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United States District Court, D. Connecticut.

Richard MESSIER, et al.
v.
SOUTHBURY TRAINING SCHOOL, et al.

No. 3:94–CV–1706 (EBB). | Dec. 2, 1998.

Opinion

RULING ON MOTION TO COMPEL RETURN OF DOCUMENTS

BURNS, Senior J.

***1** This ruling presents the question of what remedy, if any, should be ordered based on plaintiffs' motion to compel the return of documents, when the defendants[1] returned the requested documents two weeks after the motion was filed. On July 31, 1998, plaintiffs moved pursuant to Federal Rule of Civil Procedure 37(a) for an order requiring the defendants to return documents provided to them by the plaintiffs. In the same motion, plaintiffs sought additional relief and sanctions to remedy the prejudice allegedly caused by the delay in the return of the documents. Approximately two weeks after plaintiffs filed this motion, the defendants returned the documents sought. The only remaining matter concerns whether the Court should grant the additional relief and sanctions requested by the plaintiffs. For the following reasons, plaintiffs' motion to compel [Doc. No. 413] is granted in part and denied in part.

BACKGROUND

The Court summarizes only those facts necessary to reach a conclusion on this motion. On December 8, 1997, the defendants deposed Robert B. Kugel, M.D., plaintiffs' expert witness. At that time, defense counsel Thomas B. York, Esq. asked plaintiffs' counsel David C. Shaw, Esq. to provide the documents that Dr. Kugel relied upon to reach his opinion that the level of medical and health care at STS remains significantly below average. These documents include notes from Dr. Kugel's visits to STS, notes from his review of STS records, notes in preparation of his written report, and copies of internal documents and patient charts from STS. Plaintiffs gave the defendants these documents for the purpose of making copies. (Pls.' Mot. Compel ¶ 1.)

On February 20, 1998, defense experts Mark Hauser, M.D. and Theodore Kastner, M.D. issued two reports critiquing Dr. Kugel's conclusions. Plaintiffs' counsel showed Dr. Kugel these two reports to help prepare for the depositions of Dr. Hauser and Dr. Kastner scheduled on March 20, 1998 and April 2, 1998 respectively.[2] Dr. Kugel responded that he needed to review his notes to refresh his recollection regarding the original basis for his opinions. (Pls.' Reply Mem. at 5.) Attorney Shaw wrote Attorney York demanding the return of Dr. Kugel's notes and documents in a letter dated March 19, 1998 and sent by facsimile on March 23, 1998. (Letter from David C. Shaw, Esq. to Thomas B. York, Esq. of 3/23/98.) Defense counsel responded on March 24, 1998 by returning some documents, (Letter from Christina L. Smith to David C. Shaw, Esq. of 3/24/98), but they were not the specific documents that plaintiffs desired. (Defs' Mem. Opp. at 1–3; Pls.' Reply Mem. 1–3.)

It appears that two sets of documents were utilized at Dr. Kugel's deposition. First, nine deposition exhibits were created which amounted to approximately 100 pages. Second, Dr. Kugel had examined 10,000 to 20,000 documents which formed the basis for his written report and deposition testimony. Plaintiffs had turned over each of these sets of documents to the defendants for copying after Dr. Kugel's deposition on December 8, 1997. Defendants returned the nine deposition exhibits, but the second set of documents were not turned over. (Pls.' Reply Mem. 1–3.)

***2** On April 1, 1998, Attorney Shaw faxed Attorney York a letter reiterating plaintiffs' request for the Kugel documents and specifically mentioning their difficulty in preparing for Dr. Kastner's upcoming deposition on April 2, 1998. (Letter from David C. Shaw, Esq. to Thomas B. York, Esq. of 4/1/98.) On this same day, Attorney York responded with a facsimile attaching the earlier letters, apparently believing that the documents he sent and plaintiffs' April 1 letter had crossed in the mail. (Defs.' Mem. Opp. at 3–4.) From this point forward, both parties vigorously dispute what transpired.

