UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-17

ALICE MCKINNEY, Administratrix
of the Estate of PALMER EDMOND
MCKINNEY, Deceased, ET AL., PLAINTIFF,

VS: MEMORANDUM OPINION

E. I. DUPONT DENEMOURS & CO., DEFENDANT.

INTRODUCTION

The above-styled diversity action was filed by the administratrix of the estate of a person, who allegedly received fatal injuries due to explosive products designed, manufactured and distributed by the defendant company. Currently pending is a remnant of the continuing controversy concerning certain requests for admission served by plaintiff. Specifically at issue is the question of whether orders entered April 10, 1986 and June 27, 1986 should be set aside, as they pertain to certain admissions.

APPLICABLE LAW

The Federal Rules of Civil Procedure contains the following provision pertaining to requests for admission:

> **(a) Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. . . .

> . . .The matter is admitted unless, within 30 days after service of the request, or within such. . .longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . .If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he had made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admitt or deny. . .
>
> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. . .If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. . .
>
> **(b) Effect of Admission** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing the amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or admission will prejudice him in maintaining his action or defense on the merits. . .

F. R. Civ. P. 36.

Thus, under the Rule, whether to allow a late response is a matter resting within the discretion of the court. Gutting v. Falstaff Brewing Corporation, 710 F.2d 1309, 1312 (8th Cir. 1983). Although courts have used variously-named standards, the inquiry has focused on the reasonableness of the "excuse" for noncompliance (as determined by the motive of the party or the excuse on its face) and/or the prejudice to the responding party--equitable considerations. 10 Federal Procedure, L. Ed. Discovery and Depositions Sections 26.295-26.304.

Some courts within our own circuit have specifically used the standard cited in subsection (b) of the statute (presentation of the merits will be subserved and lack of prejudice to the other party) applicable to withdrawal or amendment of admissions, in determining whether to allow a late response to be filed. E.g., Herrin v. Blackman, 89 F.R.D. 622, 624 (W.D. Tenn. 1981) ; St. Regis Paper Company v. Upgrade Corporation, 86 F.R.D 355, 357 (W.D. Mich. 1980).

Whether the correct type of answer has been submitted--the substantive as opposed to the procedural issue--is determined once a motion has been made by the requesting party for a determination of the sufficiency of the tendered answers. Fed. R. Civ. P. 36(a). Under the terms of the Rule just cited, the responding party may deny entirely or qualifiedly deny the request for admission. In either case, however, this denial must be specific, and fairly meet the substance of the requested admission, a requirement which is strictly construed. Havenfield v. H & R Block, Inc., 67 F.R.D. 93, 97 (W.D. Mo. 1975). The responding party may state that he lacks information or knowledge as to the matter in question, if that party states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny; however, merely tracking the statutory language may be insufficient. Asea, Inc. v. Southern Pacific Transportation Company, 669 F.2d 1242 (9th Cir. 1981).

As mentioned previously, a court's decision as to whether to deem the matter admitted to to allow an amended answer to be filed to replace defective answers is governed by equitable considerations similar to those used in determining whether to allow a late filing of a response. 10 Federal Procedure, L. Ed. Discovery and Depositions Sections 26:318. A court may, thus, grant the party a certain amount of time in which to file an amendment rather than

automatically deem the matter admitted. E.g., Alexander v. Rizzo, 52 F.R.D. 235 (D.C. Pa. 1971).

FACTS

Undisputedly, plaintiff made their requests for admission on December 12, 1985. (Transcript of Hearing on All Pending Motions, Docket Transcript I, p. 16, 19). As L R 8(a), ED Ky. makes it plain that automatic filing of such is not required, the requests themselves appear of record only as an exhibit to one of the responses later filed. (Docket Entry No. 41, Exhibit A).[1]

It is also undisputed that nothing even purportedly in response to these requests was tendered of record until February 19, 1986, when plaintiff filed a motion and affidavit to file a response to the request for admission. (Docket Entry No. 40).[2] Defendant filed its own response opposing the motion. (Docket Entry No. 41). The relative positions of the parties were expounded in these documents, as well as through oral argument at the hearing on all pending motions held April 2, 1986.

Plaintiff noted the "surreptitious" service of the requests, in that they were mailed in the same envelope as the interrogatories propounded by plaintiff; counsel stated that he, therefore, did not notice the requests specifically until he began to answer the interrogatories, since the requests were placed behind them. Plaintiff indicated that there had been an agreement for extensions of time to respond during discovery, of which defendant had availed itself earlier, and that plaintiff relied thereon to her detriment in delaying a response for several more days; defendant could, therefore, not be prejudiced in the late response. Finally, plaintiff requested the Court to noted that requests six and ten, among others, were contradicted or denied by sworn statements in the depositions of Richard

Watts and Commissioner Stanley, so that the interests of justice would be served by allowing her to respond.

Defendant, on the other hand, argued that plaintiff's counsel simply did not comply with the time limit imposed by the Federal Rules of Civil Procedure through her counsel's own negligence. It is noted that there had been no actual agreement to automatically concur with the request for an extension of time which it had made earlier--a request for an extension of time to answer certain interrogatories for which information in records outside the state would have to be obtained--was made within the original time limit. Defendant also indicated that the statements of admission were supported by evidence of record.

Another point which defendant raised was an objection to the form of the following tendered responses:

> 6. At the time of the explosion, check curtains, temporary stoppings and line brattices were not being used to direct ventilating air currents into the working faces.
>
> Plaintiff is without sufficient information to admit or deny this request. Thus same is denied. However, plaintiff would refer defendant to the Transcript of Hearing, 2-10-82, Kentucky Department of Mines, p. 89, Question and Answer 19. (Answer edited for clarification).
>
> . . .
>
> 10. Water (or another no less effective method) was being applied to coal dust on the ribs, roof and floor withint 40 feet of the face immediately prior to the explosion.
>
> Plaintiff is without sufficient information to admit or deny request. Thus, same is denied.[1]

(Docket Entry No. 67, pp. 2,3). Defendant's counsel stated that the answers were "formula" answers, surprising since the action was already over three years old.

Plaintiff's counsel remarked at the hearing that the responses were hurriedly done in view of the developments and cited additional support for the

inherent falsity of the statements.[3]

By order entered April 10, 1986, Judge G. Wix Unthank indicated that the request for admission number six should be considered admitted and gave plaintiff an additional seven days in which to file a proper response to admission number ten.

Plaintiff, four days after the last-mentioned time limit had expired, sought to file a response to defendant's admission number ten; counsel indicated that he had not received the Court's order until the time limit had almost expired, and that subsequent delay was caused by his secretary's illness. The response sought to be filed was an outright denial, with specific references to the evidence supporting plaintiff's position; the testimony of Phillip Ray Stevens and the map used at Inspector Watts' deposition were among the sources mentioned.

At the same date, plaintiff also moved to set aside the April 10th order with regard to admissions number six. (Docket Entry No.s 70, 71). His arguments concerning admission six involved references to the same evidentiary sources as well as Watt's testimony itself.

In response, defendant indicated that plaintiff had once again filed a late and inadequate response with regard to admission ten. (Docket Entry No. 73). It noted that the testimony of Phillip Ray Stevens referred to in support of plaintiff's positions on numbers six and ten apparently came at some investigative hearings held by the Kentucky Department of Mines and Mineral, to which defendant was not a party. It argues that such would not be admissible in the present action under Fed. R. Evid. 804(b). Further, it points out that the transcript was over three years old at the time of the request for admissions, and that there could be no excuse for failing to raise it at this late

date, and that, moreover, that Steven's later testimony conflicts with some of plaintiff's assertions. As a whole, defendant noted that plaintiff had been lackluster in pursuing discovery on the case.

Plaintiff filed no immediate response thereto and, indeed, did not appear at the hearing on all pending motions held June 27, 1986. By civil minute order, completed at the hearing, the undersigned then denied plaintiff's motion to set aside in part the order of the Court entered April 10, 1986, with regard to permission to file late response to the Request for Admission No. 6; additionally, the undersigned overruled plaintiff's motion to file a response to defendant's request for admission No. 10. By that same order, the oral motion of defendant to reconsider its motion for summary judgment was taken under advisement.

More than one week later, plaintiff moved to set aside the civil minute order. As grounds therefor, plaintiff again mentioned the Mine Safety Administration report and Fed. R. Civ. P. 36. As for the issue of summary judgment, plaintiff, in addition to her objections, indicated that she wishes to be allowed to file a supplemental response, should such a motion again be under consideration.

Defendant responded, pointing to the lack of timeliness and inadequacy of the arguments.

DISCUSSION

In the present situation, it is clear that if one views the situation from the reasonableness of excuse standard, plaintiff's position does not fare well. The undersigned finds that the service of the requests was not "surreptitious" in any way, nor was plaintiff reasonable in asserting the "agreement" for extension of time argument. Plaintiff's failure to meet the deadline required in

the order of April 10, 1986 is illustrative of the problem.

As to whether the interests of the merits will be subserved by the failure to admit, the undersigned notes the argument of defendant that much of the authority cited in support of plaintiff's position came from inadmissable transcripts. Plaintiff has not specifically responded to this argument.

In the present case, discovery has already closed. The undersigned accordingly finds that no interest would be served in amending the aforementioned order, or in allowing the amendment to admission ten.

Defendant's motion for summary judgment, first made when it was unclear what would happen concerning the admissions, had gained new strength by the subsequent dilatory conduct of counsel. Before its arguments will be considered, however, plaintiff will be allowed to file an additional response to the motion.

A separate order consistent with this opinion will be entered this same date.

This the _____ day of July, 1986.

JOSEPH M. HOOD
UNITED STATES MAGISTRATE

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[1]Plaintiff's counsel referred to the requests as having been tendered on the twelfth of the month. (Tr. 19).

[2]Defendant's counsel noted that answers sent to him had been postmarked on the eighteenth of the month.

[3]Plaintiff's counsel indicated at the hearing on all pending motions that "He would have to deny" both admission numbers six and ten, and he cited a statement from a Phillip Ray Stevens in addition to the other citation. (Tr. 37-39, 42-43).

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E. I. DUPONT DENEMOURS & CO., DEFENDANT.

* * * * * *

In accordance with the memorandum opinion entered this same date,

IT IS HEREBY ORDERED that:

(1) plaintiff's motion to set aside the undersigned's order of June 27, 1986 is DENIED; and

(2) plaintiff is given thirty days from the date of entry of this order in which to file with the Clerk of this Court a memorandum in support of its position on the summary judgment issue.

This the _____ day of July, 1986.

_____

JOSEPH M. HOOD
UNITED STATES MAGISTRATE