

Slonim v Altman Stage Light. Co.
2019 NY Slip Op 33711(U)
December 20, 2019
Supreme Court, New York County
Docket Number: 190339/2017
Judge: Manuel J. Mendez
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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

ERIC SLONIM, as Administrator of the Estate of
CHRISTINE SLONIM, and ERIC SLONIM, Individually,

Plaintiffs,

INDEX NO. 190339/2017

- against -

MOTION DATE 12/11/2019

ALTMAN STAGE LIGHTING COMPANY, *et al.*,

MOTION SEQ. NO. 010

Defendants.

MOTION CAL. NO. _____

J & R FILM CO. and MAGNASYNC/MOVIOLA,
CORPORATION,

Third-Party Plaintiffs,

- against -

STEENBECK B.V., *et al.*,

Third-Party Defendants.

The following papers, numbered 1 to 7, were read on defendants J & R Film Company and Magnasync/ Moviola's motion seeking reversal of the Special Master's ruling and to compel discovery:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6 - 7</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendants J & R Film Co. (hereinafter individually "J&R") and Magnasync/Moviola Corporation's (hereinafter individually "M/M Corp.") motion to reverse the Special Master's October 30, 2019 ruling and recommendation, and upon reversal granting permission to serve a Notice for Discovery and Inspection on the plaintiffs, and to direct plaintiffs to tailor the scope of their Notice of Deposition to this case and provide temporal parameters with respect to "Exhibit A" and "Exhibit B," is denied.

On October 20, 2017, Plaintiffs, Eric Slonim and Christine Slonim, commenced this action alleging that Christine Slonim's mesothelioma was caused by exposure to asbestos in the defendants' products (NYSCEF Doc. # 1). Plaintiffs allege that Christine Slonim had second-hand exposure to asbestos from Eric's Slonim's work servicing "Moviola" film editing machines from about 1969 through 1991. J&R acquired M/M Corp. (hereinafter referred to jointly as "defendants") in about December of 1984 (NYSCEF Doc. # 367, para. 47).

The Summons and Complaint were subsequently amended approximately five times to substitute the estate and add additional defendants. On February 5, 2018, J&R was served with the Third Amended Complaint and Supplemental Summons. On May 1, 2018 J&R served its Answer (NYSCEF Doc. #s 334 and 335). On August 9, 2018 M/M Corp., was added to the action and served with the Fifth Amended Complaint (NYSCEF Doc. # 262). On August 28, 2018 M/M Corp., served its Answer (NYSCEF Doc. #s 336 and 337). This action was subsequently assigned to the October 2018 In Extremis Trial Cluster (NYSCEF Doc. # 338). On

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

May 13, 2019 the case was transferred to this Court for post-discovery proceedings (NYSCEF Doc. # 135).

On August 14, 2019 plaintiffs served a Notice of Deposition seeking to depose Randy Paskal, defendants' corporate representative. The Notice of Deposition contains "Exhibit A" a list of fourteen items on which plaintiffs want Mr. Paskal to prepare to testify about, and as "Exhibit B" a list of twenty-six documents to be produced (Mot. Exh. A). On August 28, 2019 the parties by email agreed to depose Mr. Paskal on October 3, 2019 in Los Angeles California (Mot. Exh. B).

There was no objection or further communications regarding the Notice of Deposition, until the defendants served a Notice for Discovery and Inspection dated September 25, 2019 (Mot. Exh. D). Defendants' September 25, 2019 Notice for Discovery and Inspection is a twenty-nine item list, seeking: "all documents" related to items 1, 2, 3, 6, 7, 8 and 10 - 14 of "Exhibit A" to Plaintiff's Notice of Deposition, and "all documents" that the plaintiffs intended to use at Mr. Paskal's deposition related to nine causes of action in the plaintiffs' attorney's "Standard Asbestos Complaint for Wrongful Death No. 7" (Mot. Exh. D)

On September 25, 2019, in a separate email (copied to plaintiffs' attorney) defense counsel sought permission from Special Master Shelley Olsen for Additional Discovery in accordance with CMO Section IX (L). The email sought to have the items identified in the Notice of Discovery and Inspection provided 48 hours before Mr. Paskal's scheduled October 3, 2019 deposition. Defendants stated they were willing to briefly delay the proceedings until their request was accommodated. The email referenced an attached letter (Mot. Exh. C).

In the attached letter defense counsel, for the first time after possessing the Notice of Deposition for a month, and about a week before the scheduled October 3, 2019 deposition of Mr. Paskal, objected to the items enumerated in "Exhibit A" and "Exhibit B." Defendants sought to have plaintiffs "reasonably limit and specify the scope of the requests included in "Exhibit A" and "Exhibit B" of the Notice of Deposition" (Mot. Exh. E). The letter included individual objections to the items listed in both "Exhibit A" and "Exhibit B" of the Notice of Deposition (Mot. Exh. E, pgs. 2 through 8 of 8).

In an email dated September 25, 2019 sent to Special Master Shelley Olsen and defense counsel, plaintiffs' attorney objected to the new discovery sought in defendants' Notice of Discovery and Inspection as arbitrary and stated that the defense's objections to the discovery could be just as easily noted in the record at the deposition. Plaintiffs counsel stated that defense counsel failed to identify any rule or caselaw to support its position as to the discovery sought in the Notice of Discovery and Inspection. Plaintiffs stated that since this was the first deposition taken of defendants' corporate representative, a wider range of questioning was sought to determine the extent of Mr. Paskal's knowledge (Opp. Exh. 2)

On September 26, 2019 defense counsel sent an email to Special Master Olsen and plaintiffs' attorney stating that pursuant to CPLR §3101(a) the discovery sought was presumptive and that defendants were entitled to full disclosure of the information sought in the Notice of Discovery and Inspection. Simultaneously, defense counsel sought to limit the discovery sought by plaintiff's attorneys in the Notice of Deposition, stating that plaintiffs' right to ask questions "is not unlimited." (Opp. Exh. 2). Plaintiffs' attorney, in response, objected to the defendants Notice of Discovery and Inspection and noted that the issues raised by defense counsel were never previously discussed until a week before Mr. Paskal's deposition. Plaintiffs' attorney stated that many of the documents sought by the defendants in the September 25, 2019 Notice for Discovery and Inspection, including items 1, 2, 4, 5, 6, 8, 9 and 10 were either provided to plaintiffs by the defendants or were otherwise already in the defendants' possession. Plaintiffs' attorney stated that items 3, 7 and 11 - 29 amounted to seeking disclosure of trial

exhibits and exhibit lists, which were previously produced to defense counsel or were still being compiled (Opp. Exh. 2)

In another email sent to the Special Master and defense counsel on September 26, 2019, plaintiffs' attorney stated that he planned to cross-examine Mr. Paskal with discovery produced by the defendants and anything else that is relevant. He noted that many of the documents sought in the Notice for Discovery and Inspection are equally available to the defendants. Plaintiffs' attorney stated that the defendants were inappropriately seeking to obtain strategy and state of mind prior to the deposition (Opp. Exh. 2)

Plaintiffs' attorney in a later email sent to the Special Master and defense counsel on September 26, 2019 agreed, in the interest of moving forward with Mr. Paskal's deposition, to turn over documents sought by the defendants prior to the deposition. He stated that there were not many documents to turn over, and most of the documents sought by the defendants were actually provided by the defendants in document production and interrogatories. In an email response, defense counsel cancelled Mr. Paskal's October 3, 2019 deposition citing multiple issues. Plaintiffs' attorney responded by withdrawing his offer to provide the documents sought by the defendants (Opp. Exh. 2).

On October 30, 2019 Special Master Olsen ruled that the plaintiffs' attorney did not have to provide defense counsel with documents that they had not previously produced to speed things along. Special Master Olsen stated there is no 48 hour rule for pre-deposition cross-examination documents and refused to allow defendants to change the rules which would then apply to plaintiffs' depositions. She stated, "Any objection to the scope of these Defendants' first NYCAL deposition will be placed on the record." (Mot. Exh. G)

On November 3, 2019 defense counsel, in an email to Special Master Olsen, stated that defendants were not pursuing verification or to obtain documents within the "24-hour rule" (should be 48-hour rule), rather they wanted permission to serve the supplemental discovery requests (the Notice for Discovery and Inspection), in accordance with the CMO. Defendants stated they assumed the Special Master's ruling denied their requests and that they would appeal (Mot. Exh. H).

In a November 3, 2019 email response the Special Master acknowledged the defendants decision to file an appeal and suggested discussing the scope of the deposition with the defendants as soon as possible (Mot. Exh. H).

Defendants now appeal and move for an Order reversing Special Master Olsen's October 30, 2019 ruling that allowed plaintiffs to depose Mr. Paskal without responding to their Notice for Discovery and Inspection. Defendants seek an Order granting permission to serve the September 25, 2019 Notice for Discovery and Inspection, and directing plaintiffs' to tailor the scope of their Notice of Deposition to this case. Defendants also seek to have the plaintiffs provide temporal parameters for "Exhibit A" and "Exhibit B" of the Notice of Deposition.

In New York City Asbestos Litigation ("NYCAL") the CMO states that discovery is supervised by a Special Master. Special Master Olsen is tasked with ensuring the 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.

Addressing the merits of the defendants' arguments appealing the Special Master's ruling and recommendation, they argue that they are entitled to the additional discovery from the plaintiffs pursuant to CPLR §3101(a) which encourages liberal discovery to avoid ambush and surprise. They argue that

pursuant to CPLR 3120 the Notice for Discovery and Inspection is also appropriate as necessary to the defense of this action.

Defendants cite to CMO Section IX(L), titled "Additional Discovery," which states: "any party seeking to propound discovery on a party in a given case other than that provided herein may do so only upon application to the Special Master or by stipulation by opposing Counsel." They argue that their application to the Special Master was sidetracked by lesser or irrelevant issues and that the October 30, 2019 ruling failed to address their arguments in support of proceeding with the Notice for Discovery and Inspection before Mr. Paskal's deposition and that this appeal should be granted.

