

Matter of New York City Asbestos Litig.
2013 NY Slip Op 31282(U)
June 19, 2013
Supreme Court, New York County
Docket Number: 40000/88
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

IN RE: NEW YORK CITY ASBESTOS LITIGATION

INDEX NO. 040000/1988

This documents relates to:

MOTION DATE _____

ALL WEITZ AND LUXENBURG CASES IN WHICH
BLACKMER PUMP COMPANY IS A DEFENDANT

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This motion is decided in accordance with the annexed
memorandum decision dated 6-17-13.

FILED

JUN 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6.17.13



SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
IN RE: NEW YORK CITY ASBESTOS LITIGATION
----- X

Index No. 40000/88
Motion Seq. No. 009

This Document Relates to:

ALL WEITZ AND LUXENBURG CASES IN WHICH
BLACKMER PUMP COMPANY IS A DEFENDANT
----- X

SHERRY KLEIN HEITLER, J.:

DECISION AND ORDER
FILED

JUN 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

Pursuant to Section III, paragraph B of the September 20, 1996 Case Management Order, as amended May 26, 2011 ("CMO"), which governs New York City Asbestos Litigation ("NYCAL"), defendant Blackmer Pump Company ("Blackmer") appeals from and seeks a protective order in respect of the May 8, 2013 written recommendation of Special Master Shelley Rosoff Olsen¹ ("Recommendation"), which directs, among other things, the production of certain technical manuals in Blackmer's possession. As set forth below, Blackmer's motion for a protective order is denied and the Special Master's Recommendation is confirmed as modified herein.

BACKGROUND

On May 7, 2013, counsel from Weitz & Luxenberg, P.C., on behalf of the large number of NYCAL plaintiffs whom they represent ("Plaintiffs"), and counsel for Blackmer, a NYCAL defendant, conferred with Special Master Shelley Rosoff Olsen regarding a dispute as to the sufficiency of Blackmer's answers to Plaintiffs' First Standard Set of Liability Interrogatories and Request for Production of Documents ("Document Requests"). CMO § VIII(A)(2)(e) provides that Plaintiffs' Document Requests must be "fully and substantially answered" by all NYCAL

¹ Section III.A. of the CMO provides, in relevant part, that "[t]he Special Master shall supervise compliance with discovery and, when necessary, make recommended rulings for the Court's consideration on all discovery disputes"

defendants.

The Special Master determined that Blackmer's responses to the Plaintiffs' Document Requests have been insufficient² and issued her Recommendation thereon on May 8, 2013. She recommended, among other things, that, subject to any required or appropriate confidentiality, Blackmer must produce all documents and materials responsive to Plaintiffs' Document Requests, including, but not limited to, "Blackmer equipment technical manuals and related publications, Blackmer's drawings, specifications, and correspondence with the United States Navy and Naval Shipyards, all records of purchases of asbestos containing materials used in Blackmer equipment and all documents relating to Blackmer's decision to cease use of asbestos containing materials in its equipment."³ (Recommendation ¶ 4).

By letter dated May 13, 2013,⁴ Blackmer objected to the Recommendation on the grounds that it is overbroad in terms of any discovery requests made by Plaintiffs and goes beyond the scope of the CMO. By letter dated May 17, 2013, Plaintiffs responded that the Recommendation should be affirmed because it comports with longstanding NYCAL instruction and practice. Also on May 17, 2013, Blackmer submitted an order to show cause to this court for a protective order pursuant to CPLR 3101.

The parties appeared before me on May 22, 2013 at which time they agreed to attempt to resolve their discovery issues. In light of the parties' prior letter applications on this issue, I

² Blackmer's responses to Plaintiffs' Document Requests are submitted as Exhibit D to Blackmer's June 6, 2013 letter.

³ A copy of the Recommendation is submitted as exhibit B to Blackmer's June 6, 2013 letter application for a protective order.

⁴ See CMO § III, ¶ B.

declined to sign Blackmer's order to show cause and requested that Blackmer instead submit its application for a protective order by letter should the parties fail to reach an agreement. On May 30, 2013, the parties advised me they had reached a partial resolution of the issues, namely that Blackmer would permit Plaintiffs to inspect and copy documents stored at Blackmer's document repository in Grand Rapids, Michigan.⁵ However, Blackmer declined to permit Plaintiffs to inspect its technical manuals stored at that location.

Blackmer re-submitted its application for a protective order in letter form on June 6, 2013 directed to the production of its technical manuals as set forth in the Recommendation. Plaintiffs responded by letter dated June 10, 2013. The limited issue before this court, therefore, is whether Plaintiffs' counsel should be permitted to examine all of Blackmer's technical manuals at their forthcoming document inspection in Michigan, or whether Plaintiffs' Document Requests⁶ will be satisfied by Blackmer's production of site-specific manuals on a case-by-case basis.

Blackmer contends that because each of its pumps is unique, Plaintiffs must make some

⁵ Plaintiffs' counsel expressed their desire to inspect Blackmer's document repository by the end of June, 2013, to which Blackmer agreed.

