

Garrison v Dick's Sporting Goods, Inc.

2019 NY Slip Op 34134(U)

February 26, 2019

Supreme Court, Ulster County

Docket Number: 15-0744

Judge: Christopher E. Cahill

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

ULSTER COUNTY

**JAMES GARRISON and
CHRISTOPHER GARRISON,**

Plaintiffs,

-against-

**Decision & Order
Index No.: 15-0744**

**DICK'S SPORTING GOODS, INC., and
JOHN DOE and/or JANE DOE 1-10, said
names being fictitious in nature,**

Defendants.

Supreme Court, Ulster County
Motion Return Date: December 17, 2018
RJ1 No. 55-15-01391

Present: Christopher E. Cahill, JSC

**9 FILED
H B M**

Appearances: **MAINETTI & MAINETTI, PC**
Attorneys for Plaintiffs
130 North Front Street
Kingston, New York 12401
By: Alexander E. Mainetti, Esq.

FEB 28 2019

**Nina Postupack
Ulster County Clerk**

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendants
200 Great Oaks Boulevard Suite 228
Albany, New York 12203
By: Marc J. Kaim, Esq.

Cahill, J.:

By notice of motion dated November 19, 2018, defendants have moved pursuant to CPLR § 3212 to dismiss the plaintiff's complaint. The complaint alleges that plaintiff Christopher Garrison suffered an injured thumb while using a defective crossbow which

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his father, plaintiff James Garrison, had purchased from defendant Dick's Sporting Goods, Inc. James Garrison suffered a finger injury one day after Christopher's injury while using the same crossbow. The case is scheduled for a jury trial on March 25, 2019.

The case was commenced on March 6, 2015, almost four years ago. It is well more than a year over the final Standards and Goals date of November 3, 2017. Plaintiff finally filed a note of issue on July 26, 2018 without filing the expert disclosure required under the Third Judicial District Rule which directs that such disclosure be filed with the note of issue.

The recent history of this case surrounding defendant's motion is somewhat complicated. By letter to the court dated October 17, 2018, after the court had signed a trial order dated September 4, 2018 setting a trial date of March 25, 2019 and extending plaintiffs' deadline for serving expert disclosure to October 5, 2018, plaintiffs' attorney requested permission to withdraw the note of issue as "pertinent discovery issues have arisen." By letter dated November 1, 2018, the defendants' attorney opposed plaintiffs' request, noting that plaintiffs had previously been granted extra time to complete expert disclosure which the defendants had consented to, and that defendants were prepared to make their own expert disclosure. The court set a conference date of November 26, 2018 to discuss plaintiffs' request with counsel present. Between defendants' November 1, 2018 letter and the November 26, 2018 conference, the defendants filed expert disclosure in accordance with this court's trial order dated September 4, 2018 and brought the

instant motion for summary judgment which seeks to dismiss plaintiffs' defective design on the grounds that plaintiffs have not retained an expert, whose testimony defendants argue, is necessary to oppose a dismissal of the defective design claims. The defendants also seek the dismissal of plaintiffs' remaining claims on the grounds that no questions of fact exist which prevent the court from dismissing these claims.

At the conference of this case on November 26, 2018, the court informed the parties that it would decide plaintiffs' request in writing. Shortly after the conference, the plaintiffs' attorney sent a letter to the court dated November 26, 2018 detailing the difficulty in retaining an expert and requesting the court to grant plaintiffs an additional 90 days to retain an expert, adjourn defendants' motion for 90 days to accommodate the search for an expert, and direct the defendants to produce for depositions, within 90 days, the defendants' customer service desk employee who processed James Garrison's return of the crossbow.

The defendants responded by letter dated November 27, 2018 reiterating their opposition to plaintiffs' request, and requested that the court "set defendants' motion for summary judgment for hearing". The court inadvertently and mistakenly sent the defendants' attorneys a "no opposition" letter dated December 28, 2018, in response to which defendants' have submitted a proposed order granting the motion.

After reviewing the above-referenced correspondence and motion, the court concludes as follows. Uniform Trial Court Rule 202.21 provides: "Within 20 days after

service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial . . .” It also provides that where, as here, the 20-day period has expired, “no such motion shall be allowed except for good cause shown”. While plaintiffs have not made a formal motion in accordance with Rule 202.21, given that both parties have had an opportunity to be heard both orally and in writing on this issue, and in the interest of judicial economy, the court will treat the plaintiffs’ attorney’s November 17 and November 26, 2018 letters as a formal motion to withdraw the Note of Issue, and defendants’ attorney’s letters dated November 1, 2018 and November 27, 2018 as formal opposition thereto.

A review of this entire file shows that plaintiffs have had more than ample time to retain an expert in this case which was brought long ago. Second, the court notes that the initial discovery stipulation and order dated September 14, 2015 was amended twice, extending the original May 29, 2016 note of issue date to December 29, 2017. At a conference on July 18, 2018, the case was adjourned yet again to September 4, 2018 to set a trial date and “motions date”. At the September 4, 2018 conference, the present trial date of March 25, 2019 was set as well as final expert disclosure dates of October 4, 2018 and November 5, 2018 for plaintiffs and defendants respectively. Under these circumstances, it cannot be said that plaintiffs have not had adequate time to obtain an expert.

Second, as defense counsel points out in his November 27, 2018 letter, the plaintiffs have also had ample time to seek a deposition of the employee of defendant Dick's who was working the customer service desk on November 4, 2014 when the plaintiffs returned the allegedly defective crossbow, but plaintiffs have not done so.

Finally, contrary to plaintiffs' attorney's contentions, defendants did, in fact, serve their expert disclosure by November 5, 2018 as required in the September 4, 2018 trial order. Plaintiffs, therefore, have not shown "good cause" for vacating the note of issue.

Accordingly, the plaintiffs' cross-motion to withdraw the note of issue is denied. As to defendants' motion for summary judgment, because plaintiffs have no expert, that branch of defendants' motion for summary judgment dismissing plaintiffs' defective design cause of action must be granted (see e.g. Lara v. Delta Intl. Mach. Corp., 174 F Supp 3d 719, 740 [EDNY 2016]).

As noted earlier, however, because the court inadvertently and mistakenly issued the "no opposition" letter while plaintiffs' request was still pending, the court will not sign the proposed order and will allow, in its discretion under CPLR § 2214 (c), the plaintiffs 21 days from the date hereof to submit opposition to that portion of defendants' summary judgment motion which is addressed to plaintiffs' remaining claims which apparently do not require expert testimony and the defendants shall have 14 days thereafter to reply. Although the defendants, by letter to the court dated December 19, 2018, had requested that the motion be granted on the basis of no opposition, the court

was explicit at the November 26, 2018 conference that it would issue a written decision on plaintiffs' request before the case moved forward. Indeed, the court takes some umbrage with Mr. Sheean's assertion in his January 8, 2019 letter that there is "no basis for plaintiffs to suggest that the court stayed defendants' motion for Summary Judgment, or otherwise indicate that it was held in abeyance". The simple fact is that plaintiffs were not able to respond to the motion until their request was decided.

The parties are further directed to contact the court to set a new trial date.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

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Nina Postupack
Ulster County Clerk

SO ORDERED.

Dated: Kingston, New York
Feb. 26, 2019

ENTER,


CHRISTOPHER E. CAHILL, JSC

Papers considered: Mainetti letter to the court dated October 17, 2018; Kaim letter to the court dated November 1, 2018; Notice of Motion dated November 19, 2018, Kaim affirmation dated November 19, 2018 with exhibits A to J and Memorandum of Law dated November 19, 2018; Mainetti letter to the court dated November 26, 2018; Sheean letter to the court dated November 27, 2018; Kaim letter to the court dated December 19, 2018; Gold letter dated December 28, 2018; Mainetti letter to the court dated January 3, 2019; Sheean letter to the court dated January 8, 2019; discovery stipulation and order dated September 4, 2015, amended discovery order dated September 7, 2016, amended discovery order dated June 15, 2017, trial order dated July 18, 2018 and trial order dated September 4, 2018.