Konstantin v 640 Third Ave. Assoc.
2014 NY Slip Op 33346(U)
December 15, 2014
Supreme Court, New York County
Docket Number: 190134/10
Judge: Joan A. Madden
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

OB

PRESENT: Hon. Joan A. Madden **PART** 11
Justice

Index Number : 190134/2010
KONSTANTIN, DAVID
vs
630 THIRD AVENUE
Sequence Number : 007
OTHER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
DEC 23 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: December 17, 2014

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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RUBY KONSTANTIN, Individually and as Executrix of the Estate of DAVID KONSTANTIN,

INDEX NO. 190134/10

Plaintiff,

-against-

640 THIRD AVENUE ASSOCIATES, el al,

Defendants.

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JOAN A. MADDEN, J.:

In this post-judgment motion, defendant Tishman Liquidating Corporation (Tishman) moves to reopen discovery pursuant to CPLR 5015 and 3108, with respect to any claims plaintiff submitted to bankruptcy trusts. Plaintiff Ruby Konstantin, as Executrix of the Estate of David Konstantin (Konstantin),[1] opposes the motion as untimely and without a legally sufficient factual or legal basis.

This motion was filed in February, 2014, approximately 30 months after the verdict in August, 2011,[2] and 15 months after November 19, 2012, the date the judgment was signed. In the verdict, the jury found Tishman reckless and liable for 76% of the damages sustained by Konstantin, and that three joint compound manufacturers, Georgia-Pacific Corporation, Kaiser Gypsum Company, Inc., and United States Gypsum liable, and allocated 8 % of the fault to each company.

Here, Tishman seeks to re-open discovery to determine "whether plaintiff's counsel,

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[1]The claims of Ruby Konstantin as an Individual were dismissed.

[2]The motion was fully briefed and argued in July, 2014.

Belluck & Fox made post-trial submissions to asbestos trusts or reorganized entities" affecting set-offs of the verdict so as to inflate the amount recovered, and "whether material and necessary information was withheld during pre-trial discovery." Specifically, Tishman seeks to issue subpoenas to asbestos trusts, which plaintiff has identified as responsible for exposure, to determine if claims have been made to, and paid by these trusts. Tishman also seeks to subpoena documents from trusts where plaintiff "may have filed" proof of claims, and to subpoena plaintiff's law firm to determine if it submitted any proof of claims to trusts.

In its original papers, Tishman cites as grounds for the relief it seeks, CPLR 5015(a)(2)& (3), which provide that a court may grant relief to a party with respect to a judgment based on

> (2)newly discovered evidence which, if introduced at trial, would probably have produced a different result and which probably could not have been discovered in time to move for a new trial under section 4404; or
> (3)fraud, misrepresentation, or other misconduct of an adverse party;

In its reply memorandum, Tishman cites the "general interests of justice," as additional grounds for granting the subpoenas.

Tishman's motion is primarily based on the contention that plaintiff withheld discovery during the pendency of the case, in connection with, and failed to disclose, proof of claims (POCs) plaintiff filed with two bankruptcy trusts, and that this constituted misrepresentation and misconduct, so that discovery should be reopened. Specifically, Tishman alleges plaintiff filed pre-trial, POCs with two bankrupt trusts established by US Gypsum and Armstrong World

Industries (Armstrong),[3] and did not disclose the filings to Tishman, as required by the Case Management Order (CMO) in the NYCAL in effect at the time.

At the outset, it must be noted, this motion must be considered in the context of the inability of either defendant or plaintiff, to state unequivocally, whether or not the POCs were disclosed to Tishman. Defendant law firm states it "has no record of receiving these POCs," and plaintiff law firm states that "[a]lthough there appears to be no documentation, one way or the other, upon information and belief, POCs in this case were likely disclosed at the beginning of trial, off the record."

In support of its contention that plaintiff failed to disclose and misrepresented filings with bankrupt trusts, Tishman points to Mr. Konstantin's deposition testimony, where he identifies exposure from the products of US Gypsum and Armstrong, and to plaintiff's response to the Fourth Amended Interrogatories, where plaintiff's counsel represented that they did not file any bankruptcy proof of claims.

As to the CMO, Tishman relies on the provision of the CMO requiring "any plaintiff who intends to file a proof of claim form with any bankrupt entity or trust, shall do so no later than ...ninety (90)days before trial." CMO § XV(E)(2)(1).

Tishman also points to the exclusion of Armstrong and US Gypsum from a list of settled defendants provided by plaintiff to defendant during trial, and in support of this contention,

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[3] Tishman also points to Bondex, a company as identified by Mr.Konstantin at his deposition, but does not assert issues related to it. Plaintiff states that at the commencement of the action in 2010, Bondex was named as a defendant, and during the pendency of the case, filed for bankruptcy. According to plaintiff, at the time of plaintiff's submission in connection with this motion, Bondex's bankruptcy was still pending, and therefore, an asbestos trust had not been established.

submits a string of email exchanges between defendant's firm and plaintiff's firm.

With respect to the issue of whether plaintiff made misrepresentations or committed misconduct, and whether defendant has established sufficient grounds for reopening discovery, Tishman cites to statements and conclusions in a January 10, 2014 decision by the Bankruptcy Court of the Western District of North Carolina regarding the bankruptcy case of In re Garlock Sealiig Techs., LLC, No. 10-31607, slp op. (Bankr. W.D.N.C. Jan. 10, 2014).[4] Garlock is an unrelated action and did not involve parties in this action.[5] In Garlock, the matter was before the Bankruptcy Court in connection with a hearing to determine an estimate for Garlock's liability for present and future mesothelioma claims. The Court permitted discovery in 15 cases and found that in connection with Garlock, plaintiffs had withheld evidence of exposure to other products, delayed filing claims with bankrupt trusts, and in four cases, plaintiffs represented that they had not filed any POCs with bankruptcy trusts, when disclosure revealed that such claims had in fact been filed. The court found, based on the evidence before it, that with respect to Garlock and these issues, there was a widespread pattern of abuse in asbestos litigation. Tishman argues that plaintiff's response to the interrogatory that no claims had been filed, and the Bankruptcy Court's

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[4]Tishman also discusses, but does not, in support of its motion for subpoenas, specifically rely on an article published by the American Bar Association entitled, "Bankruptcy Trusts and Asbestos Litigation," Am. Bar Assoc.: PRODUCTS LIABILITY, June 11, 2012, (Bankruptcy Article), available at: http://apps.americanbar.org/litigation/committees/products/articles/spring2012-bankruptcytrusts-asbestos-litigation.html. This article discusses asbestos litigation in which a plaintiff's counsel (not counsel in this case), sought to discourage a trust from responding to defendant's discovery requests.

[5]Tishman asserts plaintiff's counsel in this action, was counsel to one of 15 plaintiffs in Garlock, a statement plaintiff's counsel deny. However, plaintiff's counsel does state that Garlock commenced a suit against the law firm, which is under seal, before the Garlock decision was issued.

statements and conclusions in Garlock, provide a sufficient basis for the subpoenas it seeks.

In opposition, plaintiff points to the affirmation of Brian Fitzpatrick (Fitzpatrick Affirmation), of counsel to plaintiff's law firm, submitted post-verdict in Konstantin, for in camera review. This submission was in accordance with the court's procedures for review of information regarding settlements with defendants and bankrupt trusts, for the purpose of ascertaining the aggregate amount of settlements for set-off. The Fitzpatrick Affirmation contained the individual settlements reached with defendants and bankrupt trusts. While the affirmation submitted in this motion is redacted as to amounts of individual settlements, it lists the settling entities, and includes Armstrong and US Gypsum.

As to plaintiff's responses to the Fourth Amended Interrogatories referenced by Tishman, plaintiff contends that at the time of plaintiff's response, it was accurate as claims had not yet been filed with US Gypsum or Armstrong. Plaintiff points to chart A attached to the responses, identifying US Gypsum, as a source of Mr. Konstantin's asbestos exposure.[6] Plaintiff also points to Mr. Konstantin's trial and deposition testimony alleging exposure to asbestos from products of Armstrong and US Gypsum, and notes that after Mr. Konstantin's deposition, plaintiff amended the chart to include Armstrong. Plaintiff contends, based on the chart and Mr. Konstantin's deposition and trial testimony, that plaintiff disclosed to Tishman, Mr. Konstantin's claim of exposure to products of US Gypsum and Armstrong.

As to the CMO, plaintiff argues that Tishman's reliance, in its reply, on provisions of the CMO, contradicts its position in its original motion papers, that"[s]ince the judgment in

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[6], The response also identified UGL and Bondex as sources of Konstantin's asbestos exposure, as did Mr. Konstantin at his deposition and at trial.

Konstantin and Dummit, a case tried jointly with Konstantin, the NYCAL CMO has more explicitly defined plaintiff's counsel's obligations regarding the parameters and scope of bankruptcy POC disclosures in order to prevent the inflation of recoveries. Specifically, plaintiffs are now required to disclose POCS and accompanying documentation during the active discovery period." Plaintiff contends that the practice and procedures for disclosure of POCs were unclear, until a November 2012 decision by Judge Heitler, which clarified the time period in which the POCs were to be filed, and the Special Master's March, 2013 decision, delineating the time frame for disclosure of the POCs. Plaintiff further contends that the CMO referenced by Tishman only required the "filing" of claims, not their disclosure.

With respect to the email exchange, plaintiff contends in its emails, Tishman requested a list of settled defendants, and did not request information regarding filings with bankruptcy trusts. Plaintiff also points to a subsequent email on September 24, 2012, from plaintiff's firm to defendant's firm, stating that aggregate settlements amount to $2,101,576.66. This amount corresponds to the amount in the Fitzpatrick affirmation, and includes the settlements with US Gypsum and Armstrong. Moreover, plaintiff's counsel submits an affirmation stating that no POCs have been filed with any bankruptcy trusts post-verdict, that none will be filed, and that upon defendant's full satisfaction of the judgment, plaintiff will assign all prospective rights to bankruptcy trust claims to defendant.

As to the Garlock decision, plaintiff argues that it is inapplicable to the instant motion, as the Bankruptcy Judge's statements and conclusions were made in an unrelated case, between different parties, and bear no connection to this case. Thus, plaintiff argues, Tishman's contention that the Garlock Court's conclusions provide a predicate for the discovery it seeks, is

based on surmise and speculation. Plaintiff further argues that since the issue before the Garlock Court was an estimation of the amount needed to fund the trust, any individual plaintiff's failure to disclose proof of claims or delay in filing such claims, were not in issue, and therefore the Court's conclusions are dicta.

A court has inherent power to vacate its judgments. CPLR 5015 (a) codifies the principal grounds upon which courts have vacated judgments, including, inter alia, newly discovered evidence and fraud, misrepresentation or misconduct. Woodson v Mendon Leasing Corp., 100 NY2d 62, 68 (2003). The exercise of this power is not subject to any time period, and thus, plaintiff's argument that the motion is untimely does not bar its consideration. A court's discretionary power to vacate its own judgments "for sufficient reason [and] in the furtherance of justice...[This] power... does not depend upon any statute, but is inherent." Ladd v Stevenson, 112 NY 325,332 (1889); accord Goldman v Cotter, 10 AD3d 289, 293 (1st Dept 2004), quoting Woodson v Mendon Leasing Corp., supra; see also 10 Weinstein-Korn-Miller, NY Civ Prac ¶ 5015.12, at 50-325 ("The enumeration of specific grounds for vacatur in CPLR § 5015 (a) is not intended to impair the traditional power of a court to grant relief from an order or judgment in the interests of justice"). This power is rooted in a court's "exercise of control over its judgments." Ladd v Stevenson, supra. CPLR § 5015 (a) codifies the principal grounds upon which courts have vacated judgments, but it is not an exhaustive list of such grounds. See Goldman v Cotter, supra, quoting Woodson v Mendon Leasing Corp., supra.

Tishman's motion to reopen discovery, fails under CPLR 5505(a)(2)and(3), as Tishman fails to establish any newly discovered evidence, or fraud, misrepresentation or misconduct by plaintiff which warrants reopening discovery. While Tishman cites to CPLR(a)(2), it does not

address ths section in detail in its memorandum, but focuses its argument on allegations of misrepresentations and misconduct by plaintiff. In any event, the allegations here fail to establish any newly discovered evidence, and, to the extent Tishman seeks relief under this section, the motion is denied. See e.g. Coastal Sheet Metal Corp. v RJR Mechanical Inc., 85 AD3d 420, 421 (1st Dept 2011) ("Evidence only qualifies as 'newly-discovered' if it was in existence at the time of the original order or judgment, but was undiscoverable with due diligence.") see also Matter of Ayodele Ademoli J., 57 AD3d 668, 669 (2d Dept. 2008).

Moreover, under the circumstances here, in the absence of misconduct by plaintiff, or a reasonable basis to believe the subpoenas would reveal information relevant and material to issues raised in this motion, Tishman has not established grounds for reopening discovery in the interests of justice.

Significantly, defendant and plaintiff agree, that on the record before the court, it is unclear whether POCs were disclosed by plaintiff to defendant.[7] However, the record does demonstrate notice to Tishman that plaintiff claimed exposure from products of US Gypsum and Armstrong, two companies that had established asbestos bankruptcy trusts. In the initial responses to interrogatories, plaintiff identified products of U.S. Gypsum as a source of asbestos exposure; at his deposition, Mr. Konstantin identified products of U.S. Gypsum and Armstrong; and after his deposition, plaintiff amended his answer to the interrogatories to include exposure to Armstrong's products. In addition, at trial, Mr. Konstantin testified to exposure to products of US Gypsum and Armstrong.

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[7]In future trials, it will be ordered that all disclosures regarding POCs shall be in writing or on the record.

Although Tishman was on notice of Mr. Konstantin's claimed exposure to products of US Gypsum and Armstrong, Tishman does not point to any specific demand during trial it made for POCs regarding the bankruptcy trusts. Rather, in its reply memorandum, Tishman points to argument as to the POCs in Dummit, so as to infer, that since there was no argument in connection with POCs in Konstantin, POCs were not disclosed. However, this inference does not necessarily flow from the stated facts, as other explanations exist for the absence of argument.

Nor do the email exchanges, improperly submitted for the first time in Tishman's reply, show a demand for POCs. Even if considered, defendant's initial request in the emails, was related to settled defendants. The string of emails is devoid of any mention of, let alone a request for identification of bankruptcy trusts or other entities, except for settled defendants; nor does any email request information of POCs filed with bankruptcy trusts.[8]

Moreover, defendant's argument in its reply memorandum, that the Case Management Order, in place during the pendency of this case, required plaintiff to provide POCs prior to trial, is unpersuasive. This position is at odds with Tishman's position, implicit in its original memorandum, that NYCAL protocols, with respect to POCs, were unclear until the decisions of Judge Heitler in November 2012, and of the Special Master in March, 2013, clarifying the time period for filing and disclosing POCs. Moreover, plaintiff is technically correct, CMO § XV(E)(2)(1) referred to the "filing," not "disclosures"of POCs.

In addition, that the Fitzpatrick Affirmation and September 12, 2012 email, submitted in

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[8]Tishman's July 28, 2011, 4:42 p.m. email to plaintiff, states that a list of settled defendants was created by cross-referencing the defendants in the complaint with the list of dismissed defendants.

connection with molding the judgment, included the amounts received from the Armstrong and US Gypsum trusts, reflects that plaintiff reported these amounts for setoff purposes, undermining the argument that plaintiff failed to disclose such claims to inflate the amount recovered.

As to the statements and conclusions by the Bankruptcy Court in Garlock, the case involved different parties and different issues, was litigated in another jurisdiction, and in a different forum. Based on the record before this court, the conclusions in Garlock bear no relation to the issues herein. To the extent Tishman argues, the Bankruptcy Court's statements and conclusions in Garlock, as to abuses by plaintiffs' attorneys in asbestos litigation with respect to POCs, can be attributed to plaintiff's attorneys in this case, I categorically reject this argument as without foundation. Accordingly, the decision in Garlock does not impact on the issues in this motion.

However, while the Garlock decision is inapplicable, this is not to say that plaintiffs have complied with all discovery obligations. Notwithstanding that, with respect to Armstrong and US Gypsum, Tishman had notice of plaintiff's claims of exposure to asbestos from their products, and did not demand POCs, of concern is plaintiff's failure to update the response to the interrogatory. Parties are under a continuing obligation to update discovery when future events or changed circumstances warrant it. Here, plaintiff's conduct in failing to update the response after POCs had been filed, is not to be condoned. However, in light of the notice to Tishman as to the products of Armstrong and US Gypsum, and lack of specific demand for POCs by Tishman, and, as plaintiff included the amounts received from the bankruptcy trusts in the setoff notice, it cannot be said that plaintiff's failure to update the response, constitutes a misrepresentation or misconduct within the meaning of CPLR 5015(a)(3). Based on the foregoing, and on the

affirmation of plaintiff's counsel that no additional POCs have been, or will be filed, such failure, in the absence of wrongdoing, or a reasonable basis to believe that POCs were filed with other trusts, I conclude that Tishman has not presented sufficient grounds to reopen discovery in the interests of justice.

Accordingly, it is

ORDERED that the motion by defendant Tishman Liquidation Corporation to reopen discovery post judgment is denied.

ENTER

Dated: December 15, 2014

J.S.C.