⁶ Among other things, Plaintiffs assert that Blackmer is required to produce its technical manuals in accordance with Document Request # 8, # 14, and # 16.

Request for Production of Documents # 8 calls for: "All rules, regulations, manuals, standards, procedures and instructions to salesmen and other documents dealing with: (a) Sales of asbestos-containing products; (b) Health hazards of asbestos products you were selling; and (c) Communication with customers re: health hazards of asbestos."

Request for Production of Documents # 14 seeks "All documents relating in any way to the exposure or possible exposure to asbestos, asbestos-containing products and/or asbestos-containing materials by workers at: (a) shipyards . . . ; (g) Seaman . . ."

Request for Production of Documents # 16 seeks: ". . . documents prepared, reviewed, issued or commented on by you relating in any way to warnings, potential health hazards, instructions or precautions regarding the use or handling of, or exposure to, asbestos, asbestos-containing products, and/or asbestos-containing materials."

minimum showing of exposure to a specific pump at a specific site before Blackmer is required to produce the technical manual for such pump. By way of example, Blackmer refers the court to the case of *Levy v. A.O. Smith*, Index No. 190200/12, in which Plaintiffs requested documentation regarding specific ships on which Mr. Levy claimed to have worked. Blackmer purports that it produced all technical manuals, drawings, and specifications in its possession for the specific ships at issue, and argues that in so doing it satisfied its document production obligation under the CMO. Plaintiffs assert that the CMO permits examination of all technical manuals published by Blackmer during the pertinent time periods, as opposed to examination on a case-by-case basis, in order to determine Blackmer's practices in terms of asbestos. Plaintiffs argue that Blackmer's technical manuals provide instruction for the proper installation and maintenance of its various pumps, is directly relevant to the foreseeability to Blackmer that the end users of its pumps would be exposed to asbestos by following those instructions.

DISCUSSION

The NYCAL CMO is designed to "allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the cases, reach early settlements, and prepare unsettled cases for trial." CMO § 2. Discovery in NYCAL cases is governed by the CMO under which there is "full authority" in the court to issue discovery orders pertaining to ongoing asbestos litigation. *Ames v Kentile Floors.*, 66 AD3d 600, 600 (1st Dept 2009); *see also In re New York City Asbestos Litig.*, 2013 NY Slip Op. 04127, at *10-11 (1st Dept 2013) (upholding in camera review of data and materials underlying scientific studies which "may provide a permissible manner in which to attack the findings that would be consistent with the intent of the CMO to minimize the cost of and streamline discovery.")

The CMO does not replace but supplements New York's CPLR to which NYCAL parties must also adhere. In this regard, CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" The words "material" and "necessary" have been "interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 (1968); *see also Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 (1st Dept 2006). The courts possess wide discretion to decide whether information sought is material and necessary to the prosecution or defense of an action. *Allen v Crowell-Collier Publ. Co.*, *supra*, at 406.

In these proceedings, Blackmer's corporate representative testified that Blackmer's technical manuals are the single best source of information concerning the asbestos content of its products (See May 21, 2013 deposition of Mr. William Kennedy, Exhibit K to Blackmer's June 6, 2013 letter ["Deposition"], pp. 102, 120, 126):

Q. If I said to you, Mr. Kennedy, for a particular Navy ship, I would like every document, every document that Blackmer has that relates to Blackmer equipment on that ship, if that's my question, are you saying to answer that question you would only look for a technical manual and that's the end of the inquiry?

A. That would give you the information of what parts, if any, in that pump contained asbestos. That's correct.

* * * *

Q. Mr. Kennedy, I just have a few follow-up questions to try to clarify some issues here. Could you just briefly describe for us what is contained in the Navy tech manual say from the -- we've seen them from the '50s or '60s, that time period?

A. What type of material is in them?

Q. Yes.

A. There's a listing of the ships that the pumps were supplied to, what types of

pumps they are, and then there are drawings and a descriptive narrative of what the pump does. The drawings will give outlining dimensions so the Navy will know where, how much room they have to mount things in the ship. It will also give cross-section drawings which lists all the individual parts that are in with a parts list on there, indicating material, the quantity of the parts in this particular pump or device or whatever it is. Basically, there are some maintenance information; if you're going to disassemble the pump or do some work on it, here's how you do that. Here are symptoms to look for if the pump isn't performing well. You know, what's it doing; here's what you'll likely look for. It's a typical operation -- what we call Operation Installation Manual. But it gives all those parts numbers to the individual parts so that if the Navy needs to order a new case or a new -- something like that, they have the information they need to order that.

Q. And does the Navy tech manual, a Blackmer Navy tech manual indicate whether or not there are any asbestos component parts in the pumps?

A. Yes, it does.

* * * *

Q. In the tech manuals, there are sections relating to warnings and cautions for the safety of the personnel, correct?

A. There are some warnings, and yes.

Q. And Blackmer would put those in the manuals and give them to the Navy and, ultimately, the Navy, unless they had a problem with them, would approve it, correct?

A. That's correct. That's my understanding, yes.

In *Ames v Kentile Floors, supra*, then Special Master Pacheco had directed defendant Kentile Floors ("Kentile") to produce discovery in respect of certain tests conducted by Kentile's expert who had been retained in the matter of *Oswald v. A.O. Smith Water Products, et al.*, Index No. 111227/01. On November 20, 2008, I denied Kentile's objections and confirmed the Special Master's recommendation, and Kentile appealed. When Kentile settled with the plaintiff in *Oswald, supra*, it withdrew its appeal without having produced the disclosure required by my order. Thereafter, on behalf of all NYCAL plaintiffs, Weitz & Luxenberg sought to obtain the disclosure that I had ordered to be produced in my November 20, 2008 order. Special Master Pacheco again

ordered such production, and I again confirmed her recommendation. Of significance was that the settlement in *Oswald* did not moot either the Special Master's recommendation or my November 20, 2008 order since the information sought in connection therewith pertained to all ongoing NYCAL cases involving Kentile.

Here, as in *Ames v Kentile, supra*, the information sought by Plaintiffs pertains to all NYCAL cases involving Blackmer, and accordingly, should be produced in bulk rather than on a case-by-case basis.⁷ Plaintiffs have persuasively argued that Blackmer's technical manuals will likely show which of its pumps integrated asbestos containing components, whether Blackmer specified that its pumps be insulated with asbestos or not, whether Blackmer recommended that asbestos containing replacement parts be used in maintaining its pumps, and whether Blackmer warned of the dangers associated with asbestos. In light of all of the above, Blackmer's contention that the Recommendation goes beyond the scope of the CMO is without merit.

Relying on *Mendelowitz v Xerox Corp.*, 169 AD2d 300, 303-04 (1st Dept 1991), Blackmer argues that the Special Master's recommendation is overbroad and unduly burdensome. In *Mendelowitz, supra*, the plaintiff requested, among other things, "[c]opies of any books, articles or other medical information concerning the effects of asbestos exposure on human health and safety in the possession of the defendant prior to January 1, 1979", that date coinciding with the plaintiff's decedent's retirement. The plaintiff offered to withdraw the request if the defendant allowed the plaintiff access to the library maintained by the defendant in Rochester, New York. The defendant rejected this offer and moved for a protective order, which the trial court granted. The First

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A significant expenditure of time and money would be required from both sides were Blackmer permitted to produce its technical manuals on a case-by-case basis. This is inconsistent with the intent of the CMO to minimize the cost of and streamline discovery.

Department explained that a demand for the production of documents must specify the items sought with reasonable particularity, that the burden of proving specificity is on the requesting party, and that the utilization of the language “any and all” is usually an indication of a lack of the requisite specificity.

Blackmer’s position is undercut by Plaintiffs’ offer to bear the time and expense associated with the document review at issue. More important, Plaintiffs’ request is isolated to a specific group of clearly identifiable documents, namely those technical manuals that address asbestos-containing components. The Recommendation’s use of encompassing words such as “all” is appropriate since ““these phrases . . . relate to specific subject matter’ and thus does not impede a ready identification of the particular thing(s) to be produced.” *Mendelowitz, supra*, at 304 (quoting *In re Citibank, N.A.*, 100 AD2d 784 [1st Dept 1984]).

Blackmer argues that production of its technical manuals is overly intrusive and prejudicial because they are proprietary information and/or contain trade secrets. But the facts do not support this claim. The only evidence submitted by Blackmer in this regard is William Kennedy’s testimony that the Blackmer manuals constitute “active files”.⁸ This internal classification does not nearly meet Blackmer’s burden to show that the manuals are actually proprietary. In New York State, “when trade secrets are sought by an adverse party in litigation, the burden of establishing that the information sought is a trade secret lies with the disclosure objectant. If that burden is met, the party seeking disclosure must show that the information appears to be indispensable and cannot be acquired in any other way.” *Mann v Cooper Tire Co.*, 33 AD3d 24, 30-31 (1st Dept 2006); *see also Rooney v Hunter*, 26 AD2d 891 (4th Dept 1966) (attorney affirmation that the contents of a product

⁸ See Deposition pp. 94-103.

is a trade secret is insufficient to establish such fact).

Blackmer has already disclosed certain technical manuals in the *Levy* case pursuant to Plaintiffs' standard discovery requests.⁹ While the disclosure in *Levy* was limited in scope, it is inconsistent with Blackmer's claim herein that all of its manuals contain trade secrets. Moreover, as Plaintiffs point out, and apart from *Levy*, these manuals are designed to be disseminated to customers.

CONCLUSION

The court has considered Blackmer's remaining contentions and finds them to be without merit. Accordingly, and in light of the foregoing, it is hereby

ORDERED that Blackmer's application for a protective order is denied in its entirety; and it is further

ORDERED that the Special Master's May 8, 2013 Recommendation is confirmed.

This constitutes the decision and order of the court.

DATED: 6-17-13



SHERRY KLEIN HEITLER
J.S.C.

FILED

JUN 19 2013

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NEW YORK

⁹ It is worth noting that Blackmer neither sought a confidentiality agreement with respect thereto, nor identified those manuals as confidential, nor indicated that they contained confidential information.