

District of New Jersey Grants Broad Sanctions, Stops Short of Dismissal, for Willful Withholding of Relevant Photos

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On April 20, 2023, Magistrate Judge Ann Marie Donio of the United States District Court for the District of New Jersey issued a comprehensive opinion concerning the appropriate level of sanctions for discovery misconduct. Plaintiff was accused of failure to produce 81 photographs and three videos of the scene of the incident in a products liability case, including the interior of the house where it occurred and the condition of the ladder that failed. Judge Donio's decision, in Reilly v. Home Depot U.S.A, Inc., Civil Action No. 20-13030 (NLH) (AMD), denied Defendants' request for dismissal but granted lesser sanctions, specifically the authority to re-depose Plaintiff and another relevant witness on issues raised by the photographs and videos, and an award of expenses associated with those depositions to be paid by Plaintiff's counsel.

In the lawsuit, Plaintiff Peter Reilly sued Home Depot and others for injuries he suffered after falling from an allegedly defective 10-foot A-frame ladder. Shortly before Plaintiff filed his complaint, his counsel paid a visit to the scene of the accident and took the responsive photos and videos, including of the ladder in question. The photos and videos were not identified by Plaintiff in his discovery responses nor were they identified in any privilege log. Instead, defense counsel first learned of the existence of the photos and videos when Plaintiff's deposed fact witness William Castagno, who was shown at least one of the photographs, which had not been previously produced in discovery.

Upon learning of the existence of these photos and videos, Home Depot served a supplemental discovery request "to gain more information about changes in the accident scene," after Mr. Castagno's testimony "raised questions about the condition of the room where the alleged accident occurred and how it differed from the condition depicted in the photographs that Plaintiff produced." In response, Plaintiff asserted a work product claim, but failed to identify the existence of the photos and videos or produce a privilege log. Plaintiff eventually produced eighty-one (81) photos and three (3) videos of the incident scene and the ladder after an order compelling him to do so. Defendants then recognized that the photos and videos depicted the interior of the house in a substantially different condition than that Plaintiff presented to witnesses during earlier depositions. Defendants followed with their sanctions motion.

Judge Donio determined that the use of a photograph not previously disclosed at a deposition violated Fed. R. Civ. P. 26(a). She also determined that Plaintiff violated Fed. R. Civ. P. 26(b) (5) by failing to disclose on a privilege log that he had withheld the photographs and videos as alleged work product.

Judge Donio then turned to the issue of appropriate sanctions. Her Honor first determined that dismissal under Fed. R. Civ. P. 37 was unwarranted, because Rule 37(b) regarding dismissal only applies when a party fails to comply with a court order, but in this case, once the Court ordered Plaintiff to produce the withheld photographs and videos, he complied.

However, she then concluded that sanctions of preclusion of evidence could be imposed under Rule 37(c), and that the Court could also (in lieu of or addition to those sanctions) order the payment of fees and costs caused by the misconduct and could inform the jury of the failure, in addition to other appropriate sanctions. The Court determined that sanctions were warranted under both Rule 37(c) and the Court's inherent power, observing that Plaintiff's counsel concealed the existence of the photographs and videos through his conduct and then failed to proffer any justification for failing to do so.

In determining which sanctions to award, Judge Donio applied the factors laid out in Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984):

- (i) the extent of the party's personal responsibility;
- (ii) the prejudice to the adversary caused by the failure to respond to discovery;
- (iii) a history of dilatoriness;
- (iv) whether the conduct of the party or the attorney was willful or in bad faith; the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
- (v) the meritoriousness of the claim or defense.

The court must also consider the effectiveness of other, less drastic sanctions. Id. at 868.

In reviewing the factors, Judge Donio observed that there was no indication Plaintiff (rather than his attorney) knew the photographs and videos existed, but that Defendants were prejudiced by conducting depositions without the benefit of photographs and videos that more accurately portrayed the condition of the underlying incident. The Court also concluded that Plaintiff did not engage in a history of dilatory conduct because prior discovery disputes were not frivolous and Plaintiff always timely complied with the Court's orders resolving them. Nevertheless, it concluded that counsel acted in bad faith, based largely on numerous unfulfilled opportunities (such as when one photograph was used at deposition) or responsibilities (either in initial disclosures or on a privilege log) to do so. Finally, the Court found that reopening discovery would be a less drastic sanction than dismissal that would still alleviate the prejudice to Defendants.

Having made these findings, the Court permitted Defendants to re-depose Plaintiff and Mr. Castagno on issues raised by the withheld photographs and videos. Plaintiff's counsel was also required to pay all Defendants' expenses, including reasonable attorneys' fees and costs, in connection with the re-depositions.