CPLR §3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." It is within the court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepherd v Tempco Systems*, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994] and *Allen v. Crowell-Collier Publ. Co.*, 21 NY 2d 235 NE 2d 430, 288 N.Y.S. 2d 449 [1968]). The applicable standard is whether defendant's demands may lead to relevant evidence (CPLR §3101[a]; *SNI/SI Networks LLC v DIRECTV, LLC*, 132 AD3d 616, 18 NYS3d 342 [1st Dept. 2015]; *Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 8 NYS3d 88 [1st Dept. 2015]). A discovery request using the term "all" is generally deemed overbroad, unless it can be determined by examination that the items sought are limited to the specific subject matter of the action and can be identified with "reasonable particularity" so that it can be readily identified (*Mendelowitz v. Xerox Corp.*, 169 AD 2d 300, 573 NYS 2d 548 [1st Dept., 1991]).

Plaintiffs have correctly stated that every item of defendants' Notice of Discovery and Inspection seeks "*All documents* plaintiff intends to use at the deposition of Randy Paskal," (emphasis added) there is no limitation to the broad requests. Defendants have not identified the documents with "reasonable particularity" given the parties disagreement as to the scope of the discovery.

The initial burden is on the defendants to establish that plaintiffs possess documents and discovery that contain relevant information that is material and necessary to the defense. Only then does the burden shift to the plaintiffs to establish that the discovery is not useful and overbroad (*MPEG LA L.L.C. v. Toshiba Information Systems, Inc.*, 173 AD 3d 611, 100 NYS 3d 864 [1st Dept. 2019] and *Rosenhaus Real Estate, LLC v. S.A.C. Capital Management, Inc.*, 100 AD 3d 512, 953 NYS 2d 855 [1st Dept. 2012]).

The discovery sought is not different from what defendants provided to the plaintiffs. Plaintiffs stated, when they were contemplating providing responses to the defendants Notice of Discovery and Inspection, that items 1, 2, 4, 5, 6, 8, 9 and 10 were already in the defendants' possession, and that items 3, 7 and 11 - 29 amounted to seeking disclosure of trial exhibits and exhibit lists which were previously produced to defense counsel or were still being compiled (Opp. Exh. 2). Defendants have not stated or otherwise shown, in any way, that plaintiffs' statements, that defendants already possess the discovery sought, were incorrect. Plaintiffs response to the defendants' Notice for Discovery and Inspection are not necessary for the defense of this action.

Defendants refer to CPLR §3120. That section applies to service of a subpoena duces tecum on a party and is a device to secure production of discovery. CPLR §3120 does not determine whether items sought are subject to disclosure, that is the purpose of CPLR §3101(a).

Defendants next argue that the scope of the deposition should be limited. They concede that the parties have agreed to marking objections for the record at the deposition. They argue that the Notice of Deposition under "Exhibit A" and

“Exhibit B” has no temporal limits, is overbroad and objections on the record would not prevent answering questions related to unproduced documents or topics that have no time limits. Defendants state that the parameters of the Notice of Deposition should be reasonably tailored to the facts of this case.

Defendants do not offer any specific parameters or propose limitations until the reply papers, when they specifically identify items from “Exhibit A” and “Exhibit B” of plaintiffs’ Notice of Deposition. Defendants for the first time in the reply papers state that some of the items sought were provided to plaintiffs as part of their discovery responses.

New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept.,2012], In re New York City Asbestos Litigation (Konstantin), 121 A.D .3d 230, 990 N.Y.S. 2d 174 [1st Dept., 2014] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]).

The arguments stating specific limitations and referencing previously produced discovery, are made for the first time in defendants’ reply papers, deprive the plaintiffs of the opportunity to respond, and are improperly before this Court.

The Special Master correctly ruled and recommended that there was no need for the plaintiffs to respond to the defendants’ Notice for Discovery and Inspection prior to the deposition of their corporate representative, Mr. Paskal. Defendants will have an opportunity to note their objections to questions posed by the plaintiffs on the record at the deposition.

Accordingly, it is ORDERED, that defendants J & R Film Co., and Magnasync/Moviola Corporation’s motion seeking to reverse the Special Master’s October 30, 2019 ruling and recommendation, and upon reversal granting permission to serve a Notice for Discovery and Inspection on the plaintiffs, and to direct plaintiffs to tailor the scope of their Notice of Deposition to this case and provide temporal parameters with respect to “Exhibit A” and “Exhibit B” is denied, and it is further,

ORDERED, that Special Master Shelley Olsen’s October 30, 2019 ruling and recommendation that the plaintiffs’ attorney did not have to provide defense counsel with documents and that any objection to the scope of the deposition of the defendants’ corporate representative, Randy Paskal, will be placed on the record, is confirmed, and it is further,

ORDERED, that the parties shall schedule and conduct a deposition of defendants’ corporate representative, Randy Paskal, within thirty days (30) from the date of service on defense counsel pursuant to e-filing protocol of a copy of this Order with Notice of Entry.

ENTER:

Dated: December 20, 2019



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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