Matter of Schwartz v A.O. Smith Water Prods.
2017 NY Slip Op 32244(U)
October 23, 2017
Supreme Court, New York County
Docket Number: 190199/15
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

RANDY SCHWARTZ,
Plaintiff

- against -

A.O. SMITH WATER PRODUCTS, et al.,
Defendant.

INDEX NO. 190199 /15
MOTION DATE 10-18-2017
MOTION SEQ. NO. 020
MOTION CAL. NO. ____

The following papers, numbered 1 to 2 were read on this motion by non-party CERTAINTEED CORPORATION to quash a subpoena Ad Testificandum, for a protective order and costs.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers it is ordered that non-party CERTAINTEED CORPORATION'S (hereinafter " CERTAINTEED") motion to quash a subpoena Ad Testificandum served upon it by defendant DURO DYNE CORPORATION (hereinafter "DURO DYNE"), and for a protective order precluding Duro Dyne from taking any live trial testimony in this action from any CERTAINTEED representative, is granted on default to the extent of quashing the subpoena, the remainder of the motion is denied. Duro Dyne, may make use of the non-party's interrogatories and deposition testimony at trial in accordance with the CMO dated June 20, 2017.

On September 27, 2017, prior to the start of Jury selection in this New York City Asbestos Litigation case, defendant Duro Dyne served on non-party CERTAINTEED a subpoena Ad Testificandum dated September 27, 2017, requiring the appearance of "the individual designated by CERTAINTEED ("The Company") as its corporate representative/person most knowledgeable for the trial in this matter.... to give testimony in this action as a witness at trial with respect to all matters relevant to this action, including the following specific subject areas:

1- The Company's historical knowledge of the hazards or potential hazards of asbestos, and specifically when and how the company knew that asbestos could cause asbestosis, lung cancer and/or mesothelioma;

2- The corporate history of the Company;

3- Knowledge of the Company's use, sale and/or distribution of any asbestos-containing equipment and/or products manufactured, supplied, distributed, re-branded and/or sold by the company or any of its predecessor entities from 1966 through 1986 (Mr. Schwartz' alleged period of exposure to asbestos);

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

4- Any warnings/precautionary statements concerning the Company's asbestos-containing equipment or products identified in the above captioned matter regarding potential asbestos hazard associated with its products;

5- Company's membership in and/or affiliation with any of the following trade associations or other entities that disseminated information regarding asbestos or occupational health hazards generally, including but not limited to: National Safety Council, Industrial Hygiene Foundation, American Ceramics Society, the Asbestos Information Association of North America, The American Petroleum Institute, the American Society of Mechanical Engineers, the Illinois Manufacturer's Association, Asbestos Textile Institute and/or the Asbestos Information Association.

6- Knowledge of the Company's catalogs, order forms, pamphlets, brochures or any other advertising material regarding the Company's products or equipment identified in above captioned matter during the relevant time period of plaintiff's alleged exposure.

7- All other relevant matters.

Non-party CERTAINTEED, who was a party to this action but settled out, moves pursuant to CPLR §2304 to quash the subpoena, and pursuant to CPLR §3103 for a protective order. CERTAINTEED argues that this subpoena is an improper attempt by DURO DYNE to obtain discovery and should not be allowed at this late stage. It also argues that the subpoena is lacking in specificity, over broad, and burdensome, and will create an unreasonable expense and disadvantage to CERTAINTEED as it is being served on the eve of trial and after discovery has concluded. Under these circumstances, it argues, a motion to quash the trial subpoena and/or a protective order precluding DURO DYNE from taking live testimony in this action from CERTAINTEED'S representative is warranted. CERTAINTEED also argues that this court should quash the subpoena consistent with its rulings in the GALLEN V. AERCO INTERNATIONAL INC., et al, and the CARILLI V. A.O. SMITH WATER PRODUCTS CO., et al., matters. Finally, it asserts that since counsel for DURO DYNE refused to withdraw the subpoena causing CERTAINTEED to file this motion, it should be awarded the costs associated with this matter.

DURO DYNE has not opposed the motion and Is in default.

Pursuant to CPLR§ 3101(a)(4) "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof by.... Any other person, upon notice stating the circumstances or reasons such disclosure is sought or required."

Pursuant to CPLR§1601 a party defendant is entitled to place before the jury the conduct of a non-party, except one over which the plaintiff was not able to obtain jurisdiction, to determine the equitable share of culpability of the non-party(see CPLR § 1601; McKinney's Consolidated Laws of N.Y. Section 1601:2).

According to CPLR § 1601 DURO DYNE, as a party defendant, is entitled to place before the jury the conduct of a non-party, such as CERTAINTEED to determine its equitable share of culpability.

"The power to issue a Subpoena Ad Testificandum is absolute and unlimited" (Ocean-Clear, Inc., v. Continental Casualty Company, 94 A.D.2d 717, 462 N.Y.S.2d 251 [2nd. Dept. 1983]). Therefore DURO DYNE had a right to issue a subpoena Ad Testificandum to non-party CERTAINTEED. "A motion to quash or vacate is the exclusive vehicle to challenge the validity of a subpoena or the jurisdiction of its issuer" (Ayubo v. Eastman Kodak Company, 158 A.D.2d 641, 551 N.Y.S.2d 944 [2nd. Dept. 1990]). " The person challenging the subpoena bears the burden of demonstrating a lack of authority, a lack of relevancy or a lack of a factual basis for the issuance of the subpoena" (Hogan v. Cuomo, 67 A.D.3d 1144, 888 N.Y.S.2d 665 [3rd. Dept. 2009]). "An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious, or where the information sought is utterly irrelevant to any proper inquiry" (Anheuser-Busch, Inc., v. Abrams, 71 N.Y.2d 327, 520 N.E.2d 535, 525 N.Y.S.2d 816 [1988]; Velez v. Hunts Point Multi-serv. Ctr., Inc., 29 A.D.3d 104, 811 N.Y.S.2d 5 [1st. Dept. 2006]; Empire Wine & Spirits LLC v. Colon 145 A.D.3d 1157, 43 N.Y.S.3d 542 [3rd. Dept. 2016]; Hogan v. Cuomo, Supra; Ayubo v. Eastman Kodak Company, Supra]).

A trial subpoena cannot be over broad and a party cannot use a trial subpoena to obtain discovery that it failed to obtain during pre-trial disclosure (Bour v. Bleecker LLC, 104 A.D.3d 454, 961 N.Y.S.2d 98 [1st. Dept. 2013] Quashing a trial subpoena served on a non-party that is over broad , and improperly used to secure discovery that should have been obtained during pre-trial disclosure).

Absent the subpoena being over broad or served to obtain discovery that should have been obtained during pre-trial disclosure, if the subpoena complies with the notice requirements, and the disclosure sought is relevant to the prosecution or defense of an action, the motion to quash the subpoena should be denied; unless the party challenging the subpoena establishes that the information sought is utterly irrelevant to the action, or that the futility of the process to uncover anything legitimate is inevitable or obvious (see Kapon v. Koch, 23 N.Y.3d 32, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014]).

DURO DYNE is not requesting the production of documents, it is requesting a witness to provide testimony at trial. The subpoena served by DURO DYNE is not over broad and has not been served to obtain discovery that should have been obtained during pre-trial disclosure. The subpoena on its face provides notice of the specific items being requested, which are relevant to the establishing of the equitable shares of liability in this action. CERTAINTEED the party challenging the subpoena, has not established on this record that the information sought is utterly irrelevant to the action, or that the futility of the process to uncover anything legitimate is inevitable or obvious.

In this case CERTAINTEED has been served with the subpoena before the parties commenced jury selection, the subpoena is solely Ad Testificandum, it seeks testimony pertaining to the plaintiff's specific exposure period, is not over broad or unduly burdensome, and does not seek documentation that should have been obtained during pre-trial disclosure.

However CERTAINTEED argues, and rightfully so, that forcing it to produce a witness at the trial of this matter is contrary to the NEW YORK CITY ASBESTOS LITIGATION (NYCAL) CASE MANAGEMENT ORDER (CMO) dated June 20, 2017, slated

to take effect on July 20, 2017 and recently implemented on September 19, 2017 by the lifting of the Appellate Division First Department stay.

"The CMO governs various pre-trial and trial procedures in NYCAL....and differs from the CPLR in numerous ways in an attempt to address issues that permeate asbestos litigation....Such as allowing the limited use of hearsay for article 16 purposes."(see decision accompanying CMO dated June 20, 2017, Moulton, J.)

Justice Moulton stated in his decision accompanying the June 20, 2017 CMO with respect to the limited use of hearsay for article 16 purposes..."Given the longevity of asbestos litigation, many corporate representatives with personal knowledge about a company's asbestos-related products, and the warnings, if any, given to the users of such products, have either retired or died. Accordingly, defendants sought to relax hearsay rules to admit some types of information that might otherwise be barred by strict adherence to New York State's rules of evidence. In our discussions defendants argued that they should be allowed to use both interrogatory answers and depositions of non-parties to prove that non-parties should be included on the verdict sheet for article 16 purposes.... Defendants reason these interrogatory answers are sufficiently reliable to be used by other defendants, at least for the limited purpose of demonstrating that a non-party sold a product that contained or used asbestos, and failed to warn about the dangers of asbestos.... The court agrees that this limited article 16 relief is warranted given the age of asbestos litigation and the difficulty defendants face in proving that other non-party entities should be considered by the jury as potential causes of a plaintiff's disease. Interrogatory answers concerning product identification are reliable in that it is against the answering entity's interest to admit that its product contained asbestos, or required that asbestos be used to further the product's purpose. An admission concerning a failure to warn is similarly against interest. Defendants in NYCAL generally are required to answer the standard form interrogatories contemplated by the CMO only once. The interrogatory answers are then used in all NYCAL cases.... The [CMO] signed on today's date allows for the use of interrogatory answers as described above.... Of course, a settled defendant's deposition testimony can be admissible in certain circumstances for Article 16 purposes under CPLR 3117(2). However that section applies only to settled defendants, and contains other requirements...." (see decision accompanying CMO dated June 20, 2017 pp 22-23).

The CMO, in its section XIII Use at trial of Nonparty Interrogatories and Depositions, states:

"(A) Use of Nonparty Interrogatories. Answers by non-parties of NYCAL standard sets of interrogatories may be used at trial to prove: 1) that a product or products of the nonparty contained asbestos, or that asbestos was used in conjunction with the nonparties' product or products, and/or
2) any failure to warn by the nonparty concerning an asbestos-containing product and/or the use of asbestos in association with a product.....for purposes of this section a non-party shall include a settled party.

(B) Use of Non-party Depositions. Nonparty depositions may be used where allowed by the CPLR..."

Justice Moulton's decision accompanying the CMO, and the CMO, clearly allow the use by defendants in a NYCAL action of non-party and settled party interrogatories, and deposition of settling defendants (under certain circumstances). This use is

allowed due to the age of asbestos litigation and the difficulty defendants face in proving that other, non-party and settling, entities should be considered by the jury as potential causes of a plaintiff's disease. The use of non-party and settling defendants' interrogatories also serves to streamline the trial process, by allowing the defendants to prove the culpability of these entities without the need of producing a witness for this purpose. In essence following the CMO obviates the need to subpoena witnesses from non-parties and settling defendants in order to establish their equitable share of culpability.

It is no secret that these NYCAL cases have a large number of defendants, most of which settle prior to or even during the trial. It takes weeks to select a jury and months to complete a trial of one of these cases; this is without the need for the production by a non-party or settling defendant of a witness at trial. These already complicated, lengthy trials would become even lengthier. The CMO, which governs NYCAL cases, provides the mechanism for the defendant to meet its Article 16 burden through interrogatories, and at times through depositions, without the need of producing witnesses. It streamlines the trial, saves time by reducing the number of witnesses called at trial, while affording the defendant the opportunity to meet its CPLR Article 16 burden.

Accordingly, it is ORDERED that the motion by CERTAINTEED CORPORATION brought by Order to Show Cause, to Quash defendant DURO DYNE CORPORATION'S subpoena Ad Testificandum, and for a protective order is granted, on default, solely to the extent of Quashing the Subpoena, and it is further

ORDERED that DURO DYNE may make use of the non-party CERTAINTEED's interrogatories and deposition testimony at trial in accordance with the CMO dated June 20, 2017.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 23, 2017

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE