

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARE COMMUNICATIONS, INC.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
RODALE PRESS, INC.	:	NO. 95-5870

MEMORANDUM AND ORDER

HUTTON, J.

January 23, 2002

Presently before the Court are Defendant's Motion to Preclude Introduction of Evidence of Damages, Plaintiff's Motion in Limine to Preclude Defendant from Introducing Testimony of Candice Jones and Defendant's response thereto. For the reasons discussed below, Defendant's Motion to Preclude Introduction of Evidence of Damages is **GRANTED**, and Plaintiff's Motion in Limine to Preclude Defendant from Introducing Testimony of Candice Jones is, consequently, **DENIED AS MOOT**.

**I. BACKGROUND**

Plaintiff Ware Communications, Inc. instituted the current action on December 15, 1995 by filing a three-count Complaint for fraudulent misrepresentation, breach of contract, and invasion of privacy against Defendant Rodale Press, Inc. ("Defendant"). Defendant is the publisher of books and magazines on subjects ranging from fitness, health and active sports to gardening and crafts. In 1992, Reginald Ware ("Ware") on behalf of

his publishing company, Ware Communications, Inc. ("Plaintiff"), approached Defendant with an idea for a healthy lifestyle magazine geared towards African-American women. In December of 1993, the parties entered into an Advertising Representative Agreement for the publication known as Rodale's Heart & Soul. This agreement granted Defendant the right to terminate the contract upon thirty (30) days notice if advertising sales for Heart & Soul did not meet budget projections. On July 25, 1995, executives from Rodale Press met with Ware to advise him that Defendant was terminating the Agreement in the required thirty days. Ware was advised not only of the magazine's failure to meet budget projections, but also of sexual harassment allegations that had been brought against him by an employee of Defendant.

The case was originally brought in this District before the Honorable Robert S. Gawthrop, III. By the time of trial, both the fraudulent misrepresentation and breach of contract counts had been dismissed, leaving only Plaintiff's invasion of privacy charge. Following the close of Plaintiff's case in chief on October 5, 1997, the court entered judgment as a matter of law in favor of Defendant. The only issue remaining for the jury was Defendant's counterclaim based on the sexual harassment allegation.

On October 9, 1997, the jury found in favor of Plaintiff and against Defendant on the counterclaim. Plaintiff then appealed the trial court's order dismissing with prejudice Plaintiff's breach of

contract action to the United States Court of Appeals for the Third Circuit. The Third Circuit then reversed and remanded the breach of contract claim.<sup>1</sup> See Ware v. Rodale Press, Inc., 185 F.3d 864 (3d Cir. June 16, 1999) (Table, No. 98-1623) (unpublished opinion).

On December 16, 1999, Plaintiff filed a third Amended Complaint alleging breach of contract, misappropriation, breach of a duty of good faith and fair dealing, and breach of a fiduciary duty. All claims other than the breach of contract action were dismissed with prejudice.<sup>2</sup> On June 8, 2000, counsel for Defendant forwarded to Plaintiff's counsel a Request for Production of Documents and Interrogatories. Plaintiff's counsel failed to respond to Defendant's request. Defendant then filed a Motion to Compel on August 24, 2000, approximately one and a half months after a response was due. Plaintiff's counsel also neglected to respond to the Defendant's motion.

On September 19, 2000, this Court entered an Order directing Plaintiff to respond to the June 8, 2000 Request for Production of Documents and Interrogatories within fifteen (15) days. Despite the Court's Order, Plaintiff failed to respond to the discovery request within the required time period. Rather, two

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1. Specifically, the Third Circuit found that "the District Court's decision to deny amendment of the contract claim does not comport with the liberal approach to amendment embodied in the Fed. R. Civ. P. 15(a)," and thus reversed the order dismissing the breach of contract claim. See Ware v. Rodale Press, Inc., at 12-13 (3d Cir. June 16, 1999) (unpublished opinion).

2. At the same time the bulk of Plaintiff's claims were dismissed, Reginald Ware, originally named as a Plaintiff along with Ware Communications, Inc., was dismissed as a party to this suit.

days after the responses were due, Plaintiff sought an extension of time. The parties then entered into a Stipulation which extended Plaintiff's deadline to provide the requested information until October 18, 2000. The Stipulation provided that "[s]hould the Plaintiff fail to provide such full and complete responses, the parties agree that Plaintiff shall be prohibited from presenting any evidence in support of its claim at the time of trial of the within action." See Stipulation (Docket No. 113), filed Oct. 17, 2000, at ¶ 4(b). While Plaintiff's counsel complied with the October 18, 2000 deadline, the answers and documents provided were incomplete. Specifically, with respect to damages, the Plaintiff repeatedly stated that "Plaintiff has not completed its determination of its damages." See Def.'s Mot. to Preclude, Ex. D, Def.'s Interrogs., at ¶¶ 10, 11.

After Defendant was unable to obtain more specific damages information at the deposition of Ware, Defendant informed Plaintiff in a letter dated November 21, 2000 that full and complete answers to the interrogatories had not been provided. Plaintiff did not respond to Defendant's letter. By this Court's Order of October 21, 2000, discovery was to be completed on or before January 8, 2001. One year later, on the eve of trial, Plaintiff set forth for the first time the damages calculation in its pretrial memorandum dated January 7, 2002. Defendant then

filed the instant motion to preclude the evidence from being introduced at trial, which was set to begin on January 14, 2002.

## II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 37(b)(2)(B), courts are authorized to impose sanctions for discovery violations, including barring the admission of certain evidence. See In re TMI Litig., 193 F.3d 613, 721 (3d Cir. 1999); Puricelli v. Houston, No. Civ. A. 99-2982, 2000 WL 760522, at \*16 (E.D. Pa. June 12, 2000). Whether sanctions are appropriate is within the district court's broad discretion over discovery matters. Puricelli, 2000 WL 760522, at \*16. Although the exclusion of evidence is an extreme sanction, a trial court's exclusion of evidence for failure of counsel to adhere to a discovery order "will not be disturbed on appeal absent a clear abuse of discretion." In re TMI Litig., 193 F.3d at 721 (internal citations omitted); see also Semper v. Santos, 845 F.2d 1233, 1237 (3d Cir. 1988).

In cases where precluding evidence as a discovery sanction would be equivalent to a dismissal of the case, a district court should exercise caution. See Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984); Doe v. American Red Cross, Civ. A. No. 90-6734, 1992 WL 122839, at \*2 (E.D. Pa. May 28, 1992). In considering whether to impose such sanctions that amount to dismissal, a district court must balance the following factors: (1) the extent of the party's personal responsibility (as opposed

to that of the attorney); (2) the prejudice to the adversary caused by the failure to respond; (3) the party's history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense. See Poulis, 747 F.2d at 868. While all of the above factors must be considered by the court, no one factor is dispositive, and dismissal may be appropriate even when some of the factors are not met. See Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988), cert. denied, 488 U.S. 1005, 109 S.Ct. 786, 102 L.Ed.2d 777 (1989).

### **III. DISCUSSION**

Defendant in the instant case seeks to preclude Plaintiff's introduction of evidence pertaining to breach of contract damages. According to Defendant, "Plaintiff has failed and/or refused to comply with prior Court Orders to provide full and complete answers to the Defendant's discovery, as a result of which the Defendant is unable to prepare a defense to Plaintiff's claim for damages." Def.'s Mot. to Preclude at ¶ 24. Granting the requested sanction in the instant case would be tantamount to a dismissal because it would prevent Plaintiff from proving all of the elements necessary to establish a claim for breach of contract under Pennsylvania law.<sup>3</sup> Therefore, the Court must apply the Poulis

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3. "A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages." CoreStates  
(continued...)

factors to the facts of this case. See U.S. v. 68.94 Acres of Land, 918 F.2d 389, 397 (3d Cir. 1990) (applying a more discriminating balancing test to a trial court's sanction which constitutes dismissal of the action); Doe v. American Red Cross, Civ. A. No. 90-6734, 1992 WL 122839, at \*2 (E.D. Pa. May 28, 1992).

**A. The Extent of Plaintiff's Personal Responsibility**

The first Poulis factor requires the Court to examine the extent of Plaintiff's personal responsibility for the failure to respond to discovery requests. Defendant presents no evidence and makes no allegation that Ware Communications, Inc. was personally responsible for the delays in this case. Therefore, this factor does not weigh in favor of precluding the damages evidence. However, Plaintiff's "lack of responsibility for their counsel's dilatory conduct is not dispositive, because a client cannot always avoid the consequences of the acts or omissions of its counsel." Sheppard v. Glock, Inc., 176 F.R.D. 471, 473 (E.D. Pa. 1997) (quoting Poulis, 747, F.2d at 868).

**B. Prejudice to Defendant**

Next, the Court must examine the prejudice Defendant endured from the failure of Plaintiff's counsel to timely comply with discovery requests. "Prejudice' in the context of the Poulis

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3. (...continued)  
Bank N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999); see also Kurtz v. Am. Motorists Ins. Co., 1997 WL 117008, at \*4 (E.D. Pa. March 12, 1997) (granting summary judgment on breach of contract claim since there was no genuine issue of material fact on the issue of damages).

analysis does not mean 'irremediable' harm, but the extra costs of repeated delays and filing of motions required by the abusive behavior of the plaintiff." Sunday v. U. S., Civ. A. No. 89-8374, 1992 WL 221322, at \*4 (E.D. Pa. Sept. 3, 1992). Defendant has been clearly prejudiced by Plaintiff's counsel's failure to provide specific information and documentation concerning the damages calculation in a timely fashion. These unreasonable delays have caused Defendant additional expense in the form of two motions filed with the Court, specifically, Defendant's motion to compel and the instant motion to preclude evidence at trial.

Moreover, the dilatoriness of Plaintiff's counsel substantially impeded Defendant's ability to prepare a full and complete defense. Even though Plaintiff finally disclosed a breakdown of its damages calculation in its pretrial memorandum, Plaintiff has failed to produce supporting documentation. Moreover, by revealing this information for the first time on January 7, 2002, Plaintiff deprived Defendant of any significant inquiry into these amounts before the trial was set to begin on January 14, 2002. "Eventual production is not the same as timely production." Sheppard v. Glock, Inc., 176 F.R.D. 471, 474 (E.D. Pa. 1997) (quoting Poulis, 747, F.2d at 868). Due to Plaintiff's counsel's extensive delay in providing the information, Defendant had little more than a week to evaluate and rebut Plaintiff's statement of damages. Plaintiff's actions have clearly resulted in

prejudice to Defendant. Therefore, this factor weighs in favor of precluding the damages evidence.

**C. History of Dilatoriness by Plaintiff's Counsel**

The third Poulis factor, Plaintiff's counsel's history of dilatoriness, also weighs strongly in favor of precluding the damages evidence. A review of the docket in the instant case demonstrates Plaintiff's repeated failures to respond to discovery requests in a timely fashion despite Defendant's repeated requests and Orders of this Court. After Plaintiff's counsel failed to respond to Defendant's Request for Production of Documents and Interrogatories issued on June 8, 2000, Defendant filed a Motion to Compel on August 24, 2000, approximately one and a half months after a response was due. Not only did Plaintiff's counsel fail to respond to the discovery request, but he also neglected to answer Defendant's motion to compel. Consequently, on September 19, 2000, this Court entered an Order granting Defendant's uncontested motion to compel and directing Plaintiff to respond to Request for Production of Documents and Interrogatories within fifteen (15) days.

