

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

BLUE RIDGE INSURANCE CO. : CIVIL ACTION  
A/S/O/ GWEN WELDON AND :  
GWEN WELDON :  
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 :  
 v. :  
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 :  
SEARS & ROEBUCK CO. : NO. 98-5177

MEMORANDUM ORDER

Plaintiffs allege they sustained losses totaling \$123,619 as a result of a fire at plaintiff Weldon's residence. They allege that the fire was caused by defendant's improper installation of a hot water heater it sold to Ms. Weldon. Plaintiffs have asserted claims for negligence, breach of an implied warranty of fitness and strict product liability.

Presently before the court is defendants' Motion for Sanctions seeking dismissal as a sanction for plaintiff's failure to engage in discovery and to allow the case fairly to proceed to resolution.

Despite a court order directing plaintiffs to do so, they have failed without explanation to respond to various discovery requests served by defendant over ten months ago. Plaintiffs filed no response to defendant's motion to compel discovery and have filed no response to the instant motion seeking dismissal.

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).

In assessing a motion to dismiss as a sanction, a court generally considers the so-called Poulis factors. See Harris v. Philadelphia, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995); Anchorage Assoc. 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).<sup>1</sup> Not all of the Poulis factors need be satisfied to warrant such a sanction. See Hicks, 850 F.2d at 156.

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<sup>1</sup> 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.

There has been no showing or suggestion that plaintiffs have been unaware of the discovery requests and their obligations to provide responses. They thus must bear or share responsibility for the failure properly to litigate this action.

The inability during the allotted discovery period to obtain basic information from a plaintiff regarding his claim is obviously prejudicial to a defendant in his 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 as well as the need to expend resources to compel discovery). It is uncontroverted that defendant has been unable to locate any record of plaintiff's alleged purchase of a hot water heater from defendant or to identify any employee who installed such a heater at Ms. Weldon's residence. Plaintiffs' failure to provide discovery has clearly prejudiced defendant in its ability to investigate their claims and to defend in this case.

Defendant is not complaining about an isolated breach. Plaintiffs have been totally recalcitrant in honoring their discovery obligations and a court order directing them to do so. Plaintiffs also canceled a scheduled inspection by defendant of the property where the fire occurred, and Ms. Weldon engaged in a pattern of cancellations of noticed depositions. In the absence

of any satisfactory explanation, the persistent failure to honor discovery obligations and court discovery orders must be viewed as "a willful effort to evade and frustrate discovery." Morton v. Harris, 628 F.2d 438, 440 (5th Cir. 1980) (Rule 37(b)(2)(C) dismissal warranted for continuing failure to comply with court ordered discovery). See also Jourdan v. Jabe, 951 F.2d 108, 110 (6th Cir. 1991) (Rule 41(b) dismissal warranted where plaintiff fails to engage in discovery); McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 124 (2d Cir. 1988) (Rule 37(b)(2)(C) dismissal warranted for failure to comply with court discovery order); Williams v. Kane, 107 F.R.D. 632, 634 (E.D.N.Y. 1985) (plaintiff's claim dismissed pursuant to Rules 37(b)(2)(C) & 41(b) for failure to provide court ordered discovery); Booker v. Anderson, 83 F.R.D. 284, 289 (N.D. Miss. 1979).

The alternative sanction of precluding plaintiffs from introducing evidence regarding the matters about which they have failed to provide discovery responses would be tantamount to a dismissal. Any monetary sanction should be commensurate with and likely to deter the type of violation at issue. See National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976). Given the egregiousness of plaintiffs' conduct and Ms. Weldon's apparently limited means, any proportionate monetary sanction would likely rival dismissal in palatability.

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 is thus of limited practical utility in assessing dismissal under Rule 37 or 41. If a claim as alleged lacks merit, it would generally be subject to dismissal under Rule 12(b)(6) without the need to weigh other factors.<sup>2</sup> In any event, it is difficult conscientiously to characterize a claim as meritorious when the claimant refuses to subject it to scrutiny through the normal discovery process.

Plaintiffs' violation of the federal rules and the court's scheduling and discovery orders has been persistent and flagrant. It has resulted in a significant delay and diversion of resources. There is an absence of any justification. Plaintiff invoked the judicial process and then effectively thwarted discovery, making impossible the proper and efficient litigation of this action.

The pertinent factors weigh significantly in favor of dismissal. Absent the filing of an affidavit by plaintiffs or their counsel by December 3, 1999 verifying that they have now provided all discovery responsive to defendant's outstanding requests, this action will be dismissed.

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<sup>2</sup> Plaintiffs have pled a facially cognizable claim for negligence. For purposes of the instant motion, the court need not determine whether the subsequent negligent installation of a non-defective product by a seller is actionable under § 402A or U.C.C. warranties regarding product fitness implied with the sale of goods.

**ACCORDINGLY**, this                    day of November, 1999, upon consideration of defendants' Motion For Sanctions (Doc. #8) and in the absence of any response from plaintiffs, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that the above action will be dismissed at the close of business on December 3, 1999 in the absence of an affidavit filed by plaintiffs or counsel prior thereto verifying that they have provided all discovery responsive to defendant's outstanding discovery requests.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**