

**Diaz v Combe Inc.**

2019 NY Slip Op 34215(U)

December 13, 2019

Supreme Court, Westchester County

Docket Number: 59242/2018

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

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

**DECISION AND ORDER**

Plaintiffs,

Index No.: 59242/2018  
Motion Date: Dec. 9, 2019  
Motion Seq. Nos. 5 & 7

-against-

COMBE INCORPORATED and COMBE  
PRODUCTS, INC.,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by defendants (Seq. No. 5) for an order pursuant to CPLR 2221 granting leave to reargue this Court’s Decision and Order dated August 16, 2019<sup>1</sup>, and upon reargument, denying that portion of plaintiffs’ motion brought by Order to Show Cause dated July 8, 2019 compelling the depositions of Keech Combe Shetty, Robert Lanni and Carrie Barsuhn; and granting such other and further relief as this Court deems just and proper:

Order to Show Cause; Affirmation in Support; Memorandum of Law in Support; A - N;  
Affidavit of Service  
Memorandum of Law in Opposition; Affirmation in Opposition

The following papers were read on this motion by defendants (Seq. No. 7) for an order pursuant to CPLR 2221 & 3103, granting leave to renew defendants’ argument in opposition to plaintiffs’ motion to compel the depositions of additional Combe witnesses, which this Court granted on August 16, 2019; and granting a Protective Order striking plaintiffs’ deposition notices for Keech Combe Shetty (Co-Chief Executive Officer), Roberto Lanni (Chief Information Officer) and Carrie Barsuhn (Senior Director of Consumer Resources); or alternatively, limiting the noticed depositions in time and scope; and granting such other and further relief as this Court deems just and proper:

Order to Show Cause; Affirmation in Support; Memorandum of Law in Support; Exhibits A - J; Affidavit of Service  
Memorandum of Law in Opposition

Upon the foregoing papers and the proceedings held on the record on December 9, 2019, the

---

<sup>1</sup> See Decision and Order filed to NYSCEF as Doc. No. 99 on August 16, 2019.

motions are 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 July 30, 2018. Counsel for the parties have appeared multiple times for compliance conferences.

Contentions of the Parties:

In the first of two motions, defendants seek leave to reargue this Court's Decision and Order dated August 16, 2019, which granted that portion of plaintiffs' motion which sought to compel the depositions of three Combe employees, ie. Combe's Co-Chief Executive Officer, Keech Combe Shetty; Combe's Chief Information Officer, Robert Lanni; and Combe's Senior Director of Consumer Resources, Carrie Barsuhn. Defendants argue that Dr. Rao's deposition had not been completed at the time the underlying motion was made and therefore plaintiffs could not have properly evaluated the sufficiency of her testimony as a representative of defendants. Additionally, defendants argue that plaintiffs' claims that they needed the testimony of these three witnesses were speculative.

In opposition, plaintiffs argue that they explained in detail in their original motion papers why they seek the testimony of each of these three witnesses. Furthermore, plaintiffs again assert that each of the witnesses' testimony will be material and necessary to plaintiffs' claims and will not be cumulative. Additionally, plaintiffs argue that defendants do not dispute that the three witnesses have relevant information about plaintiffs' claims and submit that defendants merely submit the same arguments submitted in opposition to the original motion which the Court already reviewed and rejected.

In the second motion, defendants seek leave to renew their argument in opposition to plaintiff's motion to compel depositions of additional Combe witnesses, which motion this Court granted on August 16, 2019 and seek a protective order preventing the depositions of Combe witnesses Keech Combe Shetty, Roberto Lanni and Carrie Barsuhn, or in the alternative, limiting the scope of any such depositions that are allowed. Defendants submit that the motion to renew is based on the completion of the deposition of Dr. Pushpa Rao, the witness designated by defendants as the employee most knowledgeable about the matters which are relevant to the claims in this case. Dr. Rao's title is Senior Director of Global Product Safety and Regulatory. Defendants contend that after being deposed for four days by plaintiffs, this witness proved to be a witness knowledgeable about all the topics for which plaintiffs argued they needed the additional witnesses. Defendants now submit that, based upon the deposition transcript of Dr. Rao, plaintiffs can no longer carry their burden to compel defendants to produce additional witnesses under the facts and circumstances. Defendants request that the Court reconsider plaintiffs' motion to compel in light of Dr. Rao's testimony and her detailed knowledge over four days of testimony. Moreover, defendants argue that plaintiffs' demand for cumulative witnesses, some of whom are high-ranking corporate officers, is

nothing more than a strategic tactic which is intended to embarrass, pressure and otherwise prejudice defendants. They further contend that the remaining witnesses sought by plaintiffs do not possess any knowledge which is unique or relevant to the issues in this case.

Plaintiffs oppose the motion. They argue that the deposition testimony of Dr. Rao does not obviate the need for further testimony from defendants' witnesses, but actually confirms plaintiffs' need to depose further witnesses. Plaintiffs additionally argue that defendants have not identified new facts which would warrant changing this Court's prior decision. Plaintiffs submit that Dr. Rao's testimony confirms the need for the deposition testimony of Keech Combe Shetty ("Shetty") because she will possess information as to what higher-ups knew about the safety of the products, as she is the co-CEO of the company. Furthermore, plaintiffs contend that Dr. Rao's testimony and defendants' recent document production confirms that there is no one higher than Shetty who would have the final say on the company's strategy. Plaintiffs submit that Shetty attended both company board and project approval committee meetings. Additionally, plaintiffs contend that committee meetings are when the ones responsible for approving any changes to products would determine what funds would be allocated to reformulating products, such as replacing ingredients in the product which might be dangerous. Plaintiffs submit that Shetty would have knowledge as to the company decision making behind continuing to sell, what they describe as a dangerous product, even after the company received reports of injuries. Plaintiffs further submit that Dr. Rao did not attend board meetings and was not present for any discussions among board members and high level executives regarding such things as the company's sales, marketing or financial performance, including that of the Just for Men® line and its social media strategy, which is testimony that is material and necessary to proving plaintiffs' claims.

### Analysis

Pursuant to CPLR 3101(a)(1), there must be full disclosure of all matters "material and necessary" in the prosecution or defense of an action. The phrase "material and necessary" is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "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" (*Forman v Henkin*, 134 AD3d 529, 529 [1st Dept 2015], *quoting Vyas v Campbell*, 4 AD3d 417, 418 [2d Dept 2004]; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]). However, unlimited disclosure is not mandated and may be denied, limited, conditioned or regulated by the court (*see Diaz v City of New York*, 117 AD3d 777 [2d Dept 2014]). The essential test is "usefulness and reason" (*see, Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746[2000] [internal quotation marks omitted]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The party seeking disclosure has the burden 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*, 74 AD3d at 1140). The 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 (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept

2006]).

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d][2]; see *Matter of Carter v Carter*, 81 AD3d 819 [2d Dept 2011]). Re-argument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Dinstber v Fludd*, 2 AD3d 670 [2d Dept 2003]). The determination to grant leave to reargue a prior motion lies within the sound discretion of the court that decided it (see *Barnett v Smith*, 64 AD3d 669 [2d Dept 2009]).

