

IN RE: ALL ASBESTOS-RELATED
PERSONAL INJURY OR DEATH CASES
FILED BY BARON & BUDD, P.C. IN
FULTON COUNTY, GEORGIA

§ IN THE SUPERIOR COURTS
§
§ OF
§
§ FULTON COUNTY, GEORGIA

**PLAINTIFFS' MOTION TO COMPEL DEFENDANT A.P. GREEN INDUSTRIES, INC.
TO ANSWER FULLY AND COMPLETELY PLAINTIFFS'
INTERROGATORIES AND REQUESTS FOR PRODUCTION**

COME NOW Plaintiffs in all asbestos-related personal injury or death cases filed by Baron & Budd, P.C. in Fulton County, Georgia and pursuant to Section 9-11-37 of the Official Code of Georgia Annotated ("O.C.G.A.") and Superior Court Rule 6.4, hereby move this Court to compel Defendant A.P. Green Industries, Inc. ("Defendant") to fully and completely answer Plaintiffs' Master Set of Interrogatories and Request for Production of Documents. In support thereof, Plaintiffs show:

I.

Factual Background

Plaintiffs served their Master Set of Interrogatories and Request for Production of Documents on Defendant. On or about January 7, 1999, Defendant served its objections and what purported to be responses to Plaintiffs' discovery requests. See Defendants' Objections, Answers, and Responses to Plaintiffs' Master Set of Interrogatories and Requests for Production of Documents, attached as Exhibits A and incorporated herein by reference. Defendant failed to answer fully and completely Plaintiffs' discovery. Instead, Defendant provided no answers subject to their objections, as well as incomplete answers, evasive answers, or promises to supplement with additional information at a later date, which they have thus far failed to do, all as more fully set forth in detail below.

In fulfillment of the requirements of Superior Court Rule 6.4(B), by telephone conference dated January 28, 1999, in a good faith effort to resolve the matter of Defendant's inadequate and incomplete responses to discovery, counsel for Plaintiffs contacted counsel for Defendants. The parties are unable to resolve their differences with regard to Defendants' discovery responses at this time. See 1/28/99 letter attached as Exhibit B and incorporated herein by reference. The instant motion was necessitated by the failure of Defendant to respond to Plaintiffs' good faith efforts to resolve this matter without the necessity for this Court's intervention.

Moreover, these discovery procedures were commenced promptly, pursued diligently, and completed without unnecessary delay and within 6 months after filing the answer in this case, as required by Superior Court Rule 5.1.

II.

Argument

A. DEFENDANT FAILED TO ANSWER INTERROGATORIES FULLY AND COMPLETELY.

No Answers. Defendant has provided no substantive answer whatsoever, subject to objection, to the following 62 Interrogatories:

Interrogatory Nos. 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 72, and including Nos. 50, 51, 52, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 71, 73, 74, 75, 76, where no preliminary answer provided, but supplementation rights "reserved".

See Exhibit A.

Incomplete and Evasive Answers. Defendant provided incomplete and evasive answers

to the following 11 Interrogatories:

No.	Scope	Deficiency in Response
1	persons answering the interrogatories	Does not identify who supplied information
28	identity of any medical advisor	Denied having only industrial hygienist and chief medical officer; question broader
34	instructions re use of ACM's	Refers to sophistication of user and argumentative on duty to warn
35	list insurance policies, amounts dates, etc.	Nonresponsive; no policy identified, no subparts answered
53	Identify foreseeable users of your ACM's	Answer argumentative and non-responsive regarding duty of others to inspect and monitor job sites
54	liberation of dust during application	Nonresponsive, vague: "it depends", some did, some didn't, without specifying products as requested.
55	foreseeability of removal, etc.	Unintelligible; removal or replacement is not "use".
56	dust counts at job sites	Answer argumentative and non-responsive regarding duty of others to inspect and monitor job sites
57	action taken based on dust counts	Answer argumentative and non-responsive regarding duty of others to inspect and monitor job sites
67	industrial hygiene surveys	Answer argumentative and non-responsive regarding duty of others to inspect and monitor job sites
70	dust tests from working with defendant's asbestos products	Answer argumentative and non-responsive regarding duty of others to inspect and monitor job sites

See Exhibit A. For purposes of a motion to compel, an evasive or incomplete answer is treated as a failure to answer. GA. CODE ANN. § 9-11-37(a)(3)(1999).

The answers identified above satisfy the "evasive and incomplete" standard of 9-11-37(a)(3), because they appear to be calculated to misinform and withhold discoverable information under the guise of providing an answer. *See* Section IV, *infra*. As such, they amount to no answer at all.

Additional Information Forthcoming. Moreover, Defendant has indicated it will provide supplementary answers to the following 20 Interrogatories:

Interrogatory Nos. 50, 51, 52, 55, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 71, 73, 74, 75, 76 (no preliminary answers provided in all but 55).

See Exhibit A. Plaintiffs have yet to receive such supplementation.

B. DEFENDANT FAILED TO PROVIDE FULL AND COMPLETE RESPONSES TO PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS.

No Responses. Defendant has produced no documentation whatsoever, subject to objection, to the following 8 Requests:

Request Nos. 1, 2, 4, 7 - 11.

See Exhibit A.

Additional Information Forthcoming. Moreover, Defendant has indicated it will provide supplementary responses to the following 3 Requests:

Request Nos. 3, 5, 6.

See Exhibit A. Plaintiffs have yet to receive such supplementation.

C. DEFENDANT'S OBJECTIONS ARE WITHOUT FOUNDATION.

Since it is Defendant's burden to establish the propriety of their objections, and Defendants have thus far failed to come forward with any evidence in support of their objections, Plaintiffs will respond to Defendant's arguments in support of their objections (if and when they make them) at the appropriate time. At this juncture, however, Plaintiffs will take this opportunity to comment on three of Defendant's oft-repeated boilerplate objections.

Defendant's boilerplate "relevance" objections¹ are patently without merit under Section 9-11-26, O.C.G.A.² The discovery sought by these requests is relevant and necessary to the discovery process and calculated to lead to the discovery of admissible evidence. Moreover, these same discovery requests have been served by Plaintiffs in numerous venues throughout the country and have been determined by the court to satisfy the relevance standard.³ Further, these discovery requests were served as a result of agreement by and between counsel for Plaintiffs and counsel for the asbestos defendants numerous jurisdictions. In any event, these discovery requests are factually-specific and honed to elicit specific information concerning Defendant's liability.

In addition, Defendant's boilerplate "overbreadth" objections⁴ are likewise baseless. As the Court noted in *Carey Canada v. Hinely*, 181 Ga. App. 364, 366, 352 S.E. 2d 398, 400-401 (1987), *reversed on other grounds*, 257 Ga. 150, 356 S.E. 2d 202 (1987), *cert. denied*, 484 U.S. 898 (1987), *affirmed in part, reversed in part*, 185 Ga. App. 652, 366 S.E. 2d 292 (1988), since asbestos litigation is "complicated [and]... involves multiple parties with various business relationships in

¹ See Defendants' Objections to Interrogatory Nos. 1, 4, 5, 6, 7, 9-29, 30, 31, 32, 33, 34, 36-41, 42-45, 46, 47, 48, 49, 51, 53, 54, 55-70, 73-76 and to Requests for Production Nos. 2, 7, 8, 9, 10, 11. See Exhibit A.

