IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LOLA WOODALL,	:	
	:	C.A. NO. K10C-07-031 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
DOVER DOWNS, INC., a Delaware corporation; DOVER DOWNS GAMING AND MANAGEMENT, a Delaware corporation; and DOVER DOWNS GAMING, a Delaware corporation,	:	
	:	
Defendants.	:	

Submitted: December 12, 2014
Decided: March 25, 2015

ORDER

Upon Defendants' Second Motion for
Summary Judgement.
Granted.

Charles E. Whitehurst, Jr., Esquire of Young & Malmberg, P.A., Dover, Delaware; attorney for Plaintiff.

Michael J. Logullo, Esquire of Heckler & Frabizzio, Wilmington, Delaware; attorney for Defendants.

WITHAM, R.J.

Lola Woodall (hereinafter "Plaintiff") alleges that Dover Downs, Inc. (hereinafter "Defendant") was negligent in "several aspects [such as] protect[ing] individuals on their property from danger, fail[ing] to maintain proper security, and fail[ing] to train its employees to protect customers such as Plaintiff."[1] Plaintiff's original complaint alleged that she was thrown to the floor by an assumed patron of Defendant's, Julius Johnson, while on the premises of Dover Downs on July 20, 2008. Plaintiff filed suit on July 29, 2010 for allegedly sustaining injuries as a business invitee at Dover Downs. This case enters its fifth year of litigation and discovery is yet to be completed.

On November 6, 2012, the Defendant filed its first Motion for Summary Judgment due to (1) Plaintiff's lack of a liability expert and (2) Plaintiff's failure to produce any report or opinion from a medical expert. According to the Defense, the parties stipulated to an extension to allow Plaintiff to find and retain a liability expert, and the Defense withdrew its motion. The new scheduling order required an identification of Plaintiff's expert by September 16, 2013.

After that time, the Plaintiff still had difficulty in retaining a liability expert, and the new deadline for Plaintiff to produce expert reports was extended to September 3, 2014. On September 22, 2014, the Defendant filed its second motion for summary judgment pursuant to Delaware Superior Court Rule 56. As of January 28, 2015, the Plaintiff retained its liability expert but failed to submit an expert report, which has yet to be filed.

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[1] Defendant's Motion for Summary Judgment, p.1 at 3.

FACTS AND PROCEDURE

The Defense's second motion for summary judgment is decided after the parties had oral argument before this Court. During oral argument, the Defense described the relationship between the parties as contentious based on Plaintiff's inability to adhere to deadlines provided by the Court. During oral argument, the parties recited the case's history. On April 24, 2012, the Court issued a Trial Scheduling Order requesting that Plaintiff identify its expert by October 28, 2012. Plaintiff stated in its interrogatory it planned to retain a liability expert,[2] but failed to do so by the deadline. The Defense then made its first motion for summary judgment. Plaintiff then contacted Defense counsel and the two parties reached an agreement resulting in Defense counsel withdrawing its motion, and requiring Plaintiff to identify its expert by September 16, 2013. According to Defense counsel, the parties agreed to continue the trial to allow Plaintiff's counsel to provide discovery to the Defense in an effort to determine whether proceeding with the trial would occur. The purpose of this continuance was to give Plaintiff time to retain a liability expert.

On January 10, 2014, Defense Counsel sent a letter to the Court informing it of Plaintiff's failure to retain an expert witness, and that the parties mutually agreed to request a new trial date and scheduling order. The Plaintiff did not file a response to the Defense's first motion for summary judgment, but did file a response to the second motion for summary judgment. This was filed a day late on October 10, as timely filing would have been October 9, 2014.

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[2] Defendant's Motion for Summary Judgment, Exhibit C.

In its response, Plaintiff cites to the alleged facts of the case, arguing that it is possible that "this case may not even require an expert."[3] Discovery was issued to Defendant on December 6, 2013 and was not answered until June 27, 2014. However, Plaintiff conceded that at the time it did not have a liability witness due to the illness of Plaintiff's attorney of record at the time. During oral argument, the Defense relied on *Robinson*[4] in arguing that the Plaintiff must have a liability expert in this case. The Supreme Court of Delaware held in *Robinson* that the standard of care for a security guard could only be established through a liability expert.[5] The Plaintiff failed to produce any argument based on Delaware precedent to rebut the necessity for a liability expert. The Court ordered the Plaintiff secure a liability expert in one month. The Plaintiff identified a liability expert and provided a curriculum vitae within that month, but failed to submit the expert's report. The Plaintiff filed a motion to extend time on January 10, 2015. The Court denied the motion.

Lastly, the Defense asserts that the Court should grant the motion for summary judgment because the Plaintiff has had multiple opportunities to retain a liability expert, and that the multiple delays will lead to stale discovery. The Defense relies on the balancing test in *Drejka* [6] to support its motion for summary judgment. The

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[3] Plaintiff's Response to Motion for Summary Judgment, p.2 at 6.

[4] *Robinson v. J.C. Penney Co.*, 977 A. 2d 899 (Del. 2009).

[5] The Supreme Court affirmed the trial court's decision to grant a motion for summary judgment when the Plaintiff neither produced a liability expert nor responded to the motion.

[6] *Drejka v. Hitchens Tire Service, Inc.,* 16 A.3d 1221, 1224 (Del. 2010).

Court agrees.

STANDARD OF REVIEW

Summary judgment will be granted when, viewing all of the evidence in the light most favorable to the nonmoving party, the moving party demonstrates that "there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[7] This Court shall consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining whether to grant summary judgment.[8] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances," summary judgment will not be appropriate.[9] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[10]

DISCUSSION

The sole issue of this motion for summary judgment was Plaintiff's inability to procure a liability expert at the time of the motion's filing. In the present case, the Plaintiff argues that security at Dover Downs was inadequate and that the Plaintiff's injury could have been prevented if personnel had acted in a presumably more diligent

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[7] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991 (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989)); *see also* Del. Super. Ct. Civ. R. 56c.

[8] Del. Super. Ct. Civ. R. 56c.

[9] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

[10] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

manner. The Defense relies on *Robinson v. J.C. Penney*[11] which held that the Court may grant a motion for summary judgment if a party fails to meet discovery deadlines and procure a liability expert to discuss the standard of care for security personnel. A Court has discretion as to whether or not it should grant or deny a motion for summary judgment.[12]

Although the Plaintiff failed to timely procure a liability expert, the Court, in its discretion, allowed the Plaintiff a last chance to do so, or face dismissal. The Plaintiff was able to find such an expert in the time allotted by the Court, but failed to submit the expert's report to this Court on time. Plaintiff filed a Motion to Extend Time to Identify Experts with this Court on January 19, 2015. The Motion was denied. The Court finds that Plaintiff's Counsel had ample opportunity to retrieve an expert report in the thirty (30) day time period proscribed by this Court.

In the Motion to Extend Time, Plaintiff's Counsel attributes the delay in not identifying an expert on his own personal ailments. The Court is sympathetic to the health concerns of Counsel. However, Counsel was constrained by the same health concerns at the time of oral argument on December 12, 2014. Counsel indicated he understood an expert needed to be procured in thirty (30) days or face certain dismissal, and failed to do so. Additionally, in Plaintiff's response to Defendant's Motion for Summary Judgment, Plaintiff's Counsel offered "[i]f Plaintiff identifies an expert within one month, all other trial and pretrial dates may be met. If no expert

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[11] *Robinson v. J.C. Penney Co.*, 977 A. 2d 899 (Del. 2009).

[12] *Id.* at *1.

is ID'd by that time, the case may be dismissed."[13]

It is well settled that prior to trial parties must disclose any experts that will testify at trial as well as the basis for the experts' opinions.[14] The Court has discretion to resolve scheduling issues and control its own docket, and to that end may issue scheduling orders which govern pretrial conferences, scheduling and trial management.[15] Scheduling orders assure that parties conduct discovery in an orderly fashion, and "are not merely guidelines but have full force and effect as any other order of the Superior Court."[16]

Plaintiff's Counsel has identified just the expert's name and a copy of a curriculum vitae, but failed to provide opposing Counsel or the Court with an expert report. "A pre-condition to the admissibility of expert testimony at trial is that a party must comply with discovery requests directed to the identification of expert witnesses and disclosure of the substance of their expected opinions."[17]

The Supreme Court of Delaware held in *Drejka* that there are six factors to balance in deciding whether to dismiss a case for discovery violations:

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[13] Plaintiff's Response to Motion for Summary Judgment, p.4 at 18.

[14] *Turner v. Delaware Surgical Group, P.A.,* 67 A.3d 426, 431 (Del. 2013).

[15] *Sammons v. Doctors for Emergency Servs., P.A.,* 913 A.2d 519, 528 (Del. 2006) (citing Del. Super. Ct. Civ. R. 16(b)).

[16] *Id.*

[17] *Id.* quoting *Bush v. HMO of Del., Inc.*, 702 A.2d 921, 923 (Del. 1997).

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal ...; and (6) the meritoriousness of the claim or defense.[18]

The Court will evaluate each prong in turn. First, the extent of the party's personal responsibility is minimal. It was made obvious by the response to the motion for summary judgment that a delay in time has been at the fault of Counsel. This prong favors the Plaintiff. Second, there is a great prejudice to the Defendant that the Plaintiff has not provided an expert liability report. Without such a report, the Defendant is not able to adequately prepare it's case. The report would have provided the Defendant with the ability to "be on notice of the bases for the expert opinions, and, pursuant to the scheduling order, respond in kind as to their experts and supply the bases for their opinions by way of a report."[19] Time is not on the side of either party at this stage, given the lengthy period of uncompleted discovery is five (5) years. This prong favors the Defendant.

Further, there is a history of dilatoriness on the part of the Plaintiff, speaking to prong three (3). There have been three different scheduling orders, and the new date to have a liability expert identified could constitute as the fourth. The original

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[18] *Christian v. Counseling Res. Associates, Inc.*, 60 A.3d 1083, 1086 (Del. 2013).

[19] *Duncan v. O.A. Newton & Sons Co.*, 2006 WL 2329378, at *6 (Del. Super. July 27, 2006).

date for Plaintiff's expert discovery cut off was October 28, 2012, more than two years ago. Lastly, the Defense filed a motion to compel on November 19, 2013 for the Plaintiff's expert disclosure. There has been a clear lack of adherence to the scheduling order by the Plaintiff throughout this case. This third prong favors the Defendant.[20]

With respect to prong four (4), there is nothing to suggest that Counsel has acted in bad faith and as such this favors the Plaintiff. However, it does not appear that any sanctions other than granting the motion for summary judgment are effective in this case. The Plaintiff is seemingly aware of his own procrastination, since it was acknowledged in the response to the motion that he believed summary judgment should be granted if he could not procure an expert within a month's time. The Court granted the requested month and was still unable to procure a liability expert report. The Plaintiff may argue that merely a curriculum vitae is sufficient, and a report is not necessary, however this is not the case. "It is not reasonable to require Defendants' counsel to go on a wild goose chase with Plaintiff's experts or to depose Plaintiff's experts without the benefit of having the opinions and the medical or scientific reasoning for those opinions."[21] Thus prong five (5) favors the Defendant.

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[20] Plaintiff's Counsel filed a letter with this Court on January 9, 2015 stating that he was withdrawing his involvement from all cases; the Court approved of the withdrawal. The letter also mentioned that Mr. Kenneth Young, Esquire, would be entering his appearance on all cases that involved Plaintiff's Counsel. To date, no Entry of Appearance has been made. The only other mention of Mr. Young appearing is made in the Plaintiff's Motion to Extend Time to Identify Experts. To date, this Court sees that no effort is made by the Plaintiff to move this case along.

[21] *Duncan v. O.A. Newton & Sons Co.*, 2006 WL 2329378, at *6 (Del. Super. July 27, 2006).

The last prong of *Drejka*, the meritoriousness of the claim or defense, is contingent upon procuring a liability expert in this case. On January 28, 2015, the Court denied Plaintiff's Motion to Extend Time to Identify Experts. This denial leaves Plaintiff with no expert to assist in making out the elements of a *prima facie* case of negligence against the Defendant. Plaintiff's inability to procure liability expert testimony means that now she is unable to move past a summary judgment motion because she has not "adequately establish[ed] all the elements essential to [her] case that [she] would have the burden of proving at trial."[22] "The trial court has discretion in choosing the appropriate sanction. But, "[t]he sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort."[23] Upon a balance of the *Drejka* factors, granting the summary judgment motion is the only appropriate sanction.

CONCLUSION

Defendant's motion for summary judgment is **GRANTED** in light of Plaintiff's repeated inability to take corrective action to remedy court-ordered deadlines.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[22] *Collis v. Topper's Salon & Heath Spa, Inc.*, 2013 WL 4716237, at *4 (Del. Super. Aug. 29, 2013) citing *Rayfield*, 840 A.2d 642, 2003 WL 22873037, at * 1.

[23] *Drejka* citing *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del.2008).