

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

**JEFFREY LANGE and Karen STANCO,
as Co-Executors for the Estate of
FRANCES D. LANGE,**

Plaintiffs

-against

**AMCHEM PRODUCTS, INC.,
n/k/a RHONE POULENC AG COMPANY,
n/k/a BAYER CROPSCIENCE INC., et al.,**

Defendants

TRIAL/IAS PART 13

Index No.: 606819/2017

Motion Date: 1/7/19

Sequence No.: 002

DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....	1
Affirmation on Behalf of Hennessy Industries in Support.....	2
Affirmation in Opposition	3

PRELIMINARY STATEMENT

Plaintiff moves for a Protective Order precluding defendants from seeking an order improperly compelling Plaintiffs to issue authorizations for the records of Plaintiff's non-party deceased husband, and for further relief as this Court may see just and proper.

BACKGROUND

This is an action for wrongful death of Frances Lange as a result of mesothelioma. Plaintiffs assert that she contracted this disease as a result of the inhalation of asbestos during the course of her laundering the work clothes of her husband and son. Defendant Ford Motor Company ("Ford") emailed plaintiffs' counsel on November 12, 2018, requesting authorizations for Carl (decedent's deceased husband) and decedent's Social Security Records, in response to

which plaintiff provided Frances' Social Security Records. Ford also requested Carl and Jeffrey Lange's military records, and directed plaintiff to RecordTrak for instructions. RecordTrak has advised that they would not release the records without a Form 7050 signed by an estate representative, together with a death certificate, letter of administration, full social security number and date of birth (Exh. "A" to Opposition).

During a Conference on November 13, 2018, the Court disallowed the application of Ford to direct plaintiffs to provide authorizations for the Social Security and military records of Carl Lange. By letter dated November 20, 2018, counsel for Ford requested that the Court reconsider its determination. By letter dated December 12, 2018, the Court acknowledged receipt of letters from defendants Ford Motor Company and Hennessy Industries requesting additional authorizations. Since there was no opposition to the letter request, the Court directed that the requested authorizations be provided within 40 days, and that anyone opposing the directive, may move for a protective order within 30 days. The Court then received a letter opposing the authorizations. This motion followed.

DISCUSSION

The records which defendants seek involve the work history of decedent's deceased spouse, and a history of decedent's deceased husband service in the military. They are not seeking medical records, but rather the likelihood of Carl's exposure to asbestos from sources other than defendants which may have contributed to Frances' condition of mesothelioma.

Reference to CPLR § 4504(c)(1) is misplaced. This statute imposes a duty upon a physician or nurse to disclose information as to the mental or physical condition of a deceased patient otherwise privileged, except information which would tend to disgrace the memory of the decedent, when the privilege has been waived by the personal representative, or the surviving spouse, or the next of kin of the decedent. This is not applicable to the issue presented in this motion, since the production of information is not from a doctor or nurse, specifically at the request of the personal representative, surviving spouse, or next of kin. Moreover, the request is for records which may reveal plaintiff decedent's husband's exposure to asbestos from defendants, or from alternative sources.

CPLR § 3101(a)(4) provides that "[t]here shall be full disclosure of all matter material

and necessary in the prosecution or defense of an action, regardless of the burden of proof, by;

...

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

Among the objections to the production of the requested records, is the fact that Carl Lange is not a party to the action. As made clear in *Kapon v. Koch*, 23 N.Y.3d 32 (2018), a party seeking discovery from a nonparty must state the “circumstances or reasons” underlying a subpoena, either on the face of the subpoena or by a notice accompanying it, and a person who moves to quash the subpoena must establish that the discovery sought is “utterly irrelevant” to the action, or that the “futility of the process to uncover anything legitimate is inevitable or obvious.

Plaintiffs have not established either of these criteria as an objection to production. In any event, defendants have asserted that the information sought is material and necessary to the defense of this action. Plaintiffs’ assertion that decedent’s exposure to asbestos from the laundering of her deceased husband’s work clothes makes the nature of his employment relevant. As noted in *Kapon, supra* at 36, a party seeking disclosure from a nonparty is no longer obligated to show “adequate special circumstances” as was required in § 3101(a)(4) prior to its 1984 amendment.

In addition, *Kapon* held that the party seeking discovery was not required to demonstrate that he could not obtain the requested disclosure from any other source, abrogating cases such as *Kooper v Kooper*, 74 A.D.3d 6, 16-17 (2d Dept. 2010). Thus, plaintiffs’ contention that the information with respect to Carl’s work history was provided by deposition testimony, or otherwise, is not a material objection.

Plaintiff’s last objection, that plaintiffs’ action does not place decedent’s husband’s medical condition in issue, is also irrelevant. Defendants are not seeking to discover Carl’s medical records or history, but, rather, his work history and potential exposure to asbestos, which plaintiffs identify as the source of decedents illness and subsequent death.

Plaintiffs’ motion for a protective order precluding defendants from compelling the production of authorizations for the release of Social Security and military records of plaintiffs’ decedent’s deceased husband, Carl Lange, is denied.

Upon receipt of a copy of a proper subpoena, plaintiffs are directed within 20 days thereof, to produce authorizations and other necessary information under their control to enable defendants to try and obtain the Social Security and military records of Carl Lange by a subpoena or by authorizations or by a combination of both. Plaintiffs are authorized to sign as co-executors for the Estate of Frances D. Lange, who was the widow of Carl Lange, but they are not required by this order to sign in a representative capacity for the Estate of Carl Lange. It is further

ORDERED that, as per letter applications, the time to make any motions for summary judgment is extended to June 26, 2019.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 21, 2019

ENTER:


JEROME C. MURPHY
J.S.C.