

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

ARMANDO AGUILAR, : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
WEI EQUIPMENT, et al., :
Defendants. : No. 03-1751

MEMORANDUM AND ORDER

J. M. KELLY, J. SEPTEMBER , 2003

Presently before the Court is third-party Defendant Weiler & Company, Inc.'s ("Defendant") motion captioned "Motion To Dismiss Plaintiff's Complaint Pursuant to FRCP 37(b)(2)(C) for Failure to Comply with Rule 26," Plaintiff Armando Aguilar's ("Plaintiff") response, and Defendant's reply thereto. Defendant premises its Motion to Dismiss on Plaintiff's failure to comply with Federal Rule of Civil Procedure 26 requirements, including initial disclosures under Rule 26(a)(1) and expert testimony disclosure under Rule 26(a)(2).¹ For the following reasons, Defendant's

¹ Rule 26(a) provides in pertinent part:

(1) Initial Disclosures. . . . a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information . . . ;

(B) a copy of . . . all documents, data compilations, and tangible things that . . . the disclosing party may use . . . ;

(C) a computation of any category of damages claimed

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other

Motion to Dismiss is **DENIED**.

I. BACKGROUND

On or about October 23, 2000, Plaintiff seriously injured his left hand while operating a saw conveyor. Plaintiff was working in a food processing plant at the time of the incident.

Nearly two years later, on October 22, 2002, Plaintiff instituted suit against WEI Equipment ("WEI") by way of a writ filed in the Court of Common Pleas of Philadelphia County, Pennsylvania. Approximately four months later, on February 27, 2003, Plaintiff filed a Complaint in the Court of Common Pleas, seeking damages for injuries Plaintiff sustained from the saw conveyor alleged to be designed and manufactured in a defective manner.

On March 25, 2003, the case was removed to the United States District Court for the Eastern District of Pennsylvania. Based upon Plaintiff's claim that the saw conveyor distributed by WEI was defective, WEI joined Defendant for contribution as the manufacturer of the saw conveyor. A Hearing Notice was entered on June 16, 2003, which scheduled this matter for arbitration on

parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. **(B)** . . . this disclosure shall . . . be accompanied by a written report prepared and signed by the witness

October 9, 2003.

After reviewing the papers relevant to this Motion, it appears Defendant's counsel requested both Rule 26(a)(1) and 26(a)(2) disclosures on four separate occasions, including May 19, 2003, June 3, 2003, June 18, 2003, and July 30, 2003. Defendant's counsel alleges in the instant motion that, despite these numerous requests, no Rule 26 disclosures were ever received from Plaintiff.

In his response, Plaintiff contends that he provided Defendant with initial disclosures pursuant to Rule 26(a)(1). However, Plaintiff concedes he has not provided Defendant with an expert report pursuant to Rule 26(a)(2), evaluating liability based upon an examination of the saw conveyor.

II. DISCUSSION

Defendant moves to dismiss Plaintiff's Complaint as a Rule 37(b) sanction because it claims Plaintiff has not supplied Defendant with initial disclosures or an expert report. The parties dispute whether Plaintiff provided initial disclosures to Defendant, but agree that Plaintiff's expert report has not been submitted to the Defendant.

The Court may impose sanctions on a party if he or she fails to comply with a court order regarding discovery. Fed. R. Civ. P. 37(b)(2). To this extent, Rule 37(b) provides in relevant

part: "If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just." Fed. R. Civ. P. 37(b)(2). One possible sanction for a discovery order violation under Rule 37(b) is, as requested by Defendant:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party.

Fed. R. Civ. P. 37(b)(2)(C).

However, the array of Rule 37(b) sanctions is triggered only when a properly recorded discovery order is violated by one of the parties. Fed. R. Civ. P. 37(b)(2); see also Al Barnett & Son, Inc. v. Outboard Marine Corp., 611 F.2d 32, 35 (3d Cir. 1979); U.S. v. Princeton Gamma-Tech, Inc., No. Civ. A. 91-809, 1993 U.S. Dist. LEXIS 8603, at *8-9 (D.N.J. June 21, 1993). Since this Court has not issued any discovery orders in this matter, Plaintiff cannot be in violation of any such order, and thus, Defendant fails to present a cognizable claim under Rule 37(b).

Three years have passed since Plaintiff's injury, and almost three months have passed since a Hearing Notice was entered on June 16, 2003, which scheduled this matter for arbitration on October 9, 2003. Plaintiff's counsel has had ample time to produce an expert report. It appears to this Court that

Plaintiff's counsel continues to be negligent in failing to satisfy Defendant's repeated requests for Plaintiff's expert report, although we do not believe Plaintiff's counsel's case mismanagement amounts to bad faith.

Despite the inapplicability of Rule 37(b), the Court is mindful that Plaintiff's expert report has been requested on numerous occasions and will be a crucial component to the parties' upcoming arbitration. Therefore, an order both compelling Plaintiff's counsel to provide Defendant with an expert report by September 22, 2003, and suspending the scheduled arbitration for sixty days is warranted. Counsel shall contact the arbitration clerk to reschedule an arbitration hearing. Further, since we are concerned about Plaintiff's awareness of his counsel's case mismanagement, Plaintiff's counsel shall provide Plaintiff with a copy of this Memorandum and Order.

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O R D E R

AND NOW, this day of September 2003, after consideration of third-party Defendant Weiler & Company, Inc.'s ("Defendant") motion captioned "Motion To Dismiss Plaintiff's Complaint Pursuant to FRCP 37(b)(2)(C) for Failure to Comply with Rule 26" (Doc. No. 17), Plaintiff Armando Aguilar's ("Plaintiff") response (Doc. No. 18), and Defendant's reply thereto (Doc. No. 19), it is **ORDERED** that Defendant's Motion is **DENIED**.

It is **FURTHER ORDERED** that:

1. Plaintiff shall submit all expert reports, if any, on or before September 22, 2003 to the parties in this action. Plaintiff's failure to do so may result in the inadmissibility of such expert reports as to liability in this matter.
2. Arbitration is suspended for sixty days. Counsel shall contact the arbitration clerk to reschedule an arbitration hearing.
3. Plaintiff's counsel shall provide Plaintiff with a copy of this Memorandum and Order.

BY THE COURT:

JAMES MCGIRR KELLY, J.