[**1] **SANTOS ASSENZIO and ANNITOLIA ASSENZIO, ROBERT BRUNCK, PAUL LEVY and ROSLYN LEVY, CESAR O. SERNA, RAYMOND VINCENT, Plaintiffs, -against- A.O. SMITH WATER PRODUCTS CO., et al., Defendants.**
INDEX NOS: 190008/12, 190026/12, 190200/12, 190183/12, 190184/12

190008/12

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2015 N.Y. Misc. LEXIS 2743*; *2015 NY Slip Op 31400(U)

July 24, 2015, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] JOAN A. MADDEN, J.S.C.

OPINION BY: JOAN A. MADDEN

OPINION

JOAN A. MADDEN, J:

In the above actions, in post-verdict motions, defendants Cleaver Brooks, Inc., (Cleaver-Brooks) and Burnham LLC (Burnham) move, inter alia, for orders compelling plaintiffs to provide documentation, on a continuing basis, pertaining to, all settlements, including settlements amounts with individual entities, that plaintiffs have entered into before, during and after verdict, including settlements with bankruptcy trusts.[1] Cleaver-Brooks in a memorandum of law in support of its motions, characterizes certain settlements as undisclosed. Defendants also seek assignment of the right to file proofs of claims on behalf of plaintiffs. Plaintiffs oppose the motions on grounds that they have timely provided defendants with all required information and documents, including information regarding undisclosed settlements, and that defendants are not entitled to the assignments they seek. During working sessions, many of the issues raised in the motions were resolved, and the remaining issues are whether plaintiffs failed to [**2] disclose settlements in a timely fashion, and, if so, whether such failure affected defendants ability to present evidence [*2] with respect to Article 16 entities, and whether defendants are entitled to disclosure of the settlement agreements, including the amounts of settlement with individual companies and bankruptcy trusts.[2]

1 Specifically, defendants request "all documents identified in the memorandum of law, including but not limited to, settlements, including releases, stipulations, correspondence, emails and other records." Cleaver-Brooks has filed two motions to compel in Assenzio, Brunck, Levy and Vincent. Burnham has filed a separate motion to compel in Serna and joins in Cleaver-Brooks motions in Brunck and Vincent. To a certain extent, the motions overlap and have been consolidated for disposition with respect to remaining issues.

2 During working sessions, I ordered plaintiffs to disclose to defendants the amount of settlements with individual companies or bankruptcy trusts where plaintiffs filed the information in publically available documents.

Defendants argue that the information is needed for the purposes of molding a judgment, for determining whether plaintiffs withheld material and necessary information during discovery, and, in the event such information was withheld, for assessing whether the [*3] jury's apportionment of liability should be set aside. As to molding the judgments, defendants argue that the information and documents they seek are discoverable, as they are entitled to set offs in the amount of these settlements and need this information for such purpose. As to their remaining arguments, defendants argue that plaintiffs did not timely provide information regarding settlements with certain entities, which settlements they allege may have occurred, prior to, or during, trial. Defendants argue that this information should have been disclosed under *CPLR 3101(a)* which provides that there "shall be all disclosure of all matter material and necessary in the prosecution or defense of an action." Defendants further allege that the information was material as to Article 16 entities, and that they were deprived of an opportunity to present Article 16 evidence as to these allegedly unknown settling entities.

In response, plaintiffs contend that for purposes of molding judgments, defendants are entitled to the aggregate amounts of settlements, and not the amount of, or documents relating to, settlements with individual entities. Plaintiffs contend that the settlement [**3] agreements are confidential, [*4] and that settlement information was disclosed, that some settlements were reached after trial, and that defendants were apprised of claims plaintiffs made against certain entities, in responses to interrogatories or at depositions. Plaintiffs further argue that based on this information, defendants were on notice of plaintiffs' claims against the entities in issue, so that they had time to prepare for trial, including preparation with respect to Article 16 entities. Plaintiffs also submit in camera, release and indemnification agreements (the Agreements) in connection with the entities in issue, and contend the documents do not contain any "new liability information."

To the extent defendants seek the amounts of, and documents relating to, the settlements with individual entities for the purpose of molding judgments, the motions are denied. At the outset, I note that in NYCAL, it is my practice after verdict to conduct an in camera review of documents related to settled companies and bankruptcy trusts. This review is based on an affidavit of plaintiffs' counsel, and a review of documents related to the settlements, in order to determine the aggregate amount of setoff in an individual [*5] case. This "aggregate method" consists of reducing the verdict "either by the total of the dollar amounts to be paid by settling defendants or the total dollar amounts of their corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater." *Didner v. Keene Corp., 82 NY2d 342, 351 (1993)*. This method has been upheld by the Court of Appeals in Didner, and defendants fail to offer any compelling reason to deviate from this practice, or for the disclosure of specific settlement amounts.[3] Moreover, the disclosure of the [**4] Agreements, or the amounts of settlements, would be contrary to the confidentiality provisions in five of the eight Agreements.[4]

3 However, I suggest that uniform protocols be established with respect to molding judgments in NYCAL, and that this issue be addressed in the Case Management Order presently under review.

