

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

MARIA D'AMICO, Administratrix : CIVIL ACTION
of the Estate of FRANCES :
GAGLIARDI :
v. :
PANASONIC CORPORATION : NO. 96-5238

M E M O R A N D U M

WALDMAN, J.

March 11, 1998

This is a products liability case. Plaintiff Maria D'Amico is suing as the administratrix of the estate of Frances Gagliardi. Plaintiff alleges that on July 5, 1995 a portable television set manufactured by defendant ignited and started a fire which caused fatal injury to decedent and damage to her residence in Philadelphia. Plaintiff filed a complaint in the Philadelphia Court of common Pleas asserting product claims based on strict liability, breach of warranty and negligence. Plaintiff alleged that the television had defects in design and manufacture; that in breach of implied and express warranties it was at the time of sale in a "defective and dangerous condition"; and, was negligently designed and manufactured.

Defendant timely removed the action to this court. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

The court entered a scheduling order on March 21, 1997 directing the parties to complete discovery by November 22, 1997

and to be prepared for trial by January 1, 1998.

Defendant has filed a Motion for Sanctions by which it seeks to preclude plaintiff from offering any testimony or evidence at trial as a sanction for her repeated failure to honor discovery obligations and court orders. To preclude plaintiff from presenting any evidence is, of course, tantamount to a dismissal of her complaint and the court will consider defendant's motion accordingly. Defendant has also filed a Motion for Summary Judgment. Defendant contends that plaintiff not only failed to provide discovery but also has failed to produce evidence to support her claims.

A court may dismiss an action as a sanction against a party who fails to obey an order to provide discovery. See Fed. R. Civ. P. 37(b)(2)(C). A court may dismiss an action as a sanction against a party who fails to comply with the Federal Rules of Civil Procedure, including discovery rules, or any order of the court. See Fed. R. Civ. P. 41(b). A court also has the inherent power to dismiss a case that cannot be disposed of expeditiously because of the willful inaction or dilatoriousness of a party. See Chambers v. NASCO, Inc., 501 U.S. 32, 34 (1991); Link v. Wabash R.R. Co., 370 U.S. 626, 630-32 (1962); see also, Hewlett v. Davis, 844 F.2d 109, 114 (3d Cir. 1988).

By letter of April 10, 1996, defendant requested the

opportunity to inspect the location of the fire. Defendant reiterated the request in letters of May 1, 1996, October 8, 1996, January 16, 1997, April 21, 1997 and May 19, 1997. These requests were ignored. No access was granted. On July 3, 1997, defendant sought an order compelling plaintiff to arrange for access to the premises at which the fire occurred so a defense expert could conduct an inspection. On July 21, 1997, the court granted defendant's motion and ordered plaintiff to provide access within twenty days. Plaintiff never provided defendant with access or, until February 9, 1998, offered any explanation for the failure to do so. On that date, plaintiff advised the court that the premises had been turned over to decedent's insurer, State Farm Insurance Company. Plaintiff does not state when this occurred or why she failed for up to 22 months to relate this information.

On March 1, 1996 defendant served interrogatories and document requests upon plaintiff. By letters of April 16, 1996, January 16, 1997, March 13, 1997, April 24, 1997 and May 19, 1997, defendant persisted in asking plaintiff to respond to these discovery requests. Defendant received virtually no responsive discovery.

On July 3, 1997, defendant filed a motion to compel plaintiff's responses to the long outstanding discovery requests. On July 21, 1997, the court granted defendant's motion and

ordered plaintiff to respond to all outstanding discovery requests within twenty days. Plaintiff failed to do so.

In assessing a motion to dismiss as a sanction, a court generally considers the so-called Poulis factors. See Anchorage Assocs. v. V.I. Bd. of Tax Review, 922 F.2d 168, 177 (3d Cir. 1990); Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988); Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1987).¹ Not all of the Poulis factors need be satisfied to warrant such a sanction. See Hicks, 850 F.2d at 156.

Defendant has not asked for sanctions against counsel pursuant to 28 U.S.C. § 1927, and there is no suggestion that counsel directed or encouraged plaintiff to refuse to provide discovery or to honor court orders. The court must assume that plaintiff is personally responsible for her substantial failures to engage in discovery.²

The inability during the allotted discovery period to

¹ These factors include the extent of the party's responsibility for the failure properly to litigate; prejudice to the adverse party; any history of dilatoriness by the recalcitrant party; the willfulness of the offending conduct; the adequacy of other sanctions; and, the merit of the underlying claims.

² After six months of allotted discovery marked by nearly total non-compliance by plaintiff, two months after entry of a court order directing plaintiff to comply with her discovery obligations and after the instant motion was filed, plaintiff's counsel sought leave to withdraw. He suggested that a new lawyer might be more successful in working with plaintiff under a "new scheduling order." It would be manifestly unfair and unsound to permit a party who has thwarted the discovery process and ignored court orders to delay further the resolution of an action by effectively starting all over again with the same or a new lawyer.

obtain basic and essential information from a plaintiff regarding her claims and theories of liability is clearly prejudicial to a defendant in its attempt to defend against and obtain a prompt resolution of a lawsuit. See Adams v. Trustees, N.J. Brewery Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994) (prejudice encompasses deprivation of information from non-cooperation with discovery and the need to expend resources to compel discovery). Also, the failure to grant access to the site of the fire or timely to provide information to facilitate defendant's ability to secure access through a third party is prejudicial.

Defendant is not complaining about an isolated breach of the federal rules. This case was removed almost two years ago. Plaintiff has been totally recalcitrant in honoring her discovery obligations throughout this period. Plaintiff disregarded numerous attempts by defendant to obtain answers to routine discovery requests, as well as court orders compelling discovery. Plaintiff's persistent failure to honor discovery obligations and court orders directing her to cooperate with discovery must be viewed as willful, if not flagrant. Such tactics evince "a willful effort to both evade and frustrate discovery." Morton v. Harris, 628 F.2d 438, 440 (5th Cir. 1980)(Rule 37(b) dismissal warranted for continuing failure to comply with court ordered discovery).

A monetary sanction would have to be quite substantial to be commensurate with or likely to deter the type of persistent and egregious violations at issue. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976). A meaningful monetary sanction in this case would likely rival dismissal in palatability, particularly in view of the dearth of evidence to support her claims.

The meritoriousness of a claim must be determined from the face of the pleadings. See C.T. Bedwell & Sons v. International Fidelity Ins. Co., 843 F.2d 683, 696 (3d Cir. 1988); Poulis, 747 F.2d at 870. This factor, therefore, is of limited practical utility in assessing dismissal under Rule 37 or 41. If a claim as alleged lacks merit, it would be subject to dismissal under Rule 12(b)(6) without the need to weigh other factors. Plaintiff's facial allegations are sufficient to withstand a Rule 12(b)(6) motion. Nevertheless, the court cannot conscientiously characterize plaintiff's claims as meritorious in view of her refusal to subject them to scrutiny through the normal discovery process.

Plaintiff's flagrant violation of the federal rules and court scheduling and discovery orders, the resulting delay and diversion of resources, the absence of justification and the prejudice to defendant particularly militate in favor of dismissal. Plaintiff invoked the judicial process and then

effectively thwarted discovery and refused properly to litigate this action. The jurisprudence on sanctions for abuse of the judicial process and the power of a court to manage its docket can have little practical meaning or effect if a court were not to take strong action in these circumstances.

Had plaintiff not also failed to produce evidence sufficient to sustain her product claims, dismissal under Rule 37(b)(2)(C) and 41(b) would be appropriate.

Once the movant demonstrates an absence of genuine issues of material fact, to avert summary judgment the non-movant must establish the existence of each element on which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings but must come forward with evidence from which a reasonable jury could return a verdict in his favor. Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995). "A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Celotex Corp., 477 U.S. at 323.

The only evidence submitted by plaintiff is the report of an assistant Fire Marshall reflecting his investigation at the fire scene, the report of a physician reflecting Ms. Gagliardi's condition and her treatment at St. Agnes Medical Center and the postmortem report of a medical examiner. The pertinent facts discernible from the record and uncontroverted or viewed most favorably to plaintiff are as follow.

On July 5, 1995, a fire erupted in the first floor front room of Frances Gagliardi's home in Philadelphia. Firefighters found Ms. Gagliardi unconscious but breathing on the kitchen floor near the rear door of the house and rescuers transported her to St. Agnes Medical Center. It appeared that Ms. Gagliardi "had been overcome by smoke." She was in "moderate to severe respiratory distress" and had second and third degree burns on the face, neck and chest. She died three days later at the age of 68 from "complications of thermal injuries." Ms. Gagliardi had hypothyroidism and showed some signs of dementia and Alzheimer's disease. There were no smoke detectors in Ms. Gagliardi's dwelling at the time of the fire.

An assistant Fire Marshall from the Philadelphia Fire Department promptly investigated the fire. He concluded that the fire began in a small portable television set. The television which was manufactured ten years earlier by defendant was loaned to Ms. Gagliardi by a neighbor about a month before the fire.

Pennsylvania has adopted § 402A of the Restatement (Second) of Torts, imposing strict liability on the manufacturers and sellers of defective products. See Griggs v. BIC Corp., 981 F.2d 1429, 1431 (3d Cir. 1992); Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966). To sustain a strict product liability claim a plaintiff must prove that the product was defective, that the defect existed at the time the product left the defendant's control and that the defect in the product proximately caused plaintiff's injuries. Griggs, 981 F.2d at 1432 (citing Berkebile

v. Brantly Helicopter Corp., 337 A.2d 893, 898 (Pa. 1975));
Walton v. Avco Corp., 610 A.2d 454, 458-59 (Pa. 1991); Roselli v.
General Electric Corp., 599 A.2d 685, 688 (Pa. Super. 1991).

Defendant correctly contends that plaintiff has presented no direct evidence of a design or manufacturing defect in the portable television and the assistant Fire Marshall's report identifies no specific defect in the television which caused the fire. Contrary to defendant's assertion, however, the absence of an expert opinion on each element of proof does not necessarily foreclose a strict liability claim. A plaintiff may prove a defect through circumstantial evidence of a malfunction. Rogers v. Johnson & Johnson Prods., Inc., 565 A.2d 751, 754 (Pa. 1989)); Surowiec v. General Motors Corp., 672 A.2d 333, 335 (Pa. Super. 1996).

There is, however, a difference between evidence sufficient to support a finding of a defect and evidence sufficient to permit an inference the defect existed at the time of manufacture or sale. Even under the "malfunction theory," a plaintiff must present circumstantial evidence sufficient to allow one reasonably to find that the product was defective at the time it left the defendant's control. Taylor v. Sterling Winthrop, Inc., 1995 WL 590160, *2 (E.D. Pa. Oct. 5, 1995); Roselli, 599 A.2d at 699. The occurrence of a fire in a consumer product alone does not support an inference that the product was

defective when it left the manufacturer's control. Woodin v. J.C. Penney Company, Inc., 629 A.2d 974, 976 (Pa. Super. 1993). To support such a finding, a plaintiff must present "evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes." Rogers, 565 A.2d at 754.

Plaintiff has no evidence of a specific design or manufacturing defect in the used television.³ She has presented no evidence regarding the condition, maintenance, handling, exposure or use of the television between the time of manufacture and the time of the fire. She has presented no evidence from which one might eliminate realistic secondary causes, e.g., mishandling, knocking, dropping or other physical trauma, tampering, improper maintenance, faulty repair or defective replacement parts.

One simply cannot reasonably find from the record presented that the portable television was defective at the time it left defendant's control. A verdict for plaintiff could only be based on speculation and conjecture.

Plaintiff's warranty and negligence claims are similarly deficient. To establish a breach of an implied warranty of merchantability or a warranty of fitness for a

³ Plaintiff acknowledges that an electrical engineer who inspected the television set on plaintiff's behalf did not produce a useful expert report.

particular purpose, a plaintiff must show that the product as purchased from the defendant was defective. See Bardaji v. Flexible Flyer Co., 1995 WL 568483, *2 (E.D. Pa. Sept. 25, 1995) (citing Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992); Stratos v. Super Sagless Corp., 1994 WL 709375, *8 (E.D. Pa. Dec. 21, 1994). To sustain a product liability claim based on negligence, a plaintiff must prove that the product was defective, that the defect proximately caused an injury and that defendant failed to exercise due care in designing, manufacturing or supplying it. McKenna v. E.I. DuPont DeNemours and Co., 1988 WL 71217,*2 (E.D. Pa. June 30, 1988); Von Scoy v. Powermatic, 810 F. Supp. 131, 135 (M.D. Pa. 1992).⁴

Plaintiff has failed to present evidence from which a jury reasonably could find that the portable television was defective at the time it left defendant's control, a finding essential to her claims.⁵

⁴ Because a product negligence claim requires proof of the elements of a strict liability claim plus lack of due care by the defendant and opens the door to evidence of contributory negligence, such a claim is rarely pursued in tandem with a § 402A claim against a manufacturer or seller.

⁵ In plaintiff's response, counsel asked the court to defer ruling on the summary judgment motion for 30 days to allow another attorney to review the case who then might be in a position further to respond in "greater detail." The court assumes that in fulfilling his professional responsibilities counsel presented any available evidence which supports plaintiff's claims and it is difficult to perceive just what else in the circumstances might be presented by another attorney. In any event, the court has now waited for 32 days and nothing new

Plaintiff's comprehensive disregard of her discovery obligations and pertinent court orders warrants dismissal of her case. While seriously undermining defendant's ability to probe and prepare a defense against her claims, plaintiff also failed during the allotted period to develop evidence sufficient to prove those claims. Defendant is thus entitled to summary judgment.

Accordingly, defendant's motion for summary judgment will be granted. An appropriate order will be entered.

has been forthcoming.

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O R D E R

AND NOW, this day of March, 1998, upon
consideration of defendant's Motion for Summary Judgment and
plaintiff's response thereto, consistent with the accompanying
memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and
the above action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.