

Laise v A.O. Smith Water Prods. Co.
2020 NY Slip Op 34327(U)
December 29, 2020
Supreme Court, New York County
Docket Number: 190094/2019
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART

IAS MOTION 13

Justice

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LUIGI LAISE,

Plaintiff,

- v -

INDEX NO. 190094/2019

MOTION DATE 10/22/2020

MOTION SEQ. NO. 004

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., AMERICAN BILTRITE INC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORP., BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CBS CORP., F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORP., F/K/A WESTINGHOUSE ELECTRIC CORP., CERTAINTTEED CORP., COMPUDYNE CORP., INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO, CROSBY VALVE LLC, DOMCO PRODUCTS TEXAS, INC, FLOWSERVE US, INC., SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FORT KENT HOLDINGS, INC., FORMERLY KNOWN AS DUNHAM-BUSH, INC, GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, IMO INDUSTRIES, INC., ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, KAISER GYPSUM COMPANY, INC., KEELER-DORR-OLIVER BOILER COMPANY, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, SLANT/FIN CORP., U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORP., WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, DAP, INC.,

Defendant.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 205, 208

were read on this motion to/for

DISCOVERY

Upon the foregoing documents, and after oral arguments held by the Court on October 22, 2020, it is hereby ordered that defendant American Biltrite's order to show cause appealing the Special Master's ruling of August 2, 2020, which denied such defendant's request to conduct a deposition of plaintiff Luigi Laise, is denied.

The Court notes that in the NYCAL litigation, the Special Master supervises discovery such as the adequacy of discovery responses, production of documents, the completion of depositions, and other discovery disputes that may arise.

Here, a discovery dispute arose regarding a deposition of plaintiff requested by defendant American Biltrite. After an initial misunderstanding, both sides were provided with an opportunity to provide documents to support their arguments for and against a deposition of plaintiff. By ruling of August 2, 2020, the Special Mater denied the deposition. Thereafter, defendant American Biltrite timely moved to vacate such ruling. According to moving defendant, it has a constitutional right to depose plaintiff Luigi Laise, and that the Special Master erred in determining that the deposition of plaintiff's son was sufficient. Plaintiff opposes.

Here, defendant American Biltrite argues that plaintiff is physically and mentally capable of appearing for a deposition, that there are reasonable steps that could be taken to appease plaintiff's treating physicians, that plaintiff's medical records contradict plaintiff's physician's claims that he is not capable of participating in the instant litigation, and that plaintiff failed to comply with exhibit B of the Case Management Order dated June 20, 2017 (hereinafter referred to as the "CMO") by providing only one co-worker for a deposition. In support, defendant

American Biltrite proffers, *inter alia*, the deposition transcript of Maurizio Laise, plaintiff's son and co-worker, as well as the medical records of Dr. Myung-Ho Lee and Dr. Jarett Feldman.

Plaintiff opposes the instant motion arguing that the Special Master's determination was correct and should stand. Plaintiff argues that, as per the letters from Dr. Lee, plaintiff's treating physician, plaintiff is not capable of participating in the instant litigation.

After oral arguments, the Court hereby affirms the Special Master's August 2, 2020 ruling. The CMO is clear that "[d]epositions of fact witnesses by defendants shall be limited to plaintiff...and up to four co-workers...[and] any family member who can provide product identification information may be deposed by a defendant". CMO, XI. D. Notably, the main text of the CMO is silent as to the minimum amount of co-workers plaintiff must provide for deposition should plaintiff be unable to sit for a deposition. Instead, moving defendant focuses its argument on exhibit B of the CMO which states that "[i]f plaintiff is unable to testify due to physical illness, mental impairment or death, plaintiff will produce two co-workers for deposition no later than seven days after this date." Notice of Motion, Exh. P. CMO, Exh. B., Model Discovery Schedule Accelerated Trial Clusters, p. 1.

Preliminarily, the Court notes that moving defendant's argument regarding Exh. B of the CMO fails. While the CMO states that "[t]he discovery order applicable to each Accelerated Trial Cluster will be based on the timeline contained in the model discovery order annexed hereto as Exhibit B", the CMO explicitly states, that "[e]ach case in an Accelerated Trial Cluster will be prepared strictly in accordance with the discovery order prepared by the Special Master." CMO, XV. D. Thus, although the model discovery order proposes that two co-workers be produced for deposition, the plain language of the CMO is clear that all discovery, including the sample discovery in the model discovery order, will be prepared in accordance with discovery

ordered by the Special Master. Here, the Special Master has made clear in her August 2nd ruling that a deposition of plaintiff was not necessary and that the deposition of plaintiff's son and co-worker, Maurizio Laise, was sufficient. Thus, plaintiff has complied with the CMO.

