

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

KAREN THOMAS	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-269
UNITED STATES OF AMERICA FEDERAL	:	
AVIATION ADMINISTRATION, et al.	:	

MEMORANDUM

Baylson, J.

July 19, 2005

Plaintiff, Karen Thomas, Executrix of the Estate of Paul DiSarro, filed this action after DiSarro died on November 15, 2002 as a result of a mid-air collusion of two single engine propeller-driven airplanes near the Essex County, New Jersey airport, killing both pilots. Presently before the Court is the Motion of Defendant C & W Aero Services, Inc. (“C&W”) for Summary Judgment.

C&W’s Motion was filed March 16, 2005. Although C&W filed a brief supporting memorandum, it essentially joins in the Motion for Summary Judgment filed by Defendant Garmin AT, Inc. (“Garmin”), which need not be decided because Garmin has settled. Garmin’s Motion for Summary Judgment did not follow this Court’s requirements of setting forth, in separately numbered paragraphs, a statement of uncontroverted facts. Garmin’s motion asserts that the transponder, which Garmin manufactured, and which C&W installed in the airplane flown by DiSarro, was not defective in its manufacture, installation or operation, as a matter of law.

A principal argument in Garmin's motion was that although Plaintiff had presented five liability expert reports, not one of them discussed Garmin or C&W, and thus summary judgment was warranted because Plaintiff had failed to produce any expert report targeting the design or manufacture (or installation, as to the Motion of C&W) of the transponder.

A transponder is a device installed in an aircraft that emits a signal that is transmitted to the radar screen used by the air traffic controllers. One of the issues in this case is what signal was being transmitted by the transponder in the aircraft piloted by DiSarro; another issue is whether there was any causation between DiSarro's death and any malfunction of the transponder. Defendant Garmin, and C&W by incorporating Garmin's motion, assert that the testimony of the air traffic controllers demonstrates without any dispute that they did not rely on any signals from the transponder in their actions. Plaintiff alleges that it was the actions of the controllers that led to the death of DiSarro, and that if the transponder had been working properly, the deaths would have been avoided.

In Plaintiff's response to the Motion for Summary Judgment, Plaintiff places reliance on a supplemental report of an expert, Jeffrey Lamer, Exhibit K, dated December 23, 2004. Lamer's report states that the transponder failed to operate properly on the night of the collision due to improper installation by C&W. The report concludes that C&W used the wrong transponder coax cable, which was contrary to the Garmin installation manual.

In its reply brief, C&W asserts that testimony by the controller, Patrick Brogan, showed that he did not rely on any signal, or lack thereof, from the transponder, and thus, the operational status of the transponder is irrelevant.

Defendants object to the reference to the Lamer report because it was not produced on a

timely basis, and the Court notes that the Lamer report is not in the form of a sworn affidavit, as required by Rule 56, F.R. Civ. P. There is substantial authority in the Third Circuit that an unsworn expert report cannot provide the basis for summary judgment. See Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989).

Plaintiff's Memorandum demonstrates that the only controller in the tower, Mr. Brogan, did testify that he looked at the radar screen (which contained the signal from the transponder) and argues: "the question of fact that remains to be answered is whether Mr. Brogan would have taken notice of Mr. DiSarro's aircraft on the D-BRITE [radar screen] had the transponder been functioning and therefore presenting a more conspicuous target. Plaintiff argues that under the Pennsylvania "substantial factor test", see Jeter v. Owens-Corning Fiberglass Corp., 716 A.2d 633 (Pa. Super. 1998), the facts presented by Plaintiff warrant a jury's consideration and preclude the Court from deciding the issue of causation of a matter of law.

In its reply brief, C&W does not argue about the Brogan testimony or the legal principle set forth in Jeter, cited above, but cites two other witnesses' testimony that the radar screen was not relied on by controllers. This does not eliminate Mr. Brogan's own testimony that he did, in fact, consult the screen.

The Court finds that considering all of the record, a genuine issue of fact exists as to the causation issue concerning the transponder and therefore summary judgment must be denied to C&W. At trial, Plaintiff may call Mr. Lamer as an expert witness.

An appropriate Order follows.

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ORDER

AND NOW, this 19th day of July, 2005, for the reasons set forth in the foregoing Memorandum, the Motion for Summary Judgment filed by C & W Aero Services, Inc. (Doc. No. 53) is DENIED.

This case is placed in the Court's trial pool for September 12, 2005. A final pretrial conference will be held by telephone on Monday, August 22, 2005 at 4:45 p.m. Plaintiff's counsel will initiate the telephone conference and when all counsel are on the line, call Chambers at (267) 299.7520.

Any motions in limine must be filed by September 1, 2005, and responses are due by September 9, 2005. Points for charge shall be submitted on September 12, 2005 with a trial brief. Each side shall discuss factual stipulations and file any agreed stipulations on September 12, 2005.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.