

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

ANNA BANKS, : CIVIL ACTION  
Plaintiff, :  
 :  
v. :  
 :  
MILLAR ELEVATOR SERVICES :  
COMPANY, :  
Defendant. : NO. 98-997

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**JULY 26, 1999**

The Court heard oral argument earlier today on Plaintiff's motion to exclude several of Defendant's proposed witnesses from testifying at trial. Plaintiff moved for this sanction because it believed it had been prejudiced by Defendant's blatant and unrepentant disregard for the Court's Scheduling Order. The Court agreed, ruling from the bench that Defendant would not be permitted to introduce those witnesses at trial. This Memorandum supplements that ruling.

This case originally was scheduled to go into the trial pool on March 15, 1999, but since has been continued three times. See Banks v. Millar Elev. Servs. Co., No. 98-997 (E.D. Pa. Sept. 29, 1998; March 9, 1999; May 25, 1999) (extending dates set in the Court's Scheduling Order). The Court denied Defendant's recent motion to have discovery extended a fourth time. According to the Court's Standing Order, Defendant was obligated to submit its expert reports to Plaintiff within thirty days of the close of discovery. (Standing Or. ¶ 6.) After the final extension, Defendant should have sent its expert reports to Plaintiff by May 24, 1999. Failure to comply with this schedule, Defendant was warned, might result in the exclusion of expert testimony. Id.

Defendant missed this date by almost two months and, two days before the case was

placed in the jury pool, sent Plaintiff several expert reports.<sup>1</sup> Defendant previously identified only one of these witnesses as experts, and then only casually, mentioning him in a letter. Significantly, the reports Defendant provided were not reports Defendant just received; one report is dated June 1996, and another is dated March 1997. Defendant offers no reason why it failed to produce the reports, or even identify its experts, in a timely manner.

Plaintiff understandably believes she will be severely prejudiced if these experts are permitted to testify. At the conference last week, when Plaintiff raised this motion, she noted she had only a few days to prepare before trial, and could not reconcile trial preparation with expert witness investigation. Today Plaintiff emphasizes that she has had no notice of the defense theory Defendant intends to pursue. She therefore moves to have four of the five recently identified experts barred from testifying.

The Court finds the sanction Plaintiff seeks is more than warranted under the standard for exclusion established in Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894, 904-05 (3d Cir. 1977), overruled on other grounds, Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987). The prejudice and surprise to Plaintiff is manifest, as she was notified of Defendant's experts and their theories less than one week before trial began. In fact, as Defendant's counsel disclosed today, two of the proposed experts still have not issued their reports. She in no way could depose these new witnesses, have her experts rebut these new opinions, and prepare cross-examinations in that time. Further, even if she somehow could overcome this enormous disadvantage, the Court itself has an interest in clearing its docket of this case, now postponed three times. The Court's interest is particularly great in view of the

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<sup>1</sup>Plaintiff withdrew her objection to one of these witnesses, Dr. Allen Berkowitz.

many criminal trials already scheduled in the coming weeks. Finally, defense counsel unabashedly declined to comply with the Court's Order, and the Court has no trouble finding defense counsel's conduct, engaged in so persistently, was wilful.

Defendant opposes Plaintiff's motion in part by referring to the importance of the excluded testimony. While this certainly is a factor the Court must consider, see Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 302 (3d Cir. 1991), Defendant easily could have avoided this outcome. For example, Defendant particularly lamented the exclusion of Robert Lauer, Defendant's liability expert. Defendant claimed the delay in this case resulted because Mr. Lauer wanted to issue his report only after the deposition of a Mr. Sloane, who maintained the elevator at issue here. Sloane, however, is Defendant's employee, and Defendant could have arranged at any time for Lauer to meet him. In fact, Lauer did meet Sloane once, even by the elevator Sloane maintained. Lauer had access to all of Defendant's records as well, and so Lauer, with all information available to him, could have produced his report far earlier if Defendant had so chosen.

Defendant almost blithely suggests that the Court can cure Plaintiff's prejudice by granting an extension, which the Court again notes Defendant asked for two weeks ago but which the Court denied. Continuing the trial is no just cure for Defendant's conduct, particularly in view of the absence of any explanation whatsoever for the delay. Further, continuing the trial yet again would frustrate Plaintiff's interest in having this case resolved, would seriously inconvenience the many witnesses Plaintiff has arranged for, and would interfere with the Court's ability to move cases toward resolution. This latter concern is especially significant in view of the Speedy Trial Act, the effect of which the Court has explained to the parties several

times now.

Finally, Defendant calls this sanction exceptional, warranted only in extreme situations it believes are not present here. To the contrary, what is exceptional is Defendant's conduct; this sanction, widely noted to be available for violations of Federal Rule of Civil Procedure 16(f), is routinely levied in cases where the offending party did far less than here. See, e.g., Radecki v. Joura, 177 F.3d 694, 696 (8th Cir. 1999); Trilogy Communications v. Times Fiber Communications, 109 F.3d 739, 744 (Fed. Cir. 1997); Braun v. Lorillard Inc., 84 F.3d 230, 236-37 (7th Cir.), cert. denied, 519 U.S. 992 (1996); Geiserman v. MacDonald, 893 F.2d 787, 791-92 (5th Cir. 1990); Penk v. Oregon State Bd. Of Higher Ed., 816 F.2d 458, 466 (9th Cir. 1987), cert. denied, 484 U.S. 853 (1987); Sheppard v. Glock, Inc., 176 F.R.D. 471, 473-74 (E.D. Pa. 1997), aff'd 142 F.3d 429 (1998); Gibson v. National R.R. Passenger Corp., 176 F.R.D. 190, 192 (E.D. Pa. 1997). Remarkably, in not one of these cases had the sanctioned party delayed so long, had the Court granted so many extensions, or was the injured party potentially so prejudiced as here.

As if accepting his own challenge to abase these proceedings, defense counsel answers for his delay by moving to exclude Plaintiff's experts. Cf. Sowell, 926 F.2d at 301. Defendant claims it received supplemental expert reports late, and only recently has received fee and prior testimony information. Defendant, however, fails to articulate any meaningful reason why it is prejudiced; the supplemental reports Defendant has received relate to the damages Plaintiff claims to have suffered, and both employ the same analytic assumptions as before, but now apply New Jersey law instead of Pennsylvania law. Especially in view of the fact that Defendant's position all along has been that New Jersey law applies, the Court finds Defendant has suffered negligible prejudice. The Court therefore will deny its motion without prejudice, and will allow

Defendant to seek further relief should it find that the testimony of Plaintiff's experts at trial is inconsistent with their previous testimony or the discovery responses they produced.

An Order follows.

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**ORDER**

AND NOW, this 26th day of July, 1999, upon consideration of Plaintiff Anna Bank's Motion for the Exclusion of Defendant's Expert Witnesses and Defendant Millar Elevator Services Company's Motion for the Exclusion of Plaintiff's Expert Witnesses, and in consideration of the hearing held earlier today on these motions, it is hereby **ORDERED**:

1. Plaintiff's motion to exclude is **GRANTED** as to Robert J. Lauer, Eric D. Strauss, Irene C. Mendelsohn, and David L. Crawford; and
2. Defendant's motion to exclude is **DENIED** without prejudice.

BY THE COURT:

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JAMES McGIRR KELLY, J.