UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY HENNIGAN, *et al*.

Plaintiffs,

vs.

GENERAL ELECTRIC COMPANY, *et al.*,

Defendants.
_____/

Case No. 09-11912

Victoria A. Roberts
United States District Judge

Michael Hluchaniuk
United States Magistrate Judge

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS (Dkt. 32)

A. Procedural History

Plaintiff filed a motion to compel discovery on January 22, 2010. (Dkt. 32). This motion was referred to the undersigned for hearing and determination on January 27, 2010. (Dkt. 36). On March 18, 2010, a hearing was conducted on the motion, pursuant to notice. (Dkt. 37). At the hearing, the Court directed plaintiffs to conduct to take the depositions of GE's corporate representatives pursuant to Rule 30(b)(6) in order to provide the Court with a "more factually accurate picture of the circumstances," surrounding the storage and retrieval of pertinent documents. (Dkt. 49, Tr. at 27). The parties were directed to file supplemental briefs on the issues raised in the motion to compel, after the discovery was completed. The parties filed supplemental briefs on June 11, 2010. (Dkt. 57, 58). The Court held a second hearing on June 16, 2010.

B. GE's Compliance with Order Regarding Rule 26(a) Disclosures and Sanctions

Plaintiffs argue that GE failed to comply with Judge Roberts' Order that it produce "any complaints it has received from consumers with Microwave Models identical to those of the named Plaintiffs, that their microwaves turn on by themselves. General Electric is also to provide Plaintiffs with any information it has from consumers who have made this same complaint, regardless of the type or model of microwave oven." (Dkt. 18, ¶ 5). Four months after the Court's deadline expired, GE produced eight incident reports of microwave ovens that turned on without user direction. GE claimed these were the only responsive documents. However, plaintiffs submitted evidence (based on public reports of other incidents reported to GE) that GE has not produced all of the complaints it has received.

At the first hearing on this motion, GE's counsel stated, "there is no separate segregated repository, whether it's paper or electronic, of just consumer complaints. All the information is on a number of databases . . . ." (Dkt. 49, p. 16). GE also claimed that it would cost tens of thousands of dollars to search for customer complaints because it would be a "monumental task" to search through all of the consumer complaints using search terms to find customer complaints regarding microwave fires. GE's counsel also stated that "we don't have a file of complaints, Your Honor . . . there is no file if you will in any one person's or any number of persons' desks that contain consumer complaints. . . " *Id.* at 14.

Plaintiffs contend that the testimony of GE witness Patrick Galbreath (former Safety Manager responsible for GE microwave ovens) reveals that these contentions are false. Mr. Galbreath testified that GE maintains a discrete microwave oven "Safety Database," which has a feature that would allow anyone to simply print out all consumer safety reports relating to microwave fires. Indeed, Mr. Galbreath testified that this database has a specific dropdown menu for "auto start" within the "Fire" sub-database, all of which is easily retrievable. (Dkt. 58, Ex. G, pp. 10-16). Although GE claimed that there was no segregated file of consumer complaints (either "paper or electronic"), Mr. Galbreath testified that, in addition to the Safety Database, there is also a paper file of consumer complaints - a "four foot" "hard copy" file containing all of the consumer complaints from the CPSC relating to microwave ovens. *Id*. Plaintiffs contend that both the CPSC documents and the Safety Database documents were directly responsive to Judge Roberts Order, were easily accessible to GE, and that GE failed and refused to produce these documents. According to plaintiffs, these documents were uncovered without any of the electronic searches that GE claimed were necessary and, there is no excuse for GE's six-month delay after Judge Roberts' Order to produce these readily accessible documents and forcing plaintiffs to take depositions and file a motion to compel to obtain these documents.

GE contends that Judge Roberts' Order only required GE to "provide

Plaintiffs with any complaints it has received *from consumers* with Microwave Models identical to those of the named Plaintiffs, that their microwaves turn on by themselves" and "any information it has from consumers who have made this same complaint, regardless of the type of model of microwave oven." GE asserts that, despite the fact that it does not maintain a file with all the consumer complaints similar to the ones alleged in plaintiffs' complaint, it ran a query of a database of complaints made after 2005 for the model number of microwaves owned by plaintiffs. Based on the search criteria used, GE generated 52 hits, only eight of which suggested anything similar to plaintiffs' claims. These documents were produced to plaintiffs before the hearing.

GE also argues that its representations at the first hearing were entirely accurate because, GE does not have a "centralized file" containing all of the consumer complaints that it receives. Rather, according to GE, as the 30(b)(6) deponents explained, that information is contained in GE's large electronic databases, some of which are not searchable in their native format. GE also argues that the fact that it stores complaints (not organized or catalogued in any way) received from the CPSC and not from the consumers themselves, in no way made counsel's statement to the Court false.

In the view of the Court, GE failed to undertake reasonable efforts to locate responsive documents in accordance with Judge Roberts' Order. While the Court

has no doubt that counsel did not deliberately misrepresent the facts regarding the GE's search for and the availability of responsive documents, the Court finds that GE's counsel failed to undertake reasonably diligent efforts to determine the availability of responsive documents. This is counsel's obligation under the Federal Rules. While it is true that a complete and comprehensive search would involve the search of multiple databases, including seven terabytes of information as described by GE, it would have taken little effort or expense to uncover the readily available and responsive documents in the CPSC file and the Safety Database. Moreover, the Court finds that GE's interpretation of Judge Roberts' Order that it was not required to produce any documents it obtained from the CPSC to be an unduly narrow interpretation of her order that is not well-taken. Even giving GE the benefit of the doubt, it offers no legitimate reason for its failure to timely provide the Safety Database documents, which required no search terms and was organized in such in a way that GE could have easily produced, in accordance with Judge Roberts' Order, the narrow category of responsive documents that it has advocated to be the proper scope of discovery in this case.

Federal Rule of Civil Procedure 37(b)(2)(A) provides for sanctions to be imposed against a party who "fails to obey an order to provide or permit discovery," including the dismissal of the proceeding, striking the pleadings, holding the party in contempt, as well as other sanctions. In addition to, or instead

of, the sanctions listed under Rule 37(b)(2)(A), the court "must" order the "disobedient party, the attorney advising the party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(b)(2)(C). In the circumstances of this case, the award of sanctions under Rule 37(b)(2)(A) is not warranted. However, the Court finds that the failure to comply with Judge Roberts' Order was not substantially justified under Rule 37(b)(2)(C) and an award of costs and attorney fees is appropriate. A review of plaintiffs' counsel's affidavit reveals significant costs incurred in pursuing this motion and in obtaining the discovery necessary to locate the readily accessible documents in GE's possession that are responsive to Judge Roberts' Order. (Dkt. 58, Ex. F). However, with respect to the remaining documents, as discussed below, there are legitimate issues for resolution relating to search terms and the extent to which those documents requiring the searching of seven terabytes of data are responsive. For these reasons, the Court finds that the costs incurred by plaintiffs for the Rule 30(b)(6) depositions should be borne by GE. Those costs, according to plaintiffs' counsel's affidavit, total $3,635.61 and must be paid to plaintiffs by defendant within 21 days of entry of this order. (Dkt. 58, Ex. F).

C. Scope of Plaintiff's Discovery Requests and Search Terms

1. Legal standards

Determining the proper scope of discovery falls within the broad discretion of the trial court. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). Rule 37 of the Federal Rules of Civil Procedure authorizes a motion to compel discovery when a party fails to provide proper response to interrogatories under Rule 33 or requests for production of documents under Rule 34. Rule 37(a) expressly provides that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed.R.Civ.P. 37(a)(4). Discovery may relate to any matter that can be inquired into under Rule 26(b). Fed.R.Civ.P. 33, 34. Rule 26(b)(1) authorizes discovery regarding any non-privileged matter relevant to the subject matter of the pending action. Fed.R.Civ.P. 26(b)(1); *see also Miller v. Federal Express Corp.*, 186 F.R.D. 376, 383 (W.D. Tenn. 1999) ("Relevancy for discovery purposes is extremely broad."). The information sought need not be admissible at trial so long as it appears reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). "Although a plaintiff should not be denied access to information necessary to establish her claim, neither may a plaintiff be permitted to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive." *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007) (quotation marks and citation omitted).

If a party objects to the relevancy of information sought, as defendant has

done in this case, the party seeking the information bears the burden of showing its relevance. *Grant, Konvalinka & Harrison, P.C. v. U.S.*, 2008 WL 4865566, *4 (E.D. Tenn. 2008), citing, *Westlake Vinyls, Inc. v. Goodrich Corp.*, 2007 WL 1959168, *3 n. 1, (W.D. Ky. 2007); *see also Monsanto Co. v. Ralph*, 2001 WL 35957201 (W.D. Tenn. 2001) (differentiating between instances when discovery sought appears relevant, in which case the party resisting discovery bears the burden of establishing lack of relevance, and instances where the relevancy is not apparent, in which case the party seeking discovery bears the burden.). The party resisting discovery, however, bears of the burden of establishing that compliance with the request is unduly burdensome. *Ford Motor Co. v. U.S.*, 2009 WL 2922875, *2 (E.D. Mich. 2009).

2. Analysis and Conclusions

According to GE, plaintiffs have consistently described this case as one about microwaves that allegedly turn on by themselves and then smoke or catch fire and discovery should be so limited as well. Plaintiffs allege in the third-amended complaint that "[t]he GE-branded microwave ovens contain defects that cause the microwave ovens to begin operation unassisted and may result in smoke or fire." (Dkt 56, ¶ 22). GE asserts that plaintiffs' allegations in their pleading regarding defects in the heat sensor and magnetron, tie those components directly to their allegations of self-start. In other words, according to GE, they do not claim

any stand-alone defects in the heat sensor or magnetrons GE microwave ovens, so mentioning these components does not provide any basis to expand discovery beyond alleged self-starts and do not change the fact that this is a case about microwave ovens that allegedly start on their own. GE argues that to reach discovery of incidents other than the incident underlying a products liability action, plaintiffs must "demonstrate that the circumstances surrounding the other accidents are similar enough that information concerning those incidents is relevant [for purposes of discovery] to the circumstances of the instant case." *Froelich, et al v. Aurora Corp. of Am., et al.*, 2010 U.S. Dist. LEXIS 40139, *8 (M.D. La. 2010).

To illustrate the difference in volume between the scope of the documents requested by plaintiffs as compared with the scope of the requests when limited as suggested by GE, GE ran a test search on a sample from its Factory Service invoice database, one of five databases that contain responsive information. The search sample was over-the-range microwave data from 1/1/2005 through 1/22/2010. The first search of this database was performed using search terms requested by plaintiffs: "fire," "spark," "smok," "burn," "scorch," "explo," "control," "board," "arc," "start," "auto," "self," "flam," "charr," "popp," "turned on," "by itself," and "unattended." According to GE, this search resulted in 86,632 Factory Service records. When the same search terms were run, but were limited to records in which the words "self," "auto" or "start" also appeared, only 16,881

records were found. Thus, according to GE, the addition of one of three terms designed to more precisely catch all Factory Service records in which a customer had reported a self-start, significantly decreased the burden of the request on GE.

According to plaintiffs, GE's restrictive reading of its discovery obligations is unwarranted. Plaintiffs' third amended complaint alleges two separate defects that together make the microwave ovens dangerously defective. The first defect causes the microwave to turn on when it is not in use. The second defect causes it to catch fire. Plaintiffs asserts that, although all microwave ovens may not manifest both defects together, they are entitled to all evidence related to the second defect because that defect is a necessary part of their claims. Plaintiffs asserts that in products liability cases, information regarding whether other purchasers or users experienced similar problems with the product is relevant to a design defect claim. *See In re Guidant Defibrillators Prods. Liab. Litig.*, 2006 WL 692292, *2-*3 (D. Minn. 2006) (Plaintiffs' requests were not overbroad, even though some of the material sought might not relate to each of the specific life-sustaining implantable devices at issue because "at a minimum, the evidence is circumstantially relevant to the issues in the case."). Further, plaintiff argues that courts have been unwilling to limit discovery as to allegedly substantially similar incidents on a defendant's "unverified and factually unsupported claim that the other incidents in which it has been involved are 'substantially dissimilar' from

the plaintiff's allegations. . ." *Amcast Indus., Corp. v. Detrex Corp.*, 138 F.R.D. 115, 120 (N.D. Ind.1991), rev'd on other grounds, 2 F.3d 746 (7th Cir. 1993). According to plaintiffs, if GE's position is that the auto-start fires are caused by something unrelated to all of the other fires in its microwave ovens, it has the burden of establishing that contention. And, according to plaintiffs, GE has presented no evidence to support its argument and meet its burden.

As explained at the hearing, plaintiffs's complaint encompasses two potentially separate, but possibly related, defects: microwaves that turn themselves on, and microwaves that catch on fire while in use, but fail to turn off. According to plaintiffs, these two defects may exist together or separately. The Court concludes that plaintiffs' third amended complaint provides sufficient notice of the potential defects about which plaintiffs' complain such that the broader discovery sought by plaintiff is appropriate and relevant to the issues presented in this lawsuit.

The tests applied to reach this conclusion are not as narrowly construed as GE has advocated. It is true that courts generally permit "discovery of similar, if not identical, [product] models[.]" *Tolstih v. L.G. Electronics*, 2009 WL 439564 (S.D. Ohio 2009), quoting, *Holfer v. Mack Trucks, Inc.*, 981 F.2d 377, 380-81 (8th Cir. 1992). However, GE's objection to the scope of discovery sought by plaintiffs does not appear to be based on any claim of over breadth as to the models or

products at issue. (Dkt. 38, 57). And, the cases on which GE relies standing for the proposition that plaintiffs bear the burden of first showing "substantial similarity" before obtaining discovery of other incidents, actually involve the *admissibility* of evidence of prior accidents, not the *discoverability* of that evidence. *Tolstih*, at *5 ("In the context of determining admissibility of prior accidents involving various products, the United States Court of Appeals for the Sixth Circuit has concluded that 'substantial similarity' exists in incidents involving the same model, the same design, the same defect and occurring under similar circumstances.") citing, *Anderson v. Whittaker Corp.*, 894 F.2d 804, 813 (6th Cir.1990); *Croskey v. BMW of North Am., Inc.*, 532 F.3d 511, 518 (6th Cir. 2008) ("Substantial similarity means that the accidents must have occurred under similar circumstances or share the same cause."); *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 297 (6th Cir. 2007) (same); *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989) (same). It would be difficult, if not impossible, for a plaintiff to make a showing that other incidents are substantially similar, if they are precluded from discovery of that information in the first place. Notably, discovery in class action cases and in product liability actions involving both design and manufacturing defects (as is alleged here) is often broader in scope. *See e.g.*, *Bradley v. Cooper Tire & Rubber Co.*, 2006 WL 3360926, *2 (S.D. Miss. 2006) (Noting that product liability class action discovery may be broader in scope than

is typical and where claims were based on both design and manufacturing defects, discovery should not be limited to products with the same specification limits as the subject products.). Based on these principles, the Court concludes that plaintiffs have made a sufficient showing that their discovery requests are relevant to their claims.

The Court also finds that the search term delimiters proposed GE are unduly narrow for two reasons. First, they would exclude the discovery sought by plaintiffs that the Court has already concluded is sufficiently relevant and discoverable. Second, plaintiff has made a showing that the delimiters proposed by GE cast too narrow a net even with respect to plaintiffs' claimed defect regarding "self-starting" microwave ovens. Plaintiff offered several examples where these precise claims would not be captured in a search conducted as proposed by GE. The Court finds that the search terms proposed by plaintiff, while they may force GE to review some documents that are not relevant to the claims asserted by plaintiffs (which will virtually always be the case when using search terms to identify responsive electronic evidence), they are sufficiently well-defined, narrow in scope, and reasonable under the circumstances. Thus, GE has not established that the discovery sought by plaintiff, as limited above, is unduly burdensome. Plaintiff's motion to compel and for sanctions is, therefore, granted in part and denied in part.

IT IS SO ORDERED.

The parties to this action may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). A party may not assign as error any defect in this Order to which timely objection was not made. Fed.R.Civ.P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. Pursuant to Local Rule 72.1(d)(2), any objection must be served on this Magistrate.

Date: August 3, 2010

s/Michael Hluchaniuk
Michael Hluchaniuk
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on August 3, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to the following: F. Peter Blake, Darryl G. Bressack, Lorenzo B. Cellini, Michelle Thurber Czapski, Kelley M. Haladyna, Jeffrey D. Kaliel, Robert A. Marsac, Stephen D. McGraw, Kenneth J. McIntyre, Ann L. Miller, E. Powell Miller, Michael A. Snyed, Richard A. Wilhelm, and Hassan A. Zavareei.

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