UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to:

***Bartlett v. E. I. du Pont de Nemours and Company*, Case No. 2:13-CV-0170**

DISPOSITIVE MOTIONS ORDER NO. 13

Plaintiff's Motion to Alter or Amend Judgment to Add Pre- and Post-Judgment Interest

This matter is before the Court on Plaintiff's Motion to Alter or Amend Judgment to Add Pre-and Post-Judgment Interest (ECF No. 4258), Defendant's Memorandum in Opposition (ECF No. 4265), and Plaintiff's Reply Brief (ECF No. 4272). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion.

I.

Plaintiff Carla Marie Bartlett's case was the first to go to trial of the over 3500 cases filed against E. I. DuPont De Nemours and Company ("DuPont") that make up this multidistrict litigation ("MDL"). Mrs. Bartlett's trial began on September 14, 2015, and lasted nearly a month. The jury returned a verdict in favor of Mrs. Bartlett for a total of $1.6 million dollars. Mrs. Bartlett now moves for pre- and post-judgment interest to be added to that award.

II.

The issue of whether to award Mrs. Bartlett prejudgment interest is governed by the law of Ohio. (Dispositive Motions Order No. 3, Choice of Law, ECF No. 3551); *Estate of Riddle ex rel. Riddle v. Southern Farm Bureau Life Ins. Co.*, 421 F.3d 400, 409 (6th Cir. 2005) (holding that in a diversity case the issue of prejudgment interest is governed by state law).

A. Standard

Ohio law provides for the award of prejudgment interest to a prevailing plaintiff in a tort case who makes a good faith effort to settle, while the defendant does not. The Ohio Revised Code provides:

> If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that *the party required to pay the money failed to make a good faith effort to settle* the case *and* that *the party to whom the money is to be paid did not fail to make a good faith effort to settle the case*, interest on the judgment, decree, or order shall be computed . . . [following particular directions established herein.]

Ohio Rev. Code § 1343.03(C)(1) (emphasis added).

A party has not "failed to make a good faith effort to settle the case" under Revised Code § 1343.03(C) if it has: "(1) fully cooperated in discovery proceedings, (2) rationally evaluated [its] risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, *and* (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party." *Jeffrey v. Marietta Mem. Hosp.*, No. 11AP-492, 2013 WL 1187544, at *16 (Ohio Ct. App. 10th App. Dist. Mar. 21, 2013) (citing *Kalain v. Smith,* 25 Ohio St.3d 157 (1986)) (emphasis added). The parties in the instant action focus on the fourth inquiry.

With regard to the good faith monetary settlement, the Ohio Supreme Court explains that, absent clear evidence that making a settlement demand would be futile, a prevailing party is required to have initiated settlement negotiations with a demand or offer:

> [I]it is incumbent on a party seeking an award to present evidence of a written (or something equally persuasive) offer to settle that was reasonable considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. Other factors would include responses—or lack thereof—and a demand substantiated by facts and figures. Subjective claims of lack of good faith will generally not be sufficient. These factors, and others where appropriate, should be considered by a trial court in making a prejudgment interest determination." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d [638,] 659 [(1994)].
>
> However, in *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421 [(1994)], we found that a plaintiff is relieved of any obligation to continue efforts to negotiate where he or she is told that a settlement offer will never be made and any additional negotiation would be considered "a vain act." *Id.* at 429.

Wagner v. Midwestern Indem. Co., 83 Ohio St. 3d 287, 293 (1998) (parallel citations omitted).

A trial court has wide discretion in deciding whether to award prejudgment interest based upon the evidence of the parties' settlement efforts. *LeMaster v. Huntington Natl. Bank,* 107 Ohio App.3d 639, 642 (Ohio Ct. App. 10th Dist. 1995). A trial court's denial of a motion for prejudgment interest will not be reversed absent a showing that the court abused its discretion. *Id.*

B. Analysis

From the earliest stages of this MDL the Court has encouraged the parties to engage in settlement negotiations. Through a selection process agreed to by the parties, a mediator was chosen and appointed. In her motion, Mrs. Bartlett sets out the history of the parties' representations to the Court concerning global settlement. Mrs. Bartlett points out that, while DuPont had originally indicated that it was interested in engaging in meaningful mediation before picking the trial cases, it continually changed its position to a later time period, (*e.g.*, after

expert disclosures, then after the filing of dispositive motions, then after decision on the dispositive motions). Mrs. Bartlett suggests that because she was continually ready and willing to engage in meaningful global mediation, her conduct constitutes "repeated good faith efforts to settle her case." (Pl.'s Mot. at 7.)

