contends that his deposition is a proverbial "fishing expedition," but not that it

is for any other illegitimate purpose, such as a tactic to disqualify Electrolux Home Products' attorney, since he has not appeared as an attorney in this litigation. See Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 406.

Pruned to a material and necessary scope focussed on the only available witness knowledgeable about information within that scope, the deposition and related documents sought are not a fishing expedition.

IV. CONCLUSION

For the reasons explained above, the court grants the motion by defendants Electrolux Home Products, Inc., and Electrolux Home Products, Inc., of Augusta, Ga., for a protective order to the following limited extent. C.P.L.R. § 3103(a). Those defendants shall produce Salim Kafiti Esq. for a deposition on the facts and circumstances in connection with the recall of the Electrolux Home Free Standing Range, Model Number E30GF74HBS, November 22, 2019, at 10:00 a.m., at the office of plaintiffs' attorney, or at a prior time or different place to which the parties stipulate. At the deposition he shall produce any documents in his possession, custody, or control pertaining to the recall that Electrolux Home Products has not produced to plaintiffs. C.P.L.R. § 3111.

The court otherwise denies the motion by defendants Electrolux Home Products, Inc., and Electrolux Home Products, Inc., of Augusta, Ga., to quash and for a protective order against plaintiffs' notice of the deposition of Salim Kafiti Esq.

C.P.L.R. §§ 2304, 3103(a). The final deposition in this action, of a witness for third party defendant Harp Home Services, LLC, shall be held December 6, 2019, at 10:00 a.m., at the office of third party plaintiff's attorney, or at a prior time or different place to which the parties stipulate.

DATED: October 25, 2019



LUCY BILLINGS, J.S.C.

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