SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190109/2015
Motion Seq. 021

JEANNE EVANS, as Executor for the Estate of FREDERICK EVANS JR. and JEANNE EVANS, As Spouse

Plaintiff,

-against-

3M COMPANY, *et al.*,

Defendants

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DECISION & ORDER

PETER H. MOULTON, J.S.C:

Defendant Crane Co. ("Crane") moves by Order to Show Cause for an order quashing the trial subpoena of Defendant Burnham, LLC ("Burnham") pursuant to CPLR § 2304 and CPLR § 3101(a)(4). Crane also seeks a protective order barring enforcement of the subpoena pursuant to CPLR § 3103. Crane was dismissed from this case on April 5, 2017. Subsequently, a trial subpoena was served on counsel for Crane via personal service on or about April 12, 2017. The Trial Subpoena requests that Crane produce a person most knowledgeable to appear for trial, submit live testimony, and produce numerous voluminous documents, including Crane Co.'s historical sales records and catalogs, interrogatory responses, and several other items. Crane requests that the court quash Burnham's subpoena and order that Burnham may take no live trial testimony in this action from any Crane representative.

In support of its application, Crane states that it entered into a good faith settlement of this case in its entirety as to all claims asserted by plaintiffs, thereby extinguishing all cross-claims pursuant to N.Y. Gen. Oblig. Law §15-108(b). As such, Crane submits that it is no longer a party

to this action, and therefore does not have to answer to Burnham's subpoena.

Crane further argues that pursuant to CPLR § 311(a)(1), personal service must be effectuated by delivering it "upon a corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment of law to receive service" and "any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee."

Here, Crane argues that Burnham has failed to meet the requirements of proper service since Burnham merely served Crane's counsel rather than delivering the subpoena to an appropriate person in accordance with CPLR § 311. Crane additionally argues that the subpoena power of a New York court extends only to those individuals and entities found in the state (*see* Judiciary Law § 2-b), and that since Crane is a non-resident corporation, the court should not permit Burnham to use the court's subpoena power in an effort to gain testimony in New York.

Crane further attacks the demands of the subpoena itself. Crane argues that this is the first time Burnham is seeking any documents or testimony from Crane despite this claim being filed more than two years ago. Crane further highlights that it has been dismissed from the case, discovery has been completed, and the trial before me is near its close. Under circumstances such as this, Crane argues that courts have routinely quashed subpoenas (*see Bour v. 259 Bleeker LLC*, 104 AD3d 454 [1st Dept. 2013]). Moreover, Crane points out that many of the documents Burnham seeks to obtain - e.g.- Crane Co.'s Responses to New York County Asbestos Litigations Standard Set of Liability Interrogatories and Requests for the Production of Documents — is a public document filed with the New York County Supreme Court years ago and could have been obtained

by Burnham on their own at any time during the discovery phase of this case. As such, Crane submits that quashing the trial subpoena is appropriate, under these circumstances.

In opposition, Burnham cites *Matter of Standard Fruit & Steamship Co. v. Waterfront Commission*, 43 NY2d 11 (1977) and other cases for the proposition that a corporation found in New York may be subpoenaed to produce a person under its control that has knowledge of the transaction at issue. Burnham claims that since it properly served Crane through one of its designated agents for service of process recorded with the New York Department of State, Crane must obey with the subpoena to the full extent of its terms. Burnham further submits that the import of Crane's claims that it would be unduly burdensome to require Crane to locate and produce voluminous documents is diminished by the fact that Burnham withdrew its request for the production of documents on April 28, 2017.

Judiciary Law § 2-b, entitled, "General powers of courts of record," authorizes issuance of a subpoena "requiring the attendance of a person found in the state to testify in a cause pending in that court." The First Department has interpreted the phrase "found in the state" (§ 2-b[1]) to mean "physically present in the state for purposes of service" (*see Coutts Bank v. Anatian*, 275 AD2d 609, 610-11 [1st Dept. 2000]). As such, the phrase "found in the state" has been used to reach "persons outside the State if they have a presence in the State and service is effected in the State" (*id.*; *see also Matter of Standard Fruit*, 43 NY2d 11, *supra*). Burnham correctly points out that *Matter of Standard Fruit* permits a corporation registered within the state to be served with a subpoena to testify through its officers and employees whether or not they are in the jurisdiction.

However, Crane convincingly highlights other deficiencies in Burnham's application.

Pursuant to CPLR § 3103, "the court may at any time on its own initiative, or on motion of any party or of any person whom discovery is sought, make a protective order denying, limiting,

conditioning or regulating the use of any disclosure device. Such order shall be designated to prevent unreasonable annoyance expense, embarrassment, disadvantage, or other prejudice to any person of the courts." Moreover, pursuant to CPLR § 2304, the court "may quash, fix conditions or modify a subpoena."

It is well-settled that a subpoena which is overly broad, unduly burdensome, and seeks palpably irrelevant information should be quashed (*see Reuters Ltd, v. Dows Jones Telerate Inc.*, 231 AD2d 337, 342-44 [1st Dept. 1997]; *Avubo v. Eastman Kodak Company. Inc.*, 158 AD2d 641 [2d Dept. 1990]). It is equally well-settled that a subpoena may not be used as a tool of harassment or for a "fishing expedition" to ascertain the existence of evidence (*Reuters*, 231 AD2d 337, *supra*; *Mestel & Co. v. Smvthe Masterson & Judd. Inc.*, 215 AD2d 329, 330 [1st Dept. 2015]).

Further, a trial subpoena may not be used as a discovery device to secure wide ranging discovery which a party failed to pursue during the pre-trial stage of litigation (*Mestel & Company. Inc.*, 215 AD2d 329, *supra*, *citing In the Matter of Terry D.*, 81 NY2d 1042 [1993]).

Under CPLR § 3101, "something more than mere relevance or materiality must be shown to obtain disclosure from a nonparty witness" *Matter of Troy Sand & Gravel Co. v. Town of Nassau.* 80 A.D.3d 199 (3d Dept. 2010). To withstand a challenge to request for discovery, the party seeking discovery must be able to demonstrate that the information sought is "material and necessary to prosecution or defense of the action" (*see Kopon v. Koch*, 23 NY3d 32 [2014]).

Here, Burnham properly served Crane through one of its designated agents for service of process recorded with the New York Department of State. That said, I find that the subpoena served upon Crane is improper. The specific testimony sought by Burnham is unreasonably broad, and on the face of the subpoena encompasses Crane's "historical knowledge of the hazards or potential hazards of asbestos between 1930 and the present." Mr. Evans provided testimony during

his deposition regarding the years that he was allegedly exposed to asbestos, including specific exposure to products Crane may potentially have liability for. Conversely, Burnham's subpoena demands broader testimony that extends beyond those years, and it therefore is neither tailored to the facts of the case nor limited to the specific time periods or products at issue. Even if Burnham were to correct that deficiency, I find the subpoena to be burdensome and oppressive insofar as Burnham did not act as expeditiously as possible when issuing its subpoena to Crane, and waited to seek information that Burnham could have obtained at a much earlier juncture in time. This case was originally filed by plaintiffs in April 2015. Furthermore, Mr. Evans was deposed nearly twenty-three months ago in May 2015. At that time all defendants, including Burnham, knew the extent of plaintiffs' allegations against them. Therefore, Burnham had twenty-three months to decide whether or not it intended to seek the trial testimony of Crane's corporate representative. Instead, Burnham waited until the eve of trial, before issuing a subpoena for a Crane representative to testify twelve days later. Crane's counsel has further submitted that even if this court were to deny its application, Anthonly D. Panteleoni, the company's Vice-President of Environmental Health and Safety and "Person Most Knowledgeable," would not be available to testify on such short notice in light of "personal commitments and company obligations." While Burnham withdrew its request for some of the voluminous documents referenced in its subpoena, that withdrawal happened on April 28, 2017, while the court, plaintiffs, and Burnham were already contemplating potential charging instructions for the jury. Under the circumstances, even Burnham's ameliorative actions cannot cure the prejudice Crane has suffered on account of Burnham's unreasonable delay in making its demand. As such, I find that it would be an undue burden to order Crane to comply with Burnham's subpoena (*Reuters*, 231 AD2d 337, *supra*).

Accordingly, it is hereby

ORDERED that Crane's application is granted and that Burnham may not take live trial testimony in this action from Crane.

This constitutes the Decision and Order of the Court.

Dated: May 2, 2017

HON. PETER H. MOULTON
J.S.C.