

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

This matter is before the Court on Plaintiffs' Motion for Sanctions filed pursuant to Fed. R. Civ. P. 26(g) and 37. (Document No. 107). Defendants filed an Opposition. (Document No. 109). Plaintiffs replied. (Document No. 112). The parties' combined filings on this Motion total nearly 500 pages. A hearing was held on November 3, 2008. For the reasons stated below, Plaintiffs' Motion for Sanctions is DENIED.

Discussion

Discovery closed in this case on April 30, 2008. Plaintiffs' Motion focuses on four RAPID (Resource Appropriation and Investment Decision System) documents which were not produced by Defendants until after the close of discovery. See Pls.' Exs. H1-3 and J. Plaintiffs contend that Defendants acted in bad faith and impeded discovery by proffering evasive deposition testimony and withholding these key documents. As sanctions, Plaintiffs ask the Court to enter judgment in their favor as to liability and damages and to dismiss Defendants' counterclaims. Alternatively, Plaintiffs seek an order precluding Defendants from introducing evidence "rebutting any facts asserted by [Plaintiffs] on liability and damages for events which transpired during the period from August 5, 2003 [to]...December 21, 2004" and dismissing Defendants' counterclaims with prejudice.

(Document No. 107 at p. 23). Defendants counter that Plaintiffs' Motion is so bereft of merit as to itself be sanctionable. They assert that the documents produced post-discovery were not improperly withheld and, in fact, were not "responsive to a single Barkan discovery request." (Document No. 109 at p. 9).

Plaintiffs ask the Court to impose harsh sanctions which eliminate or significantly limit Defendants' ability to defend and counter Plaintiffs' claims in this case. Plaintiffs bear the burden of establishing grounds for such extraordinary relief, and Plaintiffs' submissions do not meet that burden. In their initial Memorandum in Support (Document No. 107), Plaintiffs make a scattershot argument that does not specifically identify any discovery request(s) that the RAPID documents were responsive to, or a violation of any Court order that warrants the requested sanctions. Plaintiffs first argue that Defendants' responses to Requests 3, 4, 5, 6, 7 and 8 of their Second Request for Production was a representation of full disclosure. Although Defendants interposed objections to some of these requests, they generally responded by representing that all responsive, non-privileged documents had been produced. The problem with Plaintiffs' reliance on these requests, however, is that Plaintiffs have not established that the documents in question are responsive to these requests. The Court has independently reviewed those documents and does not find them to be reasonably responsive to those six specific requests.

Plaintiffs additionally attempt to rely on Defendants' August 14, 2006 response to Request 12 of their Second Request for Production which follows:

Request No. 12

All documents concerning the location, possession, custody or control of any documents responsive to these requests.

Response No. 12

Objection. This request makes no sense because Defendants and/or their counsel have possession, custody, or control of all relevant documents concerning this lawsuit.

In their argument, Plaintiffs omit the word “objection” when discussing Defendants’ response. Further, Plaintiffs never challenged Defendants’ objection before the close of discovery. Plaintiffs claim they “relied” upon this response effectively as a guarantee that “all relevant documents concerning this lawsuit” were produced, regardless of the scope of Plaintiffs’ document requests. Such reliance is neither reasonable nor warranted by Defendants’ response. Defendants’ response had nothing to do with production generally or the scope of Plaintiffs’ document requests. It simply stated that the request did not make sense because Defendants and/or their counsel possessed any relevant documents. The Court agrees that the request “makes no sense” as stated in Defendants’ objection. Accordingly, Defendants properly objected to Request 12.

Plaintiffs further rely on representations made by Defendants’ counsel at an April 23, 2008 discovery hearing. Plaintiffs assert that Defendants’ counsel misled both them and the Court regarding the scope of production. Unfortunately, Plaintiffs have taken this exchange out of context and do not accurately represent the scope of the Court’s statement that “any relevant nonprivileged documents have been produced.”¹ The comment was made in the context of discussing Defendants’ Motion for Protective Order (Document No. 67) as it related to Plaintiffs’ service of a third-party document subpoena on Defendants’ attorneys. My comment was an attempt to paraphrase Defendants’ argument. (See Pl.’s Ex. E at p. 12). In particular, Defendants’ counsel argued that the

¹ This is not the first time Plaintiffs have attempted to alter history to fit their current needs in the case. In a prior discovery dispute, Plaintiffs’ representation as to the scope of their claim contradicted their statements made in prior pleadings. (See Document No. 76 at pp. 3-4).

documents being sought by Plaintiffs from Defendants' law firm had already been obtained by Plaintiffs directly from Defendants in discovery, except for privileged documents. This brief exchange between the Court and Defendants' counsel does not support Plaintiffs' position and demand for sanctions.

In their Reply Memorandum (Document No. 112), Plaintiffs now argue that the four RAPID documents in dispute are responsive to Request 1 of their First Request for Production of Documents dated February 21, 2006². Plaintiffs' Document Request 1 requested:

Any and all documents, including but not limited to e-mails, telephone logs, loan applications, and requests for refinancing, which in any way regard, refer to, relate to, and/or concern loans from The CIT Group, its affiliates and/or subsidiaries ("CIT"), to any on [sic] or more of the following entities: a. DDB Dorrance, LLC (account number 90081313); b. DDB Empire, LLC (accounts numbers 90122991 and 90883234); c. DDB Weybosset, LLC (account numbers 90081307 and 90104945); and e. [sic] DDB Fountain, LLC (account number 90083238) (collectively, the "Barkan Loans").

Plaintiffs contend that since the four RAPID documents in question "all specifically refer to CIT loans," they are responsive to Request 1. (Document No. 112 at p. 2). It is true that all of these RAPID documents refer to CIT debt, Mr. Barkan and the downtown Providence franchise locations. It is also true that Defendants did not object to Request 1 and produced responsive documents including other RAPID documents. (See Pls.' Exs. F1-3).

Request 1 seeks all documents "which in any way regard, refer to, relate to, and/or concern loans from the CIT Group" to the Providence store entities (e.g., DDB Dorrance, LLC). Given the

² It is troubling that Request 1 is not even mentioned in Plaintiffs' primary memorandum and is first relied upon in their Reply. (Document No. 112 at p. 2). Under Local Rule Cv 7(b)(2), a Reply Memorandum is limited to a "response to an objection and shall not present additional grounds for granting the motion...." Since Plaintiffs first argue in their Reply that the documents in dispute are responsive to Request 1, it presents an "additional ground" for their Motion for Sanctions and is not properly included in a Reply.

breadth of Request 1, the four RAPID documents in question are technically responsive since they all refer to Barkan's CIT debt for his Providence network. That does not end the analysis, however, because this is not a motion to compel production of documents. The documents were produced by Defendants. The issue is whether the circumstances of Defendants' production warrant the severe sanctions sought by Plaintiffs, and thus the subject of the documents and their relationship to Plaintiffs' claims are relevant to the inquiry. See Torres-Vargas v. Pereira, 431 F.3d 389, 392 (1st Cir. 2005) (case dispositive sanctions must be reviewed in the context of "the chronology of the case and the totality of the attendant circumstances").

Plaintiffs' central claim in this case is that Defendants breached a Settlement Agreement entered into on June 15, 2004. In particular, Plaintiffs allege that Defendants breached the Agreement by "failing to work with...Plaintiffs to refinance their debt with CIT...." (Document No. 31 at ¶ 50). Plaintiffs allege that, as a result of such breach, "CIT refused to refinance...Plaintiffs' debt and...Defendants terminated...Plaintiffs' SDA [Store Development Agreement] agreements." Id. at ¶ 52. Plaintiffs allege that Defendants notified them of CIT's decision not to refinance "at the end of July 2004." Id. at ¶ 23.

Although Plaintiffs' counsel argues that the RAPID documents in question go to the "heart" of the case, they do not directly relate to the Settlement Agreement, Defendants' performance under such agreement, the 2004 refinancing efforts or termination of the SDAs. Of the four RAPID documents, only one (Pls.' Ex. H-1) predates the Settlement Agreement and CIT's decision not to refinance. However, that document involves a 2003 request to develop a new, "full producing" store location in East Greenwich and lease it to Barkan. By way of background, the RAPID document describes Barkan's relationship with Defendants at the time, including his Providence stores and

existing CIT debt. Two of the RAPID documents (approved in August and December 2004, respectively) deal with Defendants' decision to repurchase loans from CIT to Barkan's Providence stores which had been guaranteed by Defendants. (Pls.' Exs. H-2 and H-3). The final RAPID document (approved in September 2004) implemented a collection hold on Barkan's network debt "so the market team can assist...Barkan with selling his network." (Pls.' Ex. J).

At the hearing, Defendants' counsel represented that his law firm only learned of these RAPID documents in connection with preparing for a June 25, 2008 Rule 30(b)(6) deposition. In particular, Defendants indicated that the documents were identified in connection with reviewing Finance Committee meeting minutes and that the documents were electronically "linked." (Document No. 109 at p. 7). It is undisputed that the RAPID documents were produced to Plaintiffs shortly after the Rule 30(b)(6) deposition. Defendants dispute that the documents are responsive to any discovery request. However, if responsive, Defendants' production would constitute a timely supplement under Fed. R. Civ. P. 26(e)(1)(A).

As noted above, Plaintiffs have chosen not to seek to reopen discovery to follow-up on the documents in question, to impose the costs of such additional discovery on Defendants or other less drastic sanctions. Rather, Plaintiffs have chosen to seek sanctions only on the harsher end of the spectrum. Plaintiffs seek to use the documents as trump cards to establish liability and damages in their favor, eliminate Defendants' counterclaims and alternatively, to substantially restrict Defendants' ability to rebut Plaintiffs' assertions on liability and damages. The First Circuit has held that evidence preclusion and negative inference are "grave steps" and "by no means an automatic response to a delayed disclosure...[or] where failure to make discovery [is] not willful." Jackson v. Harvard Univ., 900 F.2d 464, 469 (1st Cir. 1990) (quoting Freeman v. Package Machinery Co., 865

F.2d 1331, 1341 (1st Cir. 1988)). It has also advised that an “important part of the calculus of relief” for tardy production of records is whether the producing party was conscious that the documents would hurt their case. Id.

_____ While I find that the RAPID documents were technically responsive to Request 1, they are not directly relevant to Plaintiffs’ claims and do not, as claimed by Plaintiffs, go to the heart of the case. If produced earlier, the documents would likely have been the subject of inquiry and possibly additional discovery. However, they do not appear to be “smoking guns” that a party would be tempted to hide. The record simply does not support a finding of the type of “willful or deliberate misconduct” necessary to impose the sanctions sought by Plaintiffs. See Yang v. Brown Univ., 149 F.R.D. 440, 443 (D.R.I. 1993); see also Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 179 F.R.D. 77, 80 (D. Conn. 1998) (“a showing of willful disobedience or gross negligence is required to impose...harsher sanction[s]” such as dismissal and default judgment).

For the foregoing reasons, Plaintiffs’ Motion for Sanctions (Document No. 107) is DENIED.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
November 7, 2008