SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

STATE FARM FIRE AND CASUALTY COMPANY A/S/O MARK D. KROL and MARK D. KROL,

Plaintiffs,

-against-

WEIL-MCLAIN, THE MARLEY-WYLAIN COMPANY, HONEYWELL INTERNATIONAL, INC., HONEYWELL ENVIRONMENTAL AND COMBUSTION CONTROLS, HONEYWELL RESIDENTIAL AND BUSINESS CONTROL, APPOLO HEATING, INC., WATTS WATER TECHNOLOGIES, INC., WATTS REGULATOR COMPANY, INC., and WATTS DISTRIBUTION COMPANY, INC.,

Defendants.

DECISION AND ORDER

Index No. 50956/16

The following papers were read on defendants' motion for sanctions or to compel and defendants' cross-motion:

NOTICE OF MOTION
AFFIRMATION IN GOOD FAITH
AFFIRMATION IN SUPPORT
EXHIBITS A - K

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - U

AFFIRMATION IN OPPOSITION
EXHIBITS A - D

REPLY AFFIRMATION

This is a negligence and products liability action stemming from the explosion of a boiler.

Plaintiff alleges that the explosion was caused by the malfunctioning of an aquastat and a pressure release valve. Defendants Honeywell Residential and Business Control, Honeywell Environmental and Combustion Controls and Honeywell International, Inc. ("Honeywell") are alleged to have manufactured the aquastat, and defendants Watts Water Technologies, Inc., Watts Regulator Company, Inc., and Watts Distribution Company, Inc. ("Watts") are responsible for the allegedly defective pressure release valve. Both Watts and Honeywell have asserted cross-claims against each other. Watts moves to dismiss Honeywell's cross-claim based upon an alleged failure to comply with discovery. In the alternative, it moves to compel supplemental discovery responses. Honeywell cross-moves for an order imposing sanctions alleging Watts' motion is frivolous and to revoke the *pro hac vice* admission of Watts' counsel.

Watts' motion is premised upon a claim that Honeywell has failed to adequately respond to a June 5, 2018 demand for documents. The demand requested documents pertaining to the design, manufacturing, marketing and testing of a specified aquastat and a temperature sensor associated with that aquastat. Watts further sought documents pertaining to communications between Honeywell and Weil-McLain pertaining to the aquastat, its life expectancy, use limitations and performance. Honeywell's initial response in July 2016 consisted entirely of objections asserting that the demands were either vague, ambiguous, overly broad or unduly burdensome. Despite these objections, the response indicated that Honeywell would produce documents contingent upon Watts signing a confidentiality agreement. Following a telephone conference with the court based upon the claimed deficiency of the production, the court directed the parties to circulate a confidentiality agreement and, if signed, serve discovery responses by August 31, 2018. The confidentiality agreement was executed by the parties but Honeywell did not serve a supplemental response by that date. Following conversations between the parties and another discovery conference with the court on September 5, 2018, Watts alleges Honeywell made a production that was only ten pages of documents. Following another discovery conference with the court, Honeywell produced additional documents. Watts alleges that these documents are primarily historical documents pertaining to Honeywell's product lines and are not responsive to its demands for engineered drawings, specification sheets, change orders, marketing materials, testing, records and communications relevant to the subject aquastat from the relevant time period between 2009 and 2015. Watts further asserts that the subsequent production failed to delineate what documents pertained to what specific request and, in essence, constituted a "document dump" of non-relevant responses. It now moves for sanctions based upon the alleged deficient production or, in the alternative, for an order compelling a response.

Honeywell cross-moves for sanctions pursuant to 22 NYCRR §130-1.1 alleging Watts' demand for documents was served solely in retaliation for Honeywell making its own document demand and is designed to harass Honeywell. Honeywell asserts that it made a 700 page production in response to the demand and Watts had no factual basis to make the instant motion because Honeywell had already supplied all of the requested documentation. Honeywell further asserts that *pro hac vice* counsel Sean Magenis is primarily responsible for this alleged retaliatory conduct and thus the court should revoke his *pro hac vice* status. Honeywell claims that the impetus for this conduct arose when Honeywell sought documents that Watts' employee Michael Mullavey initially

failed to identify or produce in connection with his deposition testimony. During the deposition Mullavey acknowledged that the documents were in his car, but thereafter attorney Magenis stated or implied that if Honeywell sought production of those documents he would retaliate by initiating additional discovery against Honeywell and alter Watts' litigation strategy to blame Honeywell for the boiler explosion.

A party that fails to comply with court-ordered discovery may be sanctioned pursuant to CPLR 3126 This court has the discretion to determine the nature and degree of a penalty to impose for conduct that frustrates the disclosure scheme of the CPLR. The striking of a pleading, however, is only warranted when a party's conduct is shown to be willful and contumacious. See Martin v. City of New York, 46 AD3d 635 (2nd Dept 2007).

In opposition to Watts' motion, Honeywell has submitted only an affirmation of counsel stating that Honeywell has provided all documents responsive to Watts' discovery demand. It cites a 700 page production made on or about September 12, 2018. Its response includes an email sent that date with a computer link presumably that would enable Watts to access the production.

The conclusory allegations of counsel fail to demonstrate compliance with the discovery demand. Notably, the production has not been submitted in opposition to the motion. Moreover, the demand makes a specific request for documents pertaining to the production, design, manufacturing and marketing of the aquastat. Nothing in the record before the court indicates that Honeywell has made a responsive production to those specific demands. Honeywell has failed to submit an affidavit of any individual with first-hand knowledge as to those documents stating that a diligent search has been made and that all responsive documents either do not exist or have been produced. Honeywell further fails to refute Watts' claim that the documents produced were not organized or made available in a manner enabling it to identify which documents are responsive to which demand. Based on the foregoing, it is

ORDERED that Watts' motion is granted to the extent that within twenty-one days of the date of this decision and order Honeywell shall submit a supplemental response to Watts' June 5, 2018 document demand. Such response shall delineate what documents are responsive to the specific numerical document demand. If Honeywell is unable to make a production based upon the claim that it is not in possession of any responsive documents, it shall provide an affidavit from an individual with first-hand knowledge supporting such claim. Such affidavit must indicate what efforts have been made to uncover responsive documents. Should Honeywell fail to make an adequate supplemental production, Watts is granted leave to submit a supplemental affirmation renewing its request for sanctions. It is further

ORDERED that Honeywell's cross-motion for the imposition of sanctions and to revoke the *pro hac vice* admission of Sean D. Magenis is denied. The record does not supports its conclusory assertion that Watts made discovery demands solely for purposes of harassing Honeywell. To the contrary, the demands appear relevant to its ability to defend the action and pursue its cross-claims. The mere fact that it may have changed litigation strategies with respect to how aggressive it wished

to pursue its cross-claim does not provide a basis for the imposition of sanctions. Notably, within two weeks of Watts serving its discovery demands which are the subject matter of the instant motion, Honeywell served virtually identical demands to Watts seeking documentation pertaining to its design, manufacturing and marketing of a pressure release valve. Watts makes an unrefuted assertion that it timely and fully responded to such demand. This undermines Honeywell's claims that Watts' document demand was not made in good faith and was frivolous. To the contrary, it strongly suggests that the document demand was appropriately made during the course of discovery.

The foregoing constitutes the decision and order of the Court. The parties are directed to appear for a pre-trial conference on December 13, 2018 at 9:45 a.m.

Dated: November 20, 2018
Poughkeepsie, New York

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.