

Matter of Jenkins Bros.
2018 NY Slip Op 32213(U)
September 7, 2018
Supreme Court, New York County
Docket Number: 782000/2017
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

<u>IN RE: NEW YORK CITY ASBESTOS LITIGATION</u>	INDEX NO.	<u>782000/2017</u>
THIS DOCUMENT RELATES TO:	MOTION DATE	<u>08/29/2018</u>
ALL CASES IN WHICH JENKINS BROS. IS A DEFENDANT	MOTION SEQ. NO.	<u>002</u>
	MOTION CAL. NO.	<u> </u>

The following papers, numbered 1 to 7 were read on plaintiff's motion for relief from the Special Master's recommendation:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Jenkins Bros.'s (hereinafter referred to as "Jenkins") motion to vacate and overturn Special Master Shelley Olsen's July 18, 2018 Decision, is granted as stated herein. The remainder of the relief sought is denied.

The parties agree that Jenkins is a company that has been out of business and defunct for more than twenty (20) years, with no employees or assets. Jenkins claims that eventually Mr. David Boisvert, a former president of the company was identified as a witness. Mr. Boisvert was deposed on a NYCAL-wide basis starting November 22, 2017, and continuing on January 18 and 19, 2018 and July 17 and 18, 2018. Jenkins claims the plaintiffs have represented that at least two more days of Mr. Boisvert's deposition are remaining.

At Mr. Boisvert's July 17, 2018 deposition Jenkins' attorney, Mr. Jeffrey Fegan of Clyde & Co., objected to questions posed by plaintiffs' counsel, as follows:

1. "Okay. A product, when used as intended which leads to the development of cancer many years later by definition isn't a product that is safe, true?" (Mot. Exh. H, pg. 647, lines 7-10)
2. "Does Jenkins agree that a product can be deemed defective if it fails to warn about hazards inherent in the intended use of that product?" (Mot. Exh. H, pg. 649, lines 10-13)
3. "Has anyone explained to you that the main allegation against Jenkins is that the plaintiffs allege work on and around Jenkins' valves where that work released asbestos fibers into the air that they breathed that played a role in the development of asbestos-related disease, anybody explain that to you?" (Mot. Exh. H, pg. 695, lines 6-12)
4. "Sitting here today as Jenkins' corporate representative, what is your understanding of why Jenkins is being sued in these cases?" (Mot. Exh. H, pg. 695, line 25, pg. 696, lines 1-2),
5. "Mr. Boisvert, why are we here today?" (Mot. Exh. H, pg. 696, line 7)

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

6. **“What is your understanding of what these asbestos cases are all about?” (Mot. Exh. H, pg. 696, lines 10-11)**
7. **“I want to know whether Jenkins via you understands why it is involved in the myriad of lawsuits that it’s involved in the New York City Asbestos Litigation?”(Mot. Exh. H, pg. 696, lines 19-22)**
8. **“Okay. Were the conversations that you had prior to becoming a client of Clyde & Co. limited only to gaskets and packing or did they include allegations of exposure to thermal insulation products that contained asbestos associated with Jenkins’ valves?” (Mot. Exh. H, pg. 700, lines 2-7)**

Mr. Fegan objected to questions #1 and #2 because they call for legal conclusions. Mr. Fegan objected to questions #3 and #4 on privilege grounds and for asking the witness to answer legal concepts that are at issue in the case. Mr. Fegan objected to questions #5 and #6 as overly broad. Questions #7 and #8 were objected to by Mr. Fegan as asking a fact witness to talk about legal implications and conclusions or allegations made against Jenkins (Mot. Exh. F, pgs. 647-649, 695-698, and 700).

On July 18, 2018 Jenkins sent an e-mail to Special Master Shelley Olsen for a ruling on the excerpts from Mr. Boisvert’s July 17, 2018 transcript that included the challenged questions (1 - 8). On July 18, 2018, before the parties started to conduct the deposition, Special Master Olsen determined that Mr. Boisvert should answer all of the challenged questions (1 - 8). She recommended that question #2 (page 649, lines 10-13) be modified to say, “Do you have an opinion as to whether a product can be defective if it fails to warn about hazards inherent in the intended use of that product?,” and then be answered by Mr. Boisvert.

Jenkins now moves for an Order vacating Special Master Olsen’s July 18, 2018 Decision and a protective order pursuant to CPLR §3103[a] preventing Mr. Boisvert from having to answer the contested questions.

Jenkins’ motion is premised upon: (i) the Special Master’s alleged failure to address each of the questions and related objections individually; (ii) the questions posed were allegedly plainly improper and would require Mr. Boisvert to infer from facts, and speculate as to the legal contentions in the pending litigation; (iii) the objections were allegedly proper under 22 NYCRR §221.2; and (iv) the claim that Special Master Olsen’s rephrasing of question #2 made the question more improper because it asked Mr. Boisvert to speculate and give a hypothetical opinion about the legal definition of a defective product.

Jenkins also seeks relief for objections raised by Jenkins’ attorney at Mr. Boisvert’s January 18, 2018 deposition. These objections were not raised by Jenkins or addressed in the July 18, 2018 Decision of Special Master Olsen (See Mot. Exh. J) This Court will proceed to address objections to questions 1- 8 which are the subject of Special Master Olsen’s Decision and this motion to vacate.

CPLR §3101[a] permits full disclosure of all matter “material and necessary” in the prosecution or defense of an action, regardless of the burden of proof. “The test is one of usefulness and reason” (Forman v. Henkin, 30 N.Y. 3d 656, 93 N.E. 3d 882, 70 N.Y.S. 3d 157 [2018]). It is within the court’s discretion to determine whether the materials sought are “material and necessary.” The burden of proving that the disclosure sought is improper, is on the party seeking the protective order (Roman Catholic Church of the Good Shepherd v Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept. 1994]). Unlimited disclosure is not mandated, and the Court in its discretion pursuant to CPLR §3103[a] may issue a protective order “denying, limiting, conditioning or regulating the use of any disclosure device” to prevent unreasonable disadvantage or other prejudice to any party (See Sciarra v. Surgical Associates of Western New York, P.C., 104

A.D. 3d 1256, 104 N.Y.S. 2d 640 [4th Dept., 2013] and Marrow v. Gallagher, 163 A.D. 3d 804, 2018 N.Y. Slip Op. 05300 [2nd Dept., 2018]).

The June 20, 2017 CMO was ratified, after appeal to the Appellate Division First Department (See In re New York City Asbestos Litigation, 159 A.D. 3d 576, 74 N.Y.S. 3d 180[1st Dept., 2018]). The June 20, 2017 CMO Section XI, titled "Depositions" under subsection (A) titled "General Guidelines" states in relevant part, "Counsel at depositions shall behave professionally, and in accordance with 22 NYCRR §221. Any objections shall be made pursuant to CPLR §3115[b]."

22 NYCRR §221.2 requires a deponent to answer all questions at a deposition unless they are preserving a privilege or right of confidentiality, enforcing a limitation set forth in an order from a court, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. The evidentiary scope of a deposition "is at least as broad as that applicable at the trial itself....Consequently, when faced with objections at a deposition, the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR §3115" (Orner v. Mount Sinai Hosp., 305 A.D.2d 307, 309, 761 N.Y.S.2d 603 [1st Dept., 2003]).

Pursuant to CPLR §3115 the proper procedure at a deposition, is to permit the witness to answer all questions posed, unless a question is "clearly violative of the witness'[s] constitutional rights, or of some privilege recognized in law, or is palpably irrelevant" (Dibble v. Consolidated Rail Corp., 181 A.D. 2d 1040, 582 N.Y.S. 2d 582 [4th Dept., 1992] citing to White v. Martins, 100 A.D. 2d 805, 474 N.Y.S. 2d 733 [1st Dept., 1984]).

A review of questions #1 and question #2 (before and after Special Master Olsen's recommendation) reveals that both questions were properly objected to by Mr. Fegen. Jenkins correctly argues that these questions are improper and would cause prejudice if Mr. Boisvert were compelled to answer them.

The scope of permissible examination at a deposition is broader than at trial. It is proper at deposition to question a witness as to whether in his capacity he "may possess knowledge of discoverable facts." (Horowitz by Horowitz v. Upjohn Co., 149 A.D. 2d 467, 539 N.Y.S. 2d 961 [2nd Dept. 1989]). At a deposition the witness is required to answer questions based on underlying facts. Questions pertaining to a witness's understanding of the "parties' ultimate legal contentions," factual conclusions, or seeking to draw inferences from the facts, are palpably improper (Kaye v. Tee Bar Corp., 151 A.D. 3d 1530, 58 N.Y.S. 3d 695 [3rd Dept., 2017] citing to Barber v. BPS Venture, Inc., 31 A.D. 3d 887, 819 N.Y.S. 2d 329 [3rd Dept., 2006], and Mayer v. Hoang, 83 A.D. 3d 1516, 921 N.Y.S. 2d 426 [4th Dept. 2011]).

Plaintiffs' argument that Question #1 pertains to "Jenkins' institutional voice" in seeking to determine when a product is safe, is unavailing. Question #1 applies to plaintiffs' ultimate legal conclusion, does not address the underlying facts and seeks to draw an inference that Jenkin's products were not "safe" and caused mesothelioma years later.

Question #2 as initially posed likewise addresses legal and factual conclusions applying to plaintiffs' contentions that Jenkins' products should be deemed defective and that there was a failure to warn about inherent hazards in the use of the product. The amended question #2 posed by Special Master Olsen is not simply seeking an "opinion one way or another" and does not make the revised question proper. Jenkins is correct that the revised question is speculative, seeks an opinion or inference on failure to warn and what constitutes a defective product, warranting vacatur of Special Master Olsen's decision as it applies to the revised question #2. A protective order is granted preventing Mr. Boisvert, on behalf of Jenkins, from answering questions #1 and question #2 (in either form).

In NYCAL the Court has “full authority under the controlling CMO to issue its discovery order.” The CMO is recognized as a controlling factor for all cases and states that the Special Master supervises discovery. Special Master Olsen is tasked with ensuring that parties comply with discovery, and as a result, recommends rulings on all discovery disputes (*Ames v A.O. Smith Water Products, et al.*, 66 AD3d 600, 887 NYS2d 580 [1st Dept. 2009]). Pursuant to CMO Section III(C) the Special Master's recommendations are appealable to this court.

Jenkins argument that Special Master Olsen inappropriately made a blank ruling on the remaining questions 3 - 8, is unavailing. Special Master Olsen determined that all questions “at issue” should be answered (See Mot. Exh. J). Jenkins, in seeking to vacate Special Master Olsen's determination, does not individually address each of questions 3 - 8, and instead refers to them en masse.

Jenkins raised an objection, in part, on privilege grounds at the July 17, 2018 deposition for questions #3 and #4 but failed to address this objection in the motion papers or state why a response would be privileged (See Mot. Exh. H, pg. 695, lines 13-19, and pg. 696). Plaintiff's counsel in asking the questions had also clarified that the questions would not apply to conversations with lawyers (See Mot. Exh. H, pg.696, lines 15-18). Jenkins' argument that questions #3 and #4 seek to address legal implications or allegations and are palpably improper, is unavailing. Plaintiffs have shown that these questions relate to a generalized factual inquiry as to Mr. Boisvert's understanding of the claims asserted against Jenkins. Questions #3 and #4 are properly asserted, warranting denial of the protective order as to these questions.

Jenkins objected to questions #5 and #6 at the July 17, 2018 deposition as overly broad, and is now seeking a protective order arguing that they called for legal conclusions. Questions #5 and #6 were made in the context of Jenkins objections to questions #3 and #4, and are also properly asserted factually based inquiries as to the claims asserted against Jenkins. As to these questions a protective order is denied.

Jenkins objected to question #7 on the same grounds as questions #3 and #4, that is, it is seeking to elicit from Mr. Boisvert testimony involving legal implications or allegations against the defendant (Mot. Exh. H, pgs. 696-697). Question #7 addresses Mr. Boisvert's knowledge of the factual basis for Jenkins involvement in the various NYCAL lawsuits and is properly asserted.

Jenkins objected to question #8, which inquired about Mr. Boisvert's conversations with Jenkin's attorneys *before* he became a client by agreeing to be a witness, as also seeking to elicit information related to legal implications or allegations. Mr. Boisvert was allowed to answer a prior question about the first meeting he had with Jenkins' attorneys before he became a client, and his knowledge of the lawsuit against Jenkins. Mr. Boisvert testified that he was advised that Jenkins was sued because of “valves that had components in them, packing and gaskets that had asbestos in it.” (Mot. Exh. H, pg. 699, lines 11-21). Question #8, taken in the context of the permitted questioning, only sought further clarification, of conversations with Jenkins' attorneys prior to Mr. Boisvert becoming a client, and whether they included conversations about thermal insulation products. Jenkins has not shown how this question involves legal implications, legal allegations, or legal conclusions. Question #8 is not palpably improper warranting denial of a protective order.

The Court will address the merits of Jenkins argument pertaining to the January 17, 2018 deposition that was not the subject of Special Master Olsen's July 18, 2018 Decision.

At Mr. Boisvert's January 18, 2018 deposition, Jenkins' attorney, Mr. Jeffrey Fegan of Clyde & Co., objected to questions posed by plaintiffs' counsel, as follows:

9. "What was the most commonly used material for packing and gasket purposes within valves used for high-heat applications in any point in time, 1940's, 50's, 60's, 70's, or 80's?"
"MR. FEGAN: objection to form. You can answer." (Mot. Exh. E, pg. 259, lines 1-4)

Jenkin's attorney permitted Mr. Boisvert to answer question #9 over objection, there is no need for a ruling on whether a protective order is warranted.

10. "Crane Co. was a major competitor of Jenkins, right? Answer: Yes. If you- -if I show you documents where Crane Co. in realtime in the 1950's says that asbestos - containing gaskets are the most frequently used gaskets for high temperature applications, do you have any reason not to accept that as true?"
(Mot. Exh. E, pg. 260, lines 20-24)

Question #10 is proper because it is only asking the witness whether he agrees or disagrees with the statement. Question #10 is not, as alleged by Jenkins' attorneys, asking Mr. Boisvert to draw inferences or conclusions from statements and facts produced by another entity, it is proper and not subject to a protective order.

Accordingly, it is ORDERED, that Jenkins Bros.'s motion to vacate and overturn Special Master Shelley Olsen's July 18, 2018 Decision, is granted as to vacating Special Master Shelley Olsen's July 18, 2018 Decision on questions #1 and #2 as numbered herein, and it is further,

ORDERED that Special Master Shelley Olsen's July 18, 2018 Decision is vacated as to questions #1 and #2 as numbered herein, and it is further,

ORDERED, that the remainder of Special Master Shelley Olsen's July 18, 2018 Decision is confirmed, and it is further,

ORDERED that there is no need for a protective order as to questions #9 and #10 as numbered herein, which were posed at the January 18, 2018 deposition, and were not addressed in Special Master Shelley Olsen's July 18, 2018 Decision, and it is further,

ORDERED that Jenkins Bros. is granted a protective order pursuant to CPLR §3103 only to the extent that Jenkins Bros.'s witness Mr. David Boisvert, is not required to answer questions # 1 and #2 as numbered herein, from the July 17, 2018 deposition, and it is further,

ORDERED, that within thirty (30) days from the date of service of a copy of this Order with Notice of Entry, the parties shall schedule and proceed with the remaining depositions of Jenkins Bros.'s witness, Mr. David Boisvert.

ENTER:

Dated: September 7, 2018



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