

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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RE: *Nationwide Mutual Fire Ins. Co., A/S/O Jeannette Baker v. Cropper Oil
and Gas, Inc.*
C. A. No. S10C-12-024 RFS

Submitted: November 7, 2011
Decided: February 7, 2012

Dear Counsel:

This is my decision granting the motion for summary judgment filed by Cropper Oil and Gas, Inc. (“Defendant”). Nationwide Mutual Fire Insurance Company’s (“Plaintiff”) is a subrogee of Jeanette Baker. Baker’s house in Selbyville, Delaware was destroyed in a fire in December 2008, and Plaintiff paid the covered expenses. Defendant is an HVAC contractor who regularly serviced Baker’s heater, which malfunctioned.

In December 2010, Plaintiff filed suit against Defendant to recover the \$450,346.27 in payments made under Baker's policy. The Complaint alleges that Defendant failed to properly inspect and service the furnace, causing an accumulation of soot that led to the fire. Plaintiff alleges negligence and breach of contract.

A scheduling order was issued February 11, 2011. The deadline for Plaintiff to identify expert witnesses and produce reports was May 9, 2011. Plaintiff has not complied.

In its motion for summary judgment, Defendant argues that Plaintiff cannot pursue the action without an expert witness to testify on the standard of care for an HVAC contractor.

Plaintiff answers that it has not been able to obtain written verification from Baker as to one or two service calls allegedly made by Defendant, in addition to those documented in Defendant's records. Plaintiff asks for a 30-day extension (from the date of its answer, October 20, 2011) to determine whether its expert will be able to provide an opinion concerning the cause of the fire and Defendant's role, if any. This constitutes a request to amend the Scheduling Order, which states that "No deadline in this Order may be extended without prior court approval."

A scheduling order may be changed if the plaintiff shows good cause under Civil Rule 16(b). To make that showing, a party must establish that diligent efforts were made

to meet the deadlines.¹ There is nothing in the record to suggest that Plaintiff has diligently pursued the deadline of May 9, 2011 to identify experts and reports. This is confirmed by Plaintiff's October 2011 request for an additional 30 days. Good cause has not been shown, and Plaintiff's request to amend the Scheduling Order is denied.

As to the expert witness issue, Defendant replies that Baker's premises were examined by Plaintiff's expert on January 30, 2009 but no report ensued. Further, Defendant provided documentation of its service records on April 17, 2009 and April 27, 2009. Defendant argues that Plaintiff has had more than enough time to obtain an expert report. Defendant continues to pay monthly storage costs for parts of the burner. For these reasons, Defendant argues there should be no further delay and summary judgment should be entered against Plaintiff.

A motion for summary judgment is granted when no material issues of fact exist.² If the moving party meets its burden of showing the nonexistence of material issues of fact, the burden shifts to the nonmoving party to show any material issue of fact.³ The Court views the evidence in the light most favorable to the non-moving party.⁴

¹*Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 2006 WL 258305, at *4 (Del. Super.)

²*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

³*Id.*

⁴*Id.*

As Defendant asserts, Plaintiff cannot proceed without an expert witness to testify on the standard of care required of an HVAC contractor, such as Cropper, and whether Cropper met that standard in this case.⁵ Plaintiff does not dispute the necessity of presenting an expert witness.⁶ Nor does Plaintiff indicate that it has an expert who can generate a report. Plaintiff's line of defense is that it cannot obtain records from Baker because she has Alzheimer's disease.

The Scheduling Order was issued February 11, 2011. Plaintiff's expert witness report was due May 9, 2011. Plaintiff requested an additional 30 days on October 20, 2011, which in fact it has had. There is no material issue of fact in dispute, and the Court finds further delay unacceptable. Any further extension of time would be an exercise in futility, disfavored at law.⁷

Without an expert, Plaintiff cannot prosecute its case, and Defendant's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

⁵*Brandt v. Rokeby Realty Company*, 2004 WL 2050519 (Del. Super.)

⁶The parties do not dispute that Deputy Fire Marshal William Goins, Jr., cannot testify as an expert, although he investigated the Baker fire out of the Selbyville Fire Company. He was not designated as an expert and he drew no conclusions about how the heater malfunctioned.

⁷*Reserves Dev't, LLC v. R.T. Properties, LLC*, 2011 WL 4639817, at *7 (Del. Super.).