

Dunne v Amchem Prods, Inc.
2020 NY Slip Op 34681(U)
January 29, 2020
Supreme Court, Westchester County
Docket Number: Index No. 53672/2019
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

-----X
THOMAS J. DUNNE and JANICE DUNNE,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 53672/2019

AMCHEM PRODUCTS, INC., et al

Seq No. 2

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendant, Ford Motor Company (hereinafter "Ford"), for a protective order pursuant to CPLR 3103 quashing plaintiffs' Notice to Take Videotaped Deposition dated August 23, 2019, and for such other and further relief as to this court may seem just and proper:

- Order to Show Cause - Affirmation in Support - Exhibits
- Memorandum of Law in Support
- Affirmation in Opposition - Exhibits
- Supplemental Affirmation in Support - Exhibits
- Affidavit of Service

Upon the foregoing papers and proceedings, this motion is determined as follows:

This is an action for personal injuries allegedly sustained by plaintiff Thomas J. Dunne (hereinafter "Dunne") as a result of his alleged exposure to asbestos from products manufactured, sold, and/or distributed by the defendants. Defendant, Ford Motor Company, seeks a protective order with respect to a notice of deposition and request for documents issued by plaintiffs.

A preliminary conference was held on April 2, 2019. Compliance conferences were held on May 10, 2019 and July 10, 2019. Dunne testified at a deposition on July 31, 2019 and August 1, 2019. The deposition of plaintiff Janice Dunne has not yet been held.

On August 23, 2019, plaintiffs' counsel served a notice to take the videotaped deposition (hereinafter the "notice"), noticing a deposition of the "person(s) designated by Ford as most knowledgeable regarding the subjects enumerated on plaintiffs' exhibit A attached to the notice." Ford objects to each and every demand made by plaintiffs and asserts a protective order is required because the information sought in the notice is unduly burdensome, overly broad, irrelevant to the pending action, privileged, and obtainable by less burdensome means. Ford

asserts that Westchester County should be guided by the guidelines set forth for asbestos litigation in New York County, although it is admitted that these guidelines are not binding here.

Specifically, Ford objects to the demands served by plaintiffs because it is argued that (1) the demands seek burdensome and irrelevant information about literally every Ford vehicle ever manufactured, and about asbestos-containing friction vehicle components which have no relation to the facts or claims in this case; (2) the demands are not narrowly tailored to the facts of this case; (3) the notice of deposition does not narrow the topics of testimony sufficiently to give Ford an opportunity to choose an appropriate witness; and (4) much of the information sought is duplicative of information already in the possession of plaintiffs' counsel and plaintiffs' counsel already has deposed a Ford representative on multiple occasions regarding non case-specific subjects.

In a supplemental affirmation submitted by Ford at the request of the court upon oral argument of this motion, counsel provides details of discovery provided by Ford in other actions in New York and other jurisdictions. The affirmation confirms that the documents sought in connection with the instant notice have not been provided to plaintiffs' counsel in connection with this litigation. Ford essentially argues that because the information is "out there" in other cases, Ford should be relieved of any responsibility to provide the information in this case.

In opposing the motion, plaintiffs argue that the notice directs Ford to produce for examination "the deposition of the person(s) designated by Ford Motor Company as most knowledgeable regarding the subjects enumerated on Exhibit A." Exhibit A, in turn, contains 17 individual subjects of testimony requesting case and site-specific, Westchester-centric information in the context of a general "person most knowledgeable" deposition notice.

Plaintiffs argue that the subpoena is proper in all respects, and is essentially identical to subpoenas plaintiffs previously have served upon corporate defendants without difficulty in preparation for trials throughout the state. Plaintiffs request that the court order Ford to immediately designate and produce the representative who possesses the greatest knowledge of the identified events and transactions. Plaintiffs submit Ford should not be allowed to continue avoiding its discovery obligations.

Plaintiffs contend that their subpoena duces tecum sufficiently identified the corporate witness to be designated by describing the narrowly-tailored issues relevant to this case and requesting to examine the individual with the greatest knowledge of those events surrounding Dunne's exposure. It is argued that the onus is on Ford to designate a witness with the most knowledge of those particular issues to testify on its behalf.

Plaintiffs further argue that Ford's motion improperly seeks to prematurely foreclose relevant and material non-repetitive discovery. It is submitted that plaintiffs are entitled to full CPLR 3101(a) discovery in Westchester County, and have not yet been able to take a Westchester rules-driven "person most knowledgeable" deposition of a Ford representative. Indeed, plaintiffs recount Ford's indication that it would oppose any attempt to depose a

corporate witness from the outset of this litigation.

Citing *Matter of Standard Fruit & S.S. Co. v Waterfront Com. of New York Harbor* (43 NY2d 11, 15-16 [1977]), plaintiffs argue that while a corporation to be examined may exercise its own discretion in identifying and designating an appropriate witness with the greatest knowledge of the material facts, it cannot simply decline to designate anyone. Were it otherwise, defendant corporations could continually avoid providing trial testimony, and even basic discovery, simply by claiming that none of its directors, officers, or employees possesses adequate knowledge to offer meaningful testimony. Plaintiffs submit that a corporate defendant must produce the individual it deems most knowledgeable regarding the subject matter at issue, and any deficiencies in that individual's testimony may then be addressed, if necessary, by the court (citing *U.S. Overseas Airlines v. Cox*, 283 AD 31, 32 [1st Dept. 1953]).

Plaintiffs assert that Ford's objection to categories 1 and 2 of the discovery sought in the notice as "overly broad and unduly burdensome" is without merit in light of Dunne's deposition testimony. Specifically, Dunne provided testimony concerning asbestos dust exposures from Ford component parts beyond "friction products" such as drum and disc brakes and clutches, including asbestos-containing engine gaskets, and exhaust gaskets and mufflers. When asked to identify specific vehicles by make and model year that he specifically recalled working on, Dunne provided a list including but not limited to a 1965 Ford Mustang, 1972 Gran Torino, 1967 Ford Galaxy, 1981 Lincoln Continental, 1963 Ford Pinto, and Ford E 150. In reply, Ford states "[b]y demanding information on vehicles and components which there is no evidence that Dunne was exposed to, Plaintiffs are placing an undue burden on Ford". To the contrary, plaintiffs submit that it is Ford who placed an undue burden on Dunne by asking a lifetime automotive mechanic to iterate each and every Ford vehicle he worked on over his multi-decade career in an attempt to artificially narrow and preclude plaintiffs' inquiry into its use of asbestos-containing component parts on all Ford motor vehicles Dunne encountered. In his deposition testimony, Dunne confirmed that he worked on "many, many Ford vehicles."

In light of this testimony, plaintiffs argue that Ford unfairly seeks to restrict categories of inquiry in a manner that is not in conformity with the testimony provided by Dunne. By way of example, and with regard to Ford's objecting that categories 3-6 of the notice do not seek "information regarding the sale, marketing and/or distribution of Ford vehicles or asbestos-containing friction vehicles to Thomas Dunne, or even exclusively to the Ford dealerships or automotive part retailers Dunne identified in his deposition", plaintiffs disagree and refer counsel to its discovery demand of May 9, 2019 containing this exact inquiry which, plaintiffs assert never was appropriately responded to by Ford.

Ford also objects to plaintiffs' request that the deponent be able to provide information on the topic of its manufacture and assembly of all Ford Motor Company vehicles and the initial installation of asbestos-containing products as beyond the scope of discovery, unreasonable, and misguided. Plaintiffs submit that Dunne provided detailed testimony of specific bases for his assertions that he performed work on Ford original asbestos-containing component parts including "assembly clips" he observed while performing brake replacements. He stated every

single brand of vehicle incorporated these clips, which necessarily had to be removed while performing the initial brake replacement on a vehicle.

As a further example, plaintiffs note Ford's objection to the notice's categories 5 and 6 to the extent Ford alleges that the categories have no relation to the time period plaintiffs claim Dunne was exposed to asbestos, or to the specific vehicles Dunne identified at his deposition. Plaintiffs disagree and assert that the notice's categories 5 and 6 apply to a general time period of 1965 to 2000, which, except for one Ford tow truck identified as a 1960 model, encompasses all specific Ford Model year vehicles identified by Dunne. Plaintiffs argue that defense counsel conflates Dunne's years of employment and exposure with dates of manufacture of the vehicles identified by Dunne. Plaintiffs assert counsel's statements also ignore testimony regarding automotive work performed at the family home in Valhalla, Westchester County, New York, with his father in years prior to his employment as a mechanic and mechanic's helper.

Analysis/Discussion

It is axiomatic that CPLR 3101(a) mandates "full disclosure of all matter material and necessary...." To effectuate this policy, CPLR 3101(a) must be liberally construed (*see Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 (1998); *Yoshida v Hsueb-Chih Chin*, 111 AD3d 704 [2d Dept 2013]). Underlying this mandate is "New York's policy of permitting 'open and far-reaching pretrial discovery'" (*Kavanagh*, 92 NY2d at 954, quoting *DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184, 193 [1992], *rear denied sub nom. Poole v Consolidated Rail Corp.*, 81 NY2d 835 [1993]). CPLR 3126 further vests the Court with broad discretion regarding the nature and severity of sanctions to impose upon a party that "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" or "frustrates the disclosure scheme" (*Kehl v Prefer*, 94 NY2d 118, 122 [1999]; *Zletz v Wetanson*, 67 NY2d 711, 713 [1986]; *see Ortega v City of New York*, 9 NY3d at 69, 76, 79 [2007]; *Berman v Szoilzinger*, 180 AD2d 612 [1st Dept 199]); *Brandi v Chan*, 151 AD2d 853, 854 [3d Dept 1989]).

The Court of Appeals and the Appellate Divisions have repeatedly admonished that "[t]he failure to comply with deadlines and provide good-faith responses to discovery demands 'impairs the efficient functioning of the courts and the adjudication of claims' (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012], quoting *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]; *see e.g., Sandcham Realty Corp. v Sonnenschine*, 246 AD2d 477 [1st Dept 1998]). The Court of Appeals "has repeatedly emphasized, [that] our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice" (*Gibbs*, 16 NY3d at 81). The Court of Appeals explained "[w]e have noted, repeatedly, that '[l]itigation cannot be conducted efficiently if deadlines are not taken seriously . . . [and] that disregard of deadlines should not and will not be tolerated'" (*Cadichon v Facelle*, 18 NY3d 230, 236 [2011], quoting *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5

NY3d 514, 521 [2005]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]).

Here, plaintiffs served its Notice to Take Videotaped Deposition on August 23, 2019. Pursuant to CPLR 3122(a), Ford was required to serve its objection to plaintiffs' subpoena duces tecum "[w]ithin twenty days of service," which was no later than September 12, 2019. Plaintiffs' deposition notice made clear that the deposition "will commence on the 2nd of October, 2019 at 10:00 a.m." Ford's protective order was filed on September 30, 2019, eighteen days late. Nevertheless, the court has considered the merits of Ford's application.

Upon consideration of the foregoing, the court has determined that the subpoena duces tecum at issue sufficiently identified the corporate witness to be designated by describing the particular narrowly-tailored issues relevant to this case and requesting to examine the individual with the greatest knowledge of those events surrounding Dunne's exposure. In addition, plaintiffs have demonstrated the necessity of taking a further deposition or depositions in this matter. The court is satisfied that the subjects contained in the notice are sufficiently narrowly tailored to the issues in this case and are relevant to the instant matter. Ford's suggestion that by having previously provided testimony and documents in other asbestos litigation it is not required to provide testimony and discovery in this case, is without merit. In support of this assertion, Ford fails to cite any case law and instead refers this court to rules promulgated for asbestos litigation in New York County, which Ford concedes are not binding here.

In light of the foregoing, it is the determination of this court that Ford's motion for a protective order is denied.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that the defendant Ford Motor Company's motion is denied; and it is further

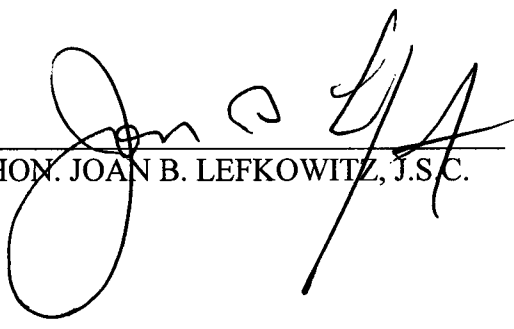
ORDERED that the deposition of a representative of Ford Motor Company as identified above shall take place on or before February 21, 2020; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Room 800, on February 7, 2020 at 9:30 A.M.; and it is further

ORDERED that Defendant Ford Motor Company shall serve a copy of this decision and order upon all parties, including American Honda Motor Co., Inc., and U.S. Rubber Company (Uniroyal) which have not consented to NYSCEF, with notice of entry within five (5) days of entry.

The foregoing shall constitute the decision and order of the court.

Dated: White Plains, New York
January 29, 2020



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

TO:
All Counsel by NYSCEF
cc: Compliance Part