

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

JEFFREY DIEFFENBACH, :  
Plaintiff, :  
 :  
v. : CA 11-371 L  
 :  
E. MARTIN STUTCHFIELD, ESQ. :  
and WINOGRAD SHINE LAND & :  
FINKLE, INC., :  
Defendants. :

**MEMORANDUM AND ORDER**  
**DENYING PLAINTIFF'S**  
**RE-INSTATED MOTION FOR SANCTIONS**

Before the Court is Plaintiff's Re-Instated Motion for Sanctions and Permission to Disclose Evidence in the Course of Mediation (Docket ("Dkt.") #21) ("Motion for Sanctions" or "Motion"). Plaintiff Jeffrey Dieffenbach ("Plaintiff") seeks sanctions against Defendants and Attorney John T. Walsh, Jr., for allegedly failing to participate in good faith at a mediation conference conducted on December 20, 2011, by the Court's Alternative Dispute Resolution ("ADR") Administrator, Dr. Berry Mitchell. See Motion at 1. A hearing was held on March 7, 2012.

Plaintiff makes a number of arguments in support of the Motion. First, he notes that on November 30, 2011, Defendants verbally agreed to participate in a mediation conference and then withdrew that agreement. Although Defendants promptly advised the Court, Dr. Mitchell, and Plaintiff of this change of heart, see Letter to Mitchell from Walsh of 11/30/11, Plaintiff indicates that

he "spent many hours," Plaintiff's Revised Memorandum in Support of Re-Instated Motion for Sanctions ("Plaintiff's Mem.") at 2, researching and preparing his mediation statement on the evening of November 30<sup>th</sup>. The proposition that Plaintiff "spent many hours" in the course of a single evening is inherently implausible. Moreover, as Defendants subsequently agreed to participate in the mediation, the time spent by Plaintiff in preparing his mediation statement was not wasted. Plaintiff appears to recognize this fact because he suggests that the Court consider time he expended in preparing and filing his first motion for sanctions, see Plaintiff's Motion for Sanctions (Dkt. #8) ("First Motion for Sanctions"), as a factor weighing in favor of granting the instant Motion. The Court is not so persuaded because it sees no basis on which the First Motion for Sanctions could have been granted.

Under this Court's ADR program, parties consent to participate in mediation. See United States District Court for the District of Rhode Island Alternative Dispute Resolution Plan ("ADR Plan") IV. C. ("'Mediation' is a voluntary, non-binding dispute resolution method involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."); cf. In re Atlantic Pipe Corp., 304 F.3d 135, 148 (1<sup>st</sup> Cir. 2002) (emphasizing that a district court should "adopt an ADR program and memorialize it in its local rules"). The fact that a party initially changes its mind regarding participating in mediation is not, at least in

the circumstances presented here, sanctionable behavior. Defendants' initial agreement to mediate was verbal. The agreement was retracted the same day in writing with notice to the Court, Dr. Mitchell, and Plaintiff. The retraction occurred well before an order referring the case to alternative dispute resolution was entered.<sup>1</sup> Moreover, Defendants subsequently agreed to go forward with the mediation. Despite Plaintiff's apparent view to the contrary, he was not prejudiced by Defendants' initial change of heart regarding mediation. In short, the fact that Plaintiff filed a First Motion for Sanctions adds nothing to the merits of the instant Motion.

Plaintiff next argues that the filing of Defendants' Motion to Amend Their Answer (Dkt. #12) ("Motion to Amend") one week before the December 20, 2011, mediation is evidence that Defendants were not acting in good faith relative to that proceeding. In particular, Plaintiff cites the fact that the proposed amended answer sought to include as the eighth affirmative defense that: "Pursuant to 15 U.S.C.A. § 1692k, defendants are entitled to attorneys' fees because plaintiff has brought this action in bad faith for the purpose of harassment." Motion to Amend, Exhibit ("Ex.") A (Defendants' First Amended Answer) at 3. Plaintiff

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<sup>1</sup> The order referring the case to ADR was subsequently entered on December 7, 2011. See Standard Order Referring Case to Alternative Dispute Resolution (Dkt. #9) ("Order of 12/7/11"). Defendants had advised Dr. Mitchell in a December 6, 2011, letter that they were willing to go forward with the mediation. See Letter from Walsh to Mitchell of 12/6/11.

suggests that Defendants sought to intimidate him in advance of the mediation conference by including the quoted sentence as an affirmative defense.

While the Court has some uncertainty whether the quoted statement constitutes an affirmative defense which must be pled pursuant to Fed. R. Civ. P. 8(c), the Court is unpersuaded that merely referencing a provision of the very statute which Plaintiff has himself cited as the basis for this Court's jurisdiction, see Complaint ¶ 2, rises to the level of sanctionable behavior. Plaintiff is an attorney and presumably was aware of this provision before he filed suit. Given these circumstances, it seems improbable that he would be intimidated by Defendants' citation of the provision. For the same reasons, it also does not seem likely that Defendants would harbor the belief that citing the provision would intimidate Plaintiff. Accordingly, to the extent that Plaintiff contends that the filing of the Motion to Amend constitutes sanctionable behavior, such argument is rejected.

Plaintiff next argues that at the mediation conference "[f]rom the onset, it was obvious that Defendants and their attorney did not want to be there." Plaintiff's Mem. at 3. However, Plaintiff also admits that the conference ended with the parties executing a Memorialization of Terms Agreed to in Principle ("Memorialization"). This fact demonstrates that progress towards settlement was made at the conference and undermines Plaintiff's

contention that Defendants were not acting in good faith. It would be incongruous to sanction a party for allegedly not participating in a mediation conference in good faith when the conference resulted in a signed agreement representing, at the very least, progress towards settlement.

