Vermont Superior Court
Filed 07/11/22
Washington Unit

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 295-5-19 Wncv

AARON LEWIS,
Plaintiff,

v.

NORTHFIELD SAVINGS BANK et al.,
Defendants.

RULING ON NSB'S MOTION FOR FEES

Defendants (collectively, NSB) seek an assessment of expenses under Rule 37(a)(4) following the long-delayed production of discovery by Mr. Lewis after NSB finally filed a motion to compel. Mr. Lewis argues that his resources are too limited to tolerate a financial sanction, any delay was reasonable under the circumstances, and NSB's discovery requests were, in part at least, unreasonable, disproportionate, overly burdensome, and irrelevant. A hearing on the motion was held on June 30, 2022.

At issue were certain interrogatories and requests to produce promulgated in May 2020 that, despite extensive back and forth between the parties, had not been satisfactorily (or much at all in some cases) responded to by the time of NSB's January 10, 2022, motion to compel. NSB carefully supported its motion in detail. Mr. Lewis responded by arguing that the parties had not adequately conferred, largely because NSB did not announce a date certain by which to comply with the discovery requests prior to filing a motion to compel. He did not respond in substance. Instead, he asked that the court give him an opportunity to respond in substance should it not deny NSB's motion. NSB assented to the extension. In a February 4, 2022, decision, the court declined to deny the motion to compel due to any lack of conferring—the parties had conferred extensively already—but granted the motion to extend because NSB had assented to it. In between then and April 19, when NSB filed the motion under consideration, Mr. Lewis satisfied the outstanding discovery requests, mooting the motion to compel, which the court thus never formally granted.

The literal text of V.R.C.P. 37(a)(4) requires an award of expenses "[i]f the motion [to compel] is granted." In this case, Mr. Lewis complied with his discovery obligations before the court ruled on the motion, which therefore was not "granted." The court's inherent authority and the spirit of the discovery rules, however, are sufficient to give the court authority to award expenses in the circumstances of this case. Federal Rule 37 also used to appear—on its face anyway—to not authorize expenses unless the motion was granted. In 1993, F.R.C.P. 37(a)(4) was amended to expressly extend to the situation in which an uncooperative party produced the withheld discovery after the motion was filed but before it was granted. The Advisory

Committee's Note simply says, "Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing." The current provision appears at F.R.C.P. 37(a)(5)(A). The amendment was technical and unremarkable. If the rule were otherwise, it would be an invitation to not produce discovery until staring down a motion to compel, which obviously would be contrary to the spirit of the rules.

Prior to the 1993 amendment, some courts had confronted the issue and had no problem assessing expenses despite not having formally granted a motion to compel:

> Although defendants in the instant case produced the requested information before the court had an opportunity to rule on the above-mentioned motions, I find that the defendants were not justified in refusing to comply with the plaintiff's requests between April 1979 and February 1980 and I rule that consequently the plaintiff may recover reasonable expenses.
>
> I note that to rule otherwise would permit a party seeking without substantial justification to delay his opponent's acquisition of properly discoverable information to do so without any risk of becoming liable for his opponent's reasonable expenses by complying with the request at the eleventh hour just before the court has an opportunity to rule on his opponent's motion to compel. Repeated use of this tactic could wreak financial ruin on the opponent.
>
> In light of the foregoing and because I find no justification for defendants' refusal to either produce the documents requested by the plaintiff or answer the questions propounded by the plaintiff in this case, I rule that plaintiff is entitled to recover the reasonable expenses of the motion including attorney's fees. After an affidavit as to time and expenses is submitted by counsel for plaintiff, a hearing, if necessary, will be held to determine the amount of the allowance to plaintiff for prosecuting those motions.

Liberty Leather Corp. v. Callum, 86 F.R.D. 550, 550–51 (D. Mass. 1980). For the same reasons, the court concludes that it is authorized to award expenses in this case even though the motion to compel became moot before it was granted.

The burden is on Mr. Lewis to show that the delay in production was "substantially justified." V.R.C.P. 37(a)(4); see also 8B Wright & Miller, Federal Practice & Procedure: Civil 3d § 2288.

The disputed discovery relates to the following: (a) the identification and description of the crypto-mining software that Mr. Lewis installed on his home computer; (b) interrogatories and medical document requests related to emotional distress made relevant by the intentional infliction of emotional distress claim; (c) the identification of documents on the hard drive provided to the parties by Rendition that support Mr. Lewis's claims; and (d) documents and information requests related to Mr. Lewis's post-termination job search.

Mr. Lewis refused to identify the software on his home computer because he deemed that information irrelevant and because he thought it would unreasonably invade his privacy. In a case in large part arising out of Mr. Lewis's crypto-mining activities, the court fails to see how the simple matter of identifying the software he was using could possibly be irrelevant or burdensome. No privacy interest protected Mr. Lewis from producing this information. There was no justification for refusing to comply with this request.

Regarding his health information, Mr. Lewis maintains that part of the delay was due to reluctance from his health care provider to produce the documents. Much of it, however, was simply because he did not want to divulge such personal information. Mr. Lewis, however, made this information material by seeking damages for emotional distress. He cannot seek such damages and simultaneously prevent NSB from investigating the alleged emotional distress. There was no justification for refusing to comply with this request.

Regarding the identification of documents on the Rendition drive and explaining how they support his claims, Mr. Lewis claims that he only was required to do this because of something related to mediation, and that doing it was extremely burdensome. The court fails to see how mediation is related to this discovery request at all. Regardless of mediation, NSB would have sought this discovery. The court understands that this request was burdensome due to the volume of records, but there is little indication that Mr. Lewis attempted to comply in earnest for most of the delay, and the discovery was not irrelevant or overly burdensome in the context of this case. There was no justification for refusing to comply with this request.

Finally, Mr. Lewis disputes that he completely failed to comply with NSB's requests for records and information related to his post-termination job search. The record on this issue is more favorable to Mr. Lewis. He in fact made efforts to comply with this request and supplemented his initial response several times in reaction to communications with NSB. The court declines to see a basis for an assessment of expenses as to this matter.

In short, the record plainly shows, regarding the first three issues, that far from a substantial justification for the protracted delay in producing the discovery, there was no justification whatsoever. Mr. Lewis simply refused to do it, causing wholly unnecessary delay and expense and wasting, among other things, the court's resources. An assessment of expenses is warranted.

Mr. Lewis argues, however, that any such assessment should be minimal due to his limited financial means and because, as he puts it, this is a David versus Goliath case. In fact, he asserts that NSB has been litigating the case in a manner calculated to drain his resources. The court understands that the parties have lopsided access to resources and that civil litigation is expensive. Ability to pay is a proper consideration in these circumstances. See *Gordon v. New Eng. Tractor Trailer Training Sch*., 168 F.R.D. 178, 180 (D. Md. 1996) (explaining that considerations relevant to a Rule 11 sanction are appropriate to consider when imposing a Rule 37 sanction, including "(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation."), cited in 2 Motions in Federal Court § 7:153 (3d ed.). However, there is no compelling showing that Mr. Lewis has such a lack of resources that his disruptive and

uncooperative conduct should be entirely insulated from an assessment of expenses, and there is no basis in the record for any determination that NSB has litigated in bad faith or in some overzealous manner calculated to drain him of his resources.

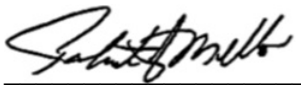
The only expense that NSB seeks is attorney fees, and the only fees it seeks are those incurred by Attorney Sage in the course of drafting and briefing the motion to compel. NSB does not seek any fees otherwise incurred throughout the discovery dispute, and it seeks no other expenses. In total, NSB seeks $12,580—58.2 hours at Attorney Sage's 2021 rate of $210/hr. and 2022 rate of $220/hr. There is no dispute about the reasonableness of Attorney Sage's hourly rate or the number of hours expended.

Weighing the lack of any justification for the delay in production and its extreme length, the parties' unbalanced access to resources, and all other circumstances in this case, the court concludes that the equitable amount of the assessment is $8,566, based on 40 hours of work. This sum represents 23.4 hours in 2021 and 2022 on the motion to compel (calculated at the 2021 rate), and 16.6 hours in 2022 on the reply (calculated at the 2022 rate).

Order

For the foregoing reasons, NSB's motion for fees is granted in the amount of $8,566.

SO ORDERED this 11th day of July, 2022.



Robert A. Mello
Superior Judge