

Theophil v A.O. Smith Water Prods. Co.
2022 NY Slip Op 33037(U)
August 31, 2022
Supreme Court, New York County
Docket Number: Index No. 190463/2018
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. 190463/2018

WILLIAM G THEOPHIL,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 007

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID
SYSTEMS CORPORATION, AMCHEM PRODUCTS,
INC., AMERICAN BILTRITE INC, ARCONIC, INC,
ARMSTRONG INTERNATIONAL, INC, ATWOOD &
MORRILL COMPANY, AURORA PUMP COMPANY,
BEAZER EAST, INC., BLACKMER, BMCE INC., BURNHAM,
LLC, BW/IP, INC. AND ITS WHOLLY OWNED
SUBSIDIARIES, CARRIER CORPORATION, CBS
CORPORATION, F/K/A VIACOM INC., CERTAINTIED
CORPORATION, CLEAVER BROOKS COMPANY, INC,
CLYDE UNION, INC, CONSOLIDATED EDISON
COMPANY, COURTER & COMPANY INCORPORATED,
CRANE CO., CRANE CO. INDIVIDUALLY AND AS
SUCCESSOR TO PACIFIC VALVES, CROLL REYNOLDS
ENGINEERING CO., INC, CROSBY VALVE LLC, CROWN
BOILER CO., CUPPLES PRODUCTS CORPORATION,
DANA COMPANIES, LLC, DOMCO PRODUCTS TEXAS,
INC., ELECTROLUX HOME PRODUCTS,
INC., FLOWSERVE US, INC., FMC CORPORATION, FORT
KENT HOLDINGS, INC., FOSTER WHEELER, L.L.C.,
GENERAL ELECTRIC COMPANY, GOODYEAR CANADA,
INC., GOULDS PUMPS LLC, GRINNELL LLC, H.H.
ROBERTSON COMPANY, HACON, INC., IMO
INDUSTRIES, INC, ITT LLC., KEELER-DORR-OLIVER
BOILER COMPANY, KOHLER CO, LENNOX INDUSTRIES,
INC, MARIO & DIBONO PLASTERING CO., INC, MILTON
ROY COMPANY, MORSE DIESEL, INC., NORTHROP
GRUMMAN CORP. AS SUCCESSOR, O'CONNOR
CONSTRUCTORS, INC., OWENS-ILLINOIS, INC,
PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER),
RESEARCH-COTTRELL INCORPORATED, RILEY POWER
INC, SEQUOIA VENTURES, INC., SLANT/FIN
CORPORATION, SPIRAX SARCO, INC., SUPERIOR
BOILER WORKS, INC, THE GOODYEAR TIRE AND
RUBBER COMPANY, TISHMAN LIQUIDATING CORP.,
TISHMAN REALTY & CONSTRUCTION CO., INC,
TREADWELL CORPORATION, TURNER CONSTRUCTION
COMPANY, U.S. RUBBER COMPANY (UNIROYAL),
UNION CARBIDE CORPORATION, UNITED CONVEYOR
CORPORATION, VIKING PUMP, INC., WARREN PUMPS,
LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-

DECISION + ORDER ON MOTION

WYLAIN COMPANY, YUBA HEAT TRANSFER LLC, PORT
AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 468, 469, 470, 471, 472, 473, 474, 475, 476, 479, 480, 481, 482, 483, 484, 485, 486

were read on this motion to/for

QUASH SUBPOENA, FIX CONDITIONS

Upon the foregoing documents, and after oral arguments, it is ordered that settled non-party Crane Co.'s n/k/a Redco Corporation (hereinafter "Redco Corporation") order to show cause is decided herein. Redco Corporation moves pursuant to CPLR § 2304 and CPLR § 3103, for an Order granting its Motion to Quash Defendant Mario & DiBono Plastering Co., Inc.'s (hereinafter "Mario & DiBono") Trial Subpoena *Ad Testificandum* and for a protective order.

In support of its Motion, Redco Corporation argues that (1) it is a non-resident corporation and has no corporate representative or person most knowledgeable within the State of New York; (2) requiring resolved parties to appear at trial and provide live testimony would negatively impact the resolution of claims and be contrary to this Court's governing Case Management Order ("CMO"); (3) the Trial Subpoena directed at Redco Corporation does not comport with the New York City Asbestos Litigation's ("NYCAL") CMO; and (4) Mario & DiBono made no effort to reach an agreement with plaintiff's counsel and the Court regarding a less burdensome means of securing evidence to meet its Article 16 burden with respect to Redco Corporation.

In opposition, Defendant Mario & DiBono argues that none of Redco Corporation's arguments are persuasive, and the Motion to Quash should be denied in its entirety because the Trial Subpoena seeks relevant evidence to establish its equitable apportionment claim against Redco Corporation at trial.

Having reviewed the submissions of the parties, and hearing oral argument on August 2, 2022, this Court grants Redco Corporation's Motion to Quash. Forcing Redco Corporation, as a settled party, "to produce a witness at the trial of this matter is contrary to the policy fostering and encouraging settlements and to the NEW YORK CITY ASBESTOS LITIGATION (NYCAL) CASE MANAGEMENT ORDER (CMO)." *Matter of Murphy-Clagett v A.O. Smith Water Products Co.*, Sup. Ct., NY County, March 7, 2018, Mendez, J., Index No. 190311/2015 (quashing subpoena directed to settled non-party). Indeed, the NYCAL CMO directly addresses the issue before the Court and provides Defendant Mario & DiBono with the appropriate relief. Section XIII of the CMO, entitled "Use at Trial of Nonparty Interrogatories and Depositions," allows the use of a resolved party's answers to NYCAL standard interrogatories to prove that its product contained asbestos or that asbestos was used in conjunction with that product, and/or any failure to warn by the non-party concerning any associated asbestos-containing product. *See* CMO §XIII(A). It further states that "[n]onparty depositions may be used where allowed by the CPLR." CMO §XIII(B). Justice Moulton's decision accompanying the CMO details the reasoning for allowing the use of the aforementioned evidence at trial in asbestos matters and states that "limited Article 16 relief is warranted given the age of asbestos litigation and the difficulty defendants face in proving that other nonparty entities should be considered by the jury as potential causes of a plaintiff's disease." *In re New York City Asbestos Litigation*, Sup Ct, NY County, June 20, 2017, Moulton, J., Index No. 782000/2017. The mechanism devised by Justice Moulton and memorialized in the CMO "promotes judicial economy and efficiency, and provides a settling defendant finality." *Murphy-Clagett, supra*. As such, the Trial Subpoena *Ad Testificandum* served by Defendant Mario & DiBono on Redco Corporation is improper under the CMO and in contravention of long-standing public policy which encourages the resolution of lawsuits.

Accordingly, it is

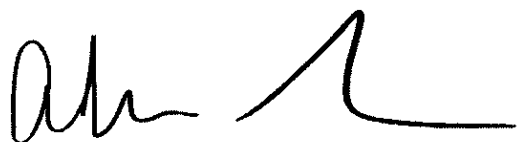
ORDERED that the Order to Show Cause by Crane Co., n/k/a Redco Corporation, seeking to Quash Defendant Mario & DiBono Plastering Co. Inc.'s Trial Subpoena *Ad Testificandum* and/or for a protective order, is granted to the extent of Quashing the Subpoena, and it is further

ORDERED that Defendant Mario & DiBono Plastering Co. Inc. may use the interrogatories and deposition of settling party Crane Co., n/k/a Redco Corporation at trial in accordance with the CMO dated June 20, 2017.

This constitutes the Decision/Order of the Court.

8/31/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES
TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE