

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

DOLORES K. BRAITHWAITE,

Plaintiff,

vs.

K-MART CORPORATION,

Defendant.

CIVIL NO. 628/1998

ACTION FOR DAMAGES
JURY TRIAL DEMANDED

NOT FOR PUBLICATION

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CABRET, J.

MEMORANDUM OPINION

(December 27, 2000)

Dolores K. Braithwaite slipped and fell in one of Kmart Corporation's ("Kmart") retail stores on St. Croix on May 25, 1998. Braithwaite sued Kmart for injuries caused by the fall, and following trial the jury returned a verdict in Braithwaite's favor. Kmart now brings this Motion to Dismiss the action on the ground that Braithwaite perpetrated fraud on the Court. Kmart asserts it is entitled to relief due to Braithwaite's "repeated perjury, in this case and others; [her] failure to provide accurate information to her expert witness; and procedural irregularities associated with [her] production of

medical records in this case.”¹ For reasons which follow, the motion will be denied.

FACTS AND PROCEDURAL POSTURE

In support of its motion, Kmart asserts that Braithwaite suffered injuries from three falls prior to the Kmart incident: in her V.I. Housing Authority (“VIHA”) apartment, at Sunshine Supermarket (“Sunshine”), and at Grand Union Supermarket. Kmart alleges Braithwaite denied the Sunshine fall both in litigation which arose from the VIHA fall and in response to interrogatories in the present action. In doing so, Braithwaite also allegedly concealed a previous back injury suffered in that fall, both from her medical expert and from the opposing party. Kmart procured the testimony of Braithwaite’s treating physician, Dr. Walter Pedersen, who testified at trial that he had treated her for back injuries after each fall. Kmart asserts that it “clearly established through the testimony of Dr. Pedersen . . . that the plaintiff had been untruthful about this incident.”² Kmart now complains that the plaintiff’s medical expert was therefore induced to rely on inaccurate information in reaching his findings that Braithwaite’s back injuries were caused by the fall at Kmart and were permanent. Kmart further asserts that relief on its motion is appropriate because it has now found a previously undisclosed medical record not received in discovery.³

Braithwaite is also now accused of concealing information that she had suffered further injury in an automobile accident three months after the Kmart accident. Kmart notes that Braithwaite testified to this accident at trial, only after being confronted by counsel on cross-examination. Moreover, Kmart argues the plaintiff lied about how much treatment she sought after the auto accident.

Kmart now argues that the plaintiff’s failure to disclose the above-noted information to her

¹ Kmart’s Memorandum in Support of Motion to Dismiss for Fraud on the Court at 1.

² Kmart’s Memorandum in Support of Motion to Dismiss at 3.

³ This record, as well as an accident report from the Sunshine fall, is merely cumulative evidence that Braithwaite had suffered a fall at Sunshine, a fact which Dr. Pedersen already testified to at trial. Furthermore, Kmart acknowledges that the failure to produce the record was due to a clerical error at Dr. Pedersen’s office and not through any deliberate effort to conceal by the plaintiff. These records therefore have no bearing on the court’s decision on this matter, as the facts to which they pertain have already been introduced at trial through Pedersen’s testimony.

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expert provided an inaccurate basis for his medical findings and is tantamount to fabrication of evidence. Significantly, Kmart does not allege any involvement of opposing counsel and, in fact, notes the greater likelihood that there was no collusion by counsel to propound the perjured testimony.

DISCUSSION

Kmart argues that the plaintiff's nondisclosure of prior accidents and alleged perjury constitute "fraud on the court" and asks this Court to exercise its inherent powers under Federal Rule of Civil Procedure 41(b) to dismiss the action. The defendant urges that the standard to be applied here are the *Poulis* factors for dismissal as a sanction, combined with factors devised by a subsequent New Jersey court.⁴ However, because Kmart specifically alleges "fraud on the court," the Court will look to cases decided under Federal Rule of Civil Procedure 60 (b) (the post-judgment remedy) for guidance in determining whether it should exercise its inherent powers to dismiss the action on this basis.

Rule 60(b) provides the Court discretion to set aside a final judgment for, *inter alia*, newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial and fraud, misrepresentation, or other misconduct of an adverse party, or any other reason justifying relief. *See* Fed. R. Civ. P. 60 (b). The court may also exercise its inherent powers to dismiss an action before a final judgment.

"Fraud on the court", which justifies dismissal, has been defined narrowly, to encompass only the most egregious conduct which seriously "subverts the integrity of the court itself or is ...perpetuated by officers of the court." *Gleason v. Jandrucko*, 860 F. 2d 556, 559, 560 (2d Cir. 1988). Recognizing that not all fraud will amount to fraud on the court, the courts have limited that finding to "only that species of fraud that does, or attempts to, subvert the integrity of the court

⁴ *See Perna v. Electronic Data Systems Corp.*, 916 F. Supp. 388 (D. N.J. 1996) (In sanctioning the plaintiff with dismissal for stealing counsel's documents during a lunch break, the court found that such a sanction should be analyzed under the following factors: the extent of the party's personal responsibility; prejudice; impact on the integrity on the judicial system; history of abuse and dilatory conduct; willfulness or bad faith; alternative sanctions; and meritoriousness of the claim.) (incorporating factors from *Poulis v. State Farm Fire and Casualty Co.*, 747 F. 2d 863 (3d Cir. 1984).

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itself or is fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner . . .” 7 J. MOORE & J. LUCAS, MOORE’S FEDERAL PRACTICE § 60.33, at 504-13 (2d ed. 1985). “In practice, this means that even fairly despicable conduct will not qualify as fraud on the court.” *Id.*; see also CHARLES A. WRIGHT AND ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2870 (1995).

Therefore, the limited conduct that have been found to come within this definition include: perjury in which an attorney knowingly participated, as opposed to perjury by a party or witness; bribery of a judge or juror; or improper influence exerted on the court by an attorney -- all instances “in which the integrity of the court and its ability to function impartially is directly impinged.” *Id.*; *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 1001, 88 L.Ed. 1250 (1944). In sum, conduct amounts to fraud on the court where it not only impugns the judicial system but is also unlikely to be exposed “by the normal adversary process.” *Id.*

Given this limited application, courts have been loathe to find that perjury or nondisclosure of information constitute fraud on the court, where the case was fully litigated before the court and the parties had an opportunity to challenge the testimony and cross-examine the witnesses. *Gleason*, 860 F. 2d at 559; *Hazel*, 64 S. Ct. at 1001 (citations omitted) (noting that courts have consistently held that perjury or fabrication of evidence are not grounds for relief as fraud on the court” because such conduct “are evils that can and should be exposed at trial”). Rather, the courts have held that the proper remedies for such conduct are impeachment and cross-examination, as well as contempt actions. *Hazel*, 64 S. Ct. at 1001.

In *Hazel*, which Kmart cites in support of its motion, the Supreme Court indeed found that the party had perpetrated a fraud on the Court by fabricating evidence to influence the Third Circuit Court of Appeals and the government agency. *Hazel*, 64 S. Ct. 997. Significantly, however, the scheme was specifically carried out by the attorney, who wrote an article under a pseudonym in a trade publication with the intent and effect of influencing a patent decision, and then later presented that article before the appellate court. The court found that these facts cut to the issue of judicial integrity and were sufficiently egregious to rise to the level of fraud on the court, given the direct involvement of the attorney in plotting to deceive the court. The Court specifically noted that the

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facts of the case went beyond mere perjury of a witness, thus justifying relief even 12 years after final judgment.

Other courts have found similarly, refusing to use inherent powers to dismiss where perjury or failure to disclose information in discovery is alleged. *See e.g. Gleason*, 860 F. 2d 556 (refusing to find fraud on court where police officers in a civil rights suit lied at deposition and concealed relevant evidence regarding eyewitnesses' proffered testimony, thereby inducing plaintiff to accept a settlement in an unlawful arrest action); *Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters*, 675 F. 2d 1349, 1357 (4th Cir.), *cert den.* 459 U.S. 1128, 103 S. Ct. 764 (1984) (holding there was no fraud on the court where the defendant, after being charged with a \$1 million judgment for damages from violence in a secondary strike, discovered that the plaintiff had actually planned and executed some of the violence, despite finding that the plaintiff's company witnesses had perjured themselves at trial and fabricated the evidence; holding that the company's actions, "however reprehensible," did not amount to fraud on the court.); *Kerwitt Med. Prod. V. N & H Instruments*, 616 F. 2d 833 (5th Cir. 1980) (finding no fraud on the court where attorneys failed to advise the Court of material facts not requested in discovery, and noting that if information requested in discovery had been concealed, the court would rely on the "well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to the controversy before the court does not add up to fraud of the court.").

Even more illustrative is the decision in *Lockwood v. Bowles*, which involved deliberate fabrication and concealment of evidence by the parties, intended to influence the outcome of the litigation. *Lockwood v. Bowles*, 46 F.R.D. 625 (D.D.C. 1969). The defendant and her husband had concocted an elaborate scheme to ensure she would take the entire estate in the event of his death. She therefore lied at trial that she never had – and could not have – any children and had raised, though not adopted, two orphan children. The defendant took the entire estate. The scheme was uncovered 11 years later, when it was discovered that the two children were actually the couple's natural born and that hospital records had been fabricated and presented to the court to support the couple's story. *Id.* The scheme prevented the couple's children from taking their share of the estate. However, the court refused to set aside the proceedings, holding that the facts did not

amount to fraud on the court but, rather, presented a credibility issue which was more properly attacked on cross-examination. *Id.* at 633.

On facts strikingly similar to the instant action, this jurisdiction – relying on *Lockwood* -- has held that neither perjured testimony nor false answers to interrogatories amounts to fraud on the court. *Petry v. Gen. Motion Corp.*, 62 F.R.D. 357, 359 (Pa. 1974). This was a personal injury suit in which the defendant gave false and misleading answers to interrogatories regarding whether it had received similar complaints of problems with its engines and also concealed engine test results. *Id.* Plaintiff complained it relied on that information in deciding to settle the case. The Court found that there was, indeed, fraud, but noted that such fraud did not rise to the level of fraud on the court.

The Court observed, “If perjured testimony does not rise to the level of fraud upon the court, it cannot be said that false answers to interrogatories should be given such status.” *Id.* at 361.

These cases are in line with the general proposition that fraud on the court requires more than just perjury or nondisclosure, but must involve conduct which goes to the very heart of judicial integrity. Thus, the touchstone for finding fraud on the court has been involvement of an officer of the court and the absence of any opportunity to challenge the fraud or the perjured testimony in the course of the regular adversary process. *See Levander v. Prober*, 180 F.R.D. 1114 (9th Cir. 1999) (While noting that a party cannot claim fraud on the court when it could have challenged the testimony at trial, the court found such fraud existed in that instance because the nature of the information – concealed corporate assets which affected settlement decisions– could not have been discovered and where there was no reason for the adverse party to question the veracity of the defendant’s responses regarding those assets.).⁵

Kmart cites to *Publicker* for the proposition that the Third Circuit has accepted perjury as a

⁵ The authorities on which Kmart rely are also consistent with the line of cases that require involvement of counsel or serious interference with the judicial process. *See Aoude v. Mobil Oil Corp.*, 892 F. 2d 1115, 1118 (1st Cir. 1989) (relying on *Hazel* and dismissing action where plaintiff had produced a bogus purchase agreement); *Nichols v. Klein Tools, Inc.*, 949 F. 2d 1047, 1048 (dismissing product liability suit for injuries from a defective hook where the party had, in fact, been injured by a home-made hook; holding that dismissal was appropriate because the plaintiff’s conduct destroyed the entire theory of the claim); *Pope v. Federal Express Corp.*, 974 F. 2d 982 (8th Cir. 1992) (sanctioning the plaintiff with dismissal under Rule 11 where a fabricated letter was used to support a sexual harassment claim and where the plaintiff’s counsel knew false testimony was being offered).

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sufficient basis for finding fraud on the court and quotes to one sentence of that decision.⁶ However, the Court in *Publicker* went to great pains to underscore its reasoning for finding fraud on the court in that instance. That case involved a receiver who accepted an extremely low settlement on a debt based on the debtor's lies regarding his true financial worth. The Court, accepting the general proposition that litigants should expect the possibility of false testimony and be prepared to "meet and expose perjury" at trial, noted that judgment may not be avoided merely because of perjury. *Publicker*, 106 F. 2d at 950, 951. However, the Court reasoned that relief was appropriate in that instance because: 1) there had been no real adversarial hearing; 2) the receiver was not serving its own interest, unlike a private litigant who will give greater effort to uncovering perjury; 3) the Court had acted as an advocate for the settlement offer; 4) and the Court had an interest in finding the truth on behalf of the creditors. *Id.* at 951. Moreover, the Court noted that, because of its role as an "advocate" in that case, "petitioner's perjury not only misled the receivers, but impinged directly on the administration of justice." Therefore, contrary to Kmart's assertions, *Publicker* is not inconsistent with the legal principles herein stated.

In the case *sub judice*, Kmart complains that Braithwaite lied in a deposition in a previous case and in interrogatories in this case, as well as withheld information from her expert witness in a deliberate attempt to influence the outcome of the proceeding. It is axiomatic that the truthfulness of a witness' testimony is a matter that goes to credibility and weight, which is the province of the jury. Kmart had an opportunity to challenge such testimony or uncover any false testimony and, in fact, did so through cross-examination and impeachment testimony. Kmart notes in its brief that Braithwaite offered vague testimony on these issues and did not admit to having been injured after the Kmart incident until confronted with information on cross examination. Further, Dr. Walter Pedersen offered testimony on behalf of Kmart which contradicted the testimony by Braithwaite regarding the Sunshine fall and resulting back injury. Kmart notes in its motion that Pedersen clearly established Braithwaite's untruthfulness in his own testimony. On cross-examination, Kmart was also able to elicit information of an auto accident it claims Braithwaite was attempting to

⁶ "We believe truth is more important than the trouble it takes to get it." *Publicker v. Shallcross*, 106 F. 2d 949, 952 (3d Cir. 1939).

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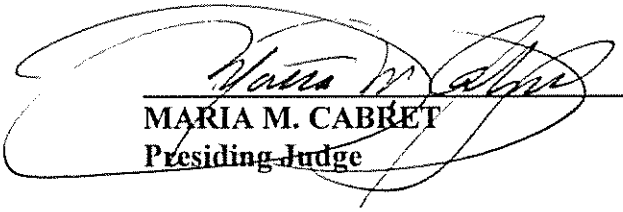
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conceal. The facts of this case fall squarely within the wealth of authority that holds that perjured testimony and concealment of information are more appropriately revealed on cross-examination or through impeachment testimony. The fact that the jury resolved the issues in favor of the plaintiff, notwithstanding the cross-examination of Braithwaite and the testimony of Dr. Pedersen, does not justify granting the relief requested.

CONCLUSION

While this Court undoubtedly frowns upon the type of conduct alleged in this case, such conduct does not rise to the level of fraud on the court. Rather, the proper remedy is to present the plaintiff's untrue statements and inconsistent responses to the jury to be considered in its credibility determinations. The defendant had an opportunity to do so at trial and, in fact, aptly uncovered Braithwaite's omissions and untrue statements through its cross-examination of Braithwaite and impeachment testimony of Dr. Walter Pedersen. The jury nevertheless resolved the conflicting testimony in favor of the plaintiff. The defendant's motion to dismiss this action based on fraud upon the court will, therefore, be denied.



MARIA M. CABRET
Presiding Judge