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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Burt Feuerstein and)	
Janet Shalwitz,)	
)	
Plaintiffs,)	2:12-cv-1062 JWS
)	
vs.)	ORDER AND OPINION
)	
The Home Depot, U.S.A., Inc., et al.,)	[Re: Motion at docket 58]
)	
Defendants.)	
)	

I. MOTION PRESENTED

At docket 58 defendants The Home Depot, U.S.A., Inc. (“HD”) and Tricam Industries, Inc. (“TI”) (collectively “Defendants”) move pursuant to Federal Rule of Civil Procedure 37(a)(1) for an order compelling plaintiff Burt Feuerstein (“Burt”) to appear for a further deposition and to provide certain deposition testimony, as well as for sanctions and costs associated with bringing the motion. Burt opposes at docket 59. Defendants reply at docket 61. A statement of personal consultation is at docket 57. Oral argument was not requested and would not be helpful to the court.

1 **II. BACKGROUND**

2 Burt and his co-plaintiff, Janet Shalwitz (collectively "Plaintiffs"), filed suit against
3 Defendants and two other entities on May 21, 2012. Jurisdiction is based on 28 U.S.C.
4 § 1332. According to his amended complaint, Burt was injured on May 8, 2011, when a
5 ladder slipped from beneath him. Plaintiffs allege the ladder was manufactured by TI
6 and sold by HD. They allege it slipped while set up on decking manufactured by
7 defendant Trex Company, Inc., which was also sold by HD. Plaintiffs plead claims
8 under Arizona law for strict liability, violation of statutory obligations, breach of an
9 implied warranty, negligence, failure to warn, punitive damages, and Janet Shalwitz's
10 loss of consortium. According to Plaintiffs, at the time of Burt's fall he was using the
11 ladder in accordance with applicable instructions. The gravamen of all Plaintiffs' claims
12 is that the ladder slipped due to a defective design of the ladder's feet, defective
13 warnings or instructions, and a defective design of the surface of the Trex decking.
14 Defendants' answers deny that the claims advanced by Plaintiffs have merit.

15 **III. STANDARD OF REVIEW**

16 Federal Rule of Civil Procedure 37(a)(1) authorizes a party to move to compel
17 discovery after conferring in good faith with the opposing party in an attempt to avoid
18 motion practice. Rule 37 (a)(5)(A) provides generally that if the motion is granted, the
19 court must order the opposing party to pay the reasonable expenses of making the
20 motion. Rule 37 (a)(5)(C) provides that where the motion is denied the court must
21 award reasonable expenses to the party opposing the motion.
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1 Rule 30 governs the conduct of depositions. It provides in pertinent part that one
2 “may instruct a deponent not to answer only when necessary to preserve a privilege, to
3 enforce a limitation ordered by the court, or to present a motion [to terminate the
4 deposition] pursuant to Rule 30(d)(3).”⁷
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6 **IV. DISCUSSION**

7 **A. Answering Particular Questions**

8 Burt was deposed on May 6, 2013. Defendants contend that their efforts to
9 obtain relevant testimony at the deposition were thwarted by the improper objections
10 made and instructions given to Burt by Plaintiffs’ counsel. Defendants assert that
11 Plaintiffs’ lawyer’s conduct should be evaluated in light of the defense contentions that if
12 the ladder slipped, this happened because Burt “set up the ladder at too shallow an
13 angle,” and he failed “to follow the instructions and warnings on the ladder.”⁸ These
14 contentions must have been known to Plaintiffs’ lawyer, because they were set out in
15 HD’s interrogatory answers dated March 25, 2013, over a month prior to Burt’s
16 deposition.⁹
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19 Defendants contend, and the deposition transcript supports the assertion, that at
20 his deposition Burt had a very limited memory of facts that would be pertinent to
21 warnings on the ladder and Defendants’ contentions about the manner in which Burt
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25 ⁷Fed. R. Civ. P. 30(c)(2).

26 ⁸Doc. 58 at p. 3.

27 ⁹Doc. 58-4.

1 was using the ladder.¹⁰ Seeking more details than Burt could remember, Defendants
2 posed questions relating to communications he might have had with other persons prior
3 to the deposition. It is some of those questions which are the subject of the motion.
4

5 The first question Defendants contend Burt should have answered but did not,
6 because Plaintiffs' lawyer instructed Burt not to respond, came after Burt's answers
7 established that he did not know what instructions were lacking on the ladder. The
8 question was, "[H]ave you ever had any conversation with . . . anyone who you
9 considered to have expertise in the area which has suggested to you that some label or
10 warning is missing from the accident ladder which would have prevented your accident
11 from taking place."¹¹ Plaintiffs' lawyer interjected before Burt could answer: "I'm going
12 to instruct the witness not to answer that question. It's not designed to elicit any
13 discoverable information."¹² Finding out whether there has been such a conversation
14 and then with whom might very well yield information that would fall within the broad
15 scope of discovery contemplated by the federal rules. The objection was not well
16 taken. In their opposition Plaintiffs assert that the work-product doctrine might support
17 Burt's refusal to answer. However, such an objection clearly is not applicable to the
18 question actually asked, which did not ask for any document or tangible thing, a request
19 which would have been foreclosed by Fed. R. Civ. P. 26 (b)(3)(A) governing trial
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25 ¹⁰Deposition of Burt Feuerstein, doc. 58-1 at deposition pp. 10-12, 18-21, and 28-29.

26 ¹¹*Id.* at deposition p. 12, ll. 19-25.

27 ¹²*Id.* at deposition p. 13, ll. 1-4.

1 preparation materials.¹³ Moreover, the work product doctrine was not mentioned in the
2 objection at the deposition. Burt will be required to answer the question posed and any
3 logical follow-up questions that do not require disclosure of privileged information, such
4 as something disclosed in a conversation in which his attorney participated, or the
5 content of something protected by Rule 26 (b)(3)(A).
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7 Next, Defendants assert that Burt should have answered the following inquiry:
8 “Mr. Feuerstein, have you ever had any conversations with anyone who claims to have
9 expertise in the area of ladder labeling or anyone who has suggested to you that he is
10 going to offer testimony in this case regarding this claim of yours that there was some
11 deficiency in the labels and the warnings and instructions on the ladder?”¹⁴ He did not
12 answer because his lawyer interjected the following: “And I’m going to instruct
13 Mr. Feuerstein not to answer a question as to discussions with parties that are not here.
14 And if in fact there are experts that we intend to utilize in this action, you’ll be able to
15 depose them pursuant to the rules and ask them any questions with regard to their
16 opinions” Again, the question falls within the broad scope of permissible
17 discovery, and the question posed did not itself seek any privileged communication.
18 Because this preliminary question was not answered, it is impossible to know if follow-
19 up questions might run afoul of any privilege. Burt will be required to answer this
20 question and any logical follow-up questions that do not run afoul of any privilege or
21 Rule 26 (b)(3)(A).
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25 ¹³See Fed. R. Civ. P. 26 Advisory Committee Notes (discussing the 1970 Amendment
26 as it relates to Rule 26(b)(3)).

27 ¹⁴Doc. 58-1 at deposition p. 14, ll. 16-22.
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1 of the ladder at the time of the accident. The court agrees with Plaintiffs that this inquiry
2 seeks to learn the content of a communication Burt may have had with his lawyer, and
3 therefore, requiring an answer would violate the attorney-client privilege. Burt will not
4 be required to answer this question.
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6 **B. Sanctions**

7 As an alternative to requiring Burt to appear at a resumed deposition to answer
8 certain questions, Defendants ask the court to strike the allegations that the ladder's
9 design or manufacture caused Burt's fall and to strike the allegations that a deficiency
10 in the ladder's label or instructions caused the fall. These alternative sanctions would
11 have the effect of terminating Plaintiffs' claims against HD.
12

13 Before imposing a claim dispositive sanction, this court must consider five
14 criteria: the public interest in prompt conclusion of litigation; need to manage the court's
15 docket; risk of prejudice to the party asking for the sanction; policy favoring disposition
16 of disputes on their merits; and suitability of less drastic sanctions.¹⁶ Here, neither of
17 the first two considerations come into play, for this case may still be timely resolved.
18 The risk of prejudice to HD is virtually non-existent, for it can obtain the information it
19 seeks at a resumed deposition. The policy favoring resolution on the merits weighs
20 heavily against imposing the alternative sanctions. Moreover, imposing the sanctions
21 sought by HD might leave TI at greater risk as the only remaining defendant, yet TI has
22 no responsibility for the actions by Plaintiffs' counsel. Finally, the lesser sanction of
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26 ¹⁶*Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir.
27 2007).