With regards to moving defendant's argument that plaintiff is physically and mentally capable of sitting for a deposition, the Special Master correctly determined that defendant failed to establish this allegation. In support of the instant motion, defendant American Biltrite proffers, *inter alia*, Maurizio Laise's deposition transcript as well as plaintiff's own medical records. Notably, Maurizio Laise testified that he lives with his father and speaks to him in Italian "here and there" because they live together, that plaintiff can use words to express ideas, and that he speaks to plaintiff daily. *See* Order to Show Cause, Exh. M, EBT Tr. of Maurizio Laise, p. 562, ln. 1-21. Defendant American Biltrite relies on this general testimony to support its notion that plaintiff is mentally capable of participating in a deposition despite the clear language of the letters from plaintiff's physician to the contrary. The testimony of Maurizio Laise fails to establish how casual conversation "here and there" with your elderly father, with whom you live, would somehow demonstrate that plaintiff is mentally capable of sitting for hours of questioning. Notably, such testimony does not provide any information as to how long plaintiff is capable of speaking, how long Maurizio Laise speaks to his father on a daily basis or in one sitting, or the level of intellectual rigor of their conversations. Aside from generally testifying that he speaks to his father "here and there" daily because they live together, no other details are provided.

This also holds true for defendant American Biltrite's argument that plaintiff is physically capable of appearing for a deposition. Moving defendant relies, again, on the deposition transcript of Maurizio Laise who testifies that plaintiff goes to doctors' appointments as well as plants and harvests vegetables. *See id.* at p. 562, ln. 22 – p. 563, ln. 16. Somehow, defendant

American Biltrite equates plaintiff's ability to go to doctor's appointments and plant vegetables with the ability to physically sit for a deposition. Of note, Maurizio Laise's testimony reveals that plaintiff "stays in the patio" and plants vegetables. *Id.* He never states that plaintiff has a garden. Rather, he testified that it is "just a little thing. [Plaintiff] grows vegetables, that's it, that's all he does." *Id.* He further testified that on any given day plaintiff works on the vegetables for "maybe twenty minutes, that's it." *Id.* Maurizio Laise further testified that plaintiff never leaves the house except for doctors' appointments. *See id.* Aside from working with the plants, Maurizio Laise testified that plaintiff "doesn't do anything else for recreation." *Id.* at p.563, ln. 20. Despite moving defendant's contentions, attending doctor's appointments and planting vegetables on the patio for maybe twenty minutes a day is a far cry from establishing a physical ability to participate in an ongoing lengthy litigation. Defendant American Biltrite has failed to provide any of its own no medical documentation to establish its contention that plaintiff is physically capable of participating in a deposition.

Finally, the Court finds that plaintiff's allegedly conflicting medical records are unpersuasive on this issue. Moving defendant relies heavily on the medical records of Dr. Jarrett Feldman, dated February 11, 2020, in which it states that plaintiff denied all symptoms from fevers and chills to shortness of breath and wheezing to vomiting and abdominal pain to back pain to heat or cold intolerance. *See* Order to Show Cause, Exh. O, Dr. Feldman's medical records dated February 11, 2020, p. 2. Moving defendant further emphasizes that Dr. Feldman reported that plaintiff was "[f]ull active able to carry on all pre-disease performance without restriction." *Id.* Notably, there is no mention of plaintiff's physical capabilities other than such statement that plaintiff is able to carry out his prior activities. Plaintiff was diagnosed with lung cancer in August 2018 when he was 80 years old. There is no indication that plaintiff was

physically capable of sitting through a deposition prior to his diagnosis of lung cancer or what his prior activities were. Furthermore, contrary to moving defendant's contention, plaintiff's medical records are not contradictory. The medical records of Dr. Myung-Ho Lee, dated February 10, 2020, are consistent with those of Dr. Feldman from the very next day in that Dr. Lee's medical records also reveal that plaintiff denied fevers and chills, shortness of breath, abdominal pain, and nausea. However, Dr. Lee's medical records explicitly state that plaintiff is "[r]elatively doing well. Weak/fatigue/malaise/decreased functional capacity." As plaintiff's medical records do not conflict, and further do not establish that plaintiff is physically capable of participating in the instant litigation, the Special Master correctly relied on the two letters written by Dr. Lee, dated February 26, 2020 and June 26, 2020, in which Dr. Lee's medical opinion is that plaintiff, "[d]ue to his underlying medical and psychological history [] is unable to endure any court proceedings". Order to Show Cause, Exh. I, Letter from Dr. Lee dated February 26, 2020. Thus, defendant American Biltrite's motion seeking a deposition of plaintiff Luigi Laise is denied and the Special Master's ruling prohibiting such deposition of plaintiff is affirmed.

Accordingly, it is

ORDERED that the Special Master's August 2, 2020 ruling is affirmed; and it is further

ORDERED that defendant American Biltrite's request for a deposition of plaintiff Luigi Laise is denied in its entirety.

This constitutes the Decision/Order of the Court.



ADAM SILVERA, J.S.C.

<u>12/29/2020</u>			
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE