

Carilli v A.O Smith Water Prods.
2017 NY Slip Op 32154(U)
October 12, 2017
Supreme Court, New York County
Docket Number: 190252/15
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

ROGER J. CARILLI, Plaintiff

INDEX NO. 190252 /15

- against -

MOTION DATE 10-10-2017

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

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by ITT LLC to quash subpoenas Ad Testificandum served on it by plaintiff and Burnham LLC:

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

PAPERS NUMBERED

1- 3

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers it is ordered that ITT LLC's motion to quash the subpoenas Ad Testificandum served upon it by defendant Burnham LLC and the plaintiff and precluding Burnham LLC and plaintiff from taking any live trial testimony in this action from any ITT LLC representative, is granted and the subpoena is quashed. Burnham LLC and plaintiff, may make use of ITT LLC's interrogatories and deposition at trial, in accordance with the CMO dated June 20, 2017.

ITT LLC was named in the caption of this action as "ITT Industries Inc. Individually and as successor to Bell & Gossett Company and as successor to Hoffman Specialty and as successor to Kennedy Valve Manufacturing Co. Inc.." Defendant Burnham LLC served on ITT LLC a subpoena Ad Testificandum dated August 30, 2017 requiring the appearance of "the individual designated by ITT LLC as its corporate representative/person most knowledgeable for the trial in this matter" and added in footnote 1, "includes predecessor entities Bell & Gossett Company, Hoffman Specialty, and Kennedy Valve Manufacturing." The subpoena seeks to have the representative/person, "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 1958 through 1985 (Mr. Carilli's alleged period of exposure to asbestos);

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

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

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." (Mot. Exh. A)

Plaintiff served a subpoena Ad Testificandum dated August 22, 2017 seeking an individual designated by ITT LLC as successor in interest to Hoffman Specialty, "as the person most knowledgeable/corporate representative regarding the issues in the trial in this matter, including, but not limited to, its asbestos products, historical knowledge of the hazards of asbestos, warnings/cautions on its asbestos products and measures taken to reduce the risk of asbestos disease to its employees."(Mot. Exh. B).

ITT LLC moves to quash the subpoenas. ITT LLC argues that this subpoena is an improper attempt by Burnham LLC and plaintiff to obtain discovery and amounts to a fishing expedition that should not be allowed. It also argues that the subpoenas are lacking in specificity, overbroad, and burdensome, and will create an unreasonable expense and disadvantage to ITT LLC. Under these circumstances, it argues, a motion to quash the trial subpoena precluding Burnham LLC and plaintiff from obtaining testimony in this action from an ITT LLC representative is warranted.

Pursuant to CPLR § 3101(a)(4) "There shall be full disclosure of all matters 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 person not a party to the action, except one over which the plaintiff was not able to obtain jurisdiction, to determine the equitable share of culpability of the person not a party (see CPLR § 1601; McKinney's Consolidated Laws of N.Y. Section 1601:2).

"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 Burnham LLC and plaintiff had a right to issue a subpoena Ad Testificandum to non-party ITT LLC. "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]).

Both Burnham LLC and plaintiff are not requesting the production of documents, they are requesting a witness to provide testimony at trial. The subpoenas served by Burnham LLC and plaintiff are not over broad and have not been served to obtain discovery that should have been obtained during pre-trial disclosure. The subpoenas on their face provides notice of the specific items being requested, which are relevant to the establishing of the equitable shares of liability in this action. ITT LLC, the party challenging the subpoenas, 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 ITT LLC has been served with subpoenas before the parties commenced jury selection, the subpoenas are solely Ad Testificandum, seeking testimony pertaining to the plaintiff's specific exposure period, are not over broad or unduly burdensome, and does not seek documentation that should have been obtained during pre-trial disclosure.

This court is of the opinion that forcing ITT LLC to produce a witness at the trial of this matter is contrary to the policy of fostering and encouraging settlements, and 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.

CPLR §3117[a][2] was amended in 1996 to permit the use at trial of deposition testimony of an agent or employee of a party to the action "as of the time the deposition was taken (and not necessarily at the time of trial as well)...Post-deposition settlement of the deponent (or of the deponent's employer) would no longer bar admission of the deposition." The revision was perceived as a means of alleviating any potential discouragement of settlements, because "By its provisions, the deposition would become admissible pursuant to CPLR §3117[a][2] upon application of a party who was adverse to the deponent (or adverse to the party for whom deponent appeared) as of the date of the deposition"(see New York Bill Jacket, 1996, Ch. 117 New York Bill Jacket A.D. 7545-A pg. 10). The Trial Court in its discretion determines the admissibility of deposition testimony used as evidence. Deposition testimony used pursuant to CPLR §3117[a][2], must be admissible under the rules of evidence (Novas v. Zuckerman, 93 A.D. 3d 585, 941 N.Y.S. 2d 84 [1st Dept., 2012] and Rivera v. New York City Transit Authority 54 A.D. 3d 545, 863 N.Y.S. 2d 201 [1st Dept., 2008]).

In this case the deposition testimony of a witness on behalf of ITT LLC taken before it settled may be admissible evidence and may be used for the limited purpose of determining liability under CPLR § 1601. To the extent the testimony admits to the knowledge of the hazards of asbestos, the manufacture of asbestos related products, and failure to warn, that is admissions against interest of the party deponent, it is admissible evidence of the facts against that party (Rivera v. New York City Transit Authority 54 A.D. 3d 545, supra and GJF Const., Inc. v. Sirius America Ins. Co., 89 A.D. 3d 622, 934 N.Y.S. 2d 697 [1st Dept., 2011], facts admitted in the deposition are informal judicial admissions (Richter, J., concurring, at pgs. 626-627).

The use of interrogatories is governed by the language of CPLR §3131, and the answers "may be used to the same extent as the depositions of a party" (McKinney's Consolidated Laws of New York Annotated CPLR §3131). The Court finds that 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 also 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 only once.

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 mechanism for the defendant to meet its Article 16 burden through interrogatories, and at times through depositions, without the need of producing witnesses will streamline the trial, and saves time by reducing the number of witnesses called at trial, while affording the defendant the opportunity to meet its CPLR Article 16 burden. In sum it promotes judicial economy and efficiency, and provides finality.

Accordingly, it is ORDERED that the motion by ITT LLC, brought by Order to Show Cause, to quash the subpoenas Ad Testificandum served upon it by defendant Burnham LLC and the plaintiff, is granted, and it is further ,

ORDERED that the subpoenas are quashed, and it is further,

ORDERED that Burnham LLC and the plaintiff may make use of ITT LLC's interrogatories and deposition at trial in accordance with the CMO dated June 20, 2017, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied.

ENTER:

Dated: October 12, 2017



MANUEL J. MENDEZ J.S.C. MANUEL J. MENDEZ J.S.C.

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