

Diaz v Combe Inc.

2019 NY Slip Op 34214(U)

March 25, 2019

Supreme Court, Westchester County

Docket Number: 59242/2018

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

PHILIP L. DIAZ, FRANK S. GIOVINCO,
JOEL J. ISOM and TERRY A. WEAVER,

Plaintiffs,

-against-

COMBE INCORPORATED and COMBE
PRODUCTS, INC.,

Defendants.

LEFKOWITZ, J.

DECISION & ORDER

Index No. 59242/2018
Motion Date: March 25, 2019
Seq. No. 2

The following papers were read on this motion (Seq. #2) by defendants COMBE INCORPORATED and COMBE PRODUCTS, INC. ("COMBE") pursuant to CPLR §3103 for a protective order; and/or granting reargument pursuant to CPLR 2221, and upon reargument, vacating the Compliance Conference Referee Report and Order dated February 20, 2019, and upon vacating the order, denying plaintiffs' request that defendants COMBE produce out of priority and before plaintiffs have been deposed, a witness for a preliminary deposition as to COMBE's discovery responses; denying plaintiffs' specific request for COMBE to produce Dr. Pushpa Rao, the Senior Director of Global Product Safety and Regularity as their witness for the preliminary deposition and then have her produced a second time for a substantive deposition; and for such other and further relief as this Court may deem just and proper.

- Order to Show Cause- Affirmation in Support - Affirmation of Good Faith- Exhibits A- I
- Affidavit of Service
- Memorandum of Law in Opposition - Affirmation in Opposition

Upon the foregoing papers and the proceedings held on March 25, 2019, the motion is determined as follows:

Procedural History:

This action was commenced by the filing of a summons and complaint on June 12, 2018. Plaintiffs seek damages for claims sounding in the alleged negligent design, development, manufacturing, testing, packaging, promotion, marketing, distribution, labeling and sales of hair care products and hair dyes marketed as Just for Men®. Defendants filed an answer on or about July 30,

2018. Counsel for the parties appeared on August 21, 2018 for a preliminary conference and have appeared multiple times for compliance conferences thereafter. The parties appeared for a compliance conference on February 20, 2019 wherein plaintiffs were provided with a discovery motion briefing schedule for the present motion.

Contentions of the Parties:

Defendants move for a protective order arguing that the Court should deny plaintiffs' request to depose a witness, ie. Dr. Pushpa Rao regarding defendants' discovery responses. In the alternative, defendants argue that the Court should grant reargument, whereupon the Court should vacate the Referee Report dated February 20, 2019, so-ordered on February 21, 2019 (Lefkowitz, J.)¹ to the extent that it directed a preliminary deposition of Dr. Rao limited to defendants' discovery responses. Defendants contend that there no longer exists reasonable justification for plaintiffs' demand for a preliminary deposition regarding defendants' discovery responses, which is being held out of priority order. Defendants submit that since the issuance of the February 21, 2019 compliance conference order, defendants have served their responses to Interrogatories and responses to plaintiffs' First, Second and Third Requests for Production. Additionally, on February 28, 2019, defendants served a supplemental discovery/document production. As such, based upon all these discovery responses and copies of documents served, defendants state that there is no longer a dispute about the scope of defendants' e-discovery search and/or the adequacy of the search such that a preliminary deposition of a document custodian would be justified.

In opposition, plaintiffs argue that they were burned and injured after using Just for Men® hair dye, which allegedly contained a dangerous ingredient known as PPD. Plaintiffs submit that defendants have repeatedly hindered their efforts to proceed with discovery and have refused to provide them significant portions of discovery, including copies of complaints defendants received from other injured users of this product, copies of testimony and exhibits from other lawsuits in which defendants were sued for similar injuries. Plaintiffs submit that defendants have been repeatedly placed on notice about the dangers of this ingredient and knew it could injure men who were using the product to color their hair, sideburns, beards and mustaches. Plaintiffs argue that defendants have repeatedly delayed and avoided their discovery obligations since September 2018. Plaintiffs set forth in their Affirmation in Opposition to this motion that Dr. Pushpa Rao has been identified by defendants as "the management-level or executive-level person responsible for maintaining for [Defendants], information about injuries reported after using Just for Men®"² and Dr. Rao also verified the facts in defendants' interrogatory responses. Plaintiffs argue that they need to conduct a deposition of Dr. Rao limited to what documents defendants have produced and what they have withheld. Plaintiffs further proffer that they need to conduct this deposition prior to plaintiffs' depositions in order to address defendants' discovery responses and the deficiencies in those responses. Plaintiffs further argue that defendants are hindering their ability to properly

¹See Referee Report & Order filed to NYSCEF as doc. no. 33.

²See ¶15 on p. 5 of plaintiff's affirmation in opposition filed to NYSCEF as doc. no. 51.

prepare this case for trial. Plaintiffs agree to solely depose Dr. Rao on a preliminary basis with respect to what discovery has been produced and withheld by defendants and do not intend to depose her on any substantive issues until all of plaintiffs' depositions have been completed.

Analysis:

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally 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 and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Furthermore, pursuant to CPLR 3103[a], "[t]he court may at any time on its own initiative, or on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts." The court here too is vested with broad discretion to issue appropriate protective orders to limit discovery for which discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process kept in mind (*Cascardo v Cascardo*, 136 AD3d 729 [2d Dept 2016]).

The Court finds that, based upon the discovery responses and documents defendants served upon plaintiffs after the most recent compliance conferences, there is no longer a necessity to conduct a preliminary deposition of Dr. Rao before conducting the depositions of plaintiffs. Plaintiffs may question Dr. Rao regarding defendants' discovery responses and all substantive matters after plaintiffs' depositions have taken place. Accordingly, defendants' motion should be granted solely to the extent that defendants need not produce Dr. Rao for a limited deposition related to defendants' discovery responses prior to conducting and completing all of plaintiffs' depositions.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

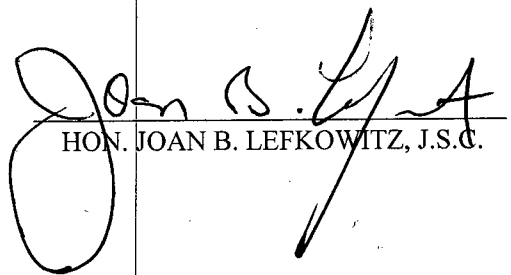
ORDERED that the branch of defendants' motion (Seq. #2) which sought a protective order is granted solely to the extent that defendants need not produce Dr. Pushpa Rao for a limited deposition prior to the completion of plaintiffs' depositions; and it is further

ORDERED that the remaining branches of defendants' motion are denied;

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on April 5, 2019 at 9:30 a.m.; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiffs within ten (10) days of entry.

Dated: White Plains, New York
March 25, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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cc: Compliance Part Clerk