Plaintiff charges that at the mediation conference Defendants sought to seek concessions from him with respect to another case which is presently on appeal to the Rhode Island Supreme Court, Haworth v. Dieffenbach, SU-11-0083,<sup>2</sup> in which he is represented by counsel. Defendants dispute that they did anything improper and cite their inclusion of a paragraph in the last version of the Settlement Agreement and General Release ("Agreement")<sup>3</sup> which specifically stated that nothing in the Agreement shall "be deemed as a limitation or restraint on Defendant Dieffenbach's right to litigate and defend [Haworth v. Dieffenbach] to the fullest." Agreement ¶ 5.

As the Court observed at the hearing, it is not unusual for parties at a settlement conference to raise other matters which they perceive as being related to the case at hand. Doing so is certainly not sanctionable conduct. Plaintiff's charge that

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<sup>2</sup> The Court obtained this case number from the Rhode Island Supreme Court's website. The parties indicate that the case number was C.A. No. NC03 154 at the superior court level.

<sup>3</sup> A copy of the last version of the Settlement Agreement and General Release ("Agreement") was submitted by Defendants' counsel at the March 7, 2012, hearing. It appears at Tab 7 of Defendants' Hearing Exhibits.

Defendants attempted to obtain concessions from him regarding another case in which he is represented by counsel is more serious. However, Defendants dispute the charge and point to language in the final version of the Agreement which tends to rebut Plaintiff's claim that Defendants sought for him to relinquish rights in the case presently on appeal to the Rhode Island Supreme Court. The Court has reviewed the documentary evidence submitted by the parties at the hearing and carefully considered the parties' arguments regarding what transpired at the conference.<sup>4</sup> After doing so, the Court is not convinced that Plaintiff has demonstrated that Defendants and their attorney should be sanctioned for their conduct at the mediation conference.

Plaintiff next complains that Defendants wrongfully disclosed a copy of the Memorialization to the Court . See Plaintiff's Mem. at 4. The wrongful disclosure was allegedly contained in the memorandum filed in support of the Motion to Strike Plaintiff's Response to Defendants' Reply (Dkt. #17). See Defendants' Memorandum of Law in Support of Their Motion to Strike Plaintiff's Response to Defendants' Reply (DE No. 15) ("Defendants' Mem. Re Motion to Strike") at 1. However, Plaintiff is mistaken in this respect. Although Defendants' Mem. Re Motion to Strike refers to

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<sup>4</sup> At the hearing Plaintiff submitted a packet of documents bearing the heading: "List of Exhibits: Plaintiff's Re Instated Motion for Sanctions." Plaintiff's Hearing Ex. Defendants also submitted a packet of documents which were tabbed 1 through 7. The Court has designated these documents as Plaintiff's Hearing Exhibits and Defendants' Hearing Exhibits.

an "Exhibit A," id. at 1, which apparently was the Memorialization, the exhibit was not filed with the Court. The Memorialization was not disclosed to the Court until the March 7, 2012, hearing when both parties voluntarily agreed to do so. Thus, there is no basis to sanction Defendants and their attorney in connection with the Memorialization.

Lastly, Plaintiff asserts that Defendants' Reply Memorandum to Plaintiff's Reply to Defendants' Motion to Amend their Answer and Motion to Strike (Dkt. #15) ("Defendants' Reply") misstates whose burden it is to show undue delay with respect to the filing of a motion to file an amended complaint. See Plaintiff's Mem. at 4 (citing Emissive Energy Corp. v. NovaTac, Inc., C.A. No. 09-13 S, 2010 WL 2991201 (D.R.I. July 28, 2010)). While it is true that in Emissive Energy Corp., the Court placed the burden of showing a valid reason for the delay on the movant, see id. at \*3, the delay in that case was almost one year, see id. at \*1. Placing the burden on the movant in Emissive was in accordance with First Circuit law which holds that where considerable time has elapsed between the filing of a pleading and a motion to amend it, the movant has the burden of showing some valid reason for his neglect and delay. See Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 71 (1<sup>st</sup> Cir. 2001) ("[W]hen considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has the burden of showing some valid reason for

his neglect and delay."); Grant v. News Grp. Boston, 55 F.3d 1, 6 (1<sup>st</sup> Cir. 1995) (same) (quoting Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 933 (1<sup>st</sup> Cir. 1983)) (alteration in original). Here the period between the filing of Defendants' Answer and the Motion to Amend is slightly less than three and a half months. It is questionable whether this period equals "considerable time," Grant, 55 F.3d at 6, such as to unequivocally place the burden of showing that there has not been undue delay on the movant. There is sufficient doubt about this matter to provide a safe harbor for Defendants' statement that "Plaintiff has not met his burden of showing undue delay, bad faith on the part of the moving party ...." Defendants' Reply at 1-2. Therefore, the statement cannot be the basis for the imposition of sanctions.

In sum, the Court is not persuaded that Plaintiff has demonstrated that Defendants have engaged in any conduct which rises to the level of sanctionable behavior. The Court has also considered whether all of the actions about which Plaintiff complains in connection with the instant Motion, taken together, warrant the imposition of sanctions. The Court concludes that they do not. Accordingly, the Motion is DENIED.

ENTER:

/s/ David L. Martin  
DAVID L. MARTIN  
United States Magistrate Judge  
March 9, 2012