

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HILMIJA DZEBIC,

Plaintiff,

No. C 10-2363 PJH

v.

**ORDER**

ROANOKE COMPANIES GROUP,  
INC., et al.,

Defendants.

RELATED CASES

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FIKRETA OSMANKIC,

Plaintiff,

No. C 10-2364 PJH

v.

HOME DEPOT U.S.A., INC.,

Defendants.

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The court is in receipt of a letter filed in the above-entitled actions on September 10, 2012. The letter is signed by plaintiffs Hilmija Dzebic and Fikreta Osmankic, but appears to have been written by some member or members of the plaintiffs' family. As far as the court can ascertain, the letter seeks an order pursuant to Federal Rule of Civil Procedure 60(b)(1), (2), and/or (3), setting aside the judgments entered in the above-entitled actions. The court finds no basis to set aside either judgment, and the motion is DENIED.

These two product liability cases were originally filed in a state court in Georgia on

1 January 8, 2008, and were subsequently removed to the U.S. District Court for the  
2 Northern District of Georgia, where they were consolidated with a personal injury Multi-  
3 District Litigation action, asserted against numerous defendants. While the cases were part  
4 of the MDL, extensive discovery was taken and the cases were set for a February 2010  
5 trial. At the February 2, 2010 pretrial conference, plaintiffs' counsel made an "emergency  
6 motion" for continuance of the trial date, which the court granted. On May 28, 2010, the  
7 cases were transferred (at plaintiffs' request) to this district.

8 Thus, at the point at which the cases were transferred, fact discovery had closed  
9 and the cases were ready for trial. In November 2010, Judge Walker, to whom the cases  
10 were then assigned, granted the motion of plaintiffs' counsel to withdraw, and ordered  
11 plaintiffs to inform the court in writing by November 29, 2010 whether they had obtained  
12 new counsel or whether they wished to proceed pro se. On November 24, 2010, plaintiffs  
13 responded in writing, stating that they had been unable to secure new counsel. The cases  
14 were reassigned to the undersigned District Judge on December 14, 2010.

15 On March 10, 2011, following two continuances, the court held an initial case  
16 management conference, at which time plaintiffs requested additional time to secure new  
17 counsel. The court granted plaintiffs an extension to April 11, 2011. Plaintiffs failed to  
18 secure new counsel by that date.

19 At the April 21, 2011 case management conference, the cases were set for trial on  
20 November 14, 2011. In the case management and pretrial order that was issued on May 2,  
21 2011, the pretrial conference date was set for October 13, 2011, and the expert discovery  
22 cut-off date and the deadline for plaintiffs to update their Plaintiff Profile Form was set for  
23 June 15, 2011. Plaintiffs did not attend the April 21, 2011 case management conference.  
24 An attorney by the name of Gurman Bal sat in the courtroom and took notes, but stated  
25 that he did not actually represent plaintiffs.

26 On May 4, 2011, counsel for defendants sent a letter via certified mail to plaintiffs,  
27 providing them with the pretrial deadlines that had been set at the case management  
28 conference. However, plaintiffs failed to pick up the letter from the post office. On May 19,

1 2011, defendants sent another letter to plaintiffs, again notifying them of the court's pretrial  
2 deadlines. This letter was delivered to plaintiffs' residence on May 20, 2011 by Federal  
3 Express. Notwithstanding the court's order, plaintiffs failed to make their expert available  
4 for deposition, and failed to update their Plaintiff Profile Forms.

5 On June 15, 2011, defendants Aerofil Technology, Inc. ("Aerofil"), Home Depot  
6 U.S.A., Inc. ("Home Depot"), and Roanoke Companies Group, Inc. ("Roanoke") moved for  
7 summary judgment as to the claims asserted by plaintiff Fikreta Osmankic, based on her  
8 failure to produce any evidence that she had been exposed to the allegedly defective  
9 product. On July 1, 2011, Aerofil, Home Depot, and Roanoke moved to dismiss both cases  
10 for lack of prosecution and for failure to comply with the court's order. On July 13, 2011,  
11 both plaintiffs file a response to defendants' motion to dismiss, in which they did not  
12 address the failure to make their expert available for deposition.

13 On July 20, 2011, the court heard the motion for summary judgment in case No. 10-  
14 2364, and took it under submission. On July 25, 2011, the court issued an order granting  
15 the motion. A copy of the order was mailed to the plaintiff in that case.

16 On August 10, 2011, the court heard the motion to dismiss case No. 10-2363 for  
17 lack of prosecution and failure to comply with the court's order. At that hearing, Hilmija  
18 Dzebic, plaintiff in case No. 10-2363, did not appear. Fikreta Osmankic, plaintiff in case  
19 No. 10-2364, attempted to appear on behalf of Mr. Dzebic, but was advised by the court  
20 that she could not do so. The court further advised Ms. Osmankic that her case against  
21 Aerofil, Home Depot, and Roanoke had been resolved based on the granting of  
22 defendants' summary judgment motion.

23 The court advised that Mr. Dzebic would be allowed a further two weeks to produce  
24 his expert for deposition. The court denied the motion to dismiss as to the claims asserted  
25 by Mr. Dzebic in case No. 10-2363, but also indicated that if the expert was not produced  
26 during that time, the defendants could renew their motion for terminating sanctions. Also  
27 on August 10, 2011, the court issued a written order, reiterating that Mr. Dzebic was  
28 required to make his expert available for deposition by August 24, 2011, and that if he

1 failed to comply with the order, defendants could renew their motion for terminating  
2 sanctions. The order was served on Mr. Dzebic, but he failed to comply.

3 On August 29, 2011, Aerofil, Home Depot, and Roanoke filed a renewed motion to  
4 dismiss case No. 10-2363 for failure to comply with the court's orders. On September 16,  
5 2011, the court issued an order granting the motion. On October 13, 2011, the court  
6 dismissed the claims against Aerofil, Home Depot, Roanoke, and Innovative Chemical  
7 Technologies, Inc. ("ICT"). Judgment was finally entered on October 13, 2011.

8 Under Rule 60(b), the court may relieve a party from a final judgment because of,  
9 among other things, (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly  
10 discovered evidence that, with reasonable diligence, could not have been discovered in  
11 time to move for a new trial under Rule 59(b); or (3) fraud, misrepresentation, or  
12 misconduct by an opposing party.

13 Here, plaintiffs appear to be arguing that the judgment should be set aside because  
14 one or more defendants failed to properly serve them with certain motions to dismiss.  
15 Although it is not clear from the letter, the motions that plaintiffs refer to may include (1) the  
16 renewed motion filed by Aerofil, Home Depot, and Roanoke on August 29, 2011 to dismiss  
17 case No. 10-2363 for failure to comply with the court's orders; (2) the motion filed by ICT on  
18 September 23, 2011 to dismiss the claims asserted against it by both Hilmija Dzebic and  
19 Fikreta Osmankic for failure to comply with an order of the court, based on the fact that  
20 plaintiffs previously agreed to a settlement of their claims, had been ordered by the court to  
21 execute a stipulated dismissal, but then had failed to execute the stipulated dismissal; and  
22 (3) and motions for entry of judgment filed by Aerofil, Home Depot, and Roanoke on  
23 September 26, 2011, as directed by the court, based on the lack of pendency of any claims  
24 or cross-claims asserted by or against them.

25 Plaintiffs' claim appears to be that certain documents showing proof of service dated  
26 August 29, 2011, were mistakenly served on them instead of the above-described motion  
27 papers. With regard to the August 29, 2011 renewed motion to dismiss filed by Aerofil,  
28 Home Depot, and Roanoke, the court finds that any failure by defendants to serve Mr.

1 Dzebic with the August 29, 2011 motion papers was not prejudicial.

2 As explained above, at the April 21, 2011 case management conference and in the  
3 follow-up case management and pretrial order, the court set an expert discovery cut-off  
4 date of June 15, 2011, and ordered Mr. Dzebic to make his expert available for deposition  
5 by that date. Although Mr. Dzebic failed to comply with that order, the court denied  
6 defendants' the initial motion to dismiss (also notwithstanding Mr. Dzebic's lack of  
7 opposition to the motion) and granted Mr. Dzebic an additional extension to August 24,  
8 2011. The court issued a written order to that effect, which was served on Mr. Dzebic.  
9 Again, Mr. Dzebic failed to comply with the order, notwithstanding the fact that he was  
10 clearly on notice of both the original deadline and the two-week extension.

11 Mr. Dzebic was also on notice that the court had advised defendants that they could  
12 renew their motion for terminating sanctions if he failed to make his expert available for  
13 deposition by August 24, 2011. Defendants did in fact file a renewed motion for terminating  
14 sanctions – on the same grounds as the prior motion – and the court issued an order  
15 granting the motion on October 13, 2011. A copy of that order was served on Mr. Dzebic.  
16 Thus, he cannot reasonably argue that he was not aware that his failure to make his expert  
17 available for deposition would result in the dismissal of his case.

18 As for the remaining two motions – which were the final motions filed in the case –  
19 they were both filed and served in late September 2011. Thus, to the extent that plaintiffs  
20 are claiming that they were not served with copies of those motions, the court notes that  
21 the proofs of service are dated August 29, 2011, which predates the filing of the motions.  
22 In addition, it is clear that summary judgment was granted as to plaintiff Fikreta Osmanovic  
23 based on her failure to produce any evidence of exposure to the alleged defective product,  
24 and that both plaintiffs were ordered to make their expert available for deposition, and failed  
25 to do so.

26 Plaintiffs were served with copies of the court's final order and the judgment in each  
27 case on October 13, 2011. Plaintiffs did not file notices of appeal. If it is true that plaintiffs  
28 did not receive copies of any of the motion papers, the time to notify the court would have

1 been when they received the October 13, 2011 order and judgments in the two cases.

2       The court finds that plaintiffs have not established that the judgments should be set  
3 aside under any ground set forth in Rule 60(b). In particular, there is no evidence that the  
4 final judgments were procured by fraud. Accordingly, the motion is DENIED.

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6 **IT IS SO ORDERED.**

7 Dated: September 14, 2012



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PHYLLIS J. HAMILTON  
United States District Judge

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