Despite the Court's Order, Plaintiff failed to respond to the discovery request within the required time period. Rather, two days after the responses were due, Plaintiff sought an extension of

time. The parties then agreed, by way of stipulation, to extend Plaintiff's deadline to provide the information until October 18, 2000. The Stipulation specifically provided that "[s]hould the Plaintiff fail to provide such full and complete responses, the parties agree that Plaintiff shall be prohibited from presenting any evidence in support of its claim at the time of trial of the within action." See Stipulation (Docket. No. 113), filed Oct. 17, 2000, at ¶ 4(b). While Plaintiff's counsel complied with this deadline, he provided Defendant with incomplete answers regarding damages, explaining that "Plaintiff has not completed its determination of its damages." See Def.'s Mot. to Preclude, Ex. D, Def.'s Interrogs., at ¶¶ 10, 11. Therefore, by October of 2000, eight months since the lawsuit commenced in this Court, and five years after the breach of contract action was originally brought before a court of this District, Plaintiff still had not completed its determination of damages. Instead, on the eve of trial, Plaintiff's provided calculations for its damages claim for the first time in its pretrial memorandum.

The excessive discovery delays in this case are further evidenced by the three scheduling orders issued by this Court to accommodate discovery. The Court's June 13, 2000 scheduling order provided five months for discovery, requiring completion by November 6, 2000. On October 31, 2000, the Court extended the discovery deadline to January 8, 2001, nearly seven months from the

date the scheduling order was issued. Plaintiff was afforded more than ample time to seek the discovery necessary to compute its damages claim. As this Court noted in its May 10, 2001 Order:

In planning their personal discovery schedule, a party must decide how they will utilize the various tools available to them. In making such a decision, the party is fully aware that discovery shall be completed within the time limits set by the Court. In the instant case, the Plaintiff chose not to begin their discovery until the deadline was upon them. . . .The Court finds the Plaintiff's decision to delay conducting discovery does not constitute good cause for extending the discovery deadline and such a ruling does not result in manifest injustice to the Plaintiff.

See Order Denying Pl.'s Mot. Reconsideration (Docket No. 136), signed May 10, 2001. Moreover, the Court noted that this case dates back in this District to September of 1995. See id. While the breach of contract claim in this action was dismissed prior to the jury trial, there was no question that "these parties were very familiar with each other and the factual contentions at issue." See id. "For that reason, the discovery in this matter should have been quite simple and straightforward." Id.

Despite the length of time this case has lingered in this District, Plaintiff waited until one full year after the close of discovery, and one week prior to trial, to produce a damages calculation. "Time limits imposed by the rules and the court serve an important purpose for the expeditious processing of litigation . . . [a] history by counsel of ignoring these time limits is intolerable." Poulis, 747 F.2d at 868. The inaction of Plaintiff's counsel in this case demonstrates a history of dilatoriness.<sup>4</sup> Therefore, this factor also weighs in favor of precluding the damages evidence.

**D. Willful and Bad Faith Conduct of Plaintiff's Attorney**

Plaintiff's counsel has demonstrated bad faith in the instant case by ignoring Defendant's requests for discovery, by failing to comply with an Order of this Court, and by failing to abide to the terms of a Court-approved Stipulation. Plaintiff's counsel consciously decided to ignore Defendant's initial request for discovery materials, then neglected to respond to Defendant's motion to compel. Plaintiff's counsel then failed to comply with the Order of this Court mandating a response to Defendant's request within fifteen (15) days. Moreover, Plaintiff's counsel refused to acknowledge Defendant's letter informing him that full and complete

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4. As the Third Circuit noted in Curtis T. Bedwell & Sons, Inc. v. Int'l Fidelity Ins. Co., 843 F.2d 683, 694 (3d Cir. 1988), "[i]n Poulis, one failure to answer interrogatories and a failure to file a pre-trial statement were sufficient to support a dismissal."

answers on the issue of damages had not been provided, as agreed upon in the Stipulation.

The general failure of Plaintiff's counsel "to supplement discovery as promised and as required by the Federal Rules . . . intimates bad faith." Sheppard v. Glock, Inc., 176 F.R.D. 471, 477 (E.D. Pa. 1997). Based on the age of this case, and the numerous extensions of the scheduling order, Plaintiff's counsel "can hardly complain that [he] had inadequate time to provide the desired reports . . ." In re TMI Litig., 193 F.3d 613, 722 (3d Cir. 1999). Nor can Plaintiff's counsel claim that the potential exclusion of the untimely provided damages evidence "caught him by surprise" since he agreed to such a sanction in the Stipulation entered into by the parties in October of 2000. See Stipulation (Docket. No. 113), filed Oct. 17, 2000, at ¶ 4(b). Plaintiff's counsel willfully delayed disclosing an itemization of damages until January 7, 2002, one year after the close of discovery and one week before the scheduled trial. No excuse has been proffered for the excessive procrastination of Plaintiff's counsel. Accordingly, this Court finds that the behavior of Plaintiff's counsel was willful and in bad faith. Therefore, this factor also weighs in favor of precluding the damages evidence.

**E. The Effectiveness of Sanctions Other Than Dismissal**

The fifth Poulis factor requires the Court to evaluate the appropriateness of sanctions other than dismissal of the

action. Other possible sanctions in Rule 37 include an order establishing designated facts in accordance with the claim of the party obtaining the order, Rule 37(b)(2)(A); an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, or rendering a judgment by default against the disobedient party, Rule 37(b)(2)(C); and an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination, Rule 37(b)(2)(D). See Sunday v. U.S., Civ. A. No. 89-8374, 1992 WL 221322, at \*5 (E.D. Pa. Sept. 3, 1992). For example, in Poulis, while the Third Circuit ultimately upheld dismissal of the action, it suggested that the preferred sanction would have been "to impose excess costs caused by such conduct directly upon the attorney, with an order that such costs are not to be passed on to the client, directly or indirectly." Poulis, 747 F.2d at 869. However, as the court in noted in Sheppard v. Glock, Inc., 176 F.R.D. 471, 478 (E.D. Pa. 1997), "we are not dealing here with a report that was just a few days late, or with an illness, death, or other family circumstance which would excuse an attorney's lack of punctuality."

In the instant case, no other sanction will remedy the prejudice to Defendant. Defendant has been deprived of its opportunity to examine the damages claim in full. Plaintiff revealed its proposed damages calculation one week before trial was scheduled to begin. Moreover, Plaintiff neglected to provide any

substantive support for its calculations. Due to Plaintiff's inordinate delay, Defendant was not afforded the opportunity to challenge the data. At this stage in the litigation, it is neither appropriate nor judicially economical to reopen discovery one year after its close to allow Defendant appropriate time to investigate the damages calculation. See In re Paoli Railroad Yard PCB Litig., 1992 WL 323675, at \*4 (E.D. Pa. Oct. 21, 1992). As previously stated, this matter has been lingering before courts of this District since 1995. Because Plaintiff's counsel failed to provide its damage calculation to Defendant until the eve of trial, the only appropriate remedy is to preclude the introduction of such evidence at trial, as Plaintiff counsel agreed to in the Court-approved Stipulation.

**F. Meritoriousness of the Claim**

This final Poulis factor requires the Court to evaluate the merits of Plaintiff's breach of contract claim as it would under a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. Therefore, the Court need only establish whether "the allegations of the pleadings, if established at trial, would support recovery by plaintiff." Poulis, 747 F.2d at 869-70. Under that standard, Plaintiff's breach of contract

claim is meritorious since it previously withstood Defendant's motion to dismiss.<sup>5</sup>

#### IV. CONCLUSION

The balance of the Poulis factors weighs in favor of precluding Plaintiff's evidence on damages, thereby effectively dismissing Plaintiff's breach of contract claim against Defendant. The Court is mindful that the exclusion of evidence is an "extreme" sanction. Sheppard v. Glock, Inc., 176 F.R.D. 471, 473 (E.D. Pa. 1997). However, "[t]he court has authority to employ 'the most severe in the spectrum of sanctions provided by statute' to ensure compliance with its discovery orders and to deter all parties in

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5. The Court notes, however, that the damages calculation provided by Plaintiff on the eve of trial is insufficient to warrant a trial on the merits. See e.g., USA Mach. Corp. v. CSC, Ltd., 184 F.3d 257, 265 (3d Cir. 1999) (finding that plaintiff could not succeed on its contract claims "because of its failure of proof with respect to damages"). Under Pennsylvania law, in order to proceed with a breach of contract action, a plaintiff must establish "(1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages." CoreStates Bank N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). In order to prove damages, a plaintiff is required "to give the factfinder evidence upon which it could base a calculation of damages to a 'reasonable certainty.'" ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 668 (3d Cir. 1998). Reasonable certainty has been defined at a minimum to include "a rough calculation that is not too 'speculative, vague or contingent upon some unknown factor.'" Id. at 669.

In the instant case, Plaintiff failed to provide any supporting documentation or expert reports or analysis to support its damages calculations. Plaintiff produced no evidence or documentation concerning costs and expenses Plaintiff avoided by not having to perform its sales duties under the contract. Nor has Plaintiff provided the basis for the itemized advertising commissions. In fact, the damages calculations, as presented, evince little more than the opinion of Reginald Ware. "It is true . . . that the Pennsylvania law of contracts allows for some uncertainty in calculating damages . . ." ATACS Corp., 155 F.3d at 670. However, "[w]hile mathematical certainty is not required, the plaintiff must introduce sufficient facts upon which the jury can determine the amount of damages without conjecture." Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1257 (Pa. 1983); see also Scully v. US WATS, Inc., 238 F.3d 497, 515 (3d Cir. 2001). After years of discovery, Plaintiff in the instant case has failed to present evidence upon which the factfinder could base a damages calculation to a reasonable certainty.

this litigation from engaging in discovery misconduct." In re Orthopedic Bone Screw Prods. Liab. Litig., 1998 WL 254038, at \*4 (E.D. Pa. May 5, 1998) (quoting National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1975)) (finding it was not an abuse of discretion to dismiss a case pursuant to Rule 37 where interrogatories remained substantially unanswered for seventeen months despite numerous extensions and warnings from the court, and promises by plaintiffs). In the instant case, Plaintiff's utter failure to provide Defendant with a damages calculation until the eve of trial is inexcusable, particularly in light of the repeated requests by Defendant, Orders of this Court, and the excessive length of time provided for discovery in this case. Therefore, the sanction of preclusion is warranted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARE COMMUNICATIONS, INC. : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
RODALE PRESS, INC. : NO. 95-5870

O R D E R

AND NOW, this 23<sup>rd</sup> day of January, 2002, upon consideration of Defendant Rodale Press, Inc.'s Motion to Preclude Introduction of Evidence of Damages and Plaintiff's Motion in Limine to Preclude Defendant from Introducing Testimony of Candice Jones and Defendant's response thereto, IT IS HEREBY ORDERED that:

(1) Defendant's Motion to Preclude is **GRANTED**;

(2) Plaintiff Ware Communication Inc.'s breach of contract claim is **DISMISSED**;

(3) Plaintiff Ware Communication Inc.'s Motion in Limine to Preclude Defendant Rodale Press, Inc. from Introducing Testimony of Candice Jones is **DENIED AS MOOT**.

BY THE COURT:

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HERBERT J. HUTTON, J.