

Smith v Ashland, Inc.
2022 NY Slip Op 31666(U)
May 24, 2022
Supreme Court, New York County
Docket Number: Index No. 156780/2017
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Sandra Smith et al.

INDEX NO. 156780/2017

- v -

MOT. DATE

Ashland, Inc. et al.

MOT. SEQ. NO. 33

The following papers were read on this motion to/for _____
 Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s). _____
 Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s). _____
 Replying Affidavits ECFS DOC No(s). _____

This is another motion by plaintiff regarding Texaco's compliance or lack thereof with its discovery obligations in this action. Previously, in a decision/order dated November 18, 2021, the court directed Texaco to, *inter alia*, provide the franchise agreements for the Texaco service stations Mr. Smith worked at and to the extent that these documents are unavailable, sample franchise agreements from the time period Mr. Smith worked at Texaco gas stations along with an affidavit attesting to the search performed for copies of the actual franchise agreements. The court further directed Texaco to "produce a witness with material and necessary information concerning the Rubber Repair Kit and/or Texaco's historic documents, how they are maintained, and how they were searched in responding to plaintiff's discovery demands. The court also denied Texaco's motion for a protective order regarding plaintiff's notice to admit but did not specifically address plaintiff's cross-motion to the extent that she sought an order compelling Texaco to respond to same.

Now, plaintiff moves to strike Texaco's answer for failing to provide discovery or alternatively an order compelling Texaco to produce a witness and provide an affidavit concerning efforts to locate one, as well as costs and expenses and to extend the note of issue deadline. Naturally, Texaco opposes the motion. Striking a pleading for failure to provide discovery is a drastic remedy and should not be granted absent a showing that the non-disclosure was willful, contumacious or due to bad faith (*McGilvery v. New York City Transit Authority*, 213 AD2d 322 [1st Dept 1995]). This sanction is not warranted on the record before the court, although plaintiff's motion is granted in part as follows.

Texaco has complied with the court's directives to produce a witness with personal knowledge regarding Texaco's historic documents, how they are maintained and how they were searched in responding to plaintiff's discovery demands. Given the dearth of information provided by Texaco as to the Rubber Repair Kit, plaintiff is entitled to a further deposition of John Harper, Texaco/Chevron's historian, to the extent he is still employed, within 60 days. If Harper is no longer employed by Texaco, within 30

Dated: 5/24/22



 HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

days, Texaco shall provide his last known address. Also, within 30 days, Texaco shall provide the last known addresses of Barbara Rake and Greg Boone, who are no longer employed by Texaco but may have relevant information regarding plaintiff's claims in this action.

As for the franchise agreements, the court finds that plaintiff has established that Texaco did not fully comply with the 11/18/21 decision/order. Texaco witness Michael Formoso testified on February 3, 2022 that he did not locate any franchise agreements related to the Texaco stations plaintiff worked at. This testimony is compliant with a portion of the court's 11/18/21 decision/order. However, Texaco has not provided any sample franchise agreement, and its counsel represents to the court that such a sample agreement was to be based upon franchise agreements in New York which Texaco was unable to locate. However, on page 73 of Formoso's deposition, Formoso testified that he did find records with regard to Texaco service stations in New York and he sent those records to Chevron legal. The missing link in this chain of events is an affidavit from Chevron legal regarding its search of records previously identified by Formoso and its determination that a sample franchise agreement could not be culled therefrom, since Formoso clearly testified that he didn't analyze the search results. The court is not persuaded by Texaco's counsel's argument that Chevron's in-house counsel's search is privileged simply because Chevron's in-house counsel performed legal work on behalf of its client in reviewing the documents to be exchange. It remains an open question whether Texaco has a sample franchise agreement to provide plaintiff. In any event, the court hereby directs Texaco to produce the documents located by Formoso in his search for records pertaining to all service stations in New York during the relevant time periods as specified in paragraph 3 of his affidavit dated January 24, 2022 for *in camera* review. The court holds in abeyance its decision on the balance of the motion pertaining to the franchise agreements pending the *in camera* review.

Finally, the court turns to plaintiff's notice to admit. The court previously denied Texaco's motion for a protective order as to the notice to admit but did not specifically address plaintiff's request for relief in her cross-motion with respect to same. The offending items are as follows: Nos. 11, 12-13, 15-16, 21-22 and 33-34.

No. 11 asks Texaco to admit that the portion of the image depicted on Exhibit B which reads "6-68" is consistent with how Texaco designated the month and year on its product labels at some time during the 1960's. Texaco responds that it "objects to this request as ambiguous and vague as worded and overbroad as to the use of the term product labels." Texaco then goes on to state that it "has located no documents reflecting the label or sales of the Texaco Rubber Repair Kit. Therefore, [Texaco] is unable to admit or deny this request with regard to Exhibit B." This is a non-response.

First, the objection is overruled because plaintiff's request to admit is not vague or ambiguous and calls for a specific, ascertainable admission. Texaco's substantive response does not address plaintiff's request because it only claims that since it has no documents regarding the Texaco Rubber Repair Kit, it cannot admit or deny this request. Accordingly, Texaco shall properly respond to plaintiff's request no. 11 within 30 days or be precluded at the time of trial from arguing that the portion of the image depicted on Exhibit B of plaintiff's notice to admit which reads "6-68" is **NOT** consistent with how Texaco designated the month and year on its product labels at some time during the 1960's.

Nos. 12-13 request admissions regarding whether Texaco has information in its possession that would support a contention that the images depicted in photos of a Texaco Rubber Repair Kit show a product that was sold by Texaco in the 1960s and 1970s. After another inappropriate "ambiguous and vague" objection, Texaco asserts that the products depicted in the subject photos were not produced by defendant. Since plaintiff is not asking whether the product was produced by Texaco, and Texaco has not responded to whether it has information which would prove that the products depicted in the photos were not sold by Texaco, Texaco is therefore directed to respond to request nos. 12-13 within 30 days or be precluded at the time of trial from arguing that the products depicted in Exhibits A and B of plaintiff's notice to admit were not sold by Texaco in the 1960s and 1970s.

Nos. 15-16 mirrors nos. 12-13 except plaintiff seeks an admission as to whether the images depict a product which was distributed by Texaco in the 1960s and 1970s. Accordingly, Texaco is therefore directed to respond to request nos. 15-16 within 30 days or be precluded at the time of trial from arguing that the products depicted in Exhibits A and B of plaintiff's notice to admit were not distributed by Texaco in the 1960s and 1970s.

Nos. 21-22 seek an admission as to whether the Texaco Rubber Repair Kit did not contain benzene in the 1960s and 1970s. Texaco responded that it has no documents or other information "reflecting its sales of the Texaco Rubber Repair Kit and therefore can neither admit or deny that it sold a product called Texaco Rubber Repair Kit at any specific time period." Plaintiff's request did not ask whether Texaco sold the product, and since Texaco's response is nonresponsive, Texaco shall properly respond to request nos. 21-22 within 30 days or be precluded at the time of trial from arguing that the Texaco Rubber Repair Kit did not contain benzene in the 1960s or 1970s.

Finally, plaintiff's request nos. 33-34 seeks admissions as to whether Texaco can dispute whether R. M. Hollingshead Corporation did not manufacture the rubber cement that was part of the Texaco Rubber Repair Kit at some time in the 1960s and 1970s. In response, Texaco improperly objects to the request and then states that it has no documents or information "reflecting the manufacturing of the Texaco Rubber Repair Kit and therefore, defendant is unable to admit or deny this request as worded." Even if Texaco does not have any documents or information regarding who manufactured the Texaco Rubber Repair Kit, that does not clearly address whether Texaco can dispute whether R. M. Hollingshead Corporation manufactured the rubber cement that was part of the Texaco Rubber Repair Kit. Therefore, Texaco has again failed to respond to plaintiff's properly asserted requests and will be given one final opportunity to do so. Texaco's failure to properly respond to request nos. 33 and 34 within 30 days shall result an order of preclusion at the time of trial from arguing that the rubber cement contained in the Texaco Rubber Repair Kit was not manufactured by R. M. Hollingshead Corporation in the 1960s and 1970s.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted as follows:

[1] Texaco shall produce John Harper, Texaco/Chevron's historian, for a further deposition of to the extent he is still employed, within 60 days. If Harper is no longer employed by Texaco, within 30 days, Texaco shall provide his last known address;

[2] within 30 days, Texaco shall provide the last known addresses of Barbara Rake and Greg Boone, who are no longer employed by Texaco but may have relevant information regarding plaintiff's claims in this action;

[3] within 60 days, Texaco shall produce to the court the documents located by Formoso in his search for records pertaining to all service stations in New York during the relevant time periods as specified in paragraph 3 of his affidavit dated January 24, 2022 for *in camera* review. The court holds in abeyance its decision on the balance of the motion pertaining to the franchise agreements in abeyance pending the *in camera* review. The documents shall be produced in electronic format, each document shall be contained in its own file, and the files may be submitted to the court via USB drive delivered to the Part 8 Clerk, Steve Carney, at 80 Centre Street, Room 278, in an envelope labeled FOR IN CAMERA REVIEW, Chambers Eyes Only, Attn Eric Wursthorn, Esq.; and

[4] The court will grant Texaco one final opportunity to respond to plaintiff's notice to admit within 30 days as follows:

[a] Texaco shall properly respond to plaintiff's request no. 11 or be precluded at the time of trial from arguing that the portion of the image depicted on Exhibit B of plaintiff's notice to admit which reads "6-68" is **NOT** consistent with how Texaco designated the month and year on its product labels at some time during the 1960's.

[b] Texaco shall properly respond to request nos. 12-13 or be precluded at the time of trial from arguing that the products depicted in Exhibits A and B of plaintiff's notice to admit were not sold by Texaco in the 1960s and 1970s.

[c] Texaco shall properly respond to request nos. 15-16 or be precluded at the time of trial from arguing that the products depicted in Exhibits A and B of plaintiff's notice to admit were not distributed by Texaco in the 1960s and 1970s.

[d] Texaco shall properly respond to request nos. 21-22 or be precluded at the time of trial from arguing that the Texaco Rubber Repair Kit did not contain benzene in the 1960s or 1970s.

[e] Texaco shall properly respond to request nos. 33 and 34 or be precluded at the time of trial from arguing that the rubber cement contained in the Texaco Rubber Repair Kit was not manufactured by R. M. Hollingshead Corporation in the 1960s and 1970s.

And it is further **ORDERED** that in the event Texaco fails to properly respond to the notice to admit, plaintiff may settle an order of preclusion on notice supported by an affirmation attesting to Texaco's non-compliance; and it is further

ORDERED that plaintiff's deadline to file note of issue is hereby extended to August 26, 2022; and it is further

ORDERED that the balance of this motion regarding costs is adjourned to August 26, 2022 for control in light of the pending *in camera* review.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

5-24-22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.