

Gogolski v A.O. Smith Water Prods. Co.
2021 NY Slip Op 32864(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 190202/2012
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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INDEX NO. 190202/2012

ANTHONY GOGOLSKI,

MOTION DATE 06/23/2021

Plaintiff,

MOTION SEQ. NO. 003

- v -

A.O. SMITH WATER PRODUCTS CO, AMERICAN
BILTRITE, INC, AZROCK INDUSTRIES, BELL & GOSSETT
COMPANY, BURNHAM, LLC, CARRIER CORP., CBS
CORP., F/K/A VIACOM INC., CERTAINTEED CORP.,
CONWED CORP., CRANE CO, CROWN BOILER CO., DAP,
INC, ELLIOTT COMPANY, EMPIRE-ACE INSULATION MFG.
CORP, FMC CORP., FOSTER WHEELER, L.L.C, GARDNER
DENVER, INC, GENERAL ELECTRIC COMPANY,
GEORGIA PACIFIC LLC, GOULDS PUMPS, INC,
INGERSOLL-RAND COMPANY, ITT CORP., KAISER
GYPSUM COMPANY, INC, KENTILE FLOORS, INC,
OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC,
RAPID-AMERICAN CORPORATION, TRANE U.S.
INC, F/K/A AMERICAN STANDARD INC, U.S. PLYWOOD
CORP., U.S. RUBBER COMPANY (UNIROYAL), UNION
CARBIDE CORP., VIKING PUMP, INC, WARREN PUMPS,
LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN
COMPANY, YARWAY CORP., ARMSTRONG PUMPS,
INC, BMCE INC, F/K/A UNITED CENTRIFUGAL PUMP,
BORG-WARNER CORPORATION BY ITS SUCCESSOR-IN-
INTEREST, BORG-WARNER MORSE TEC, INC, EATON
CORPORATION, AS SUCCESSOR -IN-INTEREST TO
CUTLER-HAMMER, 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, GOULD ELECTRONICS,
INC, HONEYWELL INTERNATIONAL, INC, F/K/A ALLIED
SIGNAL, INC. / BENDIX, KAMCO SUPPLY CORP., PACIFIC
VALVES INDIVIDUALLY AND AS A SUBSIDIARY OF
CRANE CO, SIEMENS INDUSTRY, INC, SUCCESSOR IN
INTEREST TO SIEMENS ENERGY & AUTOMATION, INC.,,
THE B.F. GOODRICH COMPANY (GOODRICH CORP.),
ROCKWELL AUTOMATION, INC. AS SUCCESSOR BY
MERGER TO ALLEN-BRADLEY COMPANY, LLC.,
SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN
AS SQUARE D COMPANY, WEYERHAEUSER COMPANY,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164

were read on this motion to/for

DISCOVERY

Upon the foregoing documents, and after oral arguments held by the Court, it is hereby ordered that defendant Armstrong Pumps, Inc.'s (hereinafter referred to as defendant "Armstrong Pumps") order to show cause appealing the Special Master's recommendation of April 11, 2021, which ordered defendant Armstrong Pumps to produce certain paper discovery and ordered the depositions of three witnesses, is decided as detailed below.

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 the production of documents which the Special Master ordered moving defendant to provide, as well as a dispute regarding additional depositions of moving defendant's corporate representatives. Thereafter, defendant Armstrong Pumps timely appealed the April 11, 2021 ruling arguing that plaintiff failed to comply with the Case Management Order dated June 20, 2017 (hereinafter referred to as the "CMO") in seeking additional documents and depositions. Plaintiff opposes and moving defendant replies.

Preliminarily, the Court will address the portion of defendant Armstrong Pumps' motion which argues that plaintiff failed to comply with the CMO in seeking the discovery ordered by the Special Master. Defendant Armstrong Pumps states that plaintiff initially raised discovery disputes to the Special Master by an email dated January 15, 2021. According to moving defendant, such email was procedurally defective and failed to comply with the CMO's "Depositions" and "Standard Consolidated Discovery" sections. After numerous emails back and forth, as well as a virtual conference with the Special Master, her recommendation was that

defendant Armstrong Pumps' procedural arguments would not be addressed as "whether or not these discovery issues came before me in the proper manner[, w]e would ultimately find ourselves right here, in any event." Order to Show Cause, Exh. D, Special Master's Recommendation dated April 11, 2021.

The specific sections of the CMO which moving defendant argues plaintiff failed to comply with state that "plaintiff may serve supplemental, non-repetitive document requests, upon good cause shown and approval of the Special Master" and that "[t]he parties shall make every effort to use depositions...obtained from defendants in other cases as if taken in NYCAL. No other depositions shall be taken of defendants except upon...application to the Special Master. Such applications shall specify the areas sought to be covered by an additional deposition, and demonstrate that the proposed lines of questioning will not be repetitive or cover ground already adequately addressed in prior depositions of defendant in question." CMO, §§ IX. H. and XI. E. Here, moving defendants argue that its corporate defendant, Jeffrey Martin, was previously deposed in a separate action in the Southern District of New York and that plaintiff did not identify the areas sought to be covered by each individual deposition and further did not demonstrate that the additional depositions would not be repetitive. As to the documentary discovery, defendant Armstrong Pumps argues that plaintiff is in possession of moving defendants' discovery which was produced in the action pending in the Southern District court. Moving defendant contends that plaintiff failed to show good cause to serve supplemental document demands.

In opposition, plaintiff has proffered evidence establishing that defendant Armstrong Pumps was provided with the reasons as to why additional depositions were being sought and provided a detailed list as to the deficiencies in Mr. Martin's testimony. Plaintiff has further

detailed a long history of discovery disputes which include numerous back and forth discussions regarding documentary discovery between counsel. Given the long history of discovery disputes regarding only the standard discovery sought, defendant Armstrong Pumps' arguments that due to plaintiff's alleged failure to comply with the procedural prerequisites in the CMO, they were unable to address the substantive discovery issues, is inapposite as moving defendant has been substantially apprised of the discovery issues.

Moreover, in arguing that plaintiff did not fulfill their procedural prerequisites, moving defendant ignores the portion of the CMO which explicitly states that "[i]n the event of a discovery dispute the requesting party shall notify the Special Master without delay and request intervention". CMO, §III. C. This is the precise procedural avenue plaintiff elected to pursue. The sections of the CMO cited to by defendant Armstrong Pumps specifically state that the requested documentary discovery and depositions are to be approved by, or upon application to, the Special Master. Rather than address the discovery issues with the Special Master as contemplated by the CMO, defendant Armstrong Pumps' creates and argues a strict interpretation of the language of the CMO. The Court holds that the Special Master, whom is indisputably charged with overseeing discovery matters, did not err in hearing the discovery issues on the merits and making a recommendation. The Court declines to accept this exceedingly technical reading of the CMO as such interpretation strips the Special Master of all discretion to supervise and resolve discovery matters in the NYCAL litigation. Thus, moving defendant's arguments with regard to plaintiff's alleged failure to follow the CMO and the Special Master's dismissal of such procedural issues, fail.

Turning to the substantive matters at hand, it is well settled that discovery shall be broad. CPLR §3101(a)(4) states that "[t]here shall be full disclosure of all matter material and necessary

in the prosecution or defense of an action, regardless of the burden of proof". The Court of Appeals has held that "[t]he words 'material and necessary' ... must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Matter of Kapon v Koch*, 23 NY3d 32, 38 (2014)(internal citations and quotations omitted).

The Special Master's recommendation orders the production of "all documents responsive to plaintiff's standard document demands, regardless of where they are stored, & regardless of whether they are officially labelled 'S.A. Armstrong' or 'Armstrong Pumps' ". Order to Show Cause, Exh. D, the Special Master's recommendation dated April 11, 2021. It further orders defendant "Armstrong [Pumps]...to provide an affidavit as to its search for those document categories not produced, including, but not limited to corporate minutes; annual meetings and reports; trademarks, patents and copyrights; sales order with pump serial numbers, Brochures from 1940 to 1970; 1952 Armstrong financial report; 1949 issue of Heating & Sanitary Age." *Id.* With regards to depositions, the Special Master found that defendant Armstrong Pumps' corporate representative, who was previously deposed, was not the person most knowledgeable. Based upon this, the Special Master ordered the depositions of three additional witnesses; James Armstrong, Deborah Ginty, and Richard Corsini. Lastly, Mr. Martin was ordered "to turn over his preparation notes for his deposition." *Id.*

As to the documentary discovery, moving defendant argues that it cannot produce documents not within its possession. Defendant Armstrong Pumps argues that the Special Master's recommendation that it produce documents in the custody and control of SAA is in error as, according to moving defendants, SAA is a non-party entity that is a separate and legally distinct entity. Defendant Armstrong Pumps argues that it is a wholly-owned subsidiary of SAA

such that it is separate from its parent corporation. Moving defendants argue that plaintiff has failed to pierce the corporate veil and that SAA is a Canadian based corporation which requires the assistance of the Canadian courts to obtain evidence for the foreign entity. Defendant Armstrong Pumps further argues that the notes of Mr. Martin are privileged based on the attorney-client privilege, and, thus, are not discoverable.

Plaintiff correctly argues that defendant Armstrong Pumps and SAA operate as one company such that it need not pierce the corporate veil. “Where the relationship is thus such that the agent-subsiidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in the litigation, the courts will not permit the agent-subsiidiary to deny control for purposes of discovery by an opposing party.” *Gerling Int’l Ins. Co. v Commissioner of Internal Revenue*, 839 F2d 131, 141 (3d Cir. 1988). The United States District Court has found that “[d]ocuments need not be in the possession of a party to be discoverable, they need only be in its custody or control.” *Cooper Industries, Inc. v British Aerospace, Inc.*, 102 FRD 918, 919 (SDNY 1984). The Southern District Court in *Cooper Industries* further held that a “[d]efendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad.” *Id.* at 920. “[I]n the parent-subsiidiary context, courts...have found control where the domestic corporation can obtain documents from its foreign parent to assist itself in litigation; ...can easily obtain documents from its parent when it has an interest in doing so; where documents ordinarily flow freely between the domestic corporation and foreign parent; or where the domestic corporation has the practical ability to obtain the requested documents for use in its business.” *Hake v Citibank, N.A.*, 2020 WL 1467132, 20-21 (SDNY 2020).

Here, moving defendant does not address its ability to obtain the records. Rather,

defendant Armstrong Pumps merely argues that the documentary discovery is inappropriate. There is no indication that moving defendant is not in control of the requested documents or that they are unable to obtain them. In fact, defendant Armstrong Pumps has previously produced SAA documents. As such, moving defendant has failed to establish that the Special Master erred in ordering the documentary discovery.

As to Mr. Martin's notes, defendant Armstrong Pumps argues that such notes are privileged as they were taken by a corporate representative memorializing his communications with attorneys and employees. Plaintiff argues that the attorney-client privilege does not apply here as Mr. Martin's notes were taken during conversations with employees for the purpose of identifying the location of documents. Both plaintiff and defendant Armstrong Pumps' arguments center around the attorney-client privilege. However, after review of all the papers, the Court notes that it is unrefuted that Mr. Martin spoke to certain employees during the course of this action in order to identify and obtain documents for discovery herein. During these meetings to obtain discovery, Mr. Martin took notes. In line with this Court's decision in *Barahona v Continental Hosts, Ltd., et. al.*, 59 Misc3d. 1001, 1006 (Sup. Ct., New York County 2018), as Mr. Martin's notes were taken in preparation for litigation, such notes are not discoverable pursuant to CPLR 3101(d)(2) which states that:

Materials...prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, ...or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Here, plaintiff has not demonstrated a substantial need for Mr. Martin's notes, particularly in light of the Special Master's recommendation which orders the moving defendant to produce the

documentary discovery despite the location of such documents. Thus, defendant Armstrong Pumps' motion is granted solely with regards to Mr. Martin's notes.

Turning to the depositions, through Mr. Martin's deposition transcript, plaintiff has established that Mr. Martin is not the person most knowledgeable in the company. The Court of Appeals has held that, "[as]s a corporation can only act through its officers and employees, a corporation is required to produce such officers and employees who have knowledge of the transaction." *Standard Fruit & S.S. Co. v Waterfront Comm'n of New York Harbor*, 43 NY2d 11, 16 (1977). Thus, plaintiff's request seeking the depositions of additional witnesses is relevant and necessary to the prosecution of the instant action. As the discovery requested is material and necessary to the prosecution of this action, the burden lies with the moving defendant to establish that the requested documents are "utterly irrelevant to any proper inquiry". *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112. No such argument is made herein. As such, defendant Armstrong Pumps' motion to appealing the Special Master's recommendation for three additional depositions is denied.

With regards to the Special Master's recommendation for depositions, plaintiff's opposition papers seek to modify such recommendation by allowing three additional depositions which the Special Master denied. Specifically, in addition to the three depositions ordered by the Special Master, plaintiff also seeks the depositions of Charles Armstrong, Michael Dumais, and Catherine Holesko arguing that such depositions would produce non-duplicative information. Defendant Armstrong Pumps contends that plaintiff may not seek modification of the Special Master's recommendation as plaintiff failed to email the Special Master within three business days of receiving the recommendation as required by the CMO. *See* CMO, §III. C.

Here, it is undisputed that plaintiff did not send an email to the Special Master within three days of receiving the recommendation. According to plaintiff, such email was not necessary as the CMO provides that an email must be sent within that time frame if a party is objecting to, and seeks to appeal, the Special Master's recommendation. Plaintiff argues that he did not seek to appeal the recommendation such that he was not required to send an email within three days. Rather, plaintiff argues that he is requesting the Court to review the entirety of the recommendation which has already been appealed by defendant Armstrong Pumps. This point is moot as, turning to the three additional depositions requested, plaintiff has failed to establish that the Special Master erred in determining that such additional depositions would not be duplicative of the three depositions already ordered.

With regards to the deposition of Mr. Charles Armstrong, both Mr. Charles Armstrong and Mr. James Armstrong held executive leadership positions at Armstrong Pumps, Inc., both had personal knowledge of the company through their lifetime, and both grew up in the family business and has historical knowledge. These two individuals have similar knowledge which could be duplicative. The deposition of Mr. Charles Armstrong may not be necessary should the deposition of Mr. James Armstrong be sufficient. With respect to plaintiff's request to depose Ms. Catherine Holesko, plaintiff points to testimony indicating that she may have a way to contact former employees, but that no one has asked her. Such argument is not indicative of a need to depose Ms. Holesko. Rather, such information may be obtained through interrogatories or through the deposition of Mr. James Armstrong. Lastly, plaintiff seeks the additional deposition of Mr. Michael Dumais, as one of two of the longest serving employees of defendant Armstrong Pumps. However, the Special Master has already approved the deposition of the other longest serving employee, Mr. Richard Corsini. Similar to Mr. James Armstrong and Mr. Charles

Armstrong, plaintiff has failed to establish that the testimony of Mr. Dumais would be significantly different than that of Mr. Corsini as both individuals have similar knowledge which could be duplicative. The deposition of Mr. Dumais may not be necessary should the deposition of Mr. Corsini be sufficient. Thus, plaintiff has failed to establish that these three additional depositions would not be duplicative such that the Special Master's recommendation stands.

Accordingly, it is

ORDERED that defendant Armstrong Pump, Inc.'s order to show cause to vacate the Special Master's April 11, 2021 recommendation is granted solely as to the notes of Mr. Martin which shall not be produced by moving defendant; and it is further

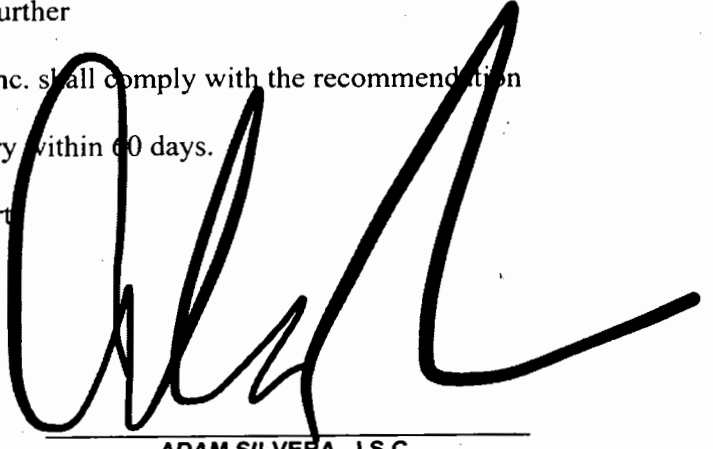
ORDERED that the remainder of defendant Armstrong Pump, Inc.'s order to show cause is denied; and it is further

ORDERED that plaintiff's request for additional depositions is denied; and it is further

ORDERED that the Special Master's April 11, 2021 recommendation is affirmed in all aspects except as to the notes of Mr. Martin; and it is further

ORDERED that defendant Armstrong Pump, Inc. shall comply with the recommendation of the Special Master and provide the ordered discovery within 60 days.

This constitutes the Decision/Order of the Court



12/23/2021
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE