

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA**

Rene C. Davidson Courthouse

<p>JESSICA LYN ROSE et al Plaintiff/Petitioner(s) VS. BASCO DRYWALL &amp; PAINTING CO. et al Defendant/Respondent(s)</p>	<p>No. 22CV009721 Date: 02/14/2023 Time: 3:00 PM Dept: 18 Judge: Richard Seabolt</p> <p>ORDER re: Hearing on Motion to Compel Digestion Analysis</p>
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Counsel on Zoom: See Attendance List

Tentative ruling was contested and hearing was held. After oral argument, the court affirms its tentative ruling set forth below with a modification that the motion is granted without prejudice.

On Defendant J-M Manufacturing Company, Inc.’s (“JMM”) Motion to Compel non-party Evelyn Beauchamp’s (“Ms. Beauchamp”) Pathology Specimens for Tissue Digestion (the “Motion to Compel”), in which defendant GCO, Inc. timely joins, the Court ORDERS THE PARTIES TO APPEAR at the hearing at 3:00 p.m. on Tuesday, 2/14/2023.

The Court provides the following Tentative Ruling to focus discussions at the hearing.

Plaintiff Jessica Rose (“Ms. Rose”) and Jeremy Neault (collectively “Plaintiffs”) allege in their complaint that Ms. Rose has developed mesothelioma caused in part by her exposures to respirable asbestos her father brought home on his clothing from work, where he worked with JMM asbestos cement pipe (“ACP”).

Evelyn Beachamp is the mother of plaintiff Jessica Rose (“Ms. Rose”), and not a party to the present action. JMM seeks an Order permitting it to conduct destructive testing on Ms. Beauchamp’s pathology samples following a recent biopsy in connection with possible asbestos-related disease, specifically pleural thickening and possible asbestosis.

JMM’s Motion is defectively noticed. The only legal authority cited in the Notice of Motion as a grounds to bring the present motion is CCP § 2017.010. § 2017.010 contains a general statement of the scope of civil discovery in a California action. It does not authorize the bringing of any specific discovery motion, nor does it constitute general authority for legal counsel to bring any creative discovery motion counsel might concoct.

Discovery motions require some statutory authority authorizing them. (See Cal. Civil Discovery Act, CCP § 2016.010 et seq.) However, JMM presents no evidence in either the Moving Lin Declaration or Defendant’s Index of Exhibits (“DIOE”) that it has served any authorized discovery device, such as a deposition subpoena or request to inspect documents or other tangible things, that JMM now seeks to compel.

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In Opposition, Plaintiffs present evidence that JMM served a business records subpoena on Mrs. Beauchamp's healthcare provider Kaiser Permanente Oakland Medical Center ("Kaiser"). However, JMM presents no authority for the proposition that Ms. Beauchamp's pathology materials are a "business record" of Kaiser or that a business record subpoena could be basis for authorizing destructive testing of tissue samples. The only case the Court could find addressing the meaning of business records cites to statutory language for the proposition that "business records" "means an item, collection, or grouping of information about a business entity" and favorably cites to Black's Law Dictionary, 6th Ed. 1990, defining "business records" as "journals, books of account and other records," indicating that business records are paper or electronic documents. (*Urban Pacific Equities Corp. v. Sup. Ct.* (1997) 59 Cal.App.4th 688, 693. Moreover, the language of CCP § 2020.410(c) plainly indicates that where, as here, a business records subpoena is requesting something more than merely the production of business records for copying, the deposition subpoena must be accompanied by an affidavit or declaration showing good cause for the production. There is no evidence in the record that JMM served a good cause declaration with its business records subpoena.

Instead, the present motion most closely resembles a Motion to Compel an atypical Physical Examination pursuant to CCP § 2032.310. A § 2032.310 motion does not require prior service of a Demand for Physical Examination pursuant to CCP § 2032.210 et seq., but it does require meet and confer efforts prior to filing the motion. The Moving Lin Dec. at ¶ 13 indicates that such meet and confer efforts have taken place, including an Informal Discovery Conference in Dept. 18. However, § 2032.010 et seq. discovery may only be propounded to the persons listed in § 2032.010(a), which do not include a non-party like Ms. Beauchamp. In fact, neither JMM's Notice nor Moving MPA cites to any authority for the proposition that it may conduct the type of discovery it is seeking from a non-party like Ms. Beauchamp.

Additionally, the Moving papers are also defective in that they do not comply with the California Rules of Court, even though the Court has previously advised JMM that it must comply with these mandatory rules. (See the Court's 10/14/2023 Order on JMM's Motion to Compel Further Discovery Responses at p. 4 of 5.) As to the present motion, JMM's brief is longer than 15 pages without having obtained prior leave of court in violation of CRC Rule 3.1113(d), and the Notice of Motion improperly contains an additional two pages of legal argument in addition to the information required by CCP § 1010 and CRC Rule 3.1110(a). Further, Exh. C to the PIOE violates Rule 3.1116(d), providing that only relevant pages of the deposition transcript be submitted. Because there is insufficient time before the 2/27/2023 preference trial in this action to allow JMM to re-submit compliant papers on a motion that already has a briefing schedule shorter than that typically required pursuant to CCP § 1005, JMM's failure to comply with applicable Cal. Rules of Court after prior warning by the Court is sufficient grounds to deny the Motion to Compel.

It further appears to the Court that JMM's Motion to Compel is really a premature Motion in Limine regarding the admissibility of Ms. Beauchamp's anticipated testimony at trial regarding her own possible asbestos-related disease, her likely testimony in connection therewith that the only possible asbestos exposures of which she is aware occurred as a result of washing her then-husband Eugene Rose's ("Mr. Rose") work clothing after he had worked with ACP, and Ms. Beauchamp's anticipated testimony that Ms. Rose, as a small child, was always present when

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Ms. Beauchamp washed Mr. Rose’s work clothing. The purpose of such testimony would be to create inferences that, like Ms. Beauchamp’s asbestos related diseases, Ms. Rose’s alleged mesothelioma must also have been caused in substantial part by her exposures to dust from her father’s work clothing. Plaintiffs’ Opposition MPA strongly suggests that Plaintiffs intend to offer such testimony at trial. (See Opp. MPA at pp. 3:1-11 and 14:15-15:9.)

The Court will not at this time address the admissibility at trial of Ms. Beauchamp’s anticipated testimony regarding her own possible asbestos-related diseases and their possible causes. The Court notes, however, that were Plaintiffs to seek to introduce such testimony at trial, it would open the door to discovery regarding Ms. Beauchamp’s possible asbestos-related diseases and the possible causative asbestos exposures. Based on the expert witness declarations presented by JMM, tissue digestion discovery would appear to be reasonably calculated to lead to the discovery of admissible evidence regarding Ms. Beauchamp’s possible asbestos-related diseases and the possible causative asbestos exposures because it could produce evidence regarding whether material found in Ms. Beauchamp’s lung tissue is consistent with prior asbestos exposures and whether that material is consistent with the types asbestos used by JMM and other ACP defendants to manufacture ACP.

Wherefore, the Court DENIES JMM’s Motion to Compel without prejudice. The Court declines JMM’s invitation to create novel discovery motions not authorized by the Cal. Civil Discovery Act.

The Court OVERRULES Plaintiff’s Opp. Objections to JMM’s Moving evidence.

The Court GRANTS Plaintiffs’ Opp. Request for Judicial Notice as to the existence of the attached medical journal articles, but not as to the contents thereof. The articles are hearsay. While expert medical opinion may rely on hearsay documents of this type in formulating the opinion, Plaintiffs do not present any expert medical opinion evidence.

The Court has not yet considered JMM’s Reply papers, if any, which had not been filed or served by 2:30 p.m. on 2/10/2023, the final Court day before the hearing. The Court anticipates that it will review the Reply papers in advance of the Tuesday, 2/14/2023 hearing.

Miscellaneous has been filed.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 02/14/2023



**Richard Seabolt / Judge**

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