4 The Agreements with H. K. Porter, U. S. Gypsum and U.S. Mineral do not contain confidentiality provisions.

Defendants' remaining argument is based primarily on allegations that plaintiffs did not timely disclose settlements and claims of exposure to asbestos from products of other companies or bankrupt trusts, and based, in part, on the decision in Garlock [*6] v. Sealing Technologies, LLC, No. 10-31607, slip op (Bankr. W.D. N.C. Jan. 10, 2014).

In support of their contention that plaintiffs failed to disclose information, defendants point to plaintiffs' post-trial disclosure in connection with eight (8) settlements with the following defendants or bankruptcy trusts:

Assenzio - H. K. Porter, Owens-Illinois, U.S. Mineral;
Brunck - American Standard, Ingersoll Rand, U.S. Gypsum;
Levy - Honeywell, U.S. Gypsum.

The dates of signature in the Agreements are:

Assenzio - H. K. Porter (1/9/13), Owens-Illinois (2/6/12), U.S. Mineral (3/14/12);
Brunck - American Standard (7/24/13),

Ingersoll Rand (10/1/13), U.S. Gypsum (10/5/12);

Levy - Honeywell (8/16/13), U.S. Gypsum (5/14/13).[5]

5 The dates of settlement are necessary for the determination of issues in this motion, and plaintiffs do not offer any specific reason for non-disclosure herein.

With respect to defendants' arguments that they were deprived of information which would have provided evidence in connection with Article 16 entities, plaintiffs contend, as noted above, that the Agreements do not contain any "new liability information," that three of the settlements, in Brunck with American Standard and Ingersoll [*7] Rand, and in Levy with [**5] Honeywell, are post-trial settlements, and therefore of no relevance to this issue. As to the settlements with the bankruptcy trusts, H.K. Porter and U.S. Mineral in Assenzio, and U.S. Gypsum in Levy, plaintiffs contend, and annex proof, that they provided disclosure as to proofs of claims filed with these trusts on October 26, 2012, prior to the May 28, 2013 commencement date of the trial. As to Owens Illinois in Assenzio, plaintiffs contend they provided information that Mr. Assenzio claimed exposure to asbestos from its products, in responses to interrogatories, which were served on January 6, 2012, and which are annexed to their opposition papers as Exhibit 3.

Defendants' contention that plaintiffs did not timely provide them with disclosures as to claims and settlements against the non-trust entities, with a limited exception as to Owens-Illinois, is without merit. The trial was held between May 28, 2013 and July 23, 2013. The settlements in Brunck with American Standard and Ingersoll Rand occurred, respectively, on July 24, 2013 and October 1, 2013; and in Levy with Honeywell, on August 16, 2013. These settlements are post-verdict, and are not relevant [*8] to defendants' allegations that settlement information was not timely provided.

Nor does the record support defendants' contention that they were not provided with information as to Brunck's and Levy's claims against these entities. As to exposure to asbestos from products of American Standard, Brunck testified at his deposition on January 12, 2012, to such exposure. As to exposure from products of Ingersoll-Rand, Brunck identified its products in his responses to interrogatories, which was served on January 19, 2012. As to Levy's claims against Honeywell, as the successor-in-interest to Bendix Corporation (Bendix), Levy testified at his deposition on June 20, 2012, to exposure to asbestos in products of Bendix, and identified [**6] exposure from Bendix's products in his supplemental/amended answers to interrogatories, which were served on June 13, 2012.

Similarly, the record reveals that, contrary to Cleaver-Brooks' contention, Assenzio provided information as to his claims against Owens-Illinois in his response to interrogatories, which was served on January 6, 2012. While plaintiffs do not contend that they provided settlement information as to Owens-Illinois prior to trial, plaintiffs' [*9] response to the interrogatories, gave defendants notice of its claims, which was sufficient to enable defendants to prepare a defense. Moreover, an in camera review of the Agreement with respect to Owens-Illinois, does not reveal any new liability information as to this company.

As to the bankruptcy trusts, H.K. Porter, U.S. Mineral and U.S. Gypsum, plaintiffs have provided documentary evidence that in Assenzio, proofs of claims were received by H.K. Porter on February 14, 2012, and by U.S. Mineral on January 6, 2012; and in Brunck, by U.S. Gypsum on February 21, 2012; and in Levy, by U.S. Gypsum on October 5, 2012. Plaintiffs state that these proofs of claims were served on defendants' counsel on October 26, 2012 by "Hightail/You Send It." Plaintiffs submit as Exhibit "2" an email from Hightail confirming that on that date it sent an "October 2012 -- POCs.zip" file to, among others, Cleaver-Brooks and Burnham, at the email addresses of counsel. Significantly, defendants do not offer any proof that they did not receive the documents, nor do they challenge plaintiffs' proofs.

While the Agreements show that settlements with these bankruptcy trusts occurred prior to trial, and plaintiffs [*10] do not contend they provided such settlement information prior to trial, an in camera review of the trust Agreements, did not reveal any additional liability information as to H. K. Porter, U.S. Mineral, and U. S. Gypsum.

[**7] Based on the foregoing, to the extent defendants' motion are based on the alleged non-production of information relating to claims against the eight named trusts and companies, in pre-trial

discovery or during trial, the record demonstrates that plaintiffs provided, in a timely fashion, the information they were required to disclose. In light of this disclosure and the lack of new liability information in the Agreements with Owens-Illinois, H. K. Porter, U.S. Mineral, and U. S. Gypsum, and while plaintiffs' failure to disclose the settlements is not condoned, based on the record before me, I conclude that such settlement information would not have assisted defendants in a meaningful way in proving liability against Article 16 entities.

Thus, to the extent defendants cite *CPLR 3101* that "all matter and material necessary ... [for the] defense of an action" is required to be disclosed, this rule does not provide a basis for additional disclosures. As discussed above, plaintiffs [*11] provided defendants with disclosures as to claims in a timely fashion, so as to enable defendants to prepare for trial, and the cases defendants cite do not mandate a different result. In *Mahoney v Turner Construction Co., 61 AD3d 101 (1st Dept. 2009)*, the court, notwithstanding a confidentiality provision, remanded the issue of disclosure of a settlement agreement to the trial court, for an in camera inspection, based on concerns that the plaintiff and settling defendants were improperly colluding, and based on the uncertainty as to whether the settling defendants planned on participating in the trial, and, if so, the reasons for their continued participation. Concerns of this nature are not at issue here. Nor does *Osowski v Amec Construction Management, Inc., 69 AD3d 99 (1st Dept. 2009)* provide a basis for disclosure. Specifically, in Osowski, a personal injury action, the court ordered disclosure to defendant subcontractor, of the confidential settlement agreement between defendants owner and construction manager, and plaintiff, which agreement, the [**8] court found, was directly relevant to the viability of a third party action by the owner and construction manager, for common law and contractual indemnification against the subcontractor.

Nor does the decision in Garlock v. Sealing Technologies, LLC, No. 10-31607, slip [*12] op (Bankr. W.D. N.C. Jan. 10, 2014), support defendants' motions for disclosure of confidential settlement agreements and settlement amounts. Defendants allege that the Garlock decision is relevant, as "the bankruptcy court noted the practice of several plaintiffs' law firms (not including the Weitz firm) to suppress or delay the filing of claims, or otherwise minimize the claims of exposure against, of (sic) other companies, in order to maximize the liability and verdict against viable trial defendants." Plaintiffs respond that the "accusations" are based "on the mention of a statistically insignificant inquiry into fifteen out of tens of thousands of settled cases pre-selected for scrutiny by defendants in an action that has absolutely nothing to do with the present case, and that is wholly unrelated to plaintiffs or their law firm... [and where the court stated the cases] are not purported to be a random or representative sample."

I find that the decision in Garlock does not provide a legal or discretionary basis to order the disclosure defendants seek. I reach this conclusion, based on defendants' failure to offer any proof that plaintiffs in the instant cases engaged in any conduct [*13] similar to that of plaintiffs in Garlock, such as to delay filing claims, or to minimize exposure to products of other companies, and on the fact that the cases in Garlock were not a representative sample and were pre-selected by the defendant. Moreover, as I stated in *Konstantin v. 640 Third Ave. Associates, 46 Misc3d 1206(A), *2 (Dec. 19, 2014)*:

> [**9] *Garlock* is an unrelated action and did not involve parties in this action. In *Garlock*, the matter was before the Bankruptcy Court in connection with a hearing to determine an estimate of 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....As to the statements and conclusions of the Bankruptcy Court in *Garlock*, the case involved different parties and different issues, was litigated in another [*14] jurisdiction, and in a different forum.

For the reasons stated above, defendants have failed to establish a legal or factual basis for that part of defendants' motions seeking discovery of settlement agreements and amounts with respect to these settling entities.

Accordingly, it is

ORDERED that as to the issues raised herein, defendants' motions are denied.

Dated: July 24, 2015

/s/ Joan A. Madden

J.S.C.