SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Peter H. Moulton PART 50

Justice

JEANNE EVANS, as Executor for the Estate of FREDERICK W. EVANS, and JEANNE EVANS, Individually

v.

3M COMPANY, *et al.*

INDEX NO. 190109/2015

MOTION DATE

MOTION SEQ. NO. 013

MOTION CAL. NO.

This motion *in limine* by defendant Burnham LLC is decided in accordance with the attached written decision of today's date.

Dated: March 29, 2017

New York, New York

J.S.C.
PETER H. MOULTON

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

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

SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190109/2015

IN RE NEW YORK CITY ASBESTOS LITIGATION

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JEANNE EVANS, as Executor for the Estate of FREDERICK W. EVANS, and JEANNE EVANS, Individually

Plaintiff,

-against-

DECISION & ORDER

3M COMPANY, et al.

Defendants

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PETER H. MOULTON, J.S.C:

In this action, plaintiff Frederick W. Evans ("plaintiff") maintains that he was exposed to asbestos-containing products in the United States Navy, during residential renovation, and while working as a cable puller, groundsman, lineman, HVAC apprentice, HVAC mechanic, and supervisor. As against defendant Burnham LLC ("Burnham"), plaintiff asserts that he came in contact with asbestos-containing products for which Burnham bears responsibility while he was employed as an HVAC mechanic by Vulcan Engineering. Burnham moves *in limine* (sequence 013) to preclude plaintiff from mentioning, criticizing, or objecting to any testimony of its corporate witness, Roger Pepper, based on a lack of personal knowledge given that Mr. Pepper was not employed by Burnham until 1991.

Burnham maintains that such an "objection is wholly lacking in merit as it ignores the fact that Mr. Pepper's testimony is offered in his capacity as a corporate representative and not as an individual and, as such, under well-settled law, whether he has 'personal

knowledge' of the subject matter of his testimony is irrelevant" (Defendant's Memo of Law, NYSCEF number 182 at 2). Burnham asserts that Mr. Pepper has been testifying on behalf of Burnham at depositions and at trial since 2014. It stresses that in his capacity as Burnham's corporate representative, Mr. Pepper has reviewed numerous documents and acquired knowledge regarding Burnham's historical use of asbestos.

Burnham emphasizes that since it is a corporation, and therefore is unable to take the stand and offer testimony, "the collective knowledge of [Burnham] must be presented through its authorized agents; in this case, a designated corporate representative" (Defendant's Memo of Law, NYSCEF number 182 at 3). Burnham further states that "[a]llowing a plaintiff to challenge the corporate representative on the basis that he or she lacks personal knowledge would render it nearly impossible for any corporation to defend itself in any action" (*id.*). To support its argument, defendant cites to federal cases, several of which reference Federal Rule 30 (b)(6). Burnham points out that Federal Rule 30 (b)(6) provides, in relevant part, that the person designated to testify on the corporation's behalf "shall testify as to matters known or reasonably available to the organization" (*id.* at 4-6). Defendant explains that Federal Rule 30 (b)(6) exists because where incidents occurred in the distant past "the plaintiffs potentially would be unable to obtain information required to prove their cases" (*id.* at 5). Burnham cites federal cases that hold that the party is obligated to prepare one or more witnesses so that they may give complete, knowledgeable, and binding answers on behalf of the corporation and even provide a substitute if it becomes obvious that the designee is deficient (*id.* at 4-5). Such preparation includes information obtained from documents and past employees, defendant adds.

Defendant also contends that it is unfair for a plaintiff to require a corporation to designate and educate a representative to provide testimony regarding products historically manufactured or supplied by the corporation and at the same time argue lack of personal knowledge and seek to preclude that representative from testifying when the information is unfavorable to the plaintiff's claim.

Although defendant asserts that state courts have made rulings similar to the federal courts, defendant points only to CPLR § 4518 – the business records exception. Defendant correctly notes that CPLR § 4518 does not require that the person who created the record be the sponsoring witness.

Plaintiff opposes the motion on the basis that it is overbroad. To be sure, plaintiff argues that Burnham has not identified any particular documents or testimony concerning Mr. Pepper that it seeks to exclude, but instead broadly asks the court to exclude any questions that pertain to the overarching subject of Mr. Pepper's personal knowledge. Such an evidentiary ruling, plaintiff avers, cannot be made without knowing exactly what evidence the court is being asked to exclude. Plaintiff submits that he has a right at trial to introduce his own evidence and to object to the evidence that defendant may proffer through Mr. Pepper. In doing so, plaintiff simultaneously avers that he has the right to undermine Mr. Pepper's credibility to the extent that he may lack personal knowledge (*see* Plaintiff's Memo In Opposition, NYSCEF number 196 at 1-2).

Plaintiff further argues that Mr. Pepper relied on hearsay evidence during his discovery deposition that may not be admissible at trial, because Federal Rule 30 (b)(6) applies to the possible use of hearsay evidence for discovery deposition purposes and to the

use of such otherwise inadmissible evidence at trial. Plaintiff does not dispute defendant's assertion that corporations have a right to prepare and educate their corporate representative witness. Rather, plaintiff takes issue with the fact that corporate representative witnesses are often educated with hearsay evidence. As such, plaintiff contends that while educating a corporate representative witness with hearsay evidence for the purpose of discovery deposition is often required, it does not follow that such hearsay evidence is admissible evidence in trial. Consequently, plaintiff states that defendant's motion must be denied so that plaintiff is not denied the opportunity to challenge defendant's potential hearsay evidence at trial.

The motion is denied. Federal Rule 30 (b)(6) has no applicability to this case in New York state court. Even if it did apply here, the provision applies to the use of otherwise inadmissible documents for discovery purposes rather than for trial. Defendant has cited no state counterpart to Federal Rule 30 (b)(6). CPLR § 4518 does not support defendant's argument because that provision relates to introduction of business records, assuming proper foundation, and not to criticizing or objecting to testimony based on the lack of personal knowledge. Not only does Federal Rule 30 (b)(6) not apply, but New York state law is to the contrary (*see Matter of New York City Asbestos Litig.*, 2016 NY Slip Op 05063 [2016] *21 ["[a]lthough Admiral Sargent had ample experience with Navy procurement practices, he gained personal knowledge of those practices only once he started working on procurement for the Navy more than a decade after Dummitt's work on Crane's valves ended and several decades after the Navy bought the valves. As a result, Admiral Sargent had no personal knowledge of the effects of the Navy procurement

practices that existed when Crane might have tried to provide warnings to Dummitt and similarly situated workers"]). Thus, in *Matter of New York City Asbestos Litig., supra,* the Court of Appeals found that the lower court properly precluded a defense witness from testifying as to certain issues "because he gained personal knowledge of Navy practices only once he started working on procurement for the Navy more than a decade after Dummitt's work on Crane's valves ended and several decades after the Navy bought the valves." Defendant cannot circumvent the requirement that a witness have personal knowledge merely because that witness testifies for a corporation. As plaintiff points out, if a corporate witness gains his knowledge through other sources -- such as the review of unspecified historical documents or unspecified conversations with other employees, that testimony is hearsay, and defendant must identify an appropriate hearsay exception.

As such, it is hereby

ORDERED that the motion *in limine* is denied.

Dated: March 29, 2017

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