

Leavitt v A.O. Smith Water Prods. Co.

2019 NY Slip Op 33447(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 190240/17

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

RUSSEL LEAVITT and JOYCE LEAVITT,

Plaintiff

INDEX NO. 190240/17

MOTION DATE 11-19-2019

-Against-

A.O. SMITH WATER PRODUCTS CO., et al.,

MOTION SEQ. NO 017
MOTION CAL. NO

Defendant.

The following papers, numbered 1 to 4 were read on this motion to compel discovery or strike defendant's answer.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion by plaintiffs to compel defendant LIQUIDATING REICHHOLD, INC. (hereinafter "REICHHOLD"), to provide responses to plaintiffs' product identification interrogatories and document requests dated December 14, 2017 or to strike Reichhold's answer is granted solely to the extent of ordering that within 15 days from the date of service on Reichhold of a copy of this order with notice of entry, Reichhold provide the requested responses to plaintiffs' product identification interrogatories and document requests or an affidavit from a person with personal knowledge stating under oath that the documents do not exist, the reasons the documents do not exist, the dates and places where a search was made to obtain the documents, the persons spoken to in conducting this search and the results of such search. The portion of the motion which seeks to strike Reichhold's answer is denied.

Plaintiffs filed this action to recover from the defendants for personal injuries sustained as a result of Mr. Leavitt's alleged exposure to asbestos from the defendant Reichhold's product. It is alleged that while Mr. Leavitt visited certain plants manufacturing electrical components, he was exposed to asbestos contained in Phenolic Molding Compound supplied to the plant by Reichhold.

E IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On December 14, 2017 Plaintiffs served on Reichhold a product identification interrogatory and document request seeking “(1)...information in Reichhold’s files or in their attorney’s possession, whether any asbestos containing product was sold, shipped, distributed, contracted for and/or manufactured by [Reichhold] at the sites listed...in chart A from plaintiff’s answers to defendant’s interrogatories and requests for production of documents.” The demand also sought that “(2)... [Reichhold] identify any documents, invoices, information stored in electronic form.... In [its] possession or in the possession of their attorneys that indicates that any asbestos containing product manufactured, sold, delivered, shipped, rebranded, contracted for, distributed, installed or retailed by you, your successor or predecessor entities, subdivisions or affiliates were present at the sites specified in Question one.”

On June 6, 2019 Reichhold submitted a response to plaintiffs’ product identification interrogatories and documents requests. The response raised certain objections and stated that “...Subject to and without waiving the foregoing objections, to the best of its knowledge, Reichhold does not have possession, custody or control of any documents between or related to itself and plaintiff’s worksite. Reichhold’s former Carteret, New Jersey, facility alone made phenolic molding compounds. Reichhold sold its Carteret facility and phenolic molding compound business, including the assets, technology, books and records of that plant, but excluding the plasticizer business, to BTL Specialty Resins in June 1986. The terms of the sales agreement between Reichhold and BTL required Reichhold to transfer all documents pertaining to its molding compound operations to BTL. Accordingly, records and information which might be responsive to this Interrogatory, if ever existed are no longer in Reichhold’s possession.”

Plaintiffs considered these responses inadequate and requested permission from the special master to make this motion. The special master granted permission and plaintiffs now makes this motion to compel responses to their interrogatories and document requests or the striking of Reichhold’s answer if it fails to respond. Reichhold opposes the motion on the grounds that it is procedurally defective in accordance with the NYCAL rules, that it has already provided a sufficient response and that the documents plaintiffs seek are not in Reichhold’s possession. Finally, it argues that striking the answer is a drastic remedy and not warranted in this instance because its behavior is not willful or contumacious.

In accordance with CMO IX-E, all answers to interrogatories shall be verified by a party. In accordance with CMO IX-Q, discovery disputes are to be brought to the attention of the Special Master. In accordance with CMO XIX- Discovery Sanctions : “.... Any failure to comply with a deadline in a discovery order issued by the special master....shall be deemed to be a willful failure to disclose within the meaning of CPLR§ 3126. ...Sanctions may include...the striking of a pleading....Any party wishing to avail itself of the sanctions provided herein shall make a written application, on notice, to the Special Master....”

CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR §3101(a) allows for the disclosure of “all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. The words material and necessary are to be liberally interpreted to require disclosure upon request of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay. CPLR §3126 grants the court the power to sanction a party that fails to comply with a court’s discovery order.

The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v. City of New York*, 274 A.D. 2d 337, 711 N.Y.S. 2d 396 [1st. Dept. 2000]). Willful and contumacious conduct, warranting the striking of a pleading, may be inferred from a party’s repeated failure to comply with a court order, coupled with inadequate explanations for the failure to comply (*Duncan v. Hebb*, 47 A.D. 3d 871, 850 N.Y.S. 2d 610 [2nd. Dept. 2008]). Willful and contumacious conduct may be inferred from a party’s repeated, unexcused, failure to comply with multiple orders and directives over an extended period (*Rawlings v. Gillert*, 78 A.D. 3d 806, 911 N.Y.S. 2d 117 [2nd. Dept. 2010]).

The nature and degree of the penalty to be imposed for a party’s failure to comply with an order is a matter within the sound discretion of the court (CPLR § 3126).

Reichhold provided a verified response to plaintiffs’ request for interrogatory responses and document demands. Plaintiffs, not being satisfied with Reichhold’s responses sought the intervention of the special master without notifying Reichhold, which is in violation of NYCAL’s CMO. Although Reichhold’s responses may not be adequate, it has not willfully disobeyed a court order to provide the demanded discovery. Its conduct is not willful, contumacious or in bad faith, and does not rise to a level that would warrant the striking of its answer. However, Reichhold is required to provide adequate responses or provide an affidavit from a person with personal knowledge, stating under oath that the documents do not exist, the reasons the documents do not exist, the dates and places where a search to obtain the documents was made, the persons spoken to in conducting this search and the results of such search.

Accordingly, it is ORDERED that Plaintiffs motion to compel Liquidating Reichhold Inc.’s responses to their product identification interrogatories and document requests dated December 14, 2017 or to strike Liquidating Reichhold Inc.’s answer is granted solely to the extent of ordering that within 15 days from the date of service on Reichhold of a copy of this order with notice of entry, Reichhold provide the requested responses or provide an affidavit from a person with personal knowledge, stating under oath that the documents do not exist, the reasons the documents do not exist, the dates and places where a search to

obtain the documents was made, the persons spoken to in conducting this search and the results of such search, and it is further

ORDERED that plaintiffs' motion to strike Liquidating Reichhold Inc.'s answer is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: November 19, 2019


Manuel J. Mendez
J.S.C.

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