

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IRWIN J. BARKAN and :
D&D BARKAN LLC :
 :
v. : C.A. No. 05-050L
 :
DUNKIN' DONUTS, INC. and :
BASKIN-ROBBINS USA, CO. :

MEMORANDUM AND ORDER

Before the Court is Plaintiffs' Motion for Leave to File a Motion to Compel. (Document No. 96). Defendants object. (Document No. 98). This Motion was referred to me by Senior Judge Lagueux on July 1, 2008 for determination. 28 U.S.C. § 636(b)(1)(A); LR Cv 72. For the reasons discussed below, Plaintiffs' Motion is DENIED.

This case was commenced in 2005, and discovery closed, after several extensions, on April 30, 2008. The last-minute rush to complete discovery generated several discovery motions including six filed by Plaintiffs. On February 20, 2006, Judge Lagueux issued his standard Pretrial Order which notified counsel that "[a]fter 10 days from the close of discovery, no motions shall be filed and accepted by the Clerk of this Court except by leave of the undersigned...." (Document No. 20). Subsequent amendments include the same limitation. (Document Nos. 51 and 95). Thus, the ten-day limitation should not have come as a surprise to Plaintiffs' counsel.

On May 15, 2008, Plaintiffs filed an untimely Motion to Compel without seeking leave as plainly required by the Pretrial Order. (Document No. 83). That Motion was referred to me for determination on June 16, 2008. On June 17, 2008, I denied the Motion by text order as untimely. Plaintiffs then filed the pending Motion for Leave on June 23, 2008. (Document No. 96).

Plaintiffs' Motion raises several puzzling arguments. First, Plaintiffs lay out the procedural background and then leap to the conclusion that they "did not understand that the ten-day rule would apply to the Motion to Compel inasmuch as the Motion to Compel was filed only three days after the ten-day rule had expired and on the same day that the two other discovery motions were filed."¹ (Document No. 96 at 2-3). This statement makes no sense. The deadline either applies or it does not. The fact that it was "only three days" late or was filed on the same day as unrelated motions is irrelevant. Judge Lagueux's Pretrial Order is clear, and Plaintiffs have shown no valid basis for any misunderstanding.

Second, Plaintiffs seek to blame the Court for not educating them about the terms of the Pretrial Order at a May 23, 2008 hearing. Plaintiffs assert that counsel "mentioned to the Court that the Motion to Compel was still pending and the Court did not inform [Plaintiffs' counsel] that the Motion to Compel was improperly filed due to Barkan's failure to seek leave from the Court." (Document No. 96 at 3). This argument has several failings. The Court has no obligation to remind counsel about the rules. Also, the Motion to Compel in question was not on the hearing agenda and had not yet been referred to the undersigned for determination. As reflected in the docket, Judge Lagueux did not refer the Motion (Document No. 83) until June 16, 2008. Thus, it was not pending before the undersigned at the time of the May 23, 2008 hearing. Finally, as noted in Defendants' objection, Plaintiffs' counsel's passing reference to the "waiver motion that we filed" was cursory at best, and did not specifically identify this particular discovery motion or the ten-day issue.

¹ As noted in my June 17, 2008 Text Order, the other two Motions were invited by the Court and arose out of timely filed discovery motions. Thus, leave to file those Motions was not necessary.

Third, Plaintiffs seek to blame Judge Lagueux's Deputy Clerk. She apparently left a message for Plaintiffs' local counsel on May 16, 2008 to remind him about the ten-day leave requirement. Plaintiffs' counsel then asserts that her failure to respond to a follow-up voice mail on the same day caused them to "not realize the ten-day issue was still applicable." (Document No. 96 at 3). This leap also makes no sense. The Clerk reminded counsel of the ten-day rule as a courtesy. She did not, and would not have authority to, vacate a portion of Judge Lagueux's Pretrial Order. Plaintiffs acted at their peril by ignoring Judge Lagueux's Pretrial Order and the Clerk's "heads up."

Unfortunately, Plaintiffs waste the Court's time with these red herrings and fail to adequately address the real issue. In particular, the issue of why the Court should grant Plaintiffs leave to file an untimely discovery motion which relates to 2006 document productions and privilege logs. While the waiver issue was sprung on Defendants at the Gabellieri deposition, it does not appear that Plaintiffs first discovered the issue at that eleventh-hour deposition. Plaintiffs waited until the final day of discovery to depose Gabillieri (a regional vice president) and apparently chose, for strategic reasons, to spring the waiver claim at that deposition. Plaintiffs have failed to show why this issue could not have been raised and litigated at an earlier stage. The case is now in the expert discovery period, and the parties should focus their efforts accordingly to avoid any further delays in moving this aging case towards a final resolution. Thus, Plaintiffs' Motion for Leave to file a discovery motion out of time is DENIED.

SO ORDERED.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
July 8, 2008