

State of New York v Thermo Fisher Scientific Inc
2025 NY Slip Op 35473(U)
March 18, 2025
Supreme Court, Albany County
Docket Number: Index No. 902691-20
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

STATE OF NEW YORK,

Plaintiff,

-against-

THERMO FISHER SCIENTIFIC INC AND
MICROGENICS CORPORATION,

Defendants.

DECISION AND
ORDER
(Motion No. 6)

Index No. 902691-20

March 18, 2025

HON. DENISE A. HARTMAN, AJSC

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Hartman, J.

Presently before the Court is the motion of defendant Microgenics Corporation (Microgenics) to depose Elizabeth Spratt, MS, F-ABFT, the expert witness of plaintiff New York State (Motion #6). The State opposes the motion. For the reasons that follow, the motion is denied.

Background

The facts and procedural history are set forth in detail in the Court's August 25, 2021 decision and order (*see* NYSCEF Doc No. 65). Presently, Microgenics seeks to depose the State's expert witness, Elizabeth Spratt (Spratt), a forensic toxicology consultant who holds a bachelor's degree in chemistry and a Master of Science in pharmacology/toxicology. As Microgenics points out, in addition to being retained as an expert witness for the State in the pending action, Spratt was previously retained by the New York State Office of the Inspector General (OIG) "to review and verify the findings in [its] investigation" concerning the same Microgenics urinalysis testing equipment that is the subject of this litigation (NYSCEF Doc No. 152 at 3).

Microgenics now argues that it should be permitted to depose Spratt on the grounds that she is an undisclosed fact witness; to inquire into purported inconsistencies between the findings in the OIG report and Spratt's expert report and present record; and to explore the basis of purported quasi-legal conclusions contained in her expert report.

The State opposes the motion, arguing that Microgenics has failed to establish extraordinary circumstances to permit the deposition of its expert witness. The State argues that Spratt is not a fact witness because, contrary to Microgenic's assertions, she provided no analysis or conclusions to the OIG's investigation or subsequent report and her involvement therein was limited to reviewing the report to ensure accuracy in the use of and/or reference to scientific terms and principles. The State further argues that the purported inconsistencies between the OIG's report, the record in this case, and Spratt's expert report do not warrant a deposition. And, to the extent Microgenics seeks to ascertain the source of the factual information contained in Spratt's report, the State argues that her report lists the various sources in the record from which she has obtained her factual information. Moreover, the State contends, the conclusions contained in Spratt's report are based on her expert knowledge of toxicology and her review of the record evidence before the Court and do not justify permitting an expert deposition.

Analysis

Generally, the only mandatory disclosure relative to expert witnesses under the CPLR is the identity of "each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of

each expert witness and a summary of the grounds for each expert's opinion" (CPLR 3101 [d] [1]). "Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate" (*id.* at 3101 [d] [1] [iii]).

This Court "has broad discretion in supervising disclosure and its determination will not be disturbed on appeal absent an abuse of discretion" (*Feldman v New York State Bridge Auth.*, 40 AD3d 1303, 1305 [3d Dept 2007]). Special circumstances exist, for example, "where physical evidence is lost or destroyed or where some other unique factual situation exists such as proof that the information sought to be discovered cannot be obtained from other sources" (*Ruthman, Mercadante & Hadjis, P.C. v Nardiello*, 288 AD2d 593, 594 [3d Dept 2001] [internal quotation marks and citations omitted]).

Microgenics has failed to establish special circumstances warranting a deposition of Spratt. The Court is unmoved by its argument that Spratt is an undisclosed fact witness. Review of the State's expert disclosure makes clear that Spratt, while making certain factual assertions, expressly draws those facts from an enumerated list of 51 documents and not knowledge obtained first-hand. And, as the State argues, the OIG report is publicly available and Microgenics has already had the opportunity to depose witnesses regarding their statements to the OIG. Microgenics fails to identify any further factual

information obtainable only through a deposition of Spratt (*see Ruthman*, 288 AD2d at 594-595).

Spratt's affirmation establishes that her involvement in the OIG investigation and report was "very limited" and consisted of "approximately two hours" of reviewing the report to "confirm the accuracy of [the OIG's] use of scientific terms and principles in the report, particularly regarding immunoassays" (NYSCEF Doc No. 164 at ¶¶ 4, 5, 6). Spratt further affirms that she "did not review any of the factual information or data upon which the OIG report was based, nor did [she] contribute any factual information or conduct any analysis" or "contribute to the conclusions of the OIG report" or "confirm the accuracy of [its] conclusions" (*id.* at ¶¶ 7, 8). Microgenics advances neither arguments nor proof to refute Spratt's sworn statement.

Further, insofar as Microgenics wishes to point out purported inconsistencies between the OIG and Spratt's expert report and/or record evidence, the appropriate vehicles for doing are Microgenic's case-in-chief or upon cross-examination of Spratt. A motion in limine or cross-examination may also be available to limit, preclude, or refute Spratt's testimony. The purported inconsistencies and/or "flaws underlying [Spratt's] opinion [do not] rise to the level of special circumstances" warranting an expert deposition (*Padro v Pfizer, Inc.*, 269 AD2d 129, 129 [1s Dept 2000]).

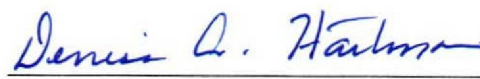
Finally, Microgenic's contention that a deposition is necessary to prepare for a "potential" *Frye* hearing is inapposite. To the extent Spratt testifies at such a hearing, Microgenics will have ample opportunity to challenge her testimony on cross-examination. As discussed above, Microgenics is already in possession of Spratt's expert report, and has access to the publicly available OIG report. The parties' remaining arguments, to the extent not directly addressed, have been considered and found to be without merit or rendered academic in light of the foregoing.

Accordingly, it is hereby

ORDERED that Microgenic's motion (Motion #6) to depose the State's expert witness, Elizabeth Spratt, is **DENIED**.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for the State shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
March 18, 2025


HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court


03/18/2025

Papers Considered

NYSCEF Doc Nos. 149-172