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination ...” and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][2], [3]). A motion for leave to renew “is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Renna v Gullo*, 19 AD3d 472 [2d Dept 2005], nor does a motion to renew serve to “offer an unsuccessful party successive opportunities to present arguments not previously advanced (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]). The rule requiring new facts is a flexible one, and the motion court may, in its discretion, grant renewal upon facts known to the movant at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts on the prior motion (*Surdo v Levittown Public School Dist.*, 41 AD3d 486 [2d Dept. 2007]; *Lawman v Gap, Inc.*, 38 AD3d 852 [2d Dept. 2007]; *Lafferty v Eklecco, LLC*, 34 AD3d 754 [2d Dept. 2006]; *Petsako v Zweig*, 8 AD3d 355 [2d Dept. 2004]). A motion for leave to renew should be denied, however, where the moving party fails to offer a reasonable justification as to why these new facts were not submitted on the prior motion (*Simpson v Cook Pony Farm Real Estate*, 12 AD3d 496 [2d Dept. 2004]; *Daria v Beacon Capital Co.*, 299 AD2d 312 [2d Dept. 2002]).

A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. In determining a combined motion for leave to reargue and leave to renew, this Court must “decide each part of the motion as if it were separately made” (CPLR 2221[f]).

At oral argument, plaintiffs argued that Dr. Rao knew nothing about the sales and marketing of the product. In response, and after consideration, defendants stated they would consent to produce a witness by the name of Vanessa Reggiardo, who would offer testimony as to the marketing of the subject product. Additionally, defendants agreed to produce Carrie Barsuhn, the Senior Director of Consumer Resources, who put out training manuals regarding the product. However, defendants argued that they would not consent to producing Keech Combe Shetty, the company’s Co-Chief Executive Officer or Roberto Lanni, whom defendants describe as an Information Technology (“IT”) person, who has never been involved in any substantive matters within the company.

Under the facts and circumstances of the present case, with respect to defendants’ motion for

leave to renew and reargue the prior court order which granted plaintiffs' motion to compel the depositions of Keech Combe Shetty, Roberto Lanni and Carrie Barsuhn (*see* CPLR 2221), the court grants defendants' application in part.

For purposes of a deposition, a corporate entity has the right to designate, in the first instance, the employee who shall be examined (*Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916 [2d Dept 2011]). The moving party that seeks additional depositions has the burden to demonstrate (1) that the representative already deposed had insufficient knowledge or were otherwise inadequate; and (2) that there is a substantial likelihood that the person sought for depositions possess information which is material and necessary to the prosecution of the case (*Gomez v State of New York*, 106 AD3d 870 [2d Dept 2013]; *Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916 [2d Dept 2011]). In the case at bar, defendants have provided the complete deposition transcript of Dr. Pushpa Rao, the employee they designated to be examined. Upon completion of that deposition and review of the full transcript and upon defendants' consent to produce two additional witnesses, ie. Vanessa Reggiardo and Carrie Barsuhn for deposition, the Court finds that defendants have demonstrated new facts which justify partially granting defendants' motion to renew. Upon renewal, the Court denies plaintiffs' motion to compel the depositions of Keech Combe Shetty and Roberto Lanni at this time.

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that defendants' motion for leave to renew this Court's August 16, 2019 Decision and Order is granted to the extent that the portion of the Court's August 16, 2019 granting plaintiffs' motion to compel the depositions of Keech Combe Shetty and Roberto Lanni is denied; and it is further

ORDERED that, upon their consent, defendants shall produce both Vanessa Reggiardo and Carrie Barsuhn for deposition on or before February 7, 2020; and it is further

ORDERED that all other branches of defendants' motions to renew and reargue are denied; and it is further

ORDERED that counsel for defendants shall serve this Decision and Order, with Notice of Entry, on plaintiffs within five (5) days of entry; and it is further

ORDERED that counsel for all parties are directed to appear in the Compliance Part, Room 800 of this Courthouse, at 9:30 a.m. on January 10, 2020.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
December 13, 2019

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

TO:

Squitieri & Fearon, LLP.  
Attorneys for plaintiffs  
32 East 57<sup>th</sup> Street, 12<sup>th</sup> Floor  
New York, New York 10022  
By NYSCEF

Haworth Rossman & Gerstman, LLC.  
Attorneys for defendants  
45 Broadway, 21<sup>st</sup> Floor  
New York, New York 10006  
By NYSCEF

CC: Compliance Part Clerk