

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

RECEIVED

MICHAEL L. PERRY and)
LONNIE L. LONG,) C/A NO. 2023-CP-40-04072

Dec 27 2024

SC Court of Appeals

Plaintiffs,

Re:
Asbestos Personal Injury Litigation
Coordinated Docket

v.

AMERICAN INTERNATIONAL
INDUSTRIES, et al.,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER FROM AMERICAN INTERNATIONAL INDUSTRIES' EXPERT DISCOVERY

On May 22, 2023, Plaintiffs moved before this Court for a protective order to prohibit Defendant American International Industries from participating in any expert and liability discovery in this case. *See* Pls' Mot. for Protective Order. The Court, because it previously issued an Order Granting Default Against American International Industries ("AII" or "Defendant") on October 3, 2023¹, agreed to limit any discovery to damages. As such, the only issue in this case in which Defendant American International Industries may participate in is the issue of damages. The Court instructed the Plaintiffs to draft an order reflecting the Court's ruling and in addition, allowed any comments and responses by Defendant AII before entering its Order. Defendant AII submitted its Response in Opposition to Plaintiffs' Motion for Protective Order and Proposed Order Granting Plaintiffs' Motion for Protective Order on May 24, 2023 ("Defendant's Response in Opposition"). For the following reasons, the Court grants Plaintiffs' Motion for Protective Order for the in-default Defendant AII.

¹ The Court issued its Order Denying AII's Motion to Lift Default on November 2, 2024. Defendant AII did not move this Court for reconsideration of its Order.

AII is in default in the above-entitled matter. This Court has already heard oral argument on the issue of default and already issued a ruling. *See* Order Denying AII/Clubman’s Mot. to Lift Default, Nov. 2, 2023. Despite this Court’s ruling, Defendant persists in attempting to litigate this action as if it were not in default. In just the past weeks, Defendant has both issued a subpoena to Mr. Perry’s employer *over Plaintiffs’ objection*, has tendered an expert for deposition, and indicated that it intends to file a motion to compel discovery regarding Plaintiffs’ identification of Clubman products and related issues.

Defendant has put forth a novel theory that it is an “active defendant” in the above captioned case because Plaintiffs filed an amended complaint adding defendants to the case. Specifically, Defendant argues AII’s default was cured by its timely answer to Plaintiffs’ First Amended Complaint and Second Amended Complaint because the first Complaint is moot and inoperative. *See* Def.’s Resp. in Opp’n, 4. Defendant’s argument that answering an amended complaint, which did not change any of the allegations or causes of action against them, defeats the default is unavailing. Plaintiffs’ amended complaint simply added additional defendants to the case. It did not change the claims, substantive or otherwise, against AII in any way. Defendant has gone beyond the issues of damages and Defendant has failed to timely contest the default and failed to timely file any motion seeking further relief. Defendant has thereby forfeited its own Motion for Protective Order since it is in default. The Court also denies adopting cited federal authority for the proposition that an amended complaint moots a prior entry of default as argued by AII. *See* Def.’s Resp. in Opp’n, 9. This matter is controlled by South Carolina statutes and rules regarding default in South Carolina.

SCRCP 5(a) provides: “No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served

upon them in the manner provided for serving summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.” Importantly, the substantive claims against Defendant have never been amended since Plaintiffs’ Original Complaint—the one for which it is in default. In fact, Plaintiffs’ complaint has only been amended to add new defendants. The claims against Defendant remain the same since the very inception of this lawsuit.

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Sundown Operating Co., v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). “The trial court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Id.* Defendant has filed no motion pursuant to SCRCP 55(c) seeking relief from this Court to lift the default. Defendant filed such a motion at the beginning of this case, which was denied.

Therefore, Defendant’s participation in this case is limited to that of damages only. Defendant is prohibited from attempting to cross-examine the Plaintiffs’ experts on liability issues such as asbestos content of its products, testing, and talc content. Further, Defendant is prohibited from any discovery that is unrelated to damages.

IT IS SO ORDERED.

[JUDGE’S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Michael L Perry , plaintiff, et al vs American International Industries ,
defendant, et al

Case Number: 2023CP4004072

Type: Order/Protective Order

So Ordered

Jean H. Toal