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| City of Glen Cove v North Shore Univ. Hosp. at Glen Cove |
| 2013 NY Slip Op 34090(U) |
| August 27, 2013 |
| Supreme Court, Nassau County |
| Docket Number: 601732-12 |
| Judge: Jerome C. Murphy |
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. JEROME C. MURPHY,
Justice.

CITY OF GLEN COVE,

Plaintiff,

- against -

TRIAL/IAS PART 24

Index No.: 601732-12

Motion Date: 6/27/13

Sequence No.: 001, 002

MG, MD

DECISION AND ORDER

NORTH SHORE UNIVERSITY HOSPITAL AT
GLEN COVE, MONTCLAIR CARE CENTER,
INC., FOREST MANOR CARE CENTER, INC.,
E. I. DU PONT DE NEMOURS & CO., ARKEMA,
INC., and HONEYWELL INTL., INC.,

Defendants.

The following papers were read on these motions:

Sequence #001:

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| Notice of Motion, Affirmation, Memorandum of Law and Exhibits..... | 1 |
| Affirmation in Opposition, Memorandum of Law and Exhibits of Defendant, North Shore University Hospital..... | 2 |
| Affirmation in Opposition of Defendant Honeywell International..... | 3 |
| Affirmation in Opposition of Defendant E.I. duPont de Nemours..... | 4 |
| Notice and Affirmation of Defendant Arkema..... | 5 |
| Reply Affirmation, Memorandum of Law and Exhibits..... | 6 |
| Stipulation of Discontinuance as against Montclair Care Center and Forest Manor Care Center, Inc..... | 7 |

Sequence #002:

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|---|----|
| Order to Show Cause, Affirmation and Memorandum of Law..... | 8 |
| Affirmation in Opposition of North Shore Hospital and Exhibits..... | 9 |
| Affirmation in Opposition of Honeywell International..... | 10 |
| Reply Affirmation and Exhibits..... | 11 |

PRELIMINARY STATEMENT

With respect to Sequence #001, plaintiff makes this application for an order, pursuant to CPLR §§ 3103 and 3101, granting protective orders quashing the Deposition Notices and cross-

notices served by defendants on Glen Cove Mayor Ralph Suozzi and City Attorney Vincent Taranto, and precluding such depositions as harassment and unlikely to reach relevant evidence readily available from other sources.

Defendants North Shore University Hospital, Honeywell International, Inc., E.I. DuPont de Nemours & Co. oppose said application, and defendant Arkema submits an affirmation in support of defendant Honeywell's opposition. The action against Montclair Care Center, Inc. And Forest Manor Care Center, Inc. was discontinued on May 31, 2013.

With respect to Sequence #002, plaintiff makes this application for an order, pursuant to CPLR §3116, striking any reference to or use of transcripts of the depositions of Maureen Basdavanos, William Archambault and Angelo Martino in defendants' opposition papers filed in response to plaintiff's pending motion for protective order to preclude the depositions of plaintiff City of Glen Cove's Mayor Thomas Suozzi and City Attorney Vincent Taranto.

Defendants North Shore University Hospital and Honeywell International, Inc. oppose said application.

BACKGROUND

Glen Cove seeks past and future damages allegedly sustained as a result of intrusion of an allegedly defectively designed product, chlorodifluoromethane, commonly referred to as R-22 or HCFC-22, into underground aquifers which supply water to the City. Defendants E.I. du Pont De Nemours & Co. ("du Pont"), Arkema, Inc., and Honeywell Int'l., Inc. are alleged to be manufacturers of the product. Defendant North Shore University Hospital ("NSUH") is alleged to have discharged the product into the aquifer. Plaintiff discontinued the actions against Montclair Care Center, Inc. and Forest Manor Care Center, Inc. By Stipulation dated May 31, 2013.

The manufacturing defendants served a Notice of Deposition dated April 26, 2013, in which they identify six representatives of plaintiff, including Ralph Suozzi, Mayor, and Vincent Taranto, City Attorney. NSUH served a Cross-notice of Deposition dated May 2, 2013, calling for the testimony of the same six individuals. By letter dated May 1, 2013 counsel for plaintiff advised defendants' counsel that William Archambault, the Director of Public Works, was the most knowledgeable person and on May 20, they requested that defendants withdraw the deposition notices for Messrs. Suozzi and Taranto, claiming that "(t)hey have no material information in either the prosecution or defense of this action."

A series of communications followed, in which there were varying considerations as to

whether either or both the Mayor and City Attorney would be required to testify. As indicated in plaintiff's memorandum of law in support of the motion, counsel found the responses to their request to withdraw the deposition notices as arrogant and presumptuous, leading to the institution of this motion for a protective order precluding the deposition of Mayor Suozzi or City Attorney Taranto.

Plaintiff contends that the Court is authorized to restrict discovery which is unduly burdensome or privileged. They contend that the deposition of neither of the individuals is likely to reveal material or necessary information, and that defendants should accept the proffer of Mr. Archambault as a knowledgeable witness. They contend that the schedule of Mayor Suozzi is demanding, and it would be difficult for him to commit to make himself available for a deposition at a particular time and place. As to the City Attorney, his activity with respect to this action involves preparation for litigation, and conversations and information arising from that conduct is privileged as being subject to the Attorney-Client privilege.

Plaintiff also seeks an order striking any reference to depositions of Angelo Martino, Maureen Basdavanos and William Archambault in defendants' opposition to plaintiff's motion for a protective order. The essence of plaintiff's claim is that the witnesses had not yet reviewed or signed their transcript prior to their use by defendants as exhibits to their opposition papers. The contention is that the defendants' failure to provide copies of the deposition transcripts to deponent for review and signature renders the depositions inadmissible, and any reference to them in the opposition papers must be struck.

In response, defendants point to the deposition testimony of City representatives, each of whom denied personal involvement in the decision to commence the lawsuit and knowledge of the material factual allegations of the Complaint. Counsel for NSUH opines that the determination to proceed with this litigation is less based upon a political decision to seek contribution toward the upgrade of a water system which has been plagued by contaminants from others for decades. They point to the fact that no witness on behalf of plaintiff has, to date, been able to establish any relationship between the hospital and the single minimally elevated R-22 reading in one well, or justify the unilateral decision to abandon the well based on a single unverified report.

In reply, plaintiff asserts that the closure of the well was directed by Nassau County Department of Health. They also point to NSUH's documents which reflect purchases of replacement R-22 on a number of occasions, and point to a website comment that air

Taranto should be protected from giving testimony as to the basis for the claim that defendants have contaminated the City water supply, and should be responsible for the cost of remedial action. Plaintiff contends that defendants' reference to the testimony of deponents who have not had the opportunity to review or modify their testimony is inappropriate. The contents of the transcript, in the absence of their being signed, or served but not returned by deponent, would be insufficient to serve as the basis for summary judgment (*Pina v. Flik Intl. Corp.*, 25 A.D.3d 772 [2d Dept. 2006]). But defendants are not seeking summary judgment, they simply point out that no witness yet produced has provided a justification for the determination that defendants are responsible for the contamination of the City's water supply.

The inclusion of references to the prior testimony of representatives of the City is irrelevant. It is inconceivable in a city the size of Glen Cove that a determination to commence an environmental action against manufacturers and users of R-22 by a municipality would occur without the input of the chief executive and his legal advisors. Certainly, inquiries as to privileged discussions involving the legality or legal impact of certain actions, made in confidence, are protected from disclosure by the client or the attorney.

In this case, there is no indication that either Mayor Suozzi or the City Attorney are eyewitnesses, or that they have firsthand knowledge of facts that are not commonly available to others, or that they are experts in this environmental field. The possibility that they may have been told that expert testimony will support the plaintiff's case is not enough for this Court to require them to testify.

However, in fairness, if the Mayor and the City Attorney do not testify, then the non-testifying individual(s) may not testify for the plaintiff as witnesses at trial, nor may they submit factual or expert affidavits as witnesses in this action in support of the plaintiff's positions.

This action will turn on witnesses' firsthand knowledge of the facts and expert testimony. Accordingly, all sides are directed to provide the names, addresses and positions of all factual witnesses known to them by October 15, 2013, if not already provided. Expert witnesses are to be provided as was presumably agreed in the Preliminary Conference Order, or as the Court otherwise directs.

Plaintiff's motion for a protective order precluding defendants from taking the depositions of Mayor Suozzi or City Attorney Taranto is granted.

Plaintiff's second motion, seeking to strike references to prior testimony by defendants, is denied. While such testimony must be in admissible form if submitted in conjunction with a motion for summary judgment, such is not the case here. Defendants merely seek to justify their

need for depositions of Mayor Suozzi and City Attorney Taranto, claiming that no previously
deposed witness has offered a rationale for the determination to proceed with the action.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
August 27, 2013

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.

ENTERED
AUG 29 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE