

Cecere v Zep Mfr., Co.
2011 NY Slip Op 34095(U)
January 31, 2011
Sup Ct, Westchester County
Docket Number: 00602/08
Judge: Joan B. Lefkowitz
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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.

FILED
FEB - 2 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

FILED AND ENTERED
ON 2-2 2011
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
GARY CECERE,

Plaintiff,

DECISION & ORDER

-against-

Index No. 00602/08

Motion Date: 1/31/11

ZEP MANUFACTURING, CO., and
ACUITY SPECIALITY PRODUCTS GROUP, INC.,

Defendants.
-----X

LEFKOWITZ, J.

The following papers numbered 1 to 18 were read on this motion by plaintiff for an order pursuant to CPLR 3124, 3126 and 22 NYCRR 130-1.1 striking defendants' answer for failure to provide discovery, or in the alternative, awarding costs incurred in connection with the deposition of Ann Campbell and in failing to conduct a diligent search for accident/incident reports, or in the alternative, compelling defendants to provide affidavits regarding the complete and detailed searches conducted for accident/incident reports.

Order to Show Cause - Affirmation in Support - Exhibits	1-16
Affirmation in Opposition - Exhibit	17-18

Upon the foregoing papers and the proceedings held on January 31, 2011, this motion is determined as follows:

In this products liability matter, plaintiff seeks to recover for injuries allegedly sustained when Sewer Aid, a commercial drain cleaner, erupted or exploded in his face on June 23, 2006. Plaintiff served a November 4, 2008 notice for discovery and inspection demanding any incident reports, reports of accidents, damage and/or physical injury in connection with the use of Sewer Aid. Defendants served a March 6, 2009 response stating Zep is not in possession of any incident or accident reports in connection with the use of Zep Sewer Aid from three years preceding the incident. Defendants produced Stanley Reed Weller, Ph.D. for a deposition on November 11, 2009. Dr. Weller testified that Zep attempted to keep a record of accidents or injuries that occur with the use of its products, the risk manager was responsible for maintaining this type of information, and her name was Ann Campbell. Plaintiff requested that defendants produce Ann Campbell for a deposition and defendants filed a motion for a protective order to limit Zep's production of witnesses to the two already produced. In a February 4, 2010 letter,

defense counsel advised that Ann Campbell left Zep's employment on January 15, 2010. On February 8, 2010, the return date of the motion, the parties entered into a so ordered stipulation resolving the motion and directing defendants to provide the last known address of Ann Campbell and the circumstances of her departure from the company. Defendants served a February 26, 2010 response providing Ms. Campbell's last known address and stating that she was laid off from the company. Plaintiff sought an open commission to obtain Ms. Campbell's nonparty deposition in Georgia.

Plaintiff seeks an order striking defendants' answer for failure to provide discovery, or in the alternative, awarding costs incurred in connection with the out of state deposition of Ann Campbell and in following for accident/incident reports. Plaintiff argues that Campbell testified on August 31, 2010 that her last date of employment with Zep was on February 23, 2010 and she spoke to defense counsel in late January and told him she was still employed at Zep. According to plaintiff's counsel, Campbell testified she never performed a comprehensive search for incident or accident reports. Plaintiff argues defense counsel made intentional misrepresentations regarding Campbell's employment status, requiring plaintiff to make an unnecessary motion for an open commission. Plaintiff argues no comprehensive search was ever conducted for accident or incident reports and defendants March 6, 2009 discovery response stating Zep is not in possession of any incident or accidents reports in connection with the use of Zep Sewer Aid is false.

In opposition, defendants argue that while the motion for a protective order was pending, defense counsel was advised that Ann Campbell's last day of employment at Zep was January 15, 2010. Counsel was not aware that one week after her initial termination date she was asked to come back to Zep for a four week period and her last day of employment at Zep was actually February 23, 2010. Defense counsel avers that on February 23, 2010 he contacted the risk management department with an investigation request and Campbell answered the phone. She reportedly advised that she had been brought back temporarily to Zep in a different capacity, but decided not to inform defense counsel of her return. Defense counsel argues he was not informed of Campbell's change in employment status until February 23, 2010, her last day at the company, and at that point it would have been impossible to produce her for a deposition as an employee of Zep.

With regard to the accident/incident reports, defendants argue Campbell testified regarding her search for such reports, including a search of a claims database. Defendants argue that following Campbell's deposition, defense counsel requested that the current risk manager at Zep, Gerald McKie, check again for any incident or accident reports involving Sewer Aid. In an October 27, 2010 letter, defendants indicated that Zep used INFOTRAC, a medical emergency response system, to respond to emergencies called in to the company from July 2003 to October 2008. Any incident reported to INFOTRAC concerning a Zep product was communicated to Zep's Compliance Services. INFOTRAC reported one incident involving workers sickened by fumes when Zep Sewer Aid was misused. A copy of that report was exchanged. In the October 27, 2010 letter, counsel states "Zep has advised that there are no other potential sources of incident reports concerning the use of Sewer Aid for that time period."

A review of Ann Campbell's August 31, 2010 deposition testimony reveals that she testified her position as risk manager was eliminated, her last day at Zep as their risk manager was January 15, 2010, but approximately a week later she was asked to come back to work on some projects and they needed her input on how things flowed and developed in the department. Campbell testified she returned to work for four weeks and her last date of employment with Zep was on February 23, 2010. Campbell testified that she did not advise defense counsel that she returned to work for Zep after January 15, 2011, but he happened to call her extension and she answered the phone (Plaintiff's Exhibit N, p. 9). Campbell initially testified this telephone conversation occurred sometime during the four weeks, probably in late January (Plaintiff's Exhibit N, p. 9). When questioned on whether she told defense counsel by February 4, 2010 that she was still employed by the company, she then testified that she could not give a specific date (Plaintiff's Exhibit N, p. 9, 19). Defense counsel states the conversation took place on February 23, 2010, as documented by entries in legal bills and in Wilson Elser's time entry program.

The drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands was willful and contumacious (CPLR 3126; *Novikov v. Maimonides Med. Ctr.*, 50 AD3d 987, 856 NYS2d 654 [2d Dept 2008]). In this case, defense counsel states he was advised that Ann Campbell's last day with Zep was January 15, 2010 and counsel was not aware that one week after her initial termination date she was asked to come back to Zep for a four week period. This is consistent with Campbell's testimony. Plaintiff ultimately obtained an open commission and deposed Campbell in Georgia. As there is no clear showing on this motion that defendant willfully and contumaciously failed to comply with discovery orders or demands, the requested relief is not warranted (*See Voutsinas v. Voutsinas*, 43 AD3d 1156, 843 NYS2d 130 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v. Your Home Funding, Inc.*, 40 AD3d 919, 836 NYS2d 667 [2d Dept 2007]). Furthermore, under these circumstances, the Court is not inclined to award costs incurred in connection with the out of state deposition of Ann Campbell (*See* 22 NYCRR 130-1.1).

Plaintiff seeks an order compelling defendants to provide affidavits regarding the complete and detailed searches conducted for accident/incident reports. Plaintiff deposed Ann Campbell regarding her search for incident or accident reports. Campbell testified that there were a lot of different "touch points" within the company where incidents were reported, including the sales organization, compliance services, research and development, and environmental health and safety (Plaintiff's Exhibit N, p. 31). She testified that she searched for incident or accident reports in compliance services (Plaintiff's Exhibit N, p. 34). Defendants argue that following Campbell's deposition, counsel requested that the current risk manager at Zep, Gerald McKie, check again for any incident or accident reports involving Sewer Aid. In an October 27, 2010 letter, defense counsel indicated INFOTRAC, the medical emergency response system used to respond to emergencies called in to the company, reported one incident from July 2003 to October 2008. Counsel states "Zep has advised that there are no other potential sources of incident reports concerning the use of Sewer Aid for that time period." As there are inconsistencies between Campbell's testimony and counsel's October 27, 2010 response, defendants are directed to provide an affidavit from the current risk manager at Zep, Gerald

McKie, detailing the search he conducted for accident/incident reports in connection with the use of Sewer Aid.

In view of the foregoing, it is

ORDERED that plaintiff's motion is granted to the extent that defendants are directed to provide on or before February 14, 2011 an affidavit from the current risk manager at Zep, Gerald McKie, detailing the search he conducted for accident/incident reports in connection with the use of Sewer Aid; and it is further

ORDERED that the branch of the motion seeking an order striking defendants' answer is denied; and it is further

ORDERED that the branch of the motion seeking costs incurred in connection with the deposition of Ann Campbell and in following for accident/incident reports is denied; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on February 24, 2011 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
January 31, 2011


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

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