

**Diaz v Combe Inc.**

2019 NY Slip Op 34216(U)

August 16, 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

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

Plaintiffs,

**DECISION & ORDER**

-against-

Index No. 59242/2018  
Motion Date: Aug.12, 2019  
Seq. No. 4

COMBE INCORPORATED and COMBE  
PRODUCTS, INC.,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs 1) for an Order pursuant to CPLR 3126 striking defendants' Answer; or in the alternative; 2) for an Order pursuant to CPLR 3101 and 3124 compelling defendants to produce the following Combe personnel for an examination before trial: Dr. Pushpa Rao, Keech Combe Shetty, Carrie Barshun and Robert Lanni; and for such other relief as this court may deem just and proper. Defendants oppose the motion.

Order to Show Cause<sup>1</sup> - Affirmation in Support - Memorandum of Law in Support  
Exhibits A-H - Affidavit of Service - Letter to Judge  
Affirmation in Opposition - Exhibits A-D - Affidavit of Service

Upon the foregoing papers and the proceedings held on August 12, 2019, this 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

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<sup>1</sup> Plaintiffs filed their Affirmation in Support, Memorandum of Law and Exhibits to NYSCEF incorrectly under Sequence #3.

appeared multiple times for compliance conferences thereafter. The parties appeared for a compliance and pre-motion conference on June 28, 2019, wherein plaintiffs were provided with a discovery motion briefing schedule for the present motion.

Contentions of the Parties:

In this case, plaintiffs contend they were caused to suffer burns, blisters and other injuries after using Just for Men® hair dye due to a dangerous hair ingredient known as PPD, which is an abbreviation for p-Phenylenediamine. By the instant motion, plaintiffs move to strike defendants' Answer because they allege in their papers that defendants have repeatedly failed to produce Dr. Pushpa Rao ("Dr. Rao") for an examination before trial, have cancelled her scheduled testimony and are refusing to produce her. In the alternative, plaintiffs seeks an Order compelling defendants to produce Dr. Rao and three other witnesses for deposition, namely Carrie Barshun, Keech Combe Shetty and Robert Lanni. Plaintiffs allege that each of those individuals will provide testimony that is material and necessary to plaintiffs' claims and that plaintiffs have sought these depositions since February 2019.

At oral argument, plaintiffs' counsel advises the Court that Dr. Rao was produced for deposition on August 7, 2019 and that her deposition was commenced, but has not been completed. Counsel for the parties state that they intend to continue and complete Dr. Rao's deposition the week of September 23, 2019, as they could not coordinate a mutually agreeable earlier date to finish this deposition. Plaintiffs' counsel further argues that he already knows that Dr. Rao will not have the information that the other witnesses he seeks to depose will offer. Plaintiffs' counsel contends that Dr. Rao is the Head of Regulatory & Scientific Affairs and describes her as the "last line of product safety." As to the other three witnesses, plaintiffs' counsel submits that each of those witnesses has distinct information that is not cumulative and is material and necessary to plaintiffs' claims. Plaintiffs' counsel also states that he can take these remaining depositions in any order and can even take their depositions before the completion of Dr. Rao's deposition.

In opposition, defendants argue that plaintiffs' motion is baseless and should be denied. Defendants submit that the parties have been working together in a diligent manner to complete discovery in this action and in the related action of *Albright v Combe Incorporated*<sup>2</sup>, which have both been joined for discovery. Defendants also submit that the parties have always understood that all plaintiffs in both actions would be deposed before Dr. Rao's deposition would take place. Defendants further contend that plaintiffs' motion is premature, as the request to depose additional witnesses from defendants Combe should be addressed only after the completion of defendants' designated corporate representative, who is Dr. Rao. Additionally, defendants argue that the additional witnesses sought by plaintiffs are unlikely to possess any relevant testimony to the claims in this action. Based upon these arguments, defendants assert that plaintiffs' motion should be denied as premature and also based upon defendants' intention to produce Dr. Rao for the completion of her deposition, as defendants' designated corporate witness.

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<sup>2</sup> See Westchester County Index No. 68906/2017.

### 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 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]), as well as impose penalties upon a party which “refuses to obey an order for disclosure” or “wilfully fails to disclose information which the court finds ought to have been disclosed” (CPLR 3126). The penalties, although not exhaustive, include deciding the disputed issue in favor of the prejudiced party, precluding the disobedient party from producing evidence at trial on the disputed issue, striking the pleadings of the disobedient party, or rendering a default judgment against the disobedient party (*DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 48-49 [2d Dept 1998]). The penalties are designed “to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the pending civil action” (*Sands v News Am. Publ.*, 161 AD2d 30, 37 [1st Dept 1990]; *see Matusewicz v Jo Jo's Auto Parts*, 18 AD3d 828 [2d Dept 2005]; *DiDomenico*, 252 AD2d at 49). “The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party’s failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). “Willful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

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 representatives already deposed had insufficient knowledge or were otherwise inadequate; and (2) that there is a substantial likelihood that the persons 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)].

With the above principles in mind, that branch of plaintiffs' motion which seeks to strike defendants' answer must be denied. Plaintiffs have failed to establish that defendants have engaged in willful and contumacious behavior, have acted in bad faith or that they have violated prior discovery Orders.

As to the depositions sought by plaintiffs, while Dr. Rao's deposition has not been completed, the Court finds that plaintiffs have demonstrated that Dr. Rao will not possess the information that Carrie Barshun, Keech Combe Shetty and Robert Lanni possess. Plaintiffs allege that Carrie Barshun is the head of Consumer Resources and oversees all representatives who dealt with complaints of injuries. She is the individual who prepared trend reports of all complaints that came in and a summary of those trend reports. Plaintiffs also contend that she is the person who prepared training manuals which instructed representatives on how to handle the various complaints that might come in regarding the products. As to Robert Lanni, plaintiffs allege that he maintains the e-data for defendants, specifically copies of all audio recordings for telephone complaints made regarding the subject products and also the financial and sales data with respect to those products. As to Keech Combe Shetty, plaintiffs argue that she is the co-CEO of the company and she will possess information as to what higher-ups knew about the safety of the products. Defendants did not dispute plaintiffs' arguments with respect to the information these witnesses would offer if produced for deposition.

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 or reference thereto.

In view of the foregoing, it is

ORDERED that the branch of plaintiffs' motion seeking to strike defendants' answer is denied in its entirety; and it is further

ORDERED that the branch of plaintiffs' motion seeking to compel the deposition of Dr. Pushpa Rao is granted to the extent that defendant shall produce Dr. Rao for deposition on September 25, 2019 to continue and complete her deposition; and it is further

ORDERED, that the branch of plaintiffs' motion seeking to compel the depositions of Carrie Barshun, Anthony Lannie and Keech Combe Shetty is granted to the extent that on or before October 18, 2019, defendants shall produce these witnesses for deposition; and it is further

ORDERED that plaintiffs shall serve a copy of this Order with Notice of Entry on defendants within seven (7) days of entry; and it is further

ORDERED that the parties are directed to appear for a conference in the Compliance Part,

Courtroom 800, on September 26, 2019 at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
August 16, 2019



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

TO:

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To all counsel via NYSCEF

CC: Compliance Part Clerk