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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

DONALD MINASSIAN and ELAINE MINASSIAN,

Plaintiffs,

- against -

BRENNTAG NORTH AMERICA, *et al.*,

Defendants.

INDEX NO.	190399/2018
MOTION DATE	12/18/2019
MOTION SEQ. NO.	004
MOTION CAL. NO.	

The following papers, numbered 1 to 8 were read on Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion pursuant to CPLR §2214 and 22 NYCRR 130-1.1 for sanctions:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s (hereinafter individually "J&J" and "JCI," collectively as the "defendants") motion for sanctions pursuant to CPLR §2214 and 22 NYCRR 130-1.1, is granted to the extent of awarding defendants the reasonable costs and reasonable attorney fees for making this motion.

Plaintiffs commenced this action on October 18, 2018 alleging Donald Minassian, was exposed to asbestos in the defendants' talcum powder products (NYSCEF Doc. # 1). The Second Amended Complaint filed on November 27, 2018 was specifically amended to assert claims against the moving defendants (NYSCEF Doc. # 10). The Third Amended Complaint filed on March 21, 2019 asserted additional claims (NYSCEF Doc. # 44). Defendants filed their Answer to the Second Amended Complaint on December 19, 2018 (NYSCEF Doc. # 23). The parties proceeded with discovery before Special Master Shelley Olsen.

The defendants, with plaintiffs' consent, submitted a "Discovery Protective Order" that pursuant to CPLR §3103 applied to all discovery (Mot. Exh F). The proposed Order imposed confidentiality restrictions on the disclosure of discovery to specific individuals or entities. On March 18, 2019 this Court signed the "Discovery Protective Order" (Mot. Exh. G). Section 9, titled "Protected Documents in Depositions," subsection (b), states:

> "Parties (and deponents) may within thirty (30) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as Protected Documents. Until expiration of such thirty (30) day period, *the entire transcript, including exhibits, will be treated as subject to Protection under this Order.* If no party or deponent timely designates A transcript as a Protected Document, then none of the transcript or its exhibits will be treated as Protected Documents." (Emphasis Added) (Mot. Exh. G, pg. 9).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On December 18, 2018 Mr. Alex Gorsky, J&J's CEO and Chairman, appeared on Jim Cramer's CNBC show "Mad Money" and made public statements. On March 21, 2019 plaintiffs applied to the Special Master Shelley Olsen for leave, pursuant to CMO Section XI(E), to depose Mr. Gorsky based on the public statements he made on CNBC. Plaintiffs stated that the deposition was material and necessary because Mr. Gorsky held himself out as having unique knowledge regarding the safety of the defendants' talc products, that allegedly caused plaintiffs injuries; the testing of those products; the information produced to government regulators; and the ability to recall products prior to plaintiffs exposure.

Plaintiffs conceded that there had been a significant exchange of discovery in their case but argued that they had not obtained discovery covering all of Mr. Gorsky's representations (Mot. Exh. C). On March 29, 2019 the defendants sent a letter to Special Master Olsen objecting to the discovery sought from Mr. Gorsky, arguing that as a high-level executive he did not have any unique personal knowledge and that the statements made on CNBC were insufficient to force his deposition (Mot. Exh. D). The parties submitted documentation and argued to the Special Master in support of their respective positions.

On June 4, 2019 Special Master Shelley Olsen issued a recommendation in plaintiff's favor stating: "Notwithstanding J&J's position that 'Plaintiffs' reply grossly mischaracterizes and/or obfuscates the facts relevant to the analysis of this issue' (4/3 email by Thomas Kurland), I am ruling in Plaintiffs' favor, for the reasons stated in that very same April 3, 2019 e-mail reply letter (by plaintiffs)."

Defendants under Motion Sequence 001, appealed and moved for an Order vacating Special Master Olsen's June 4, 2019 Recommendation allowing plaintiffs to depose Alex Gorsky, alternatively, defendants sought a modification of the notice of deposition setting parameters on Mr. Gorsky's testimony. The July 18, 2019 Decision and Order of this Court affirmed Special Master Olsen's recommendation, limited the deposition of Mr. Gorsky to the items mentioned in his December 18, 2018 CNBC interview and to the periods relevant to plaintiff Donald Minassian's alleged exposure (Mot. Exh. E).

On October 3, 2019 plaintiffs conducted Mr. Gorsky's videotaped deposition (Mot. Exh. I). Plaintiffs' counsel served five additional notices of deposition dated October 11, 2019 for defendants' employees (Mot. Exh. L). On October 17, 2019 the Court Reporter forwarded a copy of the deposition transcript to the defendants (Mot. Exh. H).

Plaintiffs' attorneys provided Reuters with a copy of the written transcript and videotape, after it was allegedly requested, before the expiration of the thirty days. On October 22, 2019 Reuters published an on-line article titled "Johnson & Johnson CEO testified Baby Powder was safe 13 days before FDA bombshell." The article includes written excerpts and videotaped segments from Mr. Gorsky's deposition (Mot. Exh. J). On October 23, 2019 Plaintiffs' attorneys posted a reference to the Reuters' article, with a link, on its law firm website (Mot. Exh. K).

Defendants' motion seeks injunctive and monetary sanctions pursuant to CPLR §2214 and 22 NYCRR 130-1.1 for plaintiffs' attorneys breach of the confidentiality provisions of the "Discovery Protective Order."

Defendants are seeking injunctive relief preventing the depositions of employees, requested in the October 11, 2019 notices of deposition, from going forward. Defendants state that the plaintiffs made an application to Special Master Olsen to conduct the depositions over their objection. They state that the application was pending at the time this motion was filed. Defendants argue that although the matter is before Special Master Olsen, they are properly seeking separate injunctive relief as a sanction to prevent the plaintiffs from obtaining any

further discovery that is not included in the Case Management Order (CMO). They state that in seeking the five additional depositions, plaintiffs' counsel is conceding that Mr. Gorsky lacked personal knowledge, and is acting in bad-faith by seeking duplicative testimony that will be used to embarrass the defendants.

In New York City Asbestos Litigation ("NYCAL") the CMO states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring the parties comply with discovery, and as a result, recommends rulings on all discovery disputes (Ames v A.O. Smith Water Products, et al., 66 AD3d 600, 887 NYS2d 580 [1st Dept. 2009]). Pursuant to CMO Section III(C), to the extent defendants are unhappy with the Special Master's recommendations they can file an appeal with this Court.

Defendants have filed objections with Special Master Olsen to plaintiffs' application for the additional depositions. Special Master Olsen's decision on the application was pending as of November 19, 2019, when defendants made this motion. Defendants have proceeded before Special Master Olsen on the issue of whether plaintiffs are entitled to additional depositions and may not circumvent her determination or the appeal process by re-labeling their arguments as seeking sanctions. Special Master Olsen was also present at Mr. Gorsky's deposition and knows if the discovery currently sought by plaintiffs is appropriate. Defendants are seeking a broad injunctive sanction affecting discovery that is properly resolved by Special Master Olsen (see Barber v. Ford Motor Co., 250 AD 2d 552, 673 NYS 2d 642 [1st Dept. 1998]).

Defendants reference to Seaman v. Wyckoff Hgts. Med. Ctr., Inc., 8 Misc. 3d 628, 798 NYS 2d 866 [Sup. Ct., Nassau County, 2005], is unavailing. That case is distinguishable. In that case the plaintiff's attorneys notified the press of the location and time of the deposition so that it could be present to interview the witness and provided the press with a videotape copy of the deposition. The Court prohibited the dissemination of information to the press or anyone other than those working on the case, but the parties were not prohibited from proceeding with discovery. In this case plaintiffs' counsel provided a transcript and videotape to the press, days after the deposition, and the defendants are seeking to prevent further depositions, a more extreme sanction than omitting the press from the proceedings.

Defendants also seek the imposition of financial sanctions for the costs of making this motion, including attorney fees and the imposition of an additional financial penalty, in this Court's discretion, to punish plaintiffs' counsel for their bad faith discovery violations. They claim that plaintiffs' counsel willfully and intentionally failed to wait the thirty (30) days after Mr. Gorsky's deposition as required by the confidentiality provisions, and specifically Section 9(b) of the "Discovery Protective Order," before publicly disseminating the video and deposition transcript. Defendants argue that their inability to review the transcript to determine whether any pages should be designated as protected documents, resulted in plaintiffs' counsel's sanctionable violation of the March 18, 2019 "Discovery Protective Order" signed by this Court. They also argue that plaintiffs' counsel should be sanctioned as a deterrent for the frivolous behavior of abusing the discovery process to harass instead of advancing plaintiffs' claims.

Plaintiffs in opposition argue that sanctions are not appropriate because section 9 of the "Discovery Protective Order" is titled "Protected Documents in Depositions" and only applies to exhibit documents identified by the defendants as confidential and used at the deposition. They claim that since the documents used at the deposition were not confidential, the transcript and videotape were not subject to the terms "Discovery Protective Order" and could be exchanged.

Section 9 of the "Discovery Protective Order" has two parts and although designated as "Protected Documents in Depositions" it has specific language under subsection (b) deeming the transcripts in their entirety, "including exhibits," as subject to a protective order during the thirty day period after the deposition (Mot. Exh. G, pg. 9). Plaintiffs reference to the title of the subsection, is unavailing, because the language of section 9(b) is specific and unambiguous and imposes an obligation on them to not disseminate Mr. Gorsky's transcript publicly (see Trump Village Section 3, Inc. v. New York State Housing Finance Agency, 292 AD 2d 156, 739 NYS 2d 37 [1st Dept. 2002] and Jones Apparel Group, Inc. v. Polo Ralph Lauren Corp., 16 AD 3d 279, 791 NYS 2d 409 [1st Dept. 2005]).

Alternatively, plaintiffs argue that the preliminary stipulation entered into by the parties before the deposition began waived the language in section 9(b) of the "Discovery Protective Order." They specifically refer to the language:

> "IT IS HEREBY STIPULATED, by and between the attorneys for the respective parties hereto, *that filing, sealing and certification of the within Examination Before trial be waived*; that all objections, except as to form are reserved to the time of trial." (Emphasis Added) (Opp. Exh. AG, pg. 4)

This language is part of a standard stipulation used at all depositions, and the waiver of "sealing" does not waive confidentiality or a protective order. The waiver language applies to relieving the Court Reporter of the requirement of having to "securely seal the deposition in an envelope endorsed with the title of the action and the index number of the action...and promptly file it with, or send it by registered or certified mail to the clerk of the court where the case is to be tried." The stenographer or an officer is required to certify that the transcript of the deposition is accurate and the witness was duly sworn, otherwise it can limit a party's use of the transcript (See CPLR 3116(b) and McKinneys Consolidated Laws of New York Annotated - Professor Patrick M. Conners Practice Commentaries C3116:3 "Officer's Obligations").

Frivolity as defined by 22 NYCRR 130-1.1 involves conduct that is, "(1) completely without merit in law and cannot be supprted by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intern., Inc., 94 A.D. 3d 580, 942 N.Y.S. 2d 497 [1st Dept. 2012]). Sanctions may be imposed to avoid future conduct that would waste judicial resources, to deter vexatious conduct, and based on dilatory or malicious litigation tactics (Levy v. Carol Management Corp., 260 A.D. 2d 27, 698 N.Y.S. 2d 226 [1st Dept., 1999]).

Plaintiffs' counsel's behavior in providing the deposition transcript to Reuters prior to the expiration of the thirty days as required by section 9(b) of the "Discovery Protection Order" was not appropriate. Their handing the deposition videotape and transcript to the press, allegedly because Reuters requested it, and publishing a link on their website before the defendants could review and seek protection of any sections was frivolous and done to harass the defendants. Defendants are entitled to sanctions in the form of the reasonable costs of making this motion, including defendants' reasonable attorneys fees. The imposition of additional sanctions is not warranted.

Accordingly, it is ORDERED that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s motion for sanctions pursuant to CPLR §2214 and 22 NYCRR 130-1.1, is granted, and it is further,

ORDERED that plaintiffs' attorneys have violated a Court sanctioned "Discovery Protective Order," and it is further,

ORDERED that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc., are entitled to the reasonable costs, including reasonable attorneys fees for the making of this motion, and it is further,

ORDERED that this matter is referred to a Special Referee or Judicial Hearing Officer who is directed to hear and report on the reasonable costs including reasonable attorney fees, for making this motion, and it is further,

ORDERED that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. serve a copy of this Order with Notice of Entry pursuant to e-filing protocol upon the Trial Support Clerk and upon the Special Referee Clerk at SPREF@nycourts.gov together with the Special Referee Information sheet obtained from the nycourts.gov website, who are directed to place this matter on the Calendar of the Special Referee's Part at the earliest convenient date, for a hearing to determine reasonable costs, including reasonable attorney fees, for making this motion, and it is further,

ORDERED that the Special Referee or Judicial Hearing Officer is to hear and report pursuant to the accompanying Order of Reference, a final determination on this Motion shall be rendered upon receipt of a report from the special referee, and it is further,

ORDERED, that the remainder of the relief sought in this motion, is denied.

ENTER:

Dated: January 14, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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