Diaz v Combe Inc.
2019 NY Slip Op 34217(U)
May 16, 2019
Supreme Court, Westchester County
Docket Number: 59242/2018
Judge: Joan B. Lefkowitz
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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: May 13, 2019
Seq. No. 3

COMBE INCORPORATED and COMBE PRODUCTS, INC.,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order 1) striking defendants' answer or; compelling defendants to a) produce the testimony and exhibits from prior lawsuits involving Just For Men®; b) produce a copy of the complaint from each prior lawsuit alleging injuries from Just For Men®; c) produce a copy of consumer claims and notices asserting that Just For Men® injured a user of the product; and d) fully answer Interrogatory Number 6 by identifying the information requested by plaintiffs about other lawsuits alleging that Just For Men® injured a person who used the product; and for such other relief as this court may deem just and proper. Defendants oppose the motion.

Order to Show Cause - Affirmation in Support - Memorandum of Law in Support-Exhibits A - E
Affirmation in Opposition - Exhibit A

Upon the foregoing papers and the proceedings held on May 13, 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 appeared multiple times for compliance conferences thereafter. The parties appeared for a

compliance conference on April 5, 2019 wherein plaintiffs were provided with a discovery motion briefing schedule for the present motion.

Contentions of the Parties:

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. Plaintiffs allege that defendants have been sued numerous times by others who have been injured by their product. Plaintiffs further aver, *inter alia*, that defendants have settled claims by others who did not sue, but who complained that the product injured them. Plaintiffs allege that defendants have refused to produce information related to these prior complaints, claims and lawsuits despite plaintiffs' good faith attempts to meet and confer and resolve these issues. Specifically, plaintiffs are seeking to have defendants identify all prior lawsuits involving claims wherein a consumer alleges injuries from using Just for Men®, to produce copies of all letters, notices and other documents from consumers where defendants were notified that a consumer was injured after using Just for Men® and for defendants to produce copies of testimony given by defendants in prior Just for Men® lawsuits. Plaintiffs assert that defendants' counsel has confirmed that Dr. Rao and two or three other representatives of defendants have testified in those cases.

In opposition, defendants argue that they have not violated the Court's discovery orders as alleged by plaintiffs in their papers in support of this motion. Accordingly, defendants assert that striking their answer is not warranted, as all prior discovery disputes between the parties were previously resolved. Defendants also allege that they have asserted valid objections to plaintiffs' discovery demands which they contend have been overly broad. This current dispute involves prior lawsuits, prior testimony and prior complaints of incidents involving the subject product and defendants submit that there is no court order directing them to produce any such documents. Defendants further argue that plaintiffs' discovery demands seek sets of documents which are unlimited both as to content and time. In response to plaintiffs' demands, defendants aver that they initially produced all prior complaints for years 2015 through 2017, which defendants assert is a reasonable time- frame. After a meet and confer session with plaintiffs' counsel on February 14, 2019, defense counsel states that the parties agreed to enlarge the scope of documents to also encompass years 2013 and 2014. Defense counsel asserts that on February 28, 2019, defendants served a supplemental document production and in total they have produced 11,137 documents responsive to plaintiffs' demands. Defendants submit that despite the parties' agreement, plaintiffs have now unilaterally decided to remove the agreed upon temporal scope.

In response to plaintiffs' demands for prior consumer complaints, prior testimony and copies of the complaints from prior lawsuits, defendants state they have produced docket numbers of prior lawsuits from 2013 to the present and trend reports relating to prior incidents and complaints they received from 2013 to the present. Additionally, defendants proffer that plaintiffs have all the information necessary to retrieve any documents that are publicly available from the courts where the suits were filed. As to prior consumer complaints, defendants allege they have specifically produced trend reports for the time frame that the parties agreed upon, which demonstrate a history

of individual complaints made against defendants. Defendants argue that plaintiffs have not set forth how the discovery that defendants have provided to date is insufficient. Defendants also argue that plaintiffs have not set forth why they would be entitled to the deposition transcripts of defendants' witnesses from other litigation. Moreover, defendants submit that plaintiffs' demands have been unduly burdensome and overly broad. Based upon these arguments, defendants assert that any additional documents plaintiffs now seek are beyond the scope of this suit and their motion should be denied.

At oral argument, plaintiffs' counsel states that he is satisfied with receiving only the captions and docket numbers of other similar lawsuits from January 2013 to 2017. Plaintiffs' counsel also states that he has learned that there is only one similar case where Dr. Rao testified, as well as other defendants' witnesses, and he wants copies of the deposition testimony of those witnesses and copies of the deposition exhibits regardless of the year that case was filed. In response, defendants' counsel states that he has no issue with providing copies of the deposition testimony of defendants' witnesses and exhibits from that case.

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]).

Through discovery a party may be required to provide only those items which are in the possession, custody or control of the party served. Such items must be preexisting and tangible to be subject to discovery and production. A party may not be compelled to provide information that does not exist or create new documents (*Orzech v Smith*, 12 AD3d 1150 [4th Dept., 2004]).

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. Defendants have agreed to and have provided the captions and docket numbers of all prior suits involving the subject product from 2013 to 2017. Defendants have also agreed, at oral argument, to provide plaintiffs with copies of the prior deposition testimony of Dr. Rao and other defendants' witnesses and exhibits from those depositions in the prior similar case that the parties discussed on the record.

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 prior deposition testimony is granted solely to the extent that on or before May 31, 2019, defendants shall produce copies of the prior deposition testimony of Dr. Rao and other defendants' witnesses and the deposition exhibits in the prior similar case where the witnesses testified as to the injuries caused by the Just For Men® product; and it is further

ORDERED that the remaining branches of plaintiffs' motion seeking to compel production of all complaints from each prior lawsuit alleging injuries from using Just For Men®, a copy of consumer claims and notices asserting that Just For Men® injured a user of the product and compelling defendants' to fully answer Interrogatory Number 6 by identifying the information requested by plaintiffs about other lawsuits alleging that Just For Men® injured a person who used

the product is denied as moot as plaintiffs have agreed to accept and defendants have produced the docket numbers and captions of prior similar lawsuits from 2013 to 2017 and trend reports relating to all prior incidents and complaints defendants received from 2013 to 2017; 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 June 4, 2019 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
May 16, 2019

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

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CC: Compliance Part Clerk