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SHORT FORM ORDER

INDEX NO.: 25810-2008
SUBMIT DATE: 2-27-2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: **HON. JOHN J.J. JONES, JR.**
Justice

MOTION DATE: 002: 12-12-2012
003: 1-30-2013
MOTION NO.: 002: MD
003: MOT D

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GERARD PEMBROKE,

Plaintiff,

-against-

ACTION TARGET INC.,

Defendant.
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Upon the following papers numbered 1 to 53 read on this application for an order striking the defendant's Answer and other relief; Notice of Motion/Order to Show Cause and supporting papers 1-17 ; Notice of Cross Motion and supporting papers 18-36 ; Answering Affidavits and supporting papers 37-46 ; Replying Affidavits and supporting papers 47-53 ; Other ____; it is

ORDERED that the application by the plaintiff, Gerard Pembroke, ["the plaintiff"], for an order striking the Answer of the defendant Action Target Inc., [the "defendant" or "Action Target"] based on the defendant's failure to produce a witness and appear for oral deposition, or in the alternative, compelling the defendant to produce a witness and appear in the Supreme Court to give oral testimony (motion sequence 002), and the cross motion by the defendant for an order precluding the plaintiff from offering trial testimony as to the subject matter of the defendant's Interrogatories numbered 6, 7, 9 and 11 based on the plaintiff's refusal to comply with a discovery stipulation entered into at a compliance conference on March 21, 2012, (motion sequence 003), are decided together; and it is further

ORDERED that the application by the plaintiff for an order striking the Answer of the defendant Action Target Inc., is denied; and it is further

ORDERED that the application by the defendant for an order precluding the plaintiff from offering trial testimony as to the subject matter of the defendant's Interrogatories numbered 6, 7, 9 and 11 is decided in accordance with this decision; and it is further

ORDERED that the parties are directed to appear at the compliance conference now scheduled for May 13, 2013 prepared to provide mutually agreeable dates for the parties' depositions.

Plaintiff police officer was injured while participating in a close quarter combat drill at the Suffolk County Police Range while using an Action Target Deluxe-90 Actuator System used by law enforcement entities for firearms training.[1] The accident occurred on September 15, 2005. The action was commenced on August 8, 2008.

The Interrogatories that are the subject of the instant motion and cross motion were served by the defendant upon the plaintiff on or about September 9, 2008. The plaintiff argues that his responses were adequate and that depositions must go forward. The defendant argues that four of the responses were conclusory and vague and that without more complete responses the defendant will be prejudiced by being forced to go forward with depositions.

On March 21, 2012, the parties entered into a stipulation at a compliance conference that addressed the subject Interrogatories and provided, inter alia,

1) "[a]ll parties to [p]rovide responses to all discovery demands to extent not previously provided, w/I 45 days.

2) [Plaintiff] to provide supplemental answers to interrogatories as requested in Prelim. Conf. Order on issues of defective design, failure to warn, negligence and alternative design, as def[endant] asserts the supplemental answers are inadequate, w/I 45 days.

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4) Subject to completion of discovery exchanges as cited above in paragraphs 1 & 2, pl[aintiff]'s ebt to be conducted on July 25, 2012

Plaintiff now argues that despite the clear language in the stipulation signed by him, the stipulation only required him to review the challenged responses to the Interrogatories. According to plaintiff's counsel's interpretation of the terms of the stipulation, if plaintiff's counsel decided the

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[1] Two other related products liability and negligence actions are pending against Action Target Inc., commenced by Daniel Koenig under Index No. 0014104-2008, and Gregg Drzal under Index No. 44076-2008, respectively, that are also assigned to this Court. Similar motions and cross motions in the *Koenig* and *Drzal* actions are decided herewith.

responses were adequate "as is", he was not required to supplement the responses. Not surprisingly, the attorney for Action Target states that he has consistently maintained that plaintiff's responses are vague and conclusory and that he can not go forward with depositions until the responses are supplemented.

CPLR § 3130 and § 3131 permit the service and use of interrogatories as a discovery device in a products liability matter and the answers may be used to the same extent as the depositions of a party. A defendant in a products liability action is entitled to know which parts of a product are claimed to be defective and the nature of the alleged defects (***Dijkstra v. Millar Elevator Industries, Inc.***, 228 A.D.2d 469, 470, 644 N.Y.S.2d 284 [2d Dept.1996], *citing* ***Wiseman v. American Motors Sales Corp.***, 101 A.D.2d 859, 475 N.Y.S.2d 885 [2d Dept. 1984]).

CPLR 2104, which pertains to the enforcement of stipulations, provides that:

> "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk."

Here, the use of the words "subject to" in relation to the scheduled deposition of the plaintiff, and the requirement that the plaintiff provide supplemental answers to the interrogatories in the stipulation signed by each of the parties' attorneys, clearly and unambiguously expressed the parties' intent that the plaintiff's deposition would not go forward unless and until the plaintiff supplemented his responses on the issues of defective design, failure to warn, alternative design, and negligence. The clear and unambiguous terms of the parties' stipulation require the plaintiff to comply with the terms of the stipulation (***Fukilman v 31st Ave. Realty Corp.***, 39 A.D.3d 812, 813-14, 835 N.Y.S.2d 343 [2d Dept. 2007]).

Interrogatory No. 6 asks for a statement from the plaintiff as to whether he claims that the product was defective in its design and if so, requests that the plaintiff identify each part, component or design feature which was defective describing the defect in detail and the causal relationship between the defect and the damages alleged. In response the plaintiff, by his attorney, claims that the metal clamp affixed to the actuator is made of metal (steel) which generates splashback into the shooting area, "specifically, its composition (steel), its shape, location upon the metal actuator and its exposure to individuals firing at the target system."

The defendant claims the response is conclusory and does not inform the defendant about the specific design defect alleged. The plaintiff is provided a final forty-five days from service of the order with written notice of entry in which to either supplement the response, or, alternatively, provide a sworn statement that its product claim is limited to the alleged design defect that the metal clamp is defective because its shape, composition and location generates splashback or the ricochet of bullets as stated in plaintiff's attorney's affirmation in opposition at ¶¶ 22-24.

Interrogatory No. 7 asks for a statement as to whether the product should have incorporated some alternative safety device or design feature, and if so, to describe that alternative device in detail and identify all other like products by any manufacturer, which incorporate such device or feature. The plaintiff responded that the metal clamp in question could have been covered with replaceable rubber covers which would have reduced, minimized or eliminated splashback or ricochet injuries. Plaintiff also contends that in addition, protective wood placed in front of the metal actuator could have been raised to a height above the clamp shielding the clamp from a direct bullet strike reducing or eliminating splashback injuries. (See plaintiff's affirmation in opposition, ¶¶ 27-29).

The plaintiff is provided a final forty-five days from service of the order with written notice of entry in which to either supplement the response, or, alternatively, provide a sworn statement that its product claim about the availability of alternative safety devices or design features is limited to 1) covering the metal clamp with replaceable rubber covers, and 2) placing wood in front of the metal actuator to a height above the clamp eliminating or reducing splashback. If plaintiff intends to prove that other manufacturers used an alternative device or feature, plaintiff's sworn statement must identify the manufacturer, the product, and the alternative safety device or feature or be precluded from doing so at the time of trial.

Interrogatory No. 9 inquires about the sufficiency of the warnings at the time of sale of the product. The plaintiff's response is that all warnings and instructions contained in the Use and Operation Manual were wholly inadequate in that the manual failed to 1) direct users on how to avoid the expected splashback, 2) warn about the use of protective gear to protect shooters, 3) warn that splashback injuries were likely to occur from striking the exposed metal, 4) instruct the user to extend the wood used to cover the actuator higher to shield the exposed metal clip, 5) instruct the user to use frangible bullets, 6) describe the type of protective clothing and eye gear that would protect against splashback, and 7) provide information concerning safe shooting distances and the number of users on the shooting range at any given time.

The plaintiff is provided a final forty-five days from service of the order with written notice of entry in which to either supplement the response, or, alternatively, provide a sworn statement that its inadequate warnings claim is limited as described above.

Interrogatory No. 11 asks for the acts or omissions constituting the alleged negligence of Action Target and, if actual or constructive notice is claimed, a statement of how, when and to whom it was given. Plaintiff's Response was that "Pre-discovery plaintiff cannot respond to this interrogatory but that actual and constructive notice of 'the problem' is claimed."

Notably, the accident occurred over seven years ago and the action has been pending for well over four years. Extensive document discovery has been provided by the County of Suffolk, a defendant in the related case *Koenig v. County of Suffolk and Action Target, Inc.*, Index No. 0014104-2008. A nonparty witness from the Nassau County Police Department was deposed in that action. The same law firm represents the respective plaintiffs in three separate actions against Action Target, including *Koenig, supra*, strongly suggesting that plaintiff can certainly provide a response to this interrogatory.

Plaintiff is provided a final forty-five days from service of the order with written notice of entry to state the negligent acts or omissions of the defendant or be precluded from doing so at the time of trial. Upon deposing the defendant, the plaintiff may amend the bill of particulars in accordance with the CPLR prior to placing the matter on the trial calendar if the plaintiff deems it appropriate to do so.

The depositions of the parties are to take place within forty-five days after the plaintiff has either supplemented its responses to the four numbered Interrogatories or, provided a sworn statement that the plaintiff's claims are limited as described above. This matter appears on the compliance conference calendar on May 13, 2013. The parties are directed to consult about dates for depositions within the time frames set by this Order. Assuming the parties' good faith in doing so, the dates selected by mutual agreement can be so-ordered by the court at the conference.

This constitutes the Order of the Court.

DATED: 1 May 2013

HON. JOHN J. J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION