Minassian v Brentag N. Am.
2020 NY Slip Op 31031(U)
April 20, 2020
Supreme Court, New York County
Docket Number: 190399/2018
Judge: Manuel J. Mendez

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

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

IN RE: NEW YORK CITY ASBESTOS LITIGATION

DONALD MINASSIAN and ELAINE MINASSIAN,

Plaintiffs,

-against-

BRENTAG NORTH AMERICA, et al.,

Defendants.

INDEX NO. 190399/2018
MOTION DATE 04/01/2020
MOTION SEQ. NO. 008
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to reverse the Special Master's recommendation:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 5
Answering Affidavits — Exhibits	6 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Kolmar Laboratories Inc.'s motion to reverse the Special Master's recommendation, is denied.

Plaintiff, Donald Minassian, was diagnosed with mesothelioma on March 22, 2017 (NYSCEF Doc. No. 2). Plaintiffs allege that he was exposed to asbestos in part through the frequent use of talcum powder products that were manufactured by Kolmar Laboratories, Inc. (hereinafter referred to as "defendant) - including Johnson's Baby Powder- from about 1948 through 2005 (Mot. Exhibits A and D). Plaintiffs commenced this action on October 18, 2018. The Summons and Complaint were subsequently amended on November 27, 2018, and March 21, 2019. Defendant was added as a party when the Summons and Complaint were amended on March 21, 2019 (NYSCEF Doc. No. 1 and Mot. Exhibit B). Defendant served an "Acknowledgement of Service and Standard Verified Answer (Mot. Exhibit C).

The parties proceeded with discovery, and plaintiffs responded to defendant's demand for interrogatories on December 5, 2018 (Mot. Exhibit D). Defendant claims that on October 14, 2019 it responded to plaintiffs' "First Standard Set of Liability Interrogatories and Requests for Production of Documents of Defendant Kolmar Laboratories, Inc." (Mot. Exhibit E). Plaintiffs claim they did not receive defendant's responses until January 9, 2020, after an e-mail was sent to defense counsel seeking the missing responses (Opp. Exhibit 4). On January 27, 2020 plaintiffs served their

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

"Supplemental Interrogatories and Requests for Production of Documents [on] Defendant Kolmar Laboratories, Inc." (hereinafter "supplemental discovery") which had ten interrogatories and twelve discovery requests (Opp. Exhibit 8). On February 12, 2020 defendant served responses to plaintiffs' supplemental discovery (Opp. Exhibit 13). Defendant noticed the deposition of a corporate representative, Robert Edmonds, to be conducted on February 27, 2020 (Opp. Exhibit 12).

On February 21, 2020 plaintiffs sent an e-mail to Special Master Olsen stating that pursuant to Case Management Order (CMO) § III (C) they required assistance "to compel Defendant Kolmar Laboratories, Inc. to respond fully to Supplemental Interrogatories and Supplemental Document Requests." Plaintiffs attached a letter dated February 21, 2020 to the email sent Special Master Shelley Olsen, which stated that the supplemental discovery responses were "boilerplate objections" and that defendant "object[ed] to this demand as overbroad, unduly burdensome," or inappropriately asserted "attorney work product privilege". Plaintiffs argued that defendant's boilerplate assertions of "unduly burdensome" violated CMO §IX(J) which requires that objections be stated with particularity. Plaintiffs further argued that the defendant's assertion of "attorney work product privilege" violated CMO §IX(Q) requiring objections conform to CPLR §3122(b) (Mot. Exhibit A and Opp. Exhibit 14).

On February 24, 2020 defendant responded by e-mail stating that the plaintiffs' supplemental demands were served without first seeking permission from Special Master Olsen and therefore "a nullity." Defendant stated that the first discovery responses were served in the fall of 2019 (October 14, 2019) and plaintiffs did not object to them. Defendant stated that there were no supplemental demands served prior to the commencement of corporate deposition testimony of Ronald Yakupcin, who was deposed on January 23 and 24, 2020, and the supplemental discovery sought by plaintiffs was untimely. Defendant claimed that Johnson and Johnson had provided some of the discovery sought by plaintiffs and the supplemental demands were not "specifically tailored" and beyond the scope of this action. Defendant concluded by stating that "This improper and improperly requested discovery is not a reason to delay this deposition and we should go forward as scheduled." (Mot. Exhibit A and Opp. Exhibit 16).

On February 24, 2020 plaintiffs responded by stating that the responses to their supplemental demands were the reason for the application and that "To the extent that Kolmar now retroactively argues that they should not have answered the discovery…it is clear that any such argument has been waived." Plaintiffs stated that to the extent there were any objections related to discovery received from a co-defendant (i.e. Johnson & Johnson) that was of no moment, that they needed discovery from the defendant and could not go into the February 27, 2020 deposition without it (Mot. Exhibit A).

Defendant objected stating that the requests are "violative of the CMO." Plaintiffs stated that Special Master Olsen was in a position to deem the supplemental discovery served and the real issue was whether there was need for discovery before the defendant's corporate deposition (Mot. Exhibit A and Opp. Exhibit 17).

On February 24, 2020 Special Master Olsen rendered a ruling that stated, "If Kolmar needs to produce its corporate representative on February 27 for any other cases, they may do so. With respect to this matter, it appears that responses were not sufficient for pre-PMK discovery. Let's meet at JAMS on Friday to go over these answers." (Mot. Exhibit A and Opp. Exhibit 17).

On February 26, 2020 plaintiffs sent an e-mail seeking to confirm the discovery meeting at JAMS. Special Master Olsen sent an e-mail to the defendant to determine their position about the meeting at JAMS. Defendant responded that the meeting should not go forward since they were in the process of appealing the Special Master's recommendation (Mot. Exhibit A and Opp. Exhibit 18).

Defendant now moves for an Order pursuant to CMO § III (C) reversing Special Master Olsen's February 24, 2020 recommendation that the defendant's responses to plaintiffs' "Supplemental Interrogatories and Requests for Production of Documents to Defendant Kolmar Laboratories, Inc." were not sufficient for pre-PMK discovery.

Defendant argues the plaintiffs' supplemental demands were "grossly improper" and there is no basis to supplement any of part of them. Defendant claims that because plaintiffs did not comply with CMO § IX (C) and CMO § IX (H), the supplemental discovery sought is "a nullity."

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]). CMO § III (C), specifically states in relevant part: "No motion to compel discovery shall be made without first seeking the assistance of the Special Master. Any party objecting to a ruling by the Special Master shall notify by email the Special Master and *all other interested parties* within three days of receiving the Special Master's ruling..."(emphasis added). The Special Master's recommendations are appealable to this court.

Pursuant to CMO § III (C), the Special Master has authority to determine whether the defendant is required to respond to plaintiffs' Supplemental Interrogatories and Requests for Production of Documents which were served on Kolmar Laboratories, Inc. CMO § IX (C) permits the plaintiffs to serve supplemental interrogatories. "upon good cause shown and approval of the Special Master, a defendant shall respond to any supplemental interrogatories per the CPLR." CMO § IX (H) states in relevant part... "after a defendant responds to the standard set of document requests, plaintiff may serve supplemental, non-repetitive document requests, upon good cause shown and approval of the Special Master."

Special Master Olsen's February 24, 2020 recommendation approved the plaintiffs' service of Supplemental Interrogatories and Requests for Production of Documents on Kolmar Laboratories, Inc. Special Master Olsen had authority under the CMO and properly determined that the plaintiffs' supplemental demands were not "a nullity," because the defendant waived objections to the service of supplemental discovery by answering.

Defendant argues that Special Master Olsen incorrectly determined that their responses to plaintiffs' supplemental discovery were not sufficient for pre-PMK discovery. Defendant states that plaintiffs' supplemental demands are overly broad because: they are not limited in time and scope; seek third-party confidential and proprietary information, specifically that pertaining to Johnson and Johnson and/or Windsor Minerals; and seek information that is irrelevant to the claims asserted in this action. Defendant argues that plaintiffs' overbroad supplemental discovery warrants that this Court issue a protective order. Defendant specifically identifies plaintiffs' requests 3, 4 and 5 as having no temporal limitation, and requests 7 and 12 seek confidential, proprietary or irrelevant information.

Plaintiffs in opposition argue that defendant's supplemental discovery responses consist of boilerplate assertions that violate CMO §IX(J) and CPLR §3101which requires that objections be stated with particularity. They argue the assertions of "attorney work product privilege" violates CMO §IX(Q) requiring objections conform to CPLR §3122(b). Plaintiffs further argue that Special Master Olsen correctly determined that the overbroad statements and inappropriate assertions of privilege prevented the ability to obtain relevant evidence before the February 27, 2020 deposition, therefore this motion should be denied.

CPLR §3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." It is within the court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence. The words "material and necessary" are to be interpreted liberally and applied to requested disclosure of any facts bearing on the controversy and assists in trial preparation (Roman Catholic Church of the Good Shepherd v Tempco Systems, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994] and Allen v. Crowell-Collier Publ. Co., 21 NY 2d 235 NE 2d 430, 288 N.Y.S. 2d 449 [1968]). Disclosure can be compelled in certain limited circumstances where generalized phrases in discovery demands may relate to specific subject matter so that there is ready identification of the particular discovery to be produced (Mandelowitz v. Xerox Corp., 169 AD 2d 300, 573 NYS 2d 548 [1st Dept. 1991]). Evidence concerning the issues of notice and causation are not given weight when applied to discovery. The applicable standard is whether plaintiff's demands may lead to relevant evidence (Matter of Steam Pipe Explosion at 41st St. & Lexington Ave., 127 AD3d 554, 8 NYS3d 88 [1st Dept. 2015]).

CMO §IX(J) titled "Burdensomeness" states in relevant part, "Objections to discovery based on burdensomeness shall describe the burden with reasonable particularity."

Special Master Olsen reasonably determined that the objections as stated in the supplemental responses were not reasonably particularized as required under CMO §IX(J) and sought a meeting at JAMS "to go over the responses." Defendant's objections are not sufficiently particularized. They only state that the interrogatories and demands are "overbroad, unduly burdensome, not reasonably particularized, and not in compliance with the NYCAL Case Management Order." Furthermore, Defendant did not give the Special Master an opportunity to determine the merit of responses to individual

supplemental interrogatories and demands, or whether limitations could be imposed regardless of whether the demands are generally worded. Defendant only stated specific and detailed objections to individual demands for the first time on this motion. To the extent Special Master Olsen only generally addressed defendant's responses to the supplemental discovery, finding that they appeared to be insufficient, her determination was proper.

Alternatively, boilerplate objections that are "purely conclusory and devoid of reason should be stricken" (Anonymous v. High School for Environmental Studies, 32 AD 3d 353, 820 NYS 2d 573 [1st Dept. 2006]). Defendant's responses to plaintiffs' supplemental discovery were boilerplate and conclusory, plaintiffs have stated a need for the discovery to obtain information relevant to their case, warranting the Special Master's ruling that defendant should provide responses.

CMO §IX(Q) titled "Discovery Disputes" states in relevant part, "Objections based on privilege shall conform with the requirements of CPLR §3122(b). If not so identified, the privilege is deemed waived."

CPLR §3122(b) requires a privilege log providing notice to the party seeking discovery, and specifically requires that the party withholding disclosure state: "(1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum" (McKinney's Consolidated Laws of New York Annotated, CPLR §3122(b), and Anonymous v. High School for Environmental Studies, 32 AD 3d 353, supra at pg. 359).

The Special Master properly determined that in asserting "attorney work-product privilege" the defendant did not comply with CMO §IX(Q) and did not provide a privilege log, resulting in waiver of the asserted privilege under the terms of the CMO. Defendant did not provide plaintiffs with proper notice, or specifically state the basis for declaring "attorney work-product privilege" for the discovery sought. Special Master Olsen sought to "go over" the defendant's responses but was not provided with the opportunity to do so. Defendant has not stated a basis to reverse the February 24, 2020 recommendation of Special Master Olsen under the CMO.

Additionally, CPLR §3101(c) permits an exception to discovery for attorney's work product privilege. The burden of establishing a right to protection under this provision is with the party asserting it - the protection must be narrowly construed and its application must be consistent with the purposes underlying the immunity" (Forman v. Henkin, 30 NY 3d 656, 93 NE 3d 882, 70 NYS 3d 157 [2018] citing to Spectrum Systems Intern. Corp. v. Chemical Bank, 78 NY2d 371, 581 NE 2d 1055, 575 NYS 2d 809 [1991]). Attorney work product is limited to "documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy" (In re New York City Asbestos Litigation, 109 AD 3d 7, 966 NYS 2d 420 [1st Dept. 2013] citing to Brooklyn Union Gas Co. v. America Home Assurance Co., 23 AD 3d 190, 803 NYS 2d 532 [1st Dept. 2005]).

Defendant objected to the supplemental interrogatories 2,3 and 4 stating they were "overbroad, unduly burdensome, not reasonably particularized, not in compliance with the NYCAL Case Management Order, and subject to attorney work-product privilege." Defendant only asserted "attorney work-product privilege" for all the supplemental discovery that sought materials concerning defendant's relationship with Windsor Minerals and/or Johnson & Johnson. Defendant argues that this discovery seeks the co-defendants' proprietary material but does not provide any reason for this material to be subject to attorney work-product privilege. The improper assertion of attorney work-product privilege warrants a determination that the material sought is not privileged, and denial by this Court of defendant's application for a protective order, or that the plaintiffs provide a privilege log (Gottwald v. Sebert, 172 AD 3d 445,99 NYS 3d 295 [1st Dept. 2019] citing to Anonymous v. High School for Environmental Studies, 32 AD 3d 353, supra).

Special Master Olsen's February 24, 2020 recommendation properly determined that the responses defendant provided to plaintiffs' supplemental discovery were insufficient. Defendant did not identify specific demands or interrogatories, nor did it provide the Special Master with a detailed explanation of what was objectionable as privileged. Identifying specific supplemental interrogatory and demands as objectionable for the first time in this motion, warrants denial of defendant's motion for an order reversing the Special Master's recommendation or for a protective order.

Accordingly, it is ORDERED, that defendant Kolmar Laboratories Inc.'s motion to reverse the Special Master's recommendation is denied, and it is further,

ORDERED that Special Master Shelley Olsen's December 29, 2019 Recommendation is confirmed.

ENTER:

Dated: April 20, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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