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SHORT FORM ORDER

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

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

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GREGG DRZAL,

Plaintiff,

-against-

ACTION TARGET INC.,

Defendant.

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Index No.: 44076-2008

Motion Sequence: 003
Motion Date: 9-18-2013
Submit Date: 10-9-2013
Motion Number: MD

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DANIEL KOENIG,

Plaintiff,

- against -

ACTION TARGET, INC. and THE COUNTY OF SUFFOLK,

Defendants.

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Index No.: 14104-2008

Motion Sequence: 007
Motion Date: 9-18-2013
Submit Date: 10-9-2013
Motion Number: MD

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GERARD PEMBROKE,

Plaintiff,

-against-

ACTION TARGET INC.,

Defendant.

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Index No.: 25810-2008

Motion Sequence: 004
Motion Date: 9-18-2013
Submit Date: 10-9-2013
Motion Number: MD

Upon the following papers numbered 1 to 149 read on this application for an order in three related actions relieving the plaintiffs of their discovery default; Notice of Motion/Order to Show

Cause and supporting papers 1-18; 50-68; 102-117; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 19-36; 69-88; 118-135; Replying Affidavits and supporting papers 37-49; 89-101; 136-149; Other ____; it is

ORDERED that the application of the plaintiff, Gregg Drzal, in the Supreme Court action entitled *Drazl v. Action Target Inc. et al.*, Index No. 44076-2008, (motion sequence 003), the application of the plaintiff, Daniel Koenig, in the Supreme Court action entitled *Koenig v. Action Target Inc. et al.*, Index No. 14104-2008, (motion sequence 007), and the application of the plaintiff, Gerard Pembroke, in the Supreme Court action entitled *Pembroke v Action Target Inc.*, Index No. 25810-2008, (motion sequence 004), seeking an order vacating the plaintiffs' defaults in complying with this Court's Orders in the three referenced actions, dated May 1, 2013, are consolidated for purposes of this determination; and it is further

ORDERED that the application of the plaintiff, Gregg Drzal, for an order vacating the plaintiff's default in complying with this Court's Order dated May 1, 2013, is denied; and it is further

ORDERED that the application of the plaintiff, Daniel Koenig, for an order vacating the plaintiff's default in complying with this Court's Order dated May 1, 2013, is denied; and it is further

ORDERED that the application of the plaintiff, Gerard Pembroke, for an order vacating the plaintiff's default in complying with this Court's Order dated May 1, 2013, is denied.

The parties' familiarity with the underlying facts and the procedural history of these three related actions is presumed and will be referenced only to inform the instant decision. The discovery dispute between the parties has been fully set forth in the three decisions of this Court, all dated May 1, 2013. Briefly, on the previous motions the defendant, Action Target Inc., ["Action Target" or "the defendant"], argued that the Plaintiff's First Amended Response to Interrogatories in these products liability actions was deficient- that is, the Responses failed to give the defendant adequate notice of the claims alleged against it to enable the defendant to mount a meaningful defense to the plaintiffs' claims of defective product, failure to warn, and negligence.

The Interrogatories in question were limited in number and inquired as to the nature of the plaintiffs' claims regarding 1) the design defect alleged, 2) the available alternative safety designs and/or devices that the defendant failed to utilize, 3) the manner in which the defendant failed to warn the users of the subject product, and 4) in what manner it is alleged that the defendant was negligent. The defendant argued that the unverified responses provided by the plaintiffs in the three actions, each dated November 16, 2011, were generic, conclusory and wholly inadequate to give the defendant notice of the claims against it. The three actions were commenced in 2008 for work-related injuries that occurred on July 26, 2007, [Drazl], July 10, 2007, [Koenig], and September 15, 2005, [Pembroke], respectively. Considering the responses inadequate, the defendant refused to go forward with the plaintiffs' depositions.

In three orders dated May 1, 2013, the Court obviously signified its agreement with the defendant that five years into the litigation, Action Target was entitled to expanded responses to the posed Interrogatories, or a judicial admission that the claims were limited to the plaintiffs' served responses, before going forward with the plaintiffs' depositions. The Orders provided Drazl, Koenig and Pembroke with a "final" thirty days from service of the order with written notice of entry in which to either expand upon the responses, or, alternatively, provide a sworn statement that its claims for design defect, availability of alternative designs, failure to warn, and negligence were limited to the Interrogatory Responses dated November 16, 2011. The caveat that the thirty day reprieve was "final", was clear and unambiguous in the three Orders.

Anecdotally, the Court took the initiative of faxing the three decisions to the parties' attorneys on the day they were signed, May 1, 2013. The Orders were not served with written notice of entry until May 23, 2013. Thus, rather than having thirty days to comply with the Order calculated from service of the notice of entry, the plaintiffs had 30 days plus an additional 23 days in which to supplement their Responses to Interrogatories or provide the required affidavit concerning claims that had their genesis 6-8 years before in actions that had been commenced five years earlier.

On May 29, 2013, the attorneys for the parties signed a stipulation providing, inter alia, that the plaintiff was to comply with the May 1, 2013 orders, by July 12, 2013. Party depositions were to be completed by August 26, 2013.

Eleven days before the court-imposed deadline was set to expire, the plaintiffs' attorney sent a letter to the Court dated July 2, 2013, advising the Court that counsel was leaving for a two week vacation on July 1, 2013, (one day before the letter was dated) and would not return until four days after the July 12th deadline. The letter requested another thirty day adjournment over the objection of defense counsel. Purportedly due to an internal law office failure, plaintiffs' counsel believed the extension had been granted by the Court when in fact, the Court responded to the request by setting the case down for a compliance conference on July 24, 2013. At that time plaintiffs' counsel was advised/realized that no extension had been granted on the Court's "final" thirty day period to provide the sought-after supplemental responses.

One month later, the plaintiffs in the three related actions moved to be relieved from their default. On these applications the plaintiffs argue that no prejudice inheres to the defendant by vacating the plaintiffs' defaults, and stress that the attempt to obtain an extension was made eleven days before the time to comply had expired.[1] No expert affidavit was furnished outlining the alleged design defects and failure to warn claims in any of the three applications. A verification to the proposed Second Amended Response to Interrogatories was not proffered until the plaintiffs' respective reply affirmations.

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[1]The Court notes that, contrary to the plaintiffs' argument in reply, the Drazl's complaint was not verified by a party.

According to counsel, efforts were made to obtain an expert between the issuance of the May 1, 2013 orders and the three motions to vacate the defaults dated August 22, 2013. Plaintiffs' counsel's efforts have thus far been unsuccessful. In Reply, the plaintiffs provided an uncertified copy of a report of an internal police investigation concerning at least two of the incidents including the hearsay statement of one police investigator who opined that recommendations to explore further modifications to the subject target system to eliminate exposed metal parts and "splash-back injuries" should be considered by the plaintiffs' employer, the Suffolk County Police Department.

In order to be relieved of a default, it is incumbent on the party seeking to be relieved to provide a reasonable excuse for the default and a meritorious claim (***Aronov v. Shimonov,*** 105 A.D.3d 787, 963 N.Y.S.2d 306 [2d Dept. 2013]). The plaintiffs' excuse is two-fold: plaintiffs tried to get an expert to support their claims and were unsuccessful. At the same time they argue that they don't need an expert to prove their products liability claims. The plaintiffs also appear to be under the impression that because they sought an extension eleven days before the July 12th deadline, they are automatically entitled to be relieved of their respective defaults.

Counsel's vacation between July 1st and July 16th is not a valid excuse for the plaintiffs' default in their obligation to provide supplemental responses to the Interrogatories or provide the required affidavit by the court-imposed deadline. Plaintiffs' counsel has not disputed that he had the Court's orders the same day they were signed a full two months before the deadline. Rather, the inordinate delay in supplementing the responses to the defendant's first set of Interrogatories culminating in the May 1, 2013 decisions, coupled with the plaintiffs' continued inability to articulate and amplify the nature of their claims, persuades the Court that the defaults should not be excused.

It bears repeating that the actions were commenced over five years ago. The accidents themselves occurred between six and eight years ago. It is fair to say that the defendant has no greater idea about the nature of the plaintiffs' claims now than it did when the actions were first commenced in 2008. A letter requesting an extension on a final, court-imposed deadline, which has been further memorialized in a stipulation signed by the parties' attorneys, simply does not excuse the plaintiffs' defaults or justify yet another reprieve. The Court of Appeals has pointed out that "[c]hronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules" (***Gibbs v. St. Barnabas Hosp.***, 16 N.Y.3d at 81, 917 N.Y.S.2d 68, 942 N.E.2d 277), and has declared that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (***Kihl v. Pfeffer***, 94 N.Y.2d at 123, 700 N.Y.S.2d 87, 722 N.E.2d 55). To have meaning, court-imposed deadlines and attorney stipulations must be enforced if they are to have any meaning to the litigants (*accord* ***Arpino v. F.J.F. & Sons Elec. Co., Inc.,*** 102 A.D.3d 201, 959 N.Y.S.2d 74 [2d Dept. 2012]).

Having determined that the plaintiffs have not presented a reasonable excuse for their defaults, it is unnecessary to determine whether they demonstrated the existence of a potentially meritorious claim(s) (*see* ***Deutsche Bank Natl. Trust Co. v. Pietranico***, 102 A.D.3d 724, 957 N.Y.S.2d 868; ***Tribeca Lending Corp. v. Correa***, 92 A.D.3d 770, 938 N.Y.S.2d 599; ***Deutsche***

Bank Natl. Trust Co. v. Rudman, 80 A.D.3d 651, 914 N.Y.S.2d 672). In any event, the fact that the action is five years old, discovery has not been completed, and depositions have not been conducted, coupled with the fact that thus far, the plaintiffs have not been able to retain an expert to support their claims, speaks for itself.

The consequence of the plaintiffs' defaults is that their proof at trial is limited by their Responses to Interrogatories dated November 16, 2011. The discovery phase of the three related cases should be completed, with that caveat, including depositions of the parties, with all deliberate speed.

DATED: 16 Dec. 2013

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

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

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