IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MAR 31 1970
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Lowe

CLARENCE BOREL		
VS.		CIVIL ACTION NO. 6449
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL		

BRIEF ON DEFENDANTS' OBJECTIONS TO MOTION FOR DISCOVERY AND MOTION TO LIMIT DISCOVERY

The defendants jointly file this, their brief in support of their objections to plaintiff's motion for discovery and their request to limit and restrict plaintiff's motion. The plaintiff's motion states that plaintiff has a cause of action concerning the manufacture and distribution of asbestos insulating products and that in the interest of a full and complete trial plaintiff says it is necessary that each defendant produce samples of such materials containing any asbestos as they manufacture for use in insulating.

Plaintiff further requests that such products be identified by name of the manufacturer, trade name, together with a statement as to when the product was first manufactured, in order that each product can be identified by witnesses and the plaintiff in any discussion during the trial.

Plaintiff further requests that each defendant furnish a copy of all sales literature concerning the products manufactured or distributed by each defendant.

Plaintiff also asks for all engineering, scientific and research data concerning such product, its suggested use and adaptability, method of applying, and any safety controls suggested.

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Plaintiff also asks that each defendant be ordered to produce any breathing apparatus, device or other safeguards which defendants claim would materially reduce or completely eliminate the disease of asbestosis in workers applying asbestos materials.

Defendants will answer each of these requests in this memorandum brief.

Rule 34, Federal Rules of Civil Procedure, provides for discovery and production of documents and things for inspecting, copying or photographing. This rule provides:

> "Upon motion of any party showing good cause therefor and subject to the provisions of Rule 30(b), the court may order any party to permit the inspection and copying or photographing, by or on behalf of the moving party of any designated documents, papers, objects or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Rule 26(b) defines the scope of examination on depositions. This rule provides that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or of any other party. This rule likewise provides for examination concerning the description, nature, custody, condition and location of any books, documents or other things tangible.

Rule 30(b) provides for orders for the protection of parties and deponents. This rule provides that the court may order that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters

or that secret processes, developments or research need not be disclosed.

Comment on the Rules

A careful reading of Rule 34 will show that no provision is made for the production of products and the filing of products such as is requested by the plaintiff in this case. The rule specifically states that the court may order any party to produce and permit the inspection, copying or photographing of certain documents or tangible things which are in the possession, custody or control of the party. Rule 26(b) provides that the deponent may be examined regarding any matter which is relevent, including the existence of books, documents or other tangible things. Rule 30 provides for limitation of the orders for production. Thus, it is clear that the rule does not provide that the defendants shall furnish to the plaintiff products which they manufacture but only provides for examination. Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Volume 2A, Page 401, Section 793, provides: "xxx In another respect (Rule 34) it is similar to Rule 35, and unlike the other discovery rules, in that it requires a showing of good cause before discovery under its provisions will be permitted."

Again, this test states: "xxx Indeed relevancy and good cause for the examination are the determinative considerations in granting discovery under the rule."

Again: "xxx The document must be relevant and not privileged, and good cause for its discovery must be shown."

Again, at Page 403, this test states: "Knowledge by the movant of the facts sought to be discovered is not necessarily

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a sufficient reason for denying discovery. If however the movant's knowledge is so complete that there is no necessity for further discovery and no good purpose is to be served by further inspection or examination, discovery may be denied. The extent in point of time as to which inspection of records will be permitted, rests largely in the discretion of the court. xxx."

The scope of discovery is limited to relevant periods. Houdry Process Corporation vs. Commonwealth Oil Refining Company, District Court New York, 1959, 24 Federal Rules Decision 58.

Another limitation on this rule is that the document or things tangible must be in the possession, custody or control of the defendant. Under this rule a party must produce and permit inspection, photographing or copying of documents "which are in his possession, custody or control." The Supreme Court in amending this rule added after the term "parties" the clause "and subject to the provisions of Rule 30(b)," in order to make certain that the person in whose custody, possession or control the evidence reposes may have the benefit of the applicable protective orders stated in the rule. Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Volume 2A, Page 408.

Rule 34 is somewhat more rigid than other discovery rules and requires a showing of good cause before relief is authorized. Necessarily much must be left to the discretion of the trial court in determining what constitutes good cause in the circumstances of a particular case. Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Volume 2A, Page 415, Paragraph 796; U. S. vs. National Steel Corporation, District Court Texas, 1960, 26 Federal Rules Decision 603, 605.

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It is not the duty of the District Court to search out a good cause for production of documents sought but it is the duty of moving party explicitly to show in his motion or by a supporting affidavit the need of the document for purposes of trial. Martin v. Capital Transit, C.A.D.C. 1948, 170 F. (2d) 811.

The party seeking production and inspection of documents must make a showing of "good cause" which means some adequate reason for the desired production and inspection. Kenealy v. Texas Company, District Court of New York, 1939, 29 F. Supp. 502.

Just what constitutes good cause in a given case is not a matter for certain definition of uniform application in all cases. xxx "A showing of good cause is required in all cases. Barron and Holtzoff, Federal Practice and Procedure, Rules Editior Volume 2A, Pages 418, 419; United Air Lines, Inc. v. U. S. Distric Court, Delaware, 1960, 186 F. Supp. 824.

What must be shown under the requirement of good cause in Rule 34 are such circumstances as give the court reason to expect that the beneficial objectives of pre-trial discovery will be achieved. If significant countervailing considerations appear, of a sort not unlike those which justify protective orders under Rule 30(b), then indeed a balance of the competing interest must be struck and something "special" must be shown by the movant.

A mere statement of plaintiff's counsel that informatior desired was material was a "conclusion" and did not constitute compliance with requirement that plaintiff state facts showing that information contained in the documents was material to the issue. Archer v. Cornilland, District Court Kentucky, 1942, 41

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F. Supp. 435. An affidavit in support of a motion under this rule stating that exhibit contained relevant and material matter which was of prime importance in the instant action, was a conclusion and not in compliance with the rule. Radtke Patents Corporation vs. Rabinowitz, District Court New York, 1940, 1 Federal Rules Decision 126.

There appear to be adequate policy reasons for imposing the good cause requirement in Rules 34 and 35. xxx Compelling the production of documents under Rule 34 can be extremely harassing. Use of the weapon which this rule forges should not be permitted without more than the easily satisfied test of relevancy. Guilford National Bank of Greensboro vs. Southern Railway Company, C.A. 4th, 1962, 297 F. (2d) 921, 924, noted 1962 Duke Law Journal 572. Part of this language from the Guilford National Bank case is quoted with approval by the Supreme Court in Schlagenhauf vs. Holder, 1965, 85 Sup. Ct., 234, 242, 379 U.S. 104, 117-118, 13 Law Edition (2d) 152. The Supreme Court continued: "The courts of appeals in other cases have also recognized that Rule 34's good cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that rule."

The party seeking production of documents has the duty to explicitly show in his motion or by supporting affidavit good cause for production, and it is not the court's duty to search out a good cause. Smith vs. Insurance Company of North America, District Court, Tennessee, 1962, 30 Federal Rules Decision 534; Rockaway Pix Theatre, Inc. vs. Metro-Goldwyn-Mayer, Inc., District Court New York, 1964, 36 Federal Rules Decision 15, 16;

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Groover, Christie & Merritt vs. LoBlanco, 1964, 336 F. (2d) 969, 972, 119 U. S. Appeals, District of Columbia 50.

A bare conclusion that production of statements of witnesses was "absolutely necessary" was not a sufficient showing of good cause. Atlantic Coast Line Railroad Company vs. Daughert 1964, 141 S.E. (2d) 112, 120, Georgia Appeals, citing Barron and Holtzoff (Wright Edition).

Bare statement without explanation that information was not available by other means was not a sufficient showing of good cause. Bentz vs. Cities Service Tankers Corporation, District Court New York, 1966, 41 Federal Rules Decision 294.

Good cause requirement is not met by mere conclusory allegations of the pleadings -- nor by mere relevance to the case. Schlagenhauf v. Holder, 1965, 85 Sup. Ct., 234, 242, 379 U.S. 104.

It is the position of the defendants that they have provided much of the information which plaintiff seeks by this discovery motion, through answers to interrogatories. There is no need for production of documents when answers to interrogatori should provide information sought. Rockaway Pix Theatre, Inc. vs Metro-Goldwyn-Mayer, Inc., District Court New York, 1964, 36 Federal Rules Decision 15.

The requirement of "good cause" for production of documents is not met where the moving party has information sought, or can obtain documents or information without recourse to discovery rules. Panamusica Venezuela, C.A. vs. American Steel Export Company, District Court New York, 1954, 16 Federal Rules Decision 280.

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Relevancy of Evidence

The incorporation by reference of Rule 26(b) by the 1948 amendment, clearly indicates that the test under Rule 34 is relevancy to the subject matter of the action. Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Paragraph 797, Page 434.

Secret Processes

Under Rule 30(b) which is applicable to proceedings under this rule, the court may order that secret processes, developments, or research need not be disclosed. Barron and Holtzoff, Paragraph 798, Page 449. Defendant's request for production of certain writings under this rule must not lead to any disclosure of plaintiffs' manufacturing control or other business secrets. Canister Company vs. National Can Corporation, District Court Delaware, 1948, 8 Federal Rules Decision 408. Parties to patent interference proceeding were not to be required to produce books, papers and documents containing secret, confidential and privileged material. Korman vs. Shull, District Court Michigan, 1960, 184 F. Supp. 928. It is an abuse of discretion to order disclosure of trade secrets in the absence of a showing that the secrets are relevant and necessary to the prosecution or defense of the case. Hartley Pen Company vs. U. S. District Court for the Southern District of California, C. A. 9th, 1961, 287 F. (2d) 224; Cities Service Oil Company vs. Celanese Corporation of America, District Court Delaware, 1950, 10 Federal Rules Decision 458. Courts must exercise discretion to avoid unnecessary disclosure of trade secrets or other confidential business information. Court of Appeals, 5th Cir.,. 299 F. (2d) 557.

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Statement

The objections of the defendants will be discussed collectively although some of the objections should be considered specifically as set forth in the objections and motion to restrict

Plaintiff in this case is alleging that he developed the disease of asbestosis over the period of time from 1940 through 1969. In his motion he states: "It is necessary that each of the defendants produce samples of such materials as they manufacture for use in insulating which contain any asbestos."

Most of the defendants have objected to this request because the request is too broad and general and too vague and indefinite. Further, the request to produce a sample of each insulating product manufactured by defendant or its predecessors which contain asbestos would be burdensome and in many instances it is impossible to produce a product manufactured by a predecessor. Rule 34 does not contemplate that defendants will deliver and produce for the benefit of the plaintiff a physical exhibit of all products which it may have manufactured for some time in the past and in the present. I think I am correct in stating that each of the defendants in a prior case produced representativ samples and the plaintiff's attorney has knowledge of the existenc of the products or types of products which are manufactured by eac of the defendants. In fact, the plaintiff has the name and the trade names of all types of insulating materials manufactured by the defendants beginning in 1940, with a description of the materials and what they contain. This was given in answer to Interrogatory No. 1.

In many instances the type of product which was manufactured or produced by a defendant during the period of 1940

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forward is not material because there is no claim by the plaintiff that he worked with such material of each defendant during that period of time. An example of this is that the plaintiff has testified by deposition in regard to his working with products manufactured by Fibreboard Corporation that he believes that he may have worked with Pabco products in 1963 in California, but he doesn't know for sure. In answer to interrogatories under oath, he listed other products as having been used on this job and did not mention Pabco products. Thus, whether Fibreboard Corporation manufactured any product prior to 1963 would not and could not have any relevancy in this case and it should not be required to produce any sample of its product which it manufactured prior to that date.

Although not required under the rules, I believe each defendant would be willing to produce representative samples of its product to be used during the trial of this case.

Request of Defendants for the Marking and Identification of Any Sample Products

Plaintiff has requested that each product produced be identified by the name of the manufacturer, the trade name of the product, the date of first manufacture, so that the plaintiff and witnesses may easily identify the product. Each of the defendant have objected to this procedure because the plaintiff has testif that he was unable to identify a product or at least most of the products containing asbestos as to trade name or manufacturer unless he saw the same in a carton or packing case with the trade name or manufacturer's name on it. We submit that the Court should direct that as to any sample of product produced by the defendants that such sample be marked with a code name and then that the information concerning this particular product be suppli

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with the code name to the Court. The burden is on the plaintiff in this case to establish that he worked with products containing asbestos manufactured by each of the defendants, and if a product is labeled by the manufacturer's name, the trade name and the date of manufacture, then all that is necessary for the plaintiff to identify such product is for counsel to hold up the product and to say, "Well, did you ever work with this product," and then read off the name of the product and the manufacturer. Defendant believe that the plaintiff is unable to identify most, if not all of the products by either name or manufacturer. This is a practical evidentiary matter, but we are concerned with arriving at the truth based upon the plaintiff's testimony and testimony of other witnesses who may testify regarding these products.

One other reason why the defendants should not be required to produce samples of materials manufactured by them is that the rule does not require this production and the plaintiff or plaintiff's attorney can acquire such samples by purchase from distributors.

Sales Literature

Plaintiff says that each of the defendants should be ordered to furnish plaintiff's attorney with a copy of all sales literature concerning the products manufactured or distributed by each defendant. He does not show any good cause why this literature should be produced, nor does he show that it has any relevancy to the matters to be discovered. This defendant knows that the plaintiff's attorney has heretofore been furnished with copies of sales literature of this defendant, as well as other defendants in this suit, and he therefore has full and complete knowledge of such. The plaintiff's alleged cause of action covers

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a period from 1940 through 1969, and in some instances the present defendant or manufacturer has taken over or purchased an existing company and would not have sales literature going back over the entire period.

Plaintiff has testified by deposition that he did not read or rely upon any sales literature, therefore such sales literature could have no relevancy in this case. Defendants suggest that if the Court should require the production of sales literature, most of which the plaintiff's attorney already has or has available, that the production of such sales literatur be limited to current literature or literature for some definite reasonable time.

Objections to Production of All Engineering, Scientific and Research Data Concerning Such Products, Its Suggested Use and Adaptability, Method of Applying and Any Safety Controls Suggested

Each of the defendants in answer to Interrogatory No. 1 have given the name and the content of the product with the percentage of asbestos in the product manufactured by them from 1940 through January, 1967.

Each of the defendants object to the production of all engineering, scientific and research data concerning the manufacture of their product for the reason that many of the processe are protected by patents, such are trade secrets, and in some instances there are contracts and trade agreements which prohibit the disclosure of such engineering, scientific and research data. No good cause has been shown by the plaintiff for the production of such information, nor is such information relevant to the issues in this case, therefore the objection to the production of all engineering, scientific and research data concerning each product should be granted.

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Regarding the suggested use and adaptability of the product, such is contained in current sales literature, but it is well known that the product or products is used for heat and cold insulation.

Each of these defendants do not apply the product, but the application of the product is handled by independent contractors who are specialists in this field and by technicians or tradesmen who are members of the asbestos worker's union who are supposed to be qualified as to the application of the produc This defendant, as well as many of the other defendants, have no possession, custody or control of the application of the product The defendants respectfully request the Court to excuse them fro suggesting any method of application of the product.

Regarding safety controls, this defendant does not have possession, custody or control of the work premises or the performance of the work, but the premises is the responsibility of the owner or the independent insulating contractor and the la imposes the duty on the owner and/or the independent contractor to furnish the employees a reasonably safe place to work. There is no such duty on the manufacturer of the product as he does not have the power to control the premises of the owner, the independent contractor or the methods used by the independent contractor.

Production of Breathing Apparatus

None of the defendants in this suit manufacture any breathing apparatus, device or other safeguard. Since they do not have possession, custody or control of breathing devices and do not manufacture them, the rules do not require the production. Defendants have answered Interrogatory No. 33, which states:

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"33. Defendant contends that respirators are currently on the market which will materially reduce inhalation of asbestos dust and fibers. Such respirators are available under the United States Bureau of Mines Schedule 21B. Tests upon which said approval are based were designed and conducted by that governmental agency and are described in the Respiratory Protective Devices Manual published by the American Industrial Hygiene Association, American Conference of Governmental Hygienists, 1963. One such respirator, 'Dustfoe 77', Catalog No. 10-9600, is manufactured by the Mine Safety Appliances Company."

Defendants pray that they be excused from the productio of any breathing apparatus. Further, such breathing apparatus, device or other safeguards are available to plaintiff and plaintiff's attorney in the open market the same as they are to each of the defendants.

Respectfully submitted;

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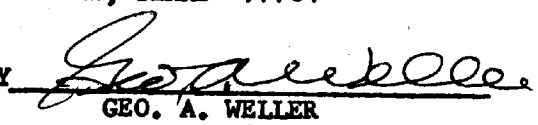
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I certify that a copy of the foregoing brief was served on Mr. Ward Stephenson, Stephenson Building, Orange, Texas, attorney for plaintiff, by mailing a copy to his address on the 31st day of March, 1970.

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