

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 08/25/2015

TIME: 08:20:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Evelyn Balam

REPORTER/ERM: Melina Homan

CASE NO: **56-2014-00458073-CU-AS-VTA**

CASE TITLE: **Robert Denyer vs AB Electrolux**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Asbestos

EVENT TYPE: Motion for Preference

MOVING PARTY: Edward Lawrence Denyer, Elisabeth Denyer Hoggan, Gertrude Denyer Individually and as Successor In Interest to Robert Denyer

CAUSAL DOCUMENT/DATE FILED: Motion - Other For Trial Preference, 07/31/2015

APPEARANCES

Stephen M. Fishback, counsel, present for Plaintiff(s).

Fred Lee, specially appearing for counsel BARRY R. SCHIRM, present for Defendant(s).

Stephanie Bowlby, specially appearing for counsel Stephen M. Nichols, present for Defendant(s).

Suzanna Minasian, specially appearing for counsel Gary D Sharp, present for Defendant(s).

Kenneth M Natelborg, counsel, present for Defendant(s).

Arpi Galfayan, specially appearing for counsel Kenneth B Prindle, present for Defendant(s).

Samantha Jackson, specially appearing for counsel Kelvin Wyles, present for Defendant(s).

Kevin Jamison, specially appearing for counsel FRANK D. POND, present for Defendant(s).

Ann Parks, specially appearing for Bell Industries Inc, Defendant.

Thomas McNamara, specially appearing for Sears Roebuck and Co, Defendant.

*** The following appearances are telephonic:

Counsel George Haddad appearing for Defendant(s).

Counsel Anthony Calero appearing for Defendant(s).

Counsel Bjorn Green appearing for Defendant(s).

Counsel Soniya Khemiani appearing for Defendant(s).

Counsel John Son appearing for Defendant(s).

Matter submitted to the Court with argument.

The Court finds/orders:

Matter taken under submission.

Having considered the submitted matter, the Court now rules as follows:

The Court's tentative is adopted as the Court's ruling.

The Court's ruling is as follows:

Sustain Defendant CertainTeed Corporation's evidential Objection No. 5. Overrule CertainTeed Corporation's remaining Objections.

Plaintiff Gertrude Denyer satisfies all the requirements for a mandatory trial preference under Code of Civil Procedure §36(a), and based on that finding the Court (a) grants Plaintiffs' request for a trial preference under the mandatory provisions of Code of Civil Procedure §36(a); (b) will set a trial date less than 120 days from the date of the hearing on this motion (i.e., on Monday, December 21, 2015, or an earlier Monday in December 2015); (c) finds "good cause" under Code of Civil Procedure §437c(a) to have motions for summary judgment/adjudication set for hearing up to and including the first day of trial, but decline to shorten time on such motions; and (d) declines to issue any blanket discovery orders.

Discussion:

Plaintiffs Gertrude Denyer, Edward Denyer, and Elisabeth Hoggan move pursuant to Code of Civil Procedure §36 for a preferential trial date. Numerous Defendants oppose Plaintiffs' motion and others have filed Joinders to those oppositions.

A. Evidentiary Objections

Defendant CertainTeed Corporation ("CertainTeed") has filed evidentiary objections to portions of the declarations of Plaintiffs' counsel Tenny Mirzayan, Plaintiff Gertrude, and Plaintiff Edward filed in support of Plaintiffs' motion. The Court probably should rule on these evidentiary objections as follows:

1. Mirzayan Declaration

1. ¶14, ll. 12-13: **OVERRULE.** Pursuant to Code of Civil Procedure §36.5, Plaintiffs' counsel's statements regarding Plaintiff Gertrude's health may be made on "information and belief." Plaintiffs' counsel states the information on which she relies in forming her belief.

2. ¶14, ll. 13-15: **OVERRULE.** This statement is also properly made "on information and belief," and is supported by information set forth in Plaintiff Gertrude's declaration.

3. ¶14, ll. 15-17: **OVERRULE.** This statement is also properly made "on information and belief," and is supported by information set forth in Plaintiff Gertrude's declaration.

2. Plaintiff Gertrude Declaration

4. ¶¶6, 7: **OVERRULE.** Plaintiff Gertrude presumptively has personal knowledge regarding her diminishing memory and her decreasing ability to participate in this litigation given her memory and health issues.

3. Plaintiff Edward Declaration

5. ¶4: **SUSTAIN.** Plaintiff Edward's statement lacks foundation, in that he lacks personal knowledge of Plaintiff Gertrude's health issues and therefore cannot render an opinion regarding her prognosis.

B. The Substantive Merits of Plaintiffs' Request for a Trial Preference

Pursuant to Code of Civil Procedure section 36, there are three requirements for a preference under this

provision: (i) the party must be over 70 years old; (ii) the party must have a substantial interest in the action as a whole; and (iii) the health of the party must be such that a preference is necessary to prevent prejudicing the party's interest in the litigation. Requirement (i) is satisfied because Plaintiffs submit evidence indicating that Plaintiff Gertrude is 72 years old. (See Plaintiff Gertrude Decl., ¶3.) Requirement (ii) is satisfied, because Plaintiff Gertrude is one of the three Plaintiffs. Requirement (iii) is satisfied, because Plaintiff Gertrude has a brain tumor that causes seizures, a thyroid condition, and high blood pressure/cholesterol all of which she is presently taking medication for. (See Mirzayan Decl., ¶14; Plaintiff Gertrude Decl., ¶¶3, 4.) Perhaps even more significantly for the purpose of the present motion, Plaintiff Gertrude's memory and overall health are deteriorating, thus diminishing her ability to participate in this action. (See Mirzoyan Decl., ¶14; Plaintiff Gertrude Decl., ¶¶6, 7; Edward Decl., ¶3.) Given that Plaintiff Gertrude's claims include those for wrongful death and loss of consortium, her own testimony and participation at trial would appear to be reasonably necessary to prosecute her claims.

In their Opposition Briefs, Defendants object to Plaintiffs' counsel Mirzayan's declaration statements "on information and belief" regarding Plaintiff Gertrude's prognosis, and to Plaintiff Gertrude's and Edward's statements regarding Plaintiff Gertrude's health and memory based on lack of expertise. However, by statute, the evidence of Plaintiff Gertrude's health condition does **not** have to be admissible, but can be submitted in the form of a declaration of Plaintiff's counsel "on information and belief." (See Code of Civil Procedure §36.5.) Moreover, Plaintiff Gertrude's and Edward's statements regarding Plaintiff Gertrude's diminishing memory appear to be within the proper scope of percipient observations of a layman and therefore do not require expert testimony. Simply stated, one does not need to be an expert to observe that someone's (or one's own) memory is deteriorating, and Plaintiff Gertrude's memory appears to be critical to her case due to her role as a witness to her wrongful death and loss of consortium damages.

Based on the above, the Court must grant Plaintiffs' request for a trial preference under §36(a). Pursuant to §36(f), the Court must also set the matter for trial not more than 120 days from the August 25, 2015 hearing date on this motion, or Wednesday, December 23, 2015. Because trial dates are set for Monday in this Court, the latest possible trial date would be Monday, December 21, 2015.

Plaintiffs request that the Court set a trial date only 60 days out, but no more than 90 days out. Plaintiff has failed to demonstrate that a trial in 60 days is necessary. In particular, neither Mirzayan nor Plaintiff Gertrude clearly indicate in their declarations that Plaintiff Gertrude's condition is deteriorating so rapidly that she would be unable to protect her interests in this action (i.e., by testifying) if a trial date is set 120 days out. Plaintiff Gertrude's vague assertion in ¶7 of her declaration that "a trial set more than a few months from now would be severely and substantially diminished..." is insufficient to justify such a short setting. The Court also notes that Defendants' position that substantial discovery remains outstanding is credible and militates against the trial date requested by Plaintiffs. Moreover, the addition of the two new wrongful death Plaintiffs (i.e., Decedent's children Edward Denyer and Elisabeth Hoggan) in the 1st Amended Complaint filed on June 30, 2015, would appear to necessitate some additional discovery into these new Plaintiffs' wrongful death damages. Under these circumstances, a trial date 60 or even 90 days out would make the considerable challenges posed by a 120-day-out trial date substantially greater.

In their Opposition Briefs, Defendants contend that – if the Court grants Plaintiffs a trial preference – the Court should impose various conditions intended to streamline discovery and shorten time on motions for summary judgment/adjudication. However, Defendants cite no authority for the proposition that the

Court may impose such conditions on the granting of a **mandatory** trial preference under §36(a). As noted above, in general, the issues relating to discovery and Defendants' ability to bring motions for summary judgment/adjudication are separate from the issue of whether Plaintiffs' request for a trial preference should be granted. (See, e.g., *Swaithes v. Sup. Ct.* (1989) 212 Cal. App.3d 1082, 1085-1086.) With respect to motions for summary judgment/adjudication, it might be true that, as a practical matter, some or all of the Defendants may have their ability to bring a summary judgment motion compromised (which requires a minimum of 75 days notice and must normally be set for hearing at least 30 days prior to the trial date, so that a motion for summary judgment/adjudication must normally be filed at least 105 days before the trial date) if a trial preference is granted, particularly if those Defendants need more time to obtain more discovery before preparing and filing such a motion. However, although the Court has the authority to shorten the 30-day time limit prior to trial for the hearing on a motion for summary judgment (and probably should do so), it is doubtful that the Court has the authority to shorten the 75-day period between the filing and the hearing on such a motion. (See, e.g., *Cuff v. Grossmont Union High School Dist.* (2013) 221 Cal. App. 4th 582, 595-596.) As a result, the Court finds "good cause" to allow summary judgment/adjudication motions to be heard as late as the first day of trial (see Code of Civil Procedure §437c(a)), but decline to allow Defendants to file and serve their motions less than 75 days prior to the hearing date. As to discovery issues, those appear to be more appropriately left to separate motions which pertain to specific issues. Defendants fail to cite any authority for the Court to make blanket modifications to the provisions of the Discovery Act, and the Court therefore declines the invitation to do so.

Based on the above, the Court (a) grants Plaintiffs' request for a trial preference under the mandatory provisions of Code of Civil Procedure §36(a); (b) will set a trial date less than 120 days from the date of the hearing on this motion (i.e., on Monday, December 21, 2015, or an earlier Monday in December); (c) finds "good cause" under Code of Civil Procedure §437c(a) to have motions for summary judgment/adjudication set for hearing up to and including the first day of trial; and (d) declines to issue any blanket discovery orders.

Jury Trial (LC) continued to 12/21/2015 at 01:30 PM in department 43.

Notice to be given by Clerk.