HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CERTAINTEED CORPORATION, Plaintiff, v. SEATTLE ROOF BROKERS, et al., Defendants.	CASE NO. C09-563RAJ ORDER

I. INTRODUCTION

This matter comes before the court on three motions: a motion (Dkt. # 65) to dismiss from Plaintiff CertainTeed Corporation ("CertainTeed"), CertainTeed's motion in limine (Dkt. # 57), and Defendant James Garcia's motion (Dkt. # 61) for a mistrial. The court heard from the parties regarding these motions at a July 22, 2010 pretrial conference. For the reasons stated herein, the court DENIES Mr. Garcia's motion, GRANTS CertainTeed's motion to dismiss, and DENIES CertainTeed's motion in limine as moot. The court VACATES the August 2 trial date. At the conclusion of this order, the court imposes deadlines for briefing on the entry of final judgment and on whether Mr. Garcia's proposed website revisions comply with the permanent injunction.

II. BACKGROUND

The court summarized the parties' disputes in its June 28, 2010 order (Dkt. # 55) granting in part CertainTeed's motion for summary judgment and imposing a permanent

injunction barring Mr. Garcia from making specific false statements about CertainTeed's fiberglass asphalt shingles. The court will not repeat that summary here, as this order focuses on the aftermath of the June 28 order.

CertainTeed's first motion after the June 28 order was for leave to withdraw its jury demand. CertainTeed agreed to abandon its quest for damages and any other legal relief, and to instead seek only equitable relief. The court granted that motion at the conclusion of the pretrial conference, because Mr. Garcia has no right to a jury trial where CertainTeed seeks only equitable relief, and Mr. Garcia's affirmative defenses do not give rise to a jury trial right. *See Toyota Motor Sales, U.S.A., Inc. v. Tabari*, No. 07-55344, 2010 U.S. App. LEXIS 13930, at *28-29 (9th Cir. Jul. 8, 2010).

Mr. Garcia did not merely object to a bench trial when he responded to CertainTeed's motion, he filed a series of objections to the June 28 order, and moved for a "mistrial." At the pretrial conference, the court explained that it could not declare a mistrial where no trial had occurred, and that the court would construe Mr. Garcia's submission as a motion for reconsideration of the June 28 order.

After initially requesting merely the withdrawal of its jury demand, CertainTeed asked the court not to conduct a trial at all. It filed a motion to voluntarily dismiss its remaining claims and enter judgment consistent with the June 28 order and permanent injunction. It proposed a dismissal without prejudice. When the court suggested at the pretrial conference that CertainTeed should dismiss the claims *with* prejudice, CertainTeed declined.

Mr. Garcia, for his part, objected to a dismissal without prejudice, requested that the court approve revisions to his seattleroofbroker.com website as compliant with the permanent injunction, and thereafter to dissolve the permanent injunction. The court explained at the pretrial conference that absent a decision to reconsider the June 28 order, the permanent injunction would remain in place regardless of the court's decision on CertainTeed's motion to dismiss.

The court now considers Mr. Garcia's motion for reconsideration and CertainTeed's motion for voluntary dismissal. Its disposition of those motions makes it unnecessary to discuss CertainTeed's motion in limine.

III. ANALYSIS

A. The Court Denies Mr. Garcia's Motion for Reconsideration.

Mr. Garcia must meet a high standard to prevail on his motion for reconsideration:

> Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Local Rules W.D. Wash. CR 7(h)(1). The court now considers whether Mr. Garcia has met this standard.

At the outset, the court compliments Mr. Garcia for his discussion at the pretrial conference of his objections to the June 28 order. Mr. Garcia spoke plainly and respectfully in addressing the order (and indeed in addressing all of the issues raised at the pretrial conference), and his comments were helpful to the court. Mr. Garcia's measured and respectful tone at the pretrial conference is in sharp contrast to the invective and sarcasm that dominates his written response to the court's order (and his other written materials in this action). In the court's view, Mr. Garcia's advocacy at the pretrial conference did substantially more to advance his cause than his written advocacy.

Part of Mr. Garcia's motion for reconsideration contends that the court has demonstrated bias against him. Mr. Garcia now admits that he was mistaken in asserting that this court had a personal relationship with CertainTeed's counsel, and the court will not address that issue further. *See* Dkt. # 62 (Jul. 12, 2010 email from Defendant apologizing for mistaken assertions). Nonetheless, he contends that the court demonstrated bias by disregarding his evidence in favor of CertainTeed's, and by impugning his "honor and integrity." Dkt. # 61 at 2, 6-7. Mr. Garcia's assertions of bias

are inseparable from his disagreements with the substance of the court's ruling. The court thus focuses on those disagreements.

Many of Mr. Garcia's objections to the June 28 order focus on aspects of the order that were immaterial to the court's decisions. For example, he decries the court's statement that there were "reasons to doubt" his statements about his financial status in response to a court order requiring him to demonstrate his ability to pay his share of mediation costs. There were indeed reasons to doubt those statements, and CertainTeed explained those reasons in its response to his financial statement. Whatever doubts the court had, however, they did not affect its ruling on this issue. The court permitted Mr. Garcia to proceed to mediation at CertainTeed's expense, and permitted Mr. Garcia the opportunity to provide more specific information about his financial situation. June 28 order at 26.

In another immaterial objection, Mr. Garcia contends that the court has improperly credited CertainTeed's assertion that he attempts to profit by steering potential customers away from CertainTeed's products toward other roofing materials. The evidence before the court (particularly Mr. Garcia's letters to homeowners) leaves no doubt that Mr. Garcia has, at times, engaged in this practice. Nonetheless, it is simply immaterial that Mr. Garcia has in fact sold CertainTeed's products to some of his customers. This does not undermine the damaging effect of his attacks on CertainTeed's products in other contexts.

Also immaterial is Mr. Garcia's objection to the court's inclusion of a footnote in its order explaining what Mr. Garcia means by a "resale inspection." Mr. Garcia apparently believes that the court disagreed with his views about the necessity of a resale inspection. He is mistaken. The court did nothing more than state what Mr. Garcia meant by the term.

Some of Mr. Garcia's objections misconstrue the June 28 order. That order found that Mr. Garcia made a false statement when he claimed that a photograph he included in

some letters to homeowners was of a roof shingled in CertainTeed fiberglass shingles. As Mr. Garcia admitted at the pretrial conference, he has no *admissible* evidence to the contrary. He has no personal knowledge of the provenance of the shingles in the photograph. His sole support for the assertion that they are CertainTeed shingles is hearsay evidence that an unidentified roofer told him that they were. This is hearsay, and the court cannot consider it as a basis for avoiding summary judgment. Mr. Garcia's lack of proof is itself enough to demonstrate the falsity of his assertions to homeowners that the photograph showed CertainTeed products. But, as additional support for that conclusion, the court cited the declaration of Robert Metz, who declared that in his opinion, the shingles depicted in the photograph were organic shingles. In his declaration, Mr. Metz described his many years of experience in the roofing industry, and described in detail the bases of his opinion that the shingles were organic. This is the proper approach for offering opinion testimony. Mr. Garcia, by contrast, merely asserted that he disagreed with Mr. Metz's opinion, without offering either an explanation of the basis for that disagreement, or evidence showing that Mr. Garcia had sufficient expertise to offer a contrary opinion. At the pretrial conference, by contrast, Mr. Garcia offered a cogent explanation for his disagreement with Mr. Metz, explaining why his opinion was that the shingles were fiberglass rather than organic. Had Mr. Garcia offered the same evidence before the court decided the summary judgment motion, the court's discussion of the contrast with Mr. Metz's opinion would likely have been different. That evidence would not, however, have changed the court's conclusion that Mr. Garcia had no *admissible* evidence to support his claim to homeowners that the picture showed CertainTeed's shingles.

Mr. Garcia's failure to offer evidence at the summary judgment stage bears on at least one other objection. CertainTeed offered addresses of numerous roofs in the Seattle area that it contended were shingled in CertainTeed products that were still in good condition after 15 to 20 years. It took photographs from ground level of at least a half

dozen of these roofs.[1] The court mistakenly stated in the June 28 order that Mr. Garcia had not visited any of these roofs himself. In fact, Mr. Garcia submitted evidence that he visited *one* of these roofs and took photographs. At the pretrial conference, he revealed to the court for the first time that he had taken photographs of other roofs and produced them to CertainTeed. For reasons he did not explain, he did not include those photographs in the evidence he submitted in opposition to summary judgment. Even if he had, however, the court's ultimate conclusion would not have been affected. As the court stated: "Even if Mr. Garcia could prove that there are one or more Seattle-area Presidential roofs that have deteriorated such that they would not pass an inspection in fewer than 20 years, he still would have no basis for declaring that *no* Presidential shingle could pass a resale inspection after 15 to 20 years, and no basis for declaring a specific lifetime for any Certainteed product, much less a lifetime of ten years or less." June 28 order at 15. The court reiterates that conclusion today.

Finally, Mr. Garcia misunderstands the court's conclusions about his statements regarding the "history of premature failure" of CertainTeed's shingles. Mr. Garcia made the statement in what the court referred to as the "Dear Homeowner Letter." Mr. Garcia attempted to cast the statement as mere opinion, contending that "failure" can mean different things to different people. The court agrees entirely. In his pleadings and even in proposed revisions to his website, Mr. Garcia has offered his own definition of failure, one that encompasses a variety of circumstances. Provided Mr. Garcia explains what he means, he is free to define "failure" as he chooses. The Dear Homeowner Letter, however, provided no such explanation. The court held that *in the context of that letter*, Mr. Garcia's use of the word "failure" connoted a roof that no longer functions. The court explained the basis for that conclusion in the June 28 order. Mr. Garcia's

[1] Mr. Garcia asserts that CertainTeed committed "fraud" and "obvious perjury" by submitting these photographs. He contends that photographs taken from ground level are useless in determining the condition of shingles. Mr. Garcia is free to dispute the value of the photographs, but he has no basis for accusing CertainTeed of fraud or perjury. CertainTeed fully disclosed to the court that the photographs were taken from the ground.

contention that the court somehow changed or created roofing industry standards for roof failure is wholly mistaken. The court merely ruled that Mr. Garcia's statements about "premature failure" were false in the context of the Dear Homeowner Letter.[2]

The court finds that Mr. Garcia has not met the standard for reconsideration of the court's June 28 order.

B. The Court Grants CertainTeed's Motion for Voluntary Dismissal.

CertainTeed's motion to dismiss invokes Fed. R. Civ. P. 41(a)(2), which permits the dismissal of claims "at the plaintiff's request only by court order and on terms that the court considers proper." The decision to grant or deny a motion for voluntary dismissal is committed to the court's discretion. *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001). The court should grant a motion for voluntary dismissal "unless a defendant can show that it will suffer some plain legal prejudice as a result." *Id.* A district court abuses its discretion when it denies a request for voluntary dismissal without identifying legal prejudice, even if the court finds other forms of prejudice to the defendant. *Westlands Water Dist. v. United States*, 100 F.3d 94, 96-98 (9th Cir. 1996) (reversing district court's denial of motion for voluntary dismissal). Legal prejudice is "prejudice to some legal interest, some legal claim, [or] some legal argument." *Id.* at 97. Proof that discovery necessary to defend against a claim would become unavailable with the passage of time is also a form of legal prejudice. *Id.* The uncertainty associated with an unresolved dispute and the threat of future litigation is not legal prejudice, even where the dismissal gives the plaintiff a tactical advantage. *Smith*, 263 F.3d at 976; *see also Westlands*, 100 F.3d at 96 (finding no legal prejudice despite adverse affect on defendant's "financial viability"). That a defendant has incurred substantial expense in the defense of a lawsuit prior to a voluntary dismissal does not amount to legal prejudice. *Westlands*, 100 F.3d at 97 ("We

[2] Context matters, as both CertainTeed and Mr. Garcia should recognize. At the pretrial conference, CertainTeed repeatedly asserted that the court had enjoined Mr. Garcia from using the words "premature failure." It is mistaken. Mr. Garcia can use whatever words he wishes, so long as the document in which he uses them puts those words in a context in which they are not false.

have explicitly stated that the expense incurred in defending against a lawsuit does not amount to legal prejudice."). Although legal prejudice is the sole basis on which the court can deny a motion for voluntary dismissal, it retains discretion to impose conditions on the dismissal to remedy other forms of harm to the defendant. *Id.* (noting authority of district court to award defendant attorney fees and costs as a condition of dismissal).

The court finds no *legal* prejudice that would arise from CertainTeed's voluntary dismissal of its remaining claims. Mr. Garcia would lose no legal right as a result of the dismissal, and there is no indication that the discovery from CertainTeed necessary to mount his defense would be more difficult to obtain later. Indeed, as discovery has closed in this action, Mr. Garcia has already had a complete opportunity to seek discovery in support of his defense.

In an equitable sense, Mr. Garcia's claim to prejudice is stronger. As Mr. Garcia made clear at the pretrial conference, this litigation has been a considerable strain on him for two years, and he would strongly prefer to put an end to it. CertainTeed, meanwhile, has shown little interest in moving beyond this dispute. Although the court cannot accurately forecast whether CertainTeed will attempt to resurrect the claims it now wishes to relinquish[3], CertainTeed refused at the pretrial conference to agree to a dismissal with prejudice. This suggests that it wishes to retain at least the threat of relitigation of these claims, a threat on which it might well make good.

On the other hand, even a dismissal with prejudice would not immunize Mr. Garcia from the threat of future litigation. As the court has already discussed, the permanent injunction will remain in place. CertainTeed can pursue relief in this court if it feels that Mr. Garcia's future conduct violates the injunction. Moreover, nothing prevents CertainTeed from filing another lawsuit if Mr. Garcia's future conduct violates the law without violating the permanent injunction.

[3] Because CertainTeed will obtain a final judgment on the merits, res judicata principles will bar at least some claims based on Mr. Garcia's prejudgment conduct. The court intimates no view as to the scope of the preclusive effect of that judgment.

CertainTeed also has sound reasons for seeking dismissal. It has apparently recognized that it has little hope of obtaining monetary relief from Mr. Garcia, so both parties have much to gain from avoiding the expense of the upcoming trial. There is no basis on the record before the court to find CertainTeed's remaining claims frivolous or unfounded, so forcing it to abandon those claims as a condition of avoiding trial is inequitable.

With all of these considerations in mind, the court grants CertainTeed's motion to voluntarily dismiss its unresolved claims. CertainTeed may move for a final judgment consistent with the June 28 order and permanent injunction. The court will, however, impose conditions on CertainTeed's dismissal. Because Mr. Garcia represented himself in this lawsuit, he incurred no attorney fees. He did, however, expend a substantial amount of time defending himself. In the June 28 order, the court authorized CertainTeed to seek monetary sanctions as a result of Mr. Garcia's improper conduct in discovery. CertainTeed's motion in limine includes a request for more than $15,000 in sanctions. The court notes that despite any shortcomings in Mr. Garcia's discovery responses, CertainTeed was able to prevail on some of its claims. In addition, some of Mr. Garcia's discovery shortcomings are likely better characterized as a failure to keep records of his past business practices. Because Mr. Garcia faces the threat of renewed discovery in a future litigation over the claims CertainTeed now dismisses, the court declines to award CertainTeed sanctions based on Mr. Garcia's discovery conduct. In addition, the court declines to require Mr. Garcia to pay for his half of mediation costs. Mr. Garcia now faces the prospect of another mediation over the same disputes.

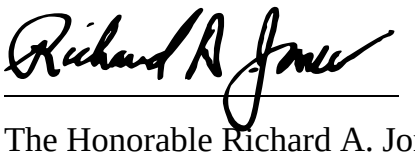
IV. CONCLUSION

For the reasons stated above, the court DENIES Mr. Garcia's motion for mistrial (Dkt. # 61) (which the court deems to be a motion for reconsideration), GRANTS CertainTeed's motion to dismiss (Dkt. # 65), and DENIES CertainTeed's motion in limine (Dkt. # 57) as moot. The court VACATES the August 2 trial date.

No later than 5:00 on Monday, July 26, CertainTeed shall file a brief of 12 pages or fewer regarding whether Mr. Garcia's proposed website revisions comply with the permanent injunction. Mr. Garcia shall respond in a brief of 12 pages or fewer no later than 5:00 on Thursday, July 29.

CertainTeed shall file a motion for entry of final judgment no later than Friday, July 30, 2010, along with a proposed form of judgment. It shall note that motion as a nondispositive motion in accordance with Local Rules W.D. Wash. CR 7(d)(3).

DATED this 23rd day of July, 2010.



The Honorable Richard A. Jones
United States District Judge