IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BELINDA CROSS	:	CIVIL ACTION
	:	
v.	:	No. 97-3703
	:	
HARRIS CORPORATION, et al.	:	

O'Neill, J. August 7, 1998

MEMORANDUM

Defendants Harris Corporation, Harris Intertype Corporation, and A.M. Graphics (collectively "Harris") move for sanctions against plaintiff's counsel, Gregory Schell, Esquire, pursuant to Federal Rule of Civil Procedure 11. For the reasons set forth below, the motion will be granted.

Plaintiff Belinda Cross brought suit on August 7, 1996 against Harris for injuries she suffered on July 6, 1994 while operating paper-cutting machinery manufactured by Harris. On March 27, 1998, Harris moved for summary judgment. On May 1, 1998, Harris served notice on plaintiff's counsel that sanctions would be sought if plaintiff did not withdraw her papers filed in opposition to defendant's motion for summary judgment and, after the 21-day waiting period required by Rule 11(c)(1)(A), filed this timely motion for Rule 11 sanctions on May 22. See Pensiero, Inc. v. Lingle, 847 F.2d 90 (3d Cir. 1988) (Rule 11 motions must be filed before district court enters final judgment order). On June 29, 1998, I entered judgment for Harris, finding that the uncontroverted evidence established as a matter of law that it was not liable for plaintiff's injury. See Memorandum Opinion dated June 29, 1998.

Plaintiff was injured when a clamp on the paper cutter suddenly swung down and crushed her arm as she was reaching under it to arrange the styrene she was cutting. Consistent with her expert's report, plaintiff contended that the accident happened when she inadvertently moved the door on a rear electrical control panel and thereby activated an electrical relay in the panel which controlled the clamp. (Pl. Memorandum of Law in Opposition to Harris' Motion for Summary Judgment ("Pl. Mem.") at 2.) Defendants did not dispute this scenario of the accident. Rather, they presented uncontroverted evidence that the paper cutter as originally manufactured had no clamp relay in the rear of the machine and the clamp could be activated only when two buttons in the front of the machine were simultaneously pushed. A third party, Colter & Peterson, had located the new clamp relay in the rear control panel when it replaced the machine's circuitry with modern technology before selling it to plaintiff's employer in April 1993. I concluded that Harris could not be held liable for injuries resulting from these changes made to the machine without its consultation nearly 30 years after Harris manufactured and sold it.

In the instant motion, defendants contend that plaintiff's counsel had no legitimate basis in law or in fact to oppose summary judgment and made material misrepresentations to this Court as to the nature of evidence in the record. Plaintiff's counsel has failed to respond to the motion in the more than two months since it was filed. Because I find that plaintiff's counsel did make unsupportable representations of fact in its papers and did not have any legitimate basis on which to oppose summary judgment, I will grant the motion and sanction counsel by requiring that he pay at least part of the expenses incurred by defendants as a result of the violations. Before determining the amount of sanctions to be imposed, however, I will afford plaintiff's counsel another opportunity to present any evidence and argument relevant to that determination,

including any challenge to the reasonableness of defendants' fees and costs.

I.

Defendants assert that plaintiff's opposition to its motion for summary judgment violated all four subsections of Rule 11(b). Rule 11 states in pertinent part:

> (a) Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name . . . .
>
> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney. . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> > (1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Rule 11 is designed to "prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987). Thus, counsel's signature on a motion or other paper certifies not only that it is offered in good faith, but that "a reasonable investigation of the facts and a normally competent level of legal research support the presentation." Lieb Topstone Industries, Inc., 788 F.2d 151,

157 (3d Cir. 1986). Subjective bad faith is not required: "[t]here is no room for a pure heart, empty head defense under Rule 11." Id. (quoting Schwarzer, Sanctions Under the New Federal Rule 11-- A Closer Look, 104 F.R.D. 181, 187 (1985)). Accordingly, the standard for considering a claim of a Rule 11 violation is an objective one -- what was reasonable to believe under the circumstances at the time the paper was filed. Dura Systems, Inc. v. Rothburry Investments Ltd., 886 F.2d 551, 556 (3d Cir. 1989).

II.

I find that both plaintiff's opposition to Harris' motion for summary judgment and specific representations in plaintiff's papers were inconsistent with Rule 11. Since the violations were the responsibility of counsel rather than plaintiff, any sanctions shall be imposed on and the responsibility of counsel and his law firm.[1]

First, in response to defendants' argument that they should be granted summary judgment because the accident could only have occurred because of the clamp relay added by Colter & Peterson, plaintiff's counsel stated "the original electrical circuitry of this machine remained intact at the time of Plaintiff's accident." (Pl. Mem. at 3.) This statement had no basis in fact. Indeed, it was contradicted not only by defendant's evidence and by plaintiff's Admissions,[2] but

[1] See Fed. R. Civ. Proc. 11(c)(1)(A) ("Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.").

[2] Plaintiff failed to respond to a Request for Admissions served January 28, 1998 and thereby conceded the following, among other things:

> 11. That Ms. Cross' accident occurred when she inadvertently contacted the unlatched door of the control panel. . . causing the door latch. . . to come into contact with a manual switch on a relay within the control panel thus activating the clamp.

by evidence attached to plaintiff's own papers.[3]

Plaintiff's counsel also violated Rule 11 when he contended there were genuine issues of material fact precluding summary judgment manifested by "differences of opinion" between plaintiff's expert on the one hand and defendants' expert and Bruce Peterson on the other. (Pl. Mem. at 3; Pl. Answer at 1-2.) These statements were unsupportable. Plaintiff's expert opined

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> 12. That all of the relays which were inside the electrical control cabinet ... at the time of the accident were installed and positioned by the third party defendant Colter & Peterson, Inc.
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> 13. That it was Colter & Peterson, Inc. which exclusively determined the positioning and/or location of all of the relays which were inside the control panel... as they existed a the time of the accident. . . .
>
> 16. That the defendant Harris Corporation did not design, manufacture, sell, distribute, install, service or repair the electrical components or circuitry which existed within the control panel at the time of the accident.

Pursuant to Federal Rule of Procedure 36, if a party fails to respond to a Request for Admission within 30 days, the matters therein are conceded. Neither in response to the motion for summary judgment nor at any other time has plaintiff's counsel addressed his failure to respond to the Request for Admissions or the significance of their concession.

[3] Plaintiff's Exhibit E included deposition testimony of Colter & Peterson's Bruce Peterson. Peterson agreed that the accident scenario posited by plaintiff's expert was possible and then gave the following testimony (Peterson Dep. at 65-66):

> Q: [Given] the electrical components and circuitry that existed within that lower cabinet when you first got the equipment from Teladyne [a previous owner of the cutter] . . . [w]as that possible, what I just described?
>
> A: No.
>
> Q: And why is that?
>
> A: Because none of the relays in the lower cabinet were in any way connected to the clamp circuitry.
>
> Q: Okay. So that -- so that I'm clear, given the condition of the electrical componentry and circuitry in the lower cabinet at the time that you acquired this cutter used, if we were to close the door with the door unlatched, there were no relays controlling the clamp, that the inside of the latch could contact to trigger the clamp?
>
> A: Correct.

how the accident occurred and that it resulted from a design defect in the machine, but did not address who was responsible for the defective design. (See Pl. Ex. A, Clauser Report.) Defendant's expert did not take any issue with the report of plaintiff's expert. Rather, he stated in his affidavit that there had not been any electrical components in the rear control panel that controlled the clamp when the machine was originally manufactured, that the machine's original circuitry had been replaced with different components neither manufactured nor sold by Harris, and that the accident scenario postulated by plaintiff's expert therefore could not have happened had the machine's original circuitry still been in place. (See Def. Ex. E, Karosas Aff.). Peterson admitted the possibility of the accident scenario proffered by plaintiff's expert and confirmed that his firm had replaced the paper cutter's circuitry and added the rear clamp relay. This evidence could not reasonably be construed as showing any disagreement, much less a dispute material to Harris' liability.

Third, plaintiff's counsel argued that plaintiff's breach of warranty claim against Harris was not barred by Pennsylvania's four-year statute of limitations because, though originally sold in 1964, the machine had been serviced and retrofitted by Colter & Peterson in April 1993. (Pl. Mem. at 3.) There was simply no basis in fact or law for such an argument. The statute of limitations for breach of warranty claims runs from the date of delivery. 13 Pa. C.S.A. § 2725(b). Accordingly, the statute of limitations for any breach of warranty claim against Harris would ordinarily have run by 1968. Plaintiff offered no legal argument for how Harris might be held liable for Colter & Peterson's refurbishing of the machine in light of undisputed evidence that Harris had nothing to do Colter & Peterson's work.

Finally, plaintiff's counsel's opposition to summary judgment with respect to the merits

of Harris' liability had no legitimate basis in law or fact. Not only did defendant's evidence establish that plaintiff's accident could not have happened had the paper cutter had its original components and circuitry design, but plaintiff had conceded the same points by failing to respond to defendant's Request for Admissions,[4] and offered no contrary evidence whatsoever. Id. at 3-4, n. 1. All plaintiff's counsel offered in opposing summary judgment were the unsupported assertions of fact discussed above; he offered essentially no legal argument at all.

III.

In light of these numerous, blatant Rule 11 violations and the fact that plaintiff's counsel had the opportunity to withdraw his opposing papers upon receipt of Harris' Rule 11 notice, I conclude that sanctions are appropriate. I thus arrive at the question of what sanctions should be imposed.

Defendants apparently seek as a sanction payment of all fees and costs it has incurred in defense of this action. However, Rule 11 only authorizes sanctions for signing or otherwise certifying writings to the court that are in violation of the Rule. Harris does not argue that the complaint itself was brought in violation of the Rule.

The Rule does authorize an award of fees and costs incurred in presenting a motion for sanctions or directly resulting from a violation. Rule 11(c).[5] Thus, I have authority to order that

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[4] See supra note 2.

[5] The Rule provides in relevant part:

> Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if

plaintiff's counsel pay all fees and expenses incurred by Harris as a result of his opposition to the summary judgment motion. However, Rule 11 is not intended as a general fee-shifting device; its primary purpose is not to compensate a wronged party but to deter misconduct. Thus, the Rule expressly commands that sanctions be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Rule 11(c)(2). To decide what amount of fees and costs to award pursuant to this deterrence goal, I must look to equitable considerations, including the sanctioned party's ability to pay, Doering v. Union County Board of Chosen Freeholders, 857 F.2d 191, 195 (3d Cir. 1988), and the state of mind and knowledge or presumed knowledge of the attorney. Thus, for example, "the conduct of an experienced lawyer or of a lawyer who acted in bad faith is more apt to invite assessment of a substantial penalty than that of a less experienced or merely negligent one." Lieb, 788 F.2d at 158.

Unfortunately, because plaintiff's counsel has failed to respond to the motion for sanctions there is no evidence before me other than counsel's filings themselves relevant to these considerations. I will therefore defer deciding what sanction should be imposed until plaintiff's counsel has been afforded yet another chance to present evidence relevant to the sanction determination, at which time he may also present any challenges to the reasonableness of the fees and other expenses defendants seek to recover.[6]

> imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Rule 11(c)(2). Subsection (c)(A) authorizes the court to award reasonable fees and costs incurred in presenting a successful Rule 11 motion if the party who violated the rule did not withdraw the offending paper upon notice that sanctions would be sought.

[6] The Court does not expect such fees and costs to be a large amount since there should have been no question that Harris was entitled to summary judgment. See Gaiardo, 835 F.2d at 483 ("When

IV.

In addition to violating Rule 11 as detailed above, plaintiff's counsel has conducted this case in extraordinarily inadequate fashion. Counsel never responded to a Request for Admissions served on plaintiff in January, 1998 and has not responded to defendants' motion for sanctions. Counsel's papers in opposition to motions for summary judgment by both Harris and third-party defendant Colter & Peterson were devoid of reasonable legal argument or citation and manifested numerous misunderstandings of both substantive law and procedure beyond those detailed above. To cite but one example, counsel appears to have believed, mistakenly, that Colter & Peterson was joined as a co-defendant to plaintiff's action by virtue of their being joined as a third-party defendant by Harris under Rule 14. (See Pl. Answer to Motion for Summary by Colter & Peterson, Inc. at ¶ 16; Pl. Mem. at 4.) Whether for this reason or not, plaintiff has now likely lost any claim she may have had against Colter & Peterson due to the running of the statute of limitations.

For these reasons as well as the Rule 11 violations, I will order plaintiff's counsel to show cause why he should not be referred for investigation and possible disciplinary proceedings for his conduct of this case pursuant to Local Rule 83.6 (V). See Lieb, 788 F.2d at 158 (referring counsel to bar association grievance committee may be appropriate sanction in some cases).

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counsel fees are sought under Rule 11, the duty of mitigation should minimize excessive burden on the sanctioned party and diminish the tactical value of orchestrating motions to increase the cost of litigation for the other side.").

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O R D E R

AND NOW, this day of August, 1998, upon consideration of the motion of defendants Harris Corporation, Harris Intertype Corporation, and A.M. Graphics for sanctions pursuant to Federal Rule of Civil Procedure 11 and the record related thereto, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED:

(1) the motion is GRANTED;

(2) by or before August 18, 1998, defendants shall present itemized documentation of fees and other expenses they have incurred in this litigation since serving notice on plaintiff on May 1, 1998 that sanctions would be sought if plaintiff did not withdraw her opposition to their motion for summary judgment; and

(3) by or before September 1, 1998, plaintiff's counsel, Gregory Schell, Esquire, and his firm, the Law Offices of Samuel S. Davis, shall

(a) submit in writing any evidence and argument relevant to determination of what monetary sanctions should be imposed for the Rule 11 violations set forth below, including

any challenges to the reasonableness of the attorney fees and costs sought by defendants; and

(b) show cause by means of written submissions to the Court why Gregory Schell, Esquire, should not be referred for possible disciplinary action pursuant to Local Rule 14; in addition or in the alternative, counsel may request a hearing before the Court to present any such evidence.

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THOMAS N. O'NEILL, JR., J.