

Slonim v Altman Stage Light. Co.

2020 NY Slip Op 30230(U)

January 28, 2020

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 01/22/2020

ALTMAN STAGE LIGHTING COMPANY, et al.,

MOTION SEQ. NO. 011

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 pursuant to CPLR §2221(e) to renew:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] 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 pursuant to CPLR §2221(e), to renew this Court's June 7, 2019 Decision and Order denying their appeal and motion to vacate Special Master Shelley Olsen's April 14, 2019 Recommendation, alternatively to Order plaintiffs to provide a testing protocol for the parties to comply with the June 7, 2019 Decision and Order, is granted to the extent of Ordering plaintiffs to provide a testing protocol. The remainder of the relief sought in this motion is denied.

Plaintiffs, Eric Slonim and Christine Slonim, commenced this action on October 20, 2017, 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 the mid-1980's. J&R acquired M/M Corp. (hereinafter referred to jointly as "defendants") sometime in December of 1984 (NYSCEF Doc. # 367, para. 47).

The Summons and Complaint was subsequently amended multiple times to substitute the estate and to 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

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

October 2018 In Extremis Trial Cluster (NYSCEF Doc. # 338). On May 13, 2019 the case was transferred to this Court for post-discovery proceedings (NYSCEF Doc. # 135).

On November 5, 2018 plaintiffs served discovery requests seeking items related to Moviola machines, including the production of those machines in the defendants' possession, in order to inspect the internal parts to determine if they contained asbestos (Mot. Exh. G). Defendants responded that they did not have asbestos-containing Moviolas in their possession. The parties eventually brought the discovery dispute to Special Master Shelley Olsen, seeking to resolve the issue of whether plaintiffs should be permitted to inspect the defendants' Moviolas.

On April 5, 2019 Special Master Olsen issued a recommendation in favor of the defendants (Mot. Exh. I). On April 14, 2019, after the plaintiffs submitted an appeal directly to Special Master Olsen, she reversed herself and ordered the parties to "jointly test" defendants' Moviolas (Mot. Exh. I). Defendants appealed and filed a motion to vacate Special Master Olsen's April 14, 2019 Recommendation (Mot. Exh. A). The motion was argued and submitted on May 29, 2019. This Court's June 7, 2019 Decision and Order confirmed Special Master Olsen's April 14, 2019 Recommendation finding that the inspection of Moviola machines sought by plaintiffs pursuant to CPLR §3101 and CPLR §3120 is relevant and reasonably calculated to lead to admissible evidence. The defendants were directed, within thirty (30) days from service of a copy of the Order with Notice of Entry, to produce the "Moviola machines in their possession from the relevant period for joint inspection" (Mot. Exh. K).

On July 10, 2019 defendants provided responses to the plaintiffs' discovery demands. Defendants stated that they possessed two upright moviola machines used for decorative purposes and had located four more 35mm upright Moviolas in a storage facility. They also stated they located one flatbed Moviola machine. Defendants stated they had no way to clarify any variables regarding origin or history of any of the Moviolas in their possession. Defendants stated that they were unable to state whether any of the upright Moviola machines in their possessions were from the relevant period sought by the plaintiffs of 1960's through the 1970's and any testing would not be relevant to this action. (see excerpts, Mot. Exh. L).

On July 12, 2019 plaintiffs' counsel sought to meet and confer regarding defendants' July 10, 2019 discovery responses and the failure to provide plaintiffs with the machines for inspection. On July 16, 2019 plaintiff's counsel sought the assistance of Special Master Olsen and requested a "meet and confer" between the parties, claiming that the defendants wanted guidance as to logistics and protocols (Mot. Exh. M). On August 13, 2019 the parties met with Special Master Olsen. Defendants claim they advised Special Master Olsen of their inability to determine when the Moviola machines in their possession were manufactured, and their position that any testing results would not be relevant. They stated that Special Master Olsen suggested they file a motion to reargue because they were unable to locate the Moviolas until after the briefing period.

On August 14, 2019 plaintiffs exchanged two reports from their expert Steven P. Compton, Ph.D. executive director of MVA Scientific Consultants ("MVA"), of his testing of a Moviola machine that was purchased on E-bay. Both reports state that asbestos was found on the machine's rheostat. The second "corrected" report dated June 12, 2019 stated that asbestos was also located on the brake lining (Mot. Exh. N). On August 28, 2019 plaintiffs provided the defendants with the Affidavit of Bruce Klein, the individual that sold the Moviola machine on E-bay to plaintiffs' attorneys. Mr. Klein stated that he had purchased the machine in Spring of 2012 at the liquidation of Continental Film Group and sold it to plaintiffs' attorneys in January of 2019 (Mot. Exh. O).

Defendants' motion seeks an Order pursuant to CPLR §2221(e) granting renewal of this Court's June 7, 2019 Decision and Order and upon renewal granting them the appeal and reversal of Special Master Olsen's April 14, 2019 Recommendation. Alternatively, defendants seek an Order directing plaintiffs to provide a testing protocol, in accordance with the Special Master's directive, and for the parties to comply with the June 7, 2019 Decision and Order requiring joint testing of the Moviola machines.

Defendants argue that the two expert reports exchanged by plaintiffs on August 14, 2019 and Mr. Klein's affidavit, are new evidence that was unavailable to them at the time the prior motion was submitted and is relevant to the underlying discovery dispute. They claim that the plaintiffs were in possession of their own Moviola machine that was not disclosed to the defendants from January of 2019. Defendants argue that the plaintiffs privately conducted testing renders irrelevant any testing of the Moviola machines in the defendants' possession, which also have an unknown provenance.

Renewal applies to the submission of new evidence not available at the time the original motion was submitted or a change in the law that would affect the outcome of the case (CPLR §2221[e][2], *Laura Vazquez v. JRG Realty Corp.*, 81 AD 3d 555, 917 NYS 2d 562 [1st Dept. 2011] and *Spierer v. Bloomingdale's*, 59 AD 3d 267, 873 NYS 2d 66 [1st Dept. 2009]). A motion for leave to renew must be based on additional material facts not offered when the prior motion was made and there must be a reasonable justification for the failure to present those facts. Reasonable justification includes that the material facts were unknown to the party seeking to renew at the time the prior motion was made (CPLR §2221[e][3], *Nassau County v Metropolitan Transp. Authority*, 99 AD3d 617, 953 NYS2d 183 [1st Dept. 2012] *citing to* *Foley v Roche*, 68 AD 2d 558, 418 NYS 2d 588 [1st Dept. 1979]).

Defendants have shown that they were unaware of the plaintiffs' purchase of a Moviola machine at the time Motion Sequence 002 was submitted and decided. However they have not established that a different result is warranted after renewal.

"Renewal is granted sparingly and only in cases where there is a valid excuse for failing to submit additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Weinberg*, 132 AD 2d 190, 522 NYS 2d 511 [1987], *lv dismissed* 71 NY 2d 994, 524 NE 2d 879, 529 NYS 2d 277 [1988]). Renewal may be denied if the submission of the new evidence "would not have warranted a different result" (*Koplowitz v. King*, 159 AD 3d 580, 70 NYS 3d 376 [1st Dept. 2018] and *Clemons v. Glicksman*, 25 AD 3d 468, 808 NYS 2d 663 [1st Dept., 2006]).

Defendants have admitted they have located multiple models of the Moviola machines, including a flatbed Moviola machine, that plaintiff Eric Slonim testified he worked on (Opp. Exh. 1, pgs. 80-81, 86-88), and is an entirely different model from the older upright model he also worked on (Opp. Exh. 1, pg. 144), that was tested by plaintiffs' attorneys and found to contain asbestos. Defendants have also stated they located four more 35mm upright Moviolas in a storage facility and have not provided anything other than speculation or conjecture that the model of the single Moviola machine tested by plaintiffs is identical to those in defendants possession rendering additional testing irrelevant.

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]).

Plaintiffs have shown that the testing of the Moviola machines in defendants' possession will potentially produce discovery that is material and necessary. Defendants have not provided any proof that they are unable to determine the approximate age or date the machines in their possession were manufactured, such that any additional testing would be irrelevant or inadmissible and unlikely to produce evidence that is "material and necessary." The plaintiffs' testing of a single Moviola machine would not warrant a different result from that of this Court's June 7, 2019 Decision and Order.

Defendants alternatively seek an Order directing plaintiffs to provide a testing protocol for the parties to comply with the June 7, 2019 Decision and Order, this relief which is unopposed by the plaintiffs is granted.


Accordingly, it is ORDERED that defendants J & R Film Co., and Magnasync/Moviola Corporation's motion pursuant to CPLR §2221(e), to renew this Court's June 7, 2019 Decision and Order denying their appeal and motion to vacate Special Master Shelley Olsen's April 14, 2019 Recommendation, alternatively to Order plaintiffs to provide a testing protocol for the parties to comply with the June 7, 2019 Decision and Order, is granted to the extent of ordering plaintiff to provide a testing protocol, and it is further,

ORDERED, that plaintiffs provide testing protocol for the joint testing of the Moviolas in J& R Film Co., and Magnasync/Moviola Corporation's possession within twenty (20) days of service on plaintiffs, pursuant to NYSCEF protocol, of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that the parties shall conduct a joint inspection of the Moviolas from J & R Film Co., and Magnasync/Moviola Corporation's in the defendants' possession within thirty days (30) from the date of plaintiffs' service of the testing protocol on the defendants.

ENTER:

Dated: January 28, 2020



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