Plaintiffs' counsel contends that he made numerous oral requests of defense counsel York between April 1998 and July 1998. (Pls.' Mot. Compel at 1; Pls.' Mem. Supp. Mot. Compel at 2.) On the other hand, Attorney York argues that Attorney Shaw mentioned the Kugel documents only once in a telephone call. (Defs.' Mem. Opp. at 4.) It suffices to say that the parties could not resolve the problem without court intervention. On July 31, 1998, plaintiffs made a motion to compel the defendants to return the documents pursuant to Federal Rule of Civil Procedure 37(a). Plaintiffs also requested

the following additional remedies: (1) an order permitting Dr. Kugel to return to STS to collect data to reconstruct the basis for his opinions; (2) an order precluding Dr. Hauser and Dr. Kastner from offering rebuttal testimony at trial; and (3) an award of attorney's fees and costs associated with this motion. (Pls.' Mot. Compel at 4.) Approximately two weeks later, the defendants returned the specific documents sought. (Pls.' Reply Mem. at 1; Defs.' Mem. Opp. at 5.)

On September 18, 1998, plaintiffs filed their reply brief which modified the relief sought in light of the return of the Kugel documents. Plaintiffs now seek an order permitting them to depose Dr. Hauser and Dr. Kastner again at defendants' expense regarding their criticisms of Dr. Kugel's report and deposition testimony. (Pls.' Reply Mem. at 6.) In addition, they continue their request for an award of reasonable attorney's fees and costs associated with this motion. (*Id.*) Plaintiffs claim that the delay in returning Dr. Kugel's notes and documents prejudiced them in effectively addressing the opinions of Dr. Hauser and Dr. Kastner at their respective depositions. (Pls.' Mot. Compel ¶¶ 8–12.) Plaintiffs deposed Dr. Hauser on March 20, 1998 and Dr. Kastner on April 2, 1998. (Pls.' Reply Mem. at 5.) They complain that Dr. Kugel could not assist them in forming questions for the defense experts without his notes, and that they could not confront the experts with documents collected from STS by Dr. Kugel because the defendants possessed them at this time. As matters currently stand, discovery has been concluded and plaintiffs cannot further depose Dr. Hauser and Dr. Kastner again absent a court order to the contrary.

DISCUSSION

I. *Fed.R.Civ.P. 30(f)(1): Procedures to Copy Documents*

***3** Federal Rule of Civil Procedure 30(f)(1) provides that "[d]ocuments and things produced for inspection during the examination of a witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party." Rule 30(f)(1) also describes alternative procedures for the making of copies in the event that the party producing the documents wishes to retain them. Pursuant to this rule, plaintiffs gave the defendants Dr. Kugel's notes and copies of documents taken from STS for their inspection and to make copies. Rule 30(f)(1) does not specify the procedures governing the return of documents after copying has been completed by a party. However, the rule clearly contemplates that such documents will be returned in a timely fashion so as not to facilitate prejudice to the opposing party. The defendants do not dispute that there was a significant delay in returning the Kugel documents. (Defs.' Mem. Opp. at 9.)

II. *Fed.R.Civ.P. 37(a): Motions to Compel and Sanctions*

Federal Rule of Civil Procedure 37 provides district courts with the authority to oversee the discovery process by issuing orders compelling discovery and sanctions against noncomplying parties. Rule 37(a)(2)(B) allows parties to compel discovery under Rules 30, 31, 33, and 34. While Rule 37(a)(2)(B) permits litigants to compel the inspection of documents in connection with a deposition as provided by Rule 30, it does not mention a corresponding right to compel the return of documents borrowed for copying to their rightful owner. However, the Court finds that Rule 37(a)(2)(B) implicitly requires that all borrowed documents must be promptly returned.

A party making a motion to compel discovery under Rule 37(a) must certify "that the movant has in good faith conferred or attempted to confer" with the opposing party "in an effort to secure the information or material without court action." Fed.R.Civ.P. 37(a)(2)(B). Conclusory statements in an affidavit asserting that the movant fulfilled the good faith meet-and-confer requirement does not satisfy Rule 37(a). *See Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.,* 1998 WL 67672, at *2 (S.D.N.Y. Feb.18, 1998); *Tri–Star Pictures, Inc. v. Unger,* 171 F.R.D. 94, 99 (S.D.N.Y.1997). Instead, the meet-and-confer requirement mandates that:

> [Parties must] meet, in person or by telephone, and make a genuine effort to resolve the dispute by determining ... what the requesting party is actually seeking; what the discovering party is reasonably capable of producing that is responsive to the request; and what specific genuine issues, if any, cannot be resolved without judicial intervention.

Deckon v. Chidebere, 1994 WL 494885, at *5 (S.D.N.Y. Sept.9, 1994). Movants must detail the efforts to confer and explain why they proved fruitless. *Ballou v. University of Kansas Med. Ctr.,* 159 F.R.D. 558, 559–60 (D.Kan.1994). Plaintiffs have complied with this requirement. As a result, the Court may order the defendants to allow the plaintiffs to take the depositions of Dr. Hauser and Dr. Kastner again if it finds that plaintiffs suffered prejudice by not having Dr. Kugel's notes and materials.

***4** Rule 37(a)(4)(A) also permits district courts to award attorney's fees and costs associated with a motion to compel discovery. The rule states the following:

> If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or the deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Fed.R.Civ.P. 37(a)(4)(A). Under this provision, the Court must order reasonable costs and attorney's fees unless the movant failed to attempt to solve the problem in good faith without court action, the nonmovant's action or inaction was substantially justified, or other circumstances make an award of expenses unjust. Fed.R.Civ.P. 37 Advisory Comm. Notes to 1970 Amendments. The Supreme Court has clarified that a party's discovery conduct is "substantially justified" if it constitutes a response to a "genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action." *Pierce v. Underwood,* 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (citations omitted).

Disciplinary sanctions under Rule 37 should serve three functions. First, sanctions should ensure that a party will not benefit from its own failure to comply with the discovery rules. *See Update Art, Inc. v. Modiin Publ'g, Ltd.,* 843 F.2d 67, 71 (2d Cir.1988); *Cine Forty–Second St. Theatre v. Allied Artists Pictures Corp.,* 602 F.2d 1062, 1066 (2d Cir.1979). Second, sanctions constitute specific deterrents and seek to obtain compliance with either court orders or the ordinary standards of care appropriate for parties and their attorneys. *See Update Art,* 843 F.2d at 71; *Cine Forty–Second St.,* 602 F.2d at 1066; *Burnett v. Venturi,* 903 F.Supp. 304, 308 (N.D.N.Y.1995). Third, sanctions should serve as a general deterrent in the case at hand and in other litigation, provided that the party against whom they are imposed was in some sense at fault. *See National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam); *Update Art,* 843 F.2d at 71.

Defendants have attempted to explain their failure to return the Kugel documents as an unintentional error, partly caused by the plaintiffs. Clearly, the imposition of the harshest sanctions under Rule 37(b)-(d), such as the preclusion of evidence or the dismissal of an action, requires willful misconduct or bad faith. *See, Societe Int'l v. Rogers,* 357 U.S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); *United States v. Certain Real Property Located at Route 1, Bryant, Ala.,* 126 F.3d 1314, 1317 (11th Cir.1997); *Update Art,* 843 F.2d at 71; *cf. Taylor v. Illinois,* 484 U.S. 400, 415–17, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (discussing the preclusion of witness testimony for willful discovery misconduct in a criminal case). Considerations of fair play dictate that courts eschew the harshest sanctions where failure to comply is due to a mere oversight of counsel amounting to no more than simple negligence. *See Cine Forty–Second St.,* 602 F.2d at 1068; *Affanato v. Merrill Bros.,* 547 F.2d 138, 141 (1st Cir.1977). Courts must inquire into the actual difficulties which the violation causes and must consider less drastic responses when litigants seek severe sanctions. *See Outley v. City of New York,* 837 F.2d 587, 591 (2d Cir.1988).

***5** In this case, the Court need not find bad faith or willful misconduct because plaintiffs filed their motion to compel pursuant to Rule 37(a), not Rule 37(b)-(d). Plaintiffs do not seek Rule 37(b)-(d)'s harshest remedies, but rather make a Rule 37(a) motion for leave to depose defendants' experts again and an award of attorney's fees and costs. Rule 37(a) does not require courts to make a finding of bad faith before ordering discovery or awarding attorney's fees as a sanction. *See Merritt v. International Bhd. of Boilermakers,* 649 F.2d 1013, 1019 (5th Cir.1981); *Devaney v. Continental Am. Ins. Co.,* 1154, 1162–63 (11th Cir.1993); Fed.R.Civ.P. 37 Advisory Comm. Notes to 1970 Amendments. As such, it proves unnecessary to determine whether defendants' failure to return the documents was willful or in bad faith. The Court may order the requested relief to remedy any prejudice that plaintiffs may have suffered so long as Rule 37(a)'s requirements have been satisfied.

III. *Additional Relief Requested by Plaintiffs*

A. Depositions of Defense Experts

The Court first denies plaintiffs' request to depose Dr. Hauser again because they likely suffered little prejudice in not having the Kugel documents when they deposed Dr. Hauser on March 20, 1998. Plaintiffs possessed advance notice of this date. However, the facts show that plaintiffs' counsel made his first written demand for the Kugel documents three days *after* the deposition took place. Plaintiffs faxed their letter dated March 19, 1998

on March 23, 1998. (Pls.' Reply Mem. at 3 n. 2; Shaw Aff. ¶ 6.) Furthermore, plaintiffs never requested a continuance of Dr. Hauser's deposition at that time. (Defs.' Mem. Opp. at 6.) Given these circumstances, the Court has little undisputed evidence that plaintiffs were prejudiced in preparing for Dr. Hauser's deposition without the Kugel documents. Therefore, the Court denies plaintiffs' petition to depose Dr. Hauser again at this juncture in the case.

At the same time, the Court grants plaintiffs leave to depose Dr. Kastner again because there exists undisputed written evidence validating their need for the Kugel documents prior to Dr. Kastner's first deposition on April 2, 1998. Plaintiffs' letters faxed on March 23, 1998 and April 1, 1998 strongly indicate the necessity of the Kugel documents. Moreover, plaintiffs' counsel requested the Kugel documents again at Dr. Kastner's fourth deposition on June 28, 1998. (Kastner Dep. at 256–57.) Without reaching a conclusion regarding whether the defendants' conduct was willful, the Court finds that plaintiffs suffered prejudice in being deprived of the Kugel documents during their depositions of Dr. Kastner. Therefore, the Court grants plaintiffs' request to depose Dr. Kastner again. In this regard, defendants shall allow the plaintiffs to depose Dr. Kastner on a date no later than December 24, 1998. The only matters that plaintiffs may address at this deposition are Dr. Kastner's criticisms of Dr. Kugel's written report and deposition testimony. The deposition shall last no longer than one day.

B. Attorney's Fees and Costs

***6** Under Federal Rule of Civil Procedure 37(a)(4)(A), the Court may order reasonable costs and attorney's fees unless the movant failed to attempt to solve the problem in good faith without court action, "the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." The circumstances underlying this motion render an award of attorney's fees and costs "unjust." First, most of the relevant factual evidence in connection with this motion remains vigorously disputed by the parties. Second, discovery has been closed. Third, plaintiffs were provided with the Kugel documents in August 1998, and thus have had almost four months to review them to prepare for trial in January 1999. Finally, the remedy of leave to depose Dr. Kastner appropriately compensates for any prejudice plaintiffs suffered. As a result, the Court denies plaintiffs' petition for an award of attorney's fees and costs associated with this motion.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to compel [Doc. No. 413] is granted in part and denied in part. The Court's ruling may be summarized as follows: (1) the Court denies plaintiffs' request for attorney's fees and costs associated with this motion; (2) the Court denies plaintiffs' application to depose Dr. Hauser again; and (3) the Court grants plaintiffs' leave to depose Dr. Kastner again. In this regard, defendants shall allow the plaintiffs to depose Dr. Kastner on a date no later than December 24, 1998. The only matters that plaintiffs may address at this deposition are Dr. Kastner's criticisms of Dr. Kugel's written report and deposition testimony. This deposition shall last no longer than one day.

SO ORDERED.

Footnotes

1 The defendants are the Commissioner of the Department of Mental Retardation, the Commissioner of the Department of Social Services, the Commissioner of the Department of Public Health, Southbury Training School ("STS"), and the Director of STS (collectively "defendants").

2 The parties dispute whether Dr. Hauser and Dr. Kastner reviewed Dr. Kugel's notes and documents to prepare for their depositions by the plaintiffs. (Pls.' Mem. Supp. Mot. Compel at 2; Defs.' Mem. Opp. at 5–6.)