DuPont responds that Ohio law requires the party requesting prejudgment interest to prove a settlement demand was made to the party from whom prejudgment interest is sought. Here, it is undisputed that Mrs. Bartlett never made any settlement demand specific to her case. DuPont concludes, therefore, that her request for prejudgment interest fails on this threshold issue. This Court agrees.

As DuPont correctly points out, Ohio courts routinely reject requests for prejudgment interest where, as here, the party seeking the award failed to make a settlement demand. For example, in *LeMaster v. Huntington National Bank*, the plaintiffs argued that they were entitled to prejudgment interest even though they never made an express settlement demand. The court rejected this position, holding that "a defendant, regardless of the merits of the case, is entitled to receive a settlement demand as a precondition . . . to the issue of prejudgment interest" and that this settlement demand must contain "specific figure[s] . . . based upon an objective evaluation of the case relating to both liability and damages." 107 Ohio App.3d at 644.

Similarly, in *Jeffrey v. Marietta Memorial Hospital*, the court held that the "[p]laintiff's failure to tender a specific settlement demand" to the defendant and "start the ball rolling" precluded the plaintiff from being awarded prejudgment interest. 2013 WL 1187544, at *19 ("Because plaintiff failed to tender a reasonable settlement offer to Marietta, however, we need not consider whether Marietta was further justified in failing to make a settlement offer."). The *Jeffrey* court explained:

> "A plaintiff's primary obligation, in consideration of entitlement to prejudgment interest, relates back in time in any litigation to a plaintiff's burden to evaluate and make a considered settlement demand upon a defendant."

Id. at *18 (quoting *LeMaster*, 107 Ohio App.3d at 644).

In reply, Mrs. Bartlett contends that she should be excused from making a settlement demand because the Ohio Supreme Court has recognized "that a plaintiff is relieved of any obligation to continue efforts to negotiate where he or she is told that a settlement offer will never be made and any additional negotiation would be considered 'a vain act.'" (Pl.'s Reply at 2) (quoting *Wagner*, 83 Ohio St. 3d at 293)). In such a situation, where it has been made clear that the defendant will not engage in any settlement discussions, a plaintiff is not required to make a settlement demand in order to obtain prejudgment interest.

Mrs. Bartlett relies upon *Wagner v. Midwestern Indemnity Company* as an example. In that case, the Ohio Supreme Court reinstated the trial court's prejudgment interest award because the defendant insurance company had told the plaintiffs that "we're not paying you one thin dime." *Wagner*, 83 Ohio St. 3d 293. According to the Ohio Supreme Court, in such a situation, the plaintiffs were not required to make a formal settlement demand, because "any further attempt by the [the plaintiffs] to settle would have been in vain, since [the defendant] had already announced that it would not pay anything." *Id.*

Mrs. Bartlett argues that "[t]he same situation is presented in this case." (Pl.'s Reply at 4.) She continues, "DuPont has never made any offer to settle, has consistently and repeatedly refused to engage in substantive [global] mediation discussions, and has repeatedly pushed back and changed the start date for any such discussions each time an agreed-upon commencement point has been reached." *Id.* Mrs. Bartlett concludes that, "[j]ust as the insurance company made clear in *Wagner* that any settlement efforts would be futile, DuPont has made it clear

throughout this litigation that any attempt to settle would be 'in vain.'" *Id.* This Court, however, disagrees.

Mrs. Bartlett does not contend that DuPont ever made an unequivocal statement that it would never settle her case similar to the *Wagner* defendant's assertion that it would not pay the plaintiff one thin dime. While the Court agrees to an extent with Mrs. Bartlett that DuPont did not vigorously engage in mediation seeking a global settlement, those negotiations are not coterminous with negotiations specific to Mrs. Bartlett's case. *See Jeffrey*, 2013 WL 1187544, at *18 ("The [trial] court concluded that a global demand on all defendants could not take the place of an individualized demand given to a specific defendant").

Further, Ohio courts make clear that this Court "need not consider whether [the defendant] was further justified in failing to make a settlement offer . . . [when a] plaintiff failed to tender a reasonable settlement offer." *Jeffrey*, 2013 WL 1187544, at *18. "Even where a defendant is 'dilatory as far as their litigation practices,' such conduct, 'standing alone, does not entitle a party to prejudgment interest in the absence of the latter's failure to tender a written settlement demand.'" *Id.* (quoting *Moskovitz*, 69 Ohio St.3d at 659). *See also LeMaster*, 107 Ohio App. 3d at 644 ("Plaintiffs seem to argue that the requirement to "make a good faith effort to settle" can be satisfied by conduct apart from making an express settlement demand. It would appear from the many cases interpreting the mandates set forth in *Kalain* [*v. Smith,* 25 Ohio St.3d 157 (1986)], that this argument of plaintiffs is not well taken.").

Moreover, DuPont's conduct as set forth by Mrs. Bartlett, is not analogous to the type of conduct Ohio courts have found to be sufficient to relieve a plaintiff from the duty to make a settlement demand. *See e.g., Wagner*, 83 Ohio St. 3d 293. DuPont's conduct is more comparable to conduct Ohio courts have found insufficient to support an award of prejudgment

interest. For example, in *Garcia v. Cleveland Clinic*, the plaintiff never presented the defendant with a formal settlement demand "because he had been given the clear indication by two different attorneys who represented the [defendant] . . . that the [defendant] would defend the case and go to trial." No. 77011, 2000 WL 1231471, at *2 (Ohio Ct. App. Aug. 31, 2000). "The court found the defendant's position a 'far cry from the level of obstinacy and intransigentness seen in the fact patterns present in *Wagner* and *Galayda*.'" *Id.* at 3. The *Garcia* court concluded that, under such circumstances, "to hold that the [plaintiff] had no duty to present any evidence of an offer to settle would render nearly meaningless the requirement of [Ohio Revised Code §] 1343.03(C) that a party seeking prejudgment interest did not fail to make a good faith effort to settle the case." *Id.*

Likewise, the *LeMaster* court found insufficient "[t]he plaintiffs have alleg[ations] that the defendants failed to cooperate with respect to discovery, failed to negotiate in good faith, failed to attend a settlement conference, and generally neglected various duties incumbent upon a party as far as responsible representation during the course of litigation." 107 Ohio App. 3d at 643. The court explained that, "[w]hile a party could, through its conduct, exhibit all forms of good faith in an effort to settle, the opposing party could not be in a position to intelligently respond to overtures relating to settlement unless a specific figure was known and the specific figure was based upon an objective evaluation of the case relating to both liability and damages." *Id.* at 644.

Similarly, in the case *sub judice*, DuPont's failure to make an offer to settle and to vigorously engage in global settlement negotiations are not similar to the level of obstinacy Ohio courts require to relieve Mrs. Bartlett of her obligation under Ohio Revised Code § 1343.03(C) to make a settlement demand. And, while Mrs. Bartlett may have exhibited all forms of good

faith in an effort to settle her case, her failure to make a settlement demand put DuPont in a position that it could not intelligently respond to any settlement overtures. Accordingly, the Court finds Mrs. Bartlett's request for prejudgment interest not well taken.[1]

III.

The totality of Mrs. Bartlett's argument related to post-judgment interest is that "[u]nder Ohio Rev. Code § 1343.03(B), Plaintiff also is entitled to post-judgment interest at the statutory rate in effect as of the date judgment was rendered (October 8, 2015) to the date on which the money is actually paid and the judgment is satisfied." (Pl.'s Mot. at 7–8.) However, as DuPont correctly notes, while "state law governs the award of prejudgment interest . . . [i]n diversity cases in this Circuit, [it is] federal law [that] controls post-judgment interest[,]" specifically 28 U.S.C. § 1961. *Estate of Riddle ex rel. Riddle*, 421 F.3d at 409.

Section 1961(a) provides, in pertinent part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1–year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding. the date of the judgment.

28 U.S.C. § 1961 (footnote omitted).

The parties are **DIRECTED** to utilize 28 U.S.C. § 1961 to calculate the appropriate amount of post-judgment interest due on the jury award to Mrs. Bartlett. In the event the parties cannot agree upon the precise amount of interest as computed under this statute, the Court will render a final computation after hearing from the parties.

[1] Because Mrs. Bartlett admits that she never made a settlement demand, the Court finds it unnecessary to hold a hearing to determine whether she made "a good faith effort to settle the case." Ohio Rev. Code § § 1343.03(C)(1).

IV.

For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART** Mrs. Bartlett's Motion to Alter or Amend Judgment to Add Pre-and Post-Judgment Interest. (ECF No. 4258.) Specifically, the Court **GRANTS** the motion as it relates to post-judgment interest and **DENIES** the motion as it relates to prejudgment interest.

IT IS SO ORDERED.

3-22-2016
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE