

Hicksville Water District v American Dry Cleaners

2012 NY Slip Op 30241(U)

January 18, 2012

Sup Ct, Nassau County

Docket Number: 24263/09

Judge: Denise L. Sher

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

HICKSVILLE WATER DISTRICT,

Plaintiff,

- against -

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 24263/09
Motion Seq. No.: 04
Motion Date: 10/12/11

AMERICAN DRY CLEANERS f/k/a AMERICAN
DRIVE-IN CLEANERS, MOY'S LAUNDRY, PAMPER
FRENCH CLEANERS, LIBERTY CLEANERS, and
JOHN and JANE DOES 1 through 100,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves for an order excluding the testimony of defendant NU-American Cleaners, Inc. d/b/a American Drive-In Cleaners i/s/h/a American Dry Cleaners f/k/a American Drive-In Cleaners' ("American") purported experts, Kevin Kleaka and James Cressy. Defendant American opposes the motion.

This case concerns the contamination of plaintiff's water supply by the presence of tetrachloroethylene ("perc") at Well #11, located at the intersection of Old Country Road and South Oyster Bay Road in Hicksville, New York. In November 2006, plaintiff received a notice of violation from the Nassau County Department of Health because elevated levels of perc were detected in the water supply of Well #11. Plaintiff was required by law to send a notice to its

customers and the well was removed from service. Thereafter, plaintiff implemented an interim filtration system at Well #11. According to plaintiff, a permanent treatment system is required.

Perc is a man-made, colorless, organic liquid with a chloroform-like odor. The largest user of perc is the dry cleaning industry and ten dry cleaner sites, including those of defendants American and Liberty, were found in the vicinity of Well #11.

Plaintiff submits that, pursuant to CPLR § 3101(d)(1), defendant American disclosed that it intends to offer the testimony of two purported experts at the trial of the instant action. Plaintiff argues that both of those experts' proposed testimony should be precluded from or largely limited at trial. Plaintiff contends that Kevin Kleaka and James Cressy should be precluded from testifying as experts because they are unqualified. Plaintiff states that defendant American has "disclosed Kevin Kleaka, Vice President of Impact Environmental Consulting, Inc. of Bohemia, New York ('Impact Environmental'), and James Cressy, Assessment Supervisor of Impact Environmental, as general 'expert witnesses,' without specifying a particular area of expertise that they are considered to be 'experts' in." Plaintiff adds that Mr. Kleaka should be precluded from testifying because he is expected to testify about matters beyond his expertise, education and experience. Plaintiff states that "[n]othing in defendants' CPLR 3101 disclosure indicates that Mr. Kleaka possesses the requisite qualifications, training, education, experience and/or expertise to opine on issues of hydrogeology, plume tracking, groundwater data analysis, and 'fate and transport' with regards to chlorinated solvents, all of which are subjects to be testified to by Mr. Kleaka. Mr. Kleaka only holds a 'Bachelor of Science in Environmental Sciences' degree with no advanced degrees in *any* field of science or engineering....Moreover, Mr. Kleaka has extremely limited training in groundwater remediation. Significantly, there is *no* indication in the CV that Mr. Kleaka has *any* experience or training in hydrogeology, 'fate and transport' of chemicals, plume tracking, groundwater data analysis or any of the necessary training, experience

or education as would qualify him as an expert in the subject he is expected to testify. As a result, this Court should preclude his testimony as an expert at trial.”

Plaintiff further argues that “[n]othing in defendants’ CPLR 3101 disclosure indicates that Mr. Cressy possesses the requisite qualifications, training, education, experience and/or expertise to opine on issues of hydrogeology, plume tracking, groundwater data analysis, and ‘fate and transport’ with regards to chlorinated solvents, all of which are subjects to be testified to by Mr. Cressy....According to his CV Mr. Cressy has been an ‘Assessment Supervisor’ for Impact Environmental since 2005, performing on Phase I and Phase II environmental site assessments. Conducting site reconnaissance work and drafting Phase I and Phase II reports does not qualify one to testify as an expert hydrologist, or expert in ‘fate and transport’ of chemicals. Although site reconnaissance work does involve *some* level of technical expertise, it certainly does not rise to the level of an experienced or trained hydrologist.”

Plaintiff also asserts that defendant American “unfairly proffers both Mr. Kleaka and Mr. Cressy as general ‘expert witnesses’ without specifying an area of expertise that they are expected to testify about. Neither this Court nor the plaintiff can know for sure if defendants’ purported ‘expert witnesses’ will be testifying as expert chemists, expert hydrologist, expert cartologists, expert geologists or expert water system engineers....As such, defendants have not fulfilled their obligation of expert disclosure for these putative witnesses where, as here, they have not disclosed *the subject matter* on which each expert is expected to testify.”

In opposition to plaintiff’s motion, defendant American argues that its experts are clearly qualified to testify as to the issues set forth in defendant American’s CPLR § 3101(d) Expert Witness Disclosure, and, notwithstanding that defendant American’s experts are qualified, plaintiff’s instant motion is premature as the case has not been scheduled for trial, has not been assigned to a judge for trial and, at the very least, defendant American’s experts are entitled to a

Frye Hearing prior to any determination being made on their qualifications.

Defendant American states that "Vice President Kevin Kleaka and Assessment Supervisor James Cressy of Impact Environmental Consulting, Inc. clearly have the requisite skill, training, education, knowledge or experience to testify as to their opinion that perc discharged from the ADIC [defendant American] site prior to September 1995 did not migrate south and impact plaintiff's water well." Defendant American makes note of Mr. Kleaka's experience, certification and training and organizational membership as set forth in his *Curriculum Vitae*. Defendant American also makes note of Mr. Cressy's experience, course work and training as set forth in his *Curriculum Vitae*. Defendant American argues that "[i]t is clear based on a review of the *curriculum vitas* of Vice President Kevin Kleaka and Assessment Supervisor James Cressy of Impact Environmental Consulting, Inc. that they have the requisite skill, training, education, knowledge or expertise to qualify as experts with regard to perc migration and contamination. Mr. Kleaka has 14 years experience as Vice President of an environmental consulting firm that does over \$4 million in annual revenue from work consisting of Phase I and II Environmental Site Assessments, NYSDEC Spill Investigations and Remediations, he is an NYSDEC approved Project Manager for NYS Inactive Hazardous Waste Sites, he has a Bachelor of Science in Environmental Sciences and has undergone training specifically with regard to groundwater remediation and geophysical investigation, which are precisely the issues in this litigation. Mr. Cressy has performed over 450 Phase I Environmental Assessments, over 100 Phase II Environmental Site Assessments and has undergone training in hydrogeology and Long Island Groundwater, again, precisely the issues in this litigation."

Based upon a review of the *Curriculum Vitas* of defendant American's proposed experts, Kevin Kleaka and James Cressy, along with defendant American's CPLR§ 3101(d) Expert Witness Disclosure, as well as the arguments presented above, the Court finds that defendant American satisfied the requirements of CPLR§ 3101(d) by providing plaintiff with information with respect to its proposed expert witnesses. At this time, the Court, in its discretion, will not

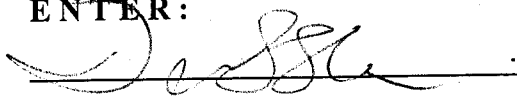
preclude said witnesses from testifying at trial. However, it will be the decision of the trial court, after hearing the pertinent testimony with respect to said witnesses, as to whether said witnesses will be deemed "experts."

Accordingly, plaintiff's motion for an order excluding the testimony of defendant NU-American Cleaners, Inc. d/b/a American Drive-In Cleaners i/s/h/a American Dry Cleaners f/k/a American Drive-In Cleaners' ("American") purported experts, Kevin Kleaka and James Cressy, is hereby **DENIED**.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on February 2, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 18, 2012

ENTERED
JAN 20 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE