

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80051-CIV-PAINE/JOHNSON

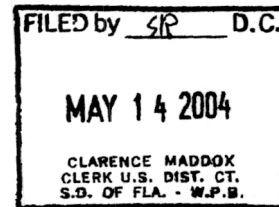
FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

SLIM DOWN SOLUTION, LLC, SLIM DOWN
SOLUTION, INC., S.S.T. MANAGEMENT, INC.,
THE KARA GROUP, LLC, RONALD ALARCON,
KATHLEEN ALARCON, MADERIA
MANAGEMENT, INC., POLYGLUCOSAMINE,
LTD., STEPHEN PIERCE,

Defendants.



**OMNIBUS ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT DENYING PLAINTIFF'S MOTION IN LIMINE AND DENYING
DEFENDANTS', MADERIA, POLYGLUCOSAMINE, AND STEPHEN PIERCE,
MOTION FOR LEAVE TO LATE FILE RESPONSE TO MOTION FOR SUMMARY
JUDGMENT AND LEAVE TO DESIGNATE LEE DEXTER AS AN EXPERT WITNESS**

This matter is before the court upon the Plaintiff's Motion for Partial Summary Judgment (DE 51), Plaintiff's Motion in Limine (DE 56), and Defendants' Maderia Management, Inc., Polyglucosamine, Ltd., and Stephen Pierce, Motion for Leave to Late file Response to Motion for Partial Summary Judgment and Leave to Designate Lee Dexter as an Expert Witness (DE 66).

PROCEDURAL BACKGROUND

The Federal Trade Commission ("FTC" or "Plaintiff"), filed this action against the Defendants for false and unsubstantiated advertising claims in relation to Slim Down Solution, a purported fat-absorption and weight-loss product, and its alleged active ingredient D-glucosamine, in January 2003. Pursuant to this court's order, this matter was set for a non-jury trial commencing on April 19, 2004 (DE 35). Pursuant to said Order, the deadline for filing pretrial motions was

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February 19, 2004. Plaintiff filed its Motion for Partial Summary Judgment on February 19, 2004. The Defendants had until and including March 4, 2004 within which to file a response or opposition to the Plaintiff's Motion for Partial Summary Judgment. No response or opposition was filed. Thereafter, the Plaintiff, on March 5, 2004 filed its Reply in Support of the Summary Judgment, stating that the Motion had gone unopposed. Finally on March 11, 2004, Defendants Maderia Management, Inc. Polyglucosamine, Ltd., and Stephen Pierce ("Maderia Defendants"), filed a Motion for Leave to Late file Response to Motion for Partial Summary Judgment and Leave to Designate Lee Dexter as an Expert Witness.²

SUMMARY JUDGMENT STANDARD

The procedure for disposition of a summary judgment motion is well established. According to the Federal Rules of Civil Procedure, summary judgment is authorized only when:

the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
Fed.R.Civ.P. 56.

The party moving for summary judgment has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In applying this standard, the Adickes Court explained that when assessing whether the movant has met this burden,

¹The Plaintiff also filed Plaintiff's Motion in Limine (DE 56) to which the Defendants never responded nor opposed.

²No response or opposition to the Partial Summary Judgment was ever filed by Defendants Slim Down Solution, LLC, Slim Down Solution, Inc., S.S.T. Management, Inc., The Kara Group, LLC, Ronald Alarcon, and Kathleen Alarcon. The court notes that Ronald Alarcon and Kathleen Alarcon filed a Suggestion of Bankruptcy, however, this matter is exempt from the automatic stay. The court has specifically addressed the Suggestion of Bankruptcy pursuant to a separate order.

the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non- movant. Id.

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact, the non-moving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir.1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir.1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir.1982). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

DISCUSSION

Defendants failed to respond to the Motion for Partial Summary Judgment.³ The failure of a party to exercise its rights to file materials in opposition to a summary judgment motion pursuant to Fed. R. Civ. P. 56 may result in the Court accepting any of the moving party's uncontroverted evidence as true. "Failure to respond adequately to the motion may result in a final judgment adverse to this plaintiff being entered without the benefit of trial. Celotex Corp. v Catrett, 477 U.S. 317 (1986)."

The court finds that the facts introduced by the FTC, in support of the Motion for Partial Summary Judgment, are uncontroverted. Accordingly, there are no genuine issues as to any material facts. Therefore, the FTC is entitled to a judgment as a matter of law. Therefore, being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that said Motion for Partial Summary Judgment (DE 51) is GRANTED. Pursuant to Rule 58, Fed.R.Civ.P., Judgment will be entered by separate Order.⁴ It is further

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine (DE 56) is DENIED as

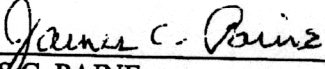
³The court finds that the Maderia Defendants have not shown good cause for an extension of time(DE 66) and accordingly deny their Motion for Leave to Late File a Response. Upon review of the record the court notes that the Maderia Defendants have not made much of an effort to comply with the court ordered deadlines. The court sympathizes with the Pierce's plight, however, Mrs. Pierce's ongoing illness does not justify the failure to timely request an enlargement of time. It appears as though the Maderia Defendants have chosen to ignore the court imposed deadlines until judgment against them was imminent.

⁴ Ronald Alarcon and Kathleen Alarcon have filed a Voluntary Petition for Bankruptcy Relief under Chapter 13 of the Bankruptcy Code. Even though this matter is exempt from the automatic stay, as acknowledged by the FTC, the Section 362(b)(4) exemption precludes the collection of any monetary judgment entered in this case against the Alarcons outside of their bankruptcy case.

moot. It is further

ORDERED AND ADJUDGED that Defendants' Maderia Management, Inc., Polyglucosamine, Ltd., and Stephen Pierce, Motion for Leave to Late file Response to Motion for Partial Summary Judgment and Leave to Designate Lee Dexter as an Expert Witness (DE 66) is DENIED.

DONE and ORDERED at West Palm Beach, Florida, this 14th day of May, 2004.



JAMES C. PAINE
UNITED STATES DISTRICT JUDGE

c: Karen Muio, Esq.
Carl A. Schmitt, Esq.
Darren Rice, Esq.
Jennifer Coberly, Esq.