SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MOULTON Justice

PART 50

NEW YORK CITY ASBESTOS LITIGATION

-v-

RE:

INDEX NO. 040000/88

MOTION DATE

MOTION SEQ. NO. 20

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ to quash is denied for the reasons stated in the attached written decision of today's date.

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

Dated: 1/12/16

, J.S.C.

HON. PETER H. MOULTON J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 50

- X

IN RE: NEW YORK CITY ASBESTOS LITIGATION :

: Index No.:
THIS DOCUMENT RELATES TO : 40000/1988
:
ALL ASBESTOS CASES :

- X

Peter H. Moulton, J.S.C.

Defendants in asbestos cases pending in the New York City Asbestos Litigation ("NYCAL") move to quash various subpoenas served by Weitz & Luxenberg P.C., a plaintiff's firm in NYCAL, upon Marc Scarcella of Bates, White LLC, an economic consulting firm. Mr. Scarcella is one of the co-authors of an article entitled The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Economy (referred to herein as "the Article"). The subpoenas seek documents and testimony concerning the article.[1] Defendants concede that the article has been invoked by defendants in NYCAL in opposition to consolidation motions. They also concede that Mr. Scarcella has from time to time served as an expert witness in NYCAL, but not as an expert in connection with the Article. The defendants contend that the proposed deposition of Mr. Scarcella will impede the parties' pending negotiations

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[1]The Subpoenas in question are the Subpoena Duces Tecum, dated October 9, 2015, the Notice to Take Videotaped Deposition Upon Oral Examination, dated October 12, 2015, and a subpoena issued by Superior Court in Washington D.C. dated October 14, 2015. They will collectively be referred to herein as "the Subpoenas."

concerning the Case Management Order ("CMO"), and runs athwart this courts' order dated August 28, 2015. The August 28th Order sets forth a framework for the CMO negotiations that does not contemplate any discovery among the parties. Defendants also argue that since the deposition of Mr. Scarcella does not arise from any specific case currently pending in NYCAL it is therefore improper. They also contend that the subpoenas are infirm for various procedural reasons.

In opposition, plaintiffs contend that the Article is frequently invoked by defendants in NYCAL litigation to oppose joinder of cases for trial. The Article has also been noted by defendants in cases on appeal. Plaintiffs point out that defendants have cited the Article's findings to this court, in a motion seeking to revise the Case Management Order that governs litigation in NYCAL, in arguing that joinder of asbestos cases for trial is less efficient than trying individual cases sequentially. One of the NYCAL defendants' chief complaints about NYCAL litigation is the absence of any limitation on joinder, and the longstanding practice of joining asbestos cases for trial. Plaintiffs additionally assert that the subpoenas need not be anchored to any particular action pending in NYCAL.

Plaintiffs have offered to drop their attempts to obtain Mr. Scarcella's deposition in return for defendants' pledge to cease using the Article in any way in NYCAL litigation. Defendants

have declined that offer.

DISCUSSION

New York State has a policy of liberal discovery, including discovery against non-parties. The Court of Appeals has held that a party seeking discovery from a non-party must only show that the requested discovery is "material and necessary," a relatively low threshold. (Kapon v Koch, 23 NY3d 32, 38.) "Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." (Id.)

Accordingly, "[a]n 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 NY2d 327, 331-2 [cite omitted].) Defendants have the burden of demonstrating that the subpoenas should be vacated. (Kapon, supra, 23 NY3d at 39.)

Defendants have failed to carry this burden. As noted above, defendants have repeatedly invoked the Article in applications before NYCAL trial judges to limit joinder. They have cited the Article in their application to me to amend the CMO. In a decision dated August 28, 2015, I granted the defendants' motion to the extent of ordering a thoroughgoing reevaluation of the Case Management Order. One of the purposes of the pending CMO

negotiation is to discuss and interrogate, and where warranted, to incorporate defendants' and plaintiffs' suggestions for improvement of NYCAL litigation into a revised CMO.

As the Article has repeatedly been invoked before trial justices in NYCAL, and before me as coordinating judge in NYCAL, it is clearly relevant to an issue that has recurred in NYCAL. Accordingly, defendants have failed to show that Mr. Scarcella's deposition is "utterly irrelevant" to ongoing NYCAL litigation. The information sought by the subpoenas is material and necessary. Where an issue recurs in NYCAL, it does not matter that a discovery request concerning that issue does not arise from a particular pending case. It is sufficient that there is "ongoing litigation" where the issue may come up. (See Ames v Kentile Floors, Inc., 66 AD3d 600.)

Finally, the technical defects averred by defendants do not support a motion to quash. In particular, the subpoenas adequately describe the information sought from Mr. Scarcella. The failure to serve defendants counsel concurrently with Scarcella has caused no prejudice to defendants as the court stayed the proposed EBT and the parties have fully briefed the questions raised by the motion.

CONCLUSION

For the reasons stated, defendants' motion to quash is denied. The deposition of Marc Scarcella shall commence on or before February 11, 2016. This constitutes the decision and order of the court.

Dated: New York, NY
January 12, 2016

Hon. Peter H. Moulton