² Pertinence or relevance as so broadly defined under O.C.G.A. 9-11-26 (b)(1) -- "relevant to the subject matter involved in the pending action ...[or] reasonably calculated to lead to the discovery of admissible evidence" -- is the test for determining whether an order requiring production should be entered. *Gazelah v. Rome General Practice, P.C.*, 232 Ga. App. 343, 344, 502 S.E.2d 251, 253 (Ga. App. 1998), *cert. denied*, GA S98C1337 (1998) (look to gravamen of underlying action). So long as the requested discovery appears reasonably calculated to lead to the discovery of admissible evidence, the opposing party should be required to respond. See, e.g., *Bullard v. Ewing*, 158 Ga. App. 287, 279 S.E. 2d 737 (1981); *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 256 S.E. 2d 102 (1979).

³ If the Court requires examples of such rulings, Plaintiff will provide same.

⁴ See Defendants' Objections to Interrogatory Nos. 1, 4, 6, 7, 9-29, 30, 31, 32, 33, 34, 35, 36-41, 42-45, 46, 47, 48, 49, 51, 53, 54, 55-70, 72, 73-76 and to Requests for Production Nos. 2, 3, 7, 8, 9, 10, 11. See Exhibit A.

mining, producing, manufacturing, and distributing products containing asbestos,” the scope of discovery allowed is necessarily broad. The requests complained of are not overbroad under the *Carey Canada* standard.

Finally, Defendant’s boilerplate claims of multiple privileges are spurious,⁵ insofar as Defendant has failed to produce any evidence in support of its claims of privilege. *See General Motors v. Conkle*, 226 Ga. 34, 47, 486 S.E. 2d 180, 191-192 (1997). Defendant’s bald assertions of privilege are not sufficient to protect responsive documents from discovery. *Id.*

In all events, none of Defendant’s objections justify its refusal to provide full and complete answers to discovery.

D. PLAINTIFFS ARE ENTITLED TO AN ORDER COMPELLING DEFENDANTS TO ANSWER AND RESPOND FULLY TO PLAINTIFFS’ OUTSTANDING DISCOVERY.

Plaintiffs’ position that these answers violate the discovery rules is amply supported by numerous authorities.

As stated by the Court in *Carey Canada*, the discovery rules should be interpreted and implemented to ensure *full and complete* discovery:

Discovery is an integral and necessary element of our civil practice. Wide latitude is given to make complete discovery possible. The broad purpose of the discovery rules, under the Civil Practice Act, is to enable the parties to prepare for trial so that each party will know the issues and be fully prepared on the facts. Discovery is specifically designed to fulfil a two-fold purpose: issue formulation and factual revelation. The use of the discovery process has been held to be broadly construed. [citations omitted]

181 Ga. App. at 366, 352 S.E. 2d at 401 (emphasis supplied). To this end, the trial court has broad discretionary powers authorized under the discovery provisions of the Civil Practice Act. *Loftin v.*

⁵ *See* Defendants claimed privileges (e.g. work product, attorney-client, trade secret) within Defendants’ Objections to Interrogatory Nos. 12-23, 29, 34, 36-41, 45, 47, 49 and to Requests for Production Nos. 8, 9. *See* Exhibit A.

Gulf Contracting Company, 224 Ga. App. 210, 215, 480 S.E.2d 604, 607-08 (1997). Trial courts have likewise been granted “broad control over the use and limitations of discovery procedures.” *Lewis v. Evans*, 212 Ga. App. 49, 51, 441 S.E. 2d 425 (1994), *cert. denied*, 212 Ga. App. 896 (1994).

A party properly served has an absolute duty to respond. *Mayer v. Interstate Fire Insurance Company*, 243 Ga. 436, 437, 254 S.E. 2d 825, 826 (1979). Its responses, moreover, must be full, complete and responsive; if answers are inadequate, the trial court is empowered to order more explicit answers. *Id.* This Court’s discretion and control thus patently extends to situations where, as here, a party has willfully and intentionally provided non-responsive, inadequate, incomplete, and evasive answers.

The courts have articulated the standards by which the adequacy of answers to discovery are measured. An answer must “fully satisfy the question posed.” *See Gazelah*, 232 Ga. App. at 345, 502 S.E. 2d at 253. Moreover, answers that are “inadequate, evasive and not responsive” are also subject to a motion and order. *Smith v. National Bank of Georgia*, 182 Ga. App. 55, 58, 354 S.E. 2d 678, 680 (Ga. App. 1987). This is determined “by comparing the straightforward questions and the responses”; if the answers are “only partially responsive,” such as where they cover “only a portion of the time being requested,” they are *de facto* “evasive and incomplete” within the meaning of Section 9-11-37, O.C.G.A. *Id.*

The defects in Defendant’s responses are not cured by their empty promises that more information is forthcoming. Promising supplemental responses and then failing to deliver on that promise should not be lightly countenanced by this Court. *See Smith*, 182 Ga. App. At 57, 354 S.E. 2d at 680 (sanctions upheld against plaintiff who “neatly accomplished a long delay for his own benefit while leading the court and opponent to believe the information would be given”); *Lewis*, 212 Ga. App. at 49, 441 S.E. 2d at 426 (sanctions upheld against the plaintiff who indicated she would

supply medical bills later, but failed to do so, despite claiming medical expenses as damages). Defendant has likewise sought to accomplish delay, to Plaintiffs' detriment, by indicating it would supplement its responses.

In short, this sophisticated Defendant's wilful, inadequate discovery responses have impeded Plaintiffs' ability to proceed with depositions, to fully develop the issues and the facts, and otherwise prepare for trial. *See Carey Canada*, 181 Ga. App. at 366, 352 S.E. 2d at 401. This Court has wide latitude to make complete discovery possible. *Id.* Plaintiffs respectfully urge this Court to exercise its discretion and order Defendants to provide factually-specific answers that are full, complete, responsive, and non-evasive. Further, Plaintiffs request the Court to order Defendant to produce all responsive documents.

Prayer for Relief

In accordance with the foregoing, Plaintiffs respectfully request that the Court overrule Defendant's objections and order Defendant to answer fully and completely Plaintiffs' Interrogatories and Request for Production of Documents. Additionally, Plaintiffs request such other and further relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was sent to all counsel of record on the 28th day of January, 1999, via the method indicated below:

- ☒ certified mail
- ☐ electronic filing
- ☐ facsimile
- ☐ federal express/hand delivery

Rhonda H. Sullivan for
LOU THOMPSON

RULE 6.4(B) CERTIFICATE OF CONFERENCE

Plaintiffs certify that counsel for Plaintiffs contacted counsel for Defendant A. P. Green Industries and attempted in good faith to resolve by agreement the issues raised in the instant motion and such effort failed.

Rhonda H. Sullivan for
LOU THOMPSON

EXHIBIT B

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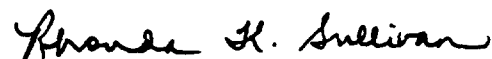
Re: *In Re: All Asbestos-Related Personal Injury or Death Cases Filed By Baron & Budd,
P.C. in Fulton County, Georgia; Responses to Master Discovery*

Dear Al & Elaine:

This is to confirm my attempts to contact you concerning Responses by Dana Corporation, GAF Corporation, Armstrong World Industries, Inc., Maremont Corporation, Certainteed, United States Gypsum, Quigley Company, Flexitallic, Inc., and A.P. Green, to Plaintiffs' Master Discovery filed in Fulton County, Georgia, in Judge Etheridge's court. While we have not yet resolved any differences we have regarding your clients' responses, we look forward to working with you to resolve this matter without necessity of a hearing before the Special Master. Should your client provide full and complete answers to the Interrogatories and Requests for Production noted in the Motion to Compel filed on this date, we will withdraw the Motion.

Please call me at your earliest convenience should you wish to discuss the matter further. I look forward to hearing from you.

Sincerely,



Rhonda K. Sullivan

RKS/hs

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