

SHOUKAT JAHAN, Plaintiff, v. SCOTLAND FUELS, INC., Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action — Law, No. 2006–637

*Requests for Admissions; Withdrawal of Admissions; Summary Judgment and Sanctions.*

1. The mere substitution of counsel is not a compelling reason for failing to timely respond to requests for admissions.
2. The Court may allow the Answers to Request for Admission to be filed *nunc pro tunc* when doing so would not prejudice the party who requested the admissions.
3. Summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
4. Summary judgment may be granted only where the right is clear and free from doubt.
5. The Court may, on motion, make an appropriate order if a party or person otherwise fails to make discovery or to obey an order of court respecting discovery.

Appearances:

Leslie D. Jacobson, Esq., *Attorney for Plaintiff*

James M. Stein, Esq., *Attorney for Defendant*

OPINION

Walsh, J., April 10, 2007

This matter is before the Court on Plaintiff's Motion for Summary Judgment and on Defendant's Motions for (a) Leave to Allow Answers for Admissions *Nunc Pro Tunc* and (b) to Allow Withdrawal of Admissions. The Plaintiff's brief provides a rendition of the facts which defense counsel concedes is essentially correct. It follows:

"This action was initiated by Shoukat Jahan ("Plaintiff") by filing a complaint for specific performance against Defendant alleging that Defendant failed to convey the subject property located at 3322 Black Gap Road, Scotland, Pennsylvania, in Franklin County pursuant to the agreement of sale. On or about July 28, 2006, Plaintiff mailed written requests for discovery to Defendant. Said discovery requests included a request for admissions. ... As provided by Pa. R.C.P. 4014(b), Defendant's answer to the requests for admission was due on or about August 28, 2006.

On September 7, 2006, ten days after the thirty (30) day time period for response as provided by the rules had expired, Plaintiff's counsel mailed a letter to Defendant's counsel requesting that Defendant's counsel provide answers to the discovery requests by Friday, September 15, 2006. ... On September 12, 2006, Plaintiff's counsel received via

facsimile, a letter from Defendant's counsel informing Plaintiff's counsel that he had received the discovery requests and apologized for the delay in response. ... After waiting several more weeks and not receiving any response to her discovery requests, Plaintiff then filed her motion for summary judgment on October 18, 2006. At the time Plaintiff's motion was filed, an additional fifty one (51) days had passed since the thirty (30) day period as provided by Pa. R.C.P. 4014(b) expired. On October 25, 2006, after receiving a copy of Plaintiff's Motion for Summary Judgment and the averments contained therein and probably realizing the Motion would be granted, Defendant responded to the Requests for Admissions. At the time Plaintiff received the Defendant's response, an additional fifty eight (58) days had passed since thirty (30) day period as provided by Pa. R.C.P. 1014(b) expired. To date, Plaintiff has not received responses to her other discovery requests also sent on July 29, 2006."

Plaintiff's Brief, Pages 1 and 2.

Plaintiff contends that pursuant to Pa. R.C.P. 4014(b) that all of its requests for admissions are deemed admitted because "the matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the Court may allow, the party to whom the request is directed serves upon the party requesting the admission an Answer verified by the party or an objection, signed by the party or the party's attorney." The Defendant, on the other hand, insists that upon its Motion, the Court may permit withdrawal or amendment of the admissions and relies for its authority on the first sentence of Pa. R.C.P. 4014(d) which provides that "any matter admitted under this rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission."

In this case, it is not disputed that Plaintiff's counsel exercised considerable forbearance. Ten (10) days after Defendant was to have responded to Plaintiff's Request for Admission, Plaintiff's counsel politely suggested in a letter to defense counsel that he provide Answers within about a week. The only response he received was a telefax from Defendant's then counsel, the entire text of which reads as follows: "Sorry for the delay. My client has been away. Additionally, my client will be getting new counsel to try this case as I no longer litigate. I hope to have such counsel in place in the near future. I'll be in touch." Plaintiff's counsel exercised forbearance for an additional five (5) weeks before filing its Motion for Summary Judgment. At the time Plaintiff's Motion was filed, an additional fifty-one (51) days had passed after expiration of the thirty (30) day period provided in Pa. R.C.P. 4014(b). Shortly after Defendant was served with Plaintiff's Motion for Summary Judgment, Defendant finally responded to Plaintiff's Request for Admission.

Plaintiff now contends that because the Defendant's late-filed responses are tantamount to a deemed admission of all of Plaintiff's requests, there now remains no issue of material fact and that the Plaintiff is entitled to summary judgment in this lawsuit as a matter of law.

## **1. Defendant's Motion for Leave to Allow Answers for Admissions *Nunc Pro Tunc***

In Commonwealth v. Diamond Shamrock Chemical Co., 391 A.2d 1333 (Pa. Cmwlth. 1978), the Commonwealth Court faced a similar factual scenario. In that case Diamond served requests for admissions on the Commonwealth pursuant to Pa. R.C.P. 4014. When the Commonwealth failed to file a timely response, Diamond filed its Motion for Summary Judgment. The Commonwealth then filed an application for leave to respond *nunc pro tunc*. The Commonwealth Court began its analysis by stating "the purpose of the procedure set forth in Pa. R.C. P. No. 4014 is to clarify issues raised in prior pleadings with the goal of expediting the litigation process." Id. at 1336. The Commonwealth Court went on to state that if the answering party can establish compelling reasons for failing to timely respond, and no prejudice results to the adverse party, a *nunc pro tunc* application to respond should be granted. Id.

In Diamond Shamrock, the answering party attributed its failure to respond to the Request for Admission on the heavy caseload of the Department of Justice Collection Division, which was handling the case; the lack of experienced attorneys in the Collections Division who were competent in handling matters involving the complexities of the Pennsylvania Rules of Procedure; the turnover of attorneys working on the case; and a "clerical error" resulting in the request being placed directly in the file by the clerical staff. Id.

The Commonwealth Court found the reasons proffered by the answering party to be less than compelling. In fact, the Court sternly stated:

Indeed, were we to find them compelling, we can conceive of few sets of circumstances which could ever be deemed noncompelling. Weight of case load is not a compelling

reason; nor is the dearth of counsel competent to handle matters involving the complexities of a rule providing that unless a response is filed within ten days, the matter of which an admission is requested is deemed admitted. Transfer of a file from one attorney to another is not a compelling reason. And assuming a "clerical error" resulted in the document initially being placed unnoticed into the file, the fact that it remained unnoticed for nearly five months renders this a noncompelling reason as well. Id.

In the instant case, Defendant offers numerous reasons for not responding to Plaintiff's Request for Admission. First, Defendant's counsel was having difficulty meeting with his client due to the Defendant's travel schedule. Second, Defendant's counsel was seeking another litigation attorney to assist the Defendant. Lastly, Defendant's counsel was hoping to settle the matter and believed answers would be unnecessary.

As in Diamond Shamrock, we find that the mere substitution of counsel is not a compelling reason for failing to timely respond to requests for admissions. Similarly we do not find Defendant's busy travel schedule to constitute a compelling reason. Pa. R.C.P. 4014(b) is very clear that requests for admissions are deemed admitted after thirty days unless the receiving party answers, objects, or on motion is granted an extension to respond by the court. If defense counsel were unable to meet with his client because of an extensive travel schedule, the proper course would have been to file a motion with the Court requesting an extension of time to answer. Here, Defendant did not ask the Court to extend the time for filing its response, nor did the Defendant object to any of the requests within the thirty day time period provided by Pa. R.C.P. 4014(b). Accordingly, defense counsel's inability to schedule a time to meet with his client is not a compelling reason. Likewise, defense counsel's aspirations of settlement are not deemed to be compelling.

The Court may allow the Answers to Request for Admission to be filed *nunc pro tunc* when doing so would not prejudice the party who requested the admissions. Id. In Diamond Shamrock, the Commonwealth Court found that Diamond had been prejudiced because the Commonwealth did not file their *nunc pro tunc* application until after Diamond filed their Summary Judgment Motion, and Diamond relied to a substantial degree on the Commonwealth's admissions when preparing their brief and Motion for Summary Judgment. Id. The facts in this case are very similar. Plaintiff relied to a substantial degree on the admissions when preparing its Motion for Summary Judgment and it was only after Plaintiff filed the Motion for Summary Judgment that Defendant submitted its responses to Plaintiff's requests.

The similarities between the Diamond Shamrock case and the case at bar require us to find that Plaintiff would be prejudiced by a *nunc pro tunc* response by Defendants. Therefore, we deny Defendant's Motion for Leave to Allow Answers for Admissions Nunc Pro Tunc.

However, our analysis cannot stop there.

## **2. Defendant's Motion to Allow Withdrawal of Admissions**

In the alternative, Defendant has filed a Motion to Allow Withdrawal of Admissions. In 1978 the Rules Committee expanded Pennsylvania Rule of Civil Procedure 4014 to allow a more liberal standard for withdrawal of admissions. See Dwight v. Gerald Medical Center, 623 A.2d 913 (Pa. Cmwlth. 1993); P.S. Hysong v. Lewicki, 811 A.2d 46 (Pa. Cmwlth. 2002). A Court is to grant the withdrawal of admissions where "upholding the admission would practically eliminate any presentation of the merits of the case; where withdrawal would prevent manifest injustice; and where the party who obtained the admissions failed to prove that withdrawal would result in prejudice to that party." Dwight at 916, citing Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192 (D.Conn. 1976). The purpose of the rule allowing withdrawal of admissions "emphasizes the importance of resolving an action on the merits and permits withdrawal where it promotes a decision on the merits while not prejudicing the party who obtained the admission." Hysong at 50, citing Bergemann v. United States, 820 F.2d 1117, 1121 (10th Circuit 1987).

Should we allow the admissions to stand the Court must accept the following as true:

- (e) "Plaintiff has at all times complied with the terms and conditions of the Sales Agreement."
- (k) "There are no facts upon which Defendant relies as a basis for any defense in this action."
- (l) "The Defendant has no claim against the Plaintiff as a result of the transactions described in Plaintiff's Complaint."
- (m) "Every statement or allegation contained in Plaintiff's Complaint is true and correct."

See Plaintiff's Motion for Summary Judgment ¶13.

Here, if we were to uphold the admissions Defendant would be denied the opportunity to present its case on the merits. Given the nature of the pleadings in this case, the above admissions would result in Summary Judgment in favor of the Plaintiff. Based on the rationale behind the Dwight holding, we must avoid such a harsh result and allow the withdrawal of the admissions unless the Plaintiff can show that such ruling would be prejudicial. In this regard, prejudice has a deferent meaning than what it does in the Diamond Shamrock case. Here, prejudice turns on whether a party opposing the withdrawal is rendered less able to obtain evidence to prove the matters admitted. Dwight at 916, citing Teleprompter of Erie, Inc. v. City of Erie, 567 F. Supp. 1277 (W.D. Pa. 1983); and Rabil v. Swafford, 128 F.R.D. 1 (D.D.C. 1989). Under this definition of prejudice, Plaintiff has the burden of proving that prejudice would result from the Defendant's withdrawal of admissions. The Plaintiff has not carried this burden. Plaintiff has not shown that withdrawal of these admissions would render Plaintiff less able to obtain evidence to prove the matters admitted. For these reasons, we allow the Defendant to withdraw the admissions and proceed on the merits of the case.

### **3. Plaintiff's Motion for Summary Judgment**

A Motion for Summary Judgment includes two distinct notions: (1) the absence of a dispute as to any material fact, and (2) the absence of evidence sufficient to permit a jury to find a fact that is essential to the cause of action or defense. See Pa.R.C.P. 1035.2 *Comment*. Summary judgment is properly granted where there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law. Shackelford v. Chester County Hospital, 690 A.2d 732 (Pa. Super. Ct. 1997). Summary judgment may be granted only where the right is clear and free from doubt. Id.

The moving party has the burden of proving there is no genuine issue of material fact. Laich v. Bracey, 776 A.2d 1022 (Pa. Cmwlth. Ct. 2001). In order to overcome a Motion for Summary Judgment, the nonmoving party must adduce sufficient evidence such that a jury could return a verdict in his favor. Ertel v. Patriot-News Company, 674 A.2d 1038 (Pa. 1996). The record and any inferences from it must be viewed in the light most favorable to the nonmoving party and any doubt must be resolved against the moving party. Shackelford v. Chester County Hospital, 690 A.2d 732 (Pa. Super. Ct. 1997).

Plaintiff's Motion for Summary Judgment is based solely on Defendant's failure to answer the Requests for Admissions. Plaintiff argues that Defendant's failure to answer conclusively establishes all elements necessary to support the Summary Judgment Motion. The only basis supporting Plaintiff's Motion for Summary Judgment was the deemed Answers to the Request for Admissions and since we granted Defendant's Motion to Allow Withdrawal of Admissions there is no basis for granting Plaintiff's Summary Judgment Motion.

After reviewing the pleadings, Plaintiff's Summary Judgment Motion is denied as premature and without prejudice, allowing the parties to continue with discovery.

### **4. Pennsylvania Rule of Civil Procedure 4019. Sanctions.**

On or about July 28, 2006, Plaintiff mailed written requests for discovery to Defendant. This discovery request included the Request for Admissions discussed above. As provided by Pa. R.C.P. 4014(b), Defendant's answer to the Request for Admissions was due on or about August 28, 2006. On September 7, 2006, ten days after the thirty (30) day time period for response as provided by the rules had expired, Plaintiff's counsel mailed a letter to Defendant's counsel requesting that Defendant's counsel provide answers to the discovery request by September 15, 2006. On September 12, 2006, Plaintiff's counsel received via facsimile, a letter from Defendant's counsel informing Plaintiff's counsel that he had received the discovery requests and apologized for the delay in response.

After waiting several more weeks and not receiving any response to the discovery requests, Plaintiff filed a Motion for Summary Judgment on October 18, 2006. It should be noted that an additional fifty-one (51) days had passed when Plaintiff filed the Motion for Summary Judgment. Plaintiff's forbearance while inviting Defendants to respond to Plaintiff's Request for Admission almost certainly resulted in out-of-pocket losses to the Plaintiff based on the time delay and the necessity of Plaintiff's filing a Motion for Summary Judgment.

Defendant continually chose to ignore Plaintiff's request; such conduct is nearly inexcusable. Pennsylvania Rule of Civil Procedure 4019 authorizes the imposition of sanctions. Specifically, subsection (a)(1)(viii) states that "the court may, on motion, make an appropriate order if a party or person otherwise fails to make discovery or to obey an order of court respecting discovery." Pa. R.C.P. 4019(a)(1)(viii). We suggest that upon proper Motion by the Plaintiff the Court would consider the imposition of monetary

sanctions and other sanctions against the Defendant for his failure to timely respond to the Plaintiff's Request for Admissions.

#### ORDER OF COURT

April 10, 2007, upon consideration of the record of these proceedings and particularly [1] Plaintiff's Motion for Summary Judgment; [2] Defendant's Motion for Leave to Allow Answers for Admission *Nunc Pro Tunc*; and [3] Defendant's Motion to Allow Withdrawal of Admissions, and upon further consideration of the briefs and arguments of the parties and the law, it is hereby ordered that Defendant's Motion for Leave to Allow Answers for Admissions *Nunc Pro Tunc* is denied. The Defendant's Motion to Allow Withdrawal of its Admissions is hereby granted. Plaintiff's Motion for Summary Judgment is denied without prejudice. It is further ordered that Plaintiff is granted leave to file, within the next thirty (30) days, an appropriate Motion for Sanctions pursuant to Pa. R.C.P. 4019.