

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

ROCK S. WILSON and
MOUNTAIN STATE LAND TITLE,
P.L.L.C., a West Virginia
professional limited liability
company,

Plaintiffs,

v.

Case No. 2:07-cv-00478

LIBERTY INSURANCE UNDERWRITERS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending before the court is Plaintiffs' Motion for Protective Order (docket # 17), filed April 25, 2008, to which Defendant responded in opposition (# 18) on April 27, 2008. Plaintiffs did not file a timely reply.¹ The Memorandum Opinion and Order entered by the Hon. John T. Copenhaver, Jr., presiding District Judge, on February 25, 2008 (# 12), sets forth the claims of the parties. To summarize, this is a first party breach of contract and bad faith action by attorneys against their legal malpractice insurer.

Pursuant to Rule 26(d)(1), *Fed. R. Civ. P.*, the parties could have commenced discovery on September 7, 2007, the date of their

¹ Pursuant to LR Civ P 7.1(c), Plaintiffs' reply was due "within 7 business days from the date of service of the memorandum in response to the motion," which was May 9, 2008 (adding 3 days, pursuant to Rule 6(d), *Fed. R. Civ. P.*).

Rule 26(f) conference (Report of Parties' Planning Meeting, # 8). On September 24, 2007, the undersigned entered a scheduling order (# 9), which provided that "[t]he parties shall complete all discovery requests by April 11, 2008 and all depositions by May 26, 2008." A motion to dismiss (# 2) was pending until February 25, 2008. Other than Rule 26(a)(1) disclosures, it appears that no discovery was undertaken until March 11, 2008, when Defendant served its first set of discovery requests to Plaintiff (# 13). Dispositive motions are due June 16, 2008.

Plaintiffs cite two grounds for their Motion: (a) the number of interrogatories exceed the limit set forth in Rule 33(a)(1), *Fed. R. Civ. P.*; and (b) the number of requests for admission are unreasonably cumulative pursuant to Rule 26(b)(2)(C), *Fed. R. Civ. P.* Plaintiffs also complain that Defendant's request for facts and documents which support the denial of any request for admission increases the number of discovery requests by the number of requests for admissions.

Defendant served its discovery requests on March 11, 2008, a Tuesday. Pursuant to Rule 33(b)(2), Rule 34(b)(2)(A), and Rule 36(a)(3), *Fed. R. Civ. P.*, the discovery responses were due "within 30 days after being served." Pursuant to Rule 6(d), *Fed. R. Civ. P.*, "3 days are added after the period would otherwise expire under Rule 6(a)." The responses were due April 14, 2008.

On April 14, 2008, Plaintiffs requested, and Defendant

granted, a seven-day extension of time for serving discovery responses. (Def.'s Response, # 18, ¶ 2, at 1.) Such stipulations are permitted by Rule 29(b), *Fed. R. Civ. P.* According to Defendant, the extension was granted "based upon a representation that the responses would be completed during such period." Id. Plaintiffs have not contradicted this assertion. The responses were due April 21, 2008.

On April 21, 2008, Plaintiffs requested another seven-day extension, and Defendant granted an extension of four days. The responses were due April 25, 2008. On that date, Plaintiffs filed the instant Motion for Protective Order, and ever since have failed to serve any discovery responses.

Defendant makes four points in opposition to Plaintiffs' Motion: (1) Plaintiffs failed to object to the discovery requests within the time period prescribed by the Rules or stipulated by the parties; (2) Plaintiffs failed to certify that they made a reasonable and good faith effort to reach agreement with opposing counsel; (3) Plaintiffs waived their objections; and (4) Plaintiffs' counsel has previously exhibited his disregard for the Rules' deadlines, and should be sanctioned by imposition of fees and costs. (Def.'s Resp., # 18, ¶¶ 4-12, at 1-5.)

The court will first address Defendant's second point, that Plaintiffs failed to make a reasonable and good faith effort to resolve the dispute. Rule 26(c)(1), *Fed. R. Civ. P.*, with respect

to protective orders, states as follows:

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. * * *

Our court's Local Rule 37.1 on "Discovery Disputes," provides as follows:

(b) Duty to confer

Before filing any discovery motion, including any motion for sanctions or for a protective order, counsel for each party shall make a good faith effort to confer in person or by telephone to narrow the areas of disagreement to the greatest possible extent. It shall be the responsibility of counsel for the moving party to arrange for the meeting.

Plaintiffs' Motion states:

Counsel for the plaintiffs and counsel for the defendant have conferred with respect to this dispute and are unable to resolve this dispute without Court action. Counsel for the plaintiffs specifically requested a further extension, however, the defendant would only agree to an extension to April 25, 2008.

(Pls' Motion, # 17, at 4.)

Defendant's Response is as follows:

[N]o certification accompanies the motion. As noted, the defendant afforded the plaintiffs two separate extensions, the first was a requested seven-day extension and the second was an additional four-day extension. The defendant heard nothing further from the plaintiffs' following the additional four-day extension, which it assumed had resolved the matter. Plainly, the defendant was under no obligation to continue to give the plaintiffs extension after extension.

(Def. Resp., # 18, ¶ 9, at 2-3.)

The court finds that both Rule 26(c)(1), *Fed. R. Civ. P.*, and Local Civil Rule 37.1(b) required the parties to meet and confer as to this discovery dispute. Rule 26(c)(1) placed the burden on Plaintiffs' counsel to make an effort to resolve the dispute. While Plaintiffs' Motion is ambiguous and craftily worded, when read together with Defendant's Response, it appears to the court that Plaintiffs sought only additional time from Defendant, not relief from the number of discovery requests. The purpose of the meet and confer obligation is to request and obtain discovery material *without court action*. If a party only requests additional time, and fails to raise the issue at the heart of the dispute, then the meeting and conference is a waste of time, paying only lipservice to the Rule's requirement.

The court finds that Plaintiffs' counsel failed to made a good faith effort to resolve this dispute before filing his Motion. If Plaintiffs' counsel requested an extension and made a representation to Defendant's counsel that he would answer the discovery requests without intending to honor that representation, then his request for an extension was done in bad faith. Accordingly, pursuant to Rule 26(c)(1), *Fed. R. Civ. P.*, it is hereby **ORDERED** that Plaintiffs' Motion for a Protective Order is denied.

The next issue (Defendant's first and third points) is that Plaintiffs failed to make timely objections to the discovery

requests and thereby waived their objections, if any. Plaintiffs have not responded to this argument.

Rule 33(b)(4), provides that "[t]he grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Rule 34(b)(2)(C) states that "[a]n objection to part of a request must specify the part and permit inspection of the rest." Rule 36(a)(5) reads: "The grounds for objecting to a request must be stated." Plaintiffs have not stated any objections whatsoever.

Our Local Rule 37.1(a) provides that "[o]bjections to disclosures or discovery that are not filed within the response time allowed by the Federal Rules of Civil Procedure, the scheduling order(s), or stipulation of the parties pursuant to FRCP 29, whichever governs, are waived unless otherwise ordered for good cause shown."

The court finds that Plaintiff failed to make timely objections to Defendant's discovery requests and, by operation of Local Rule 37.1(a), the objections were waived, "unless otherwise ordered for good cause shown." Plaintiffs' Motion for Protective Order did not operate as a stay of Plaintiffs' obligation to respond to discovery, or otherwise excuse their behavior. The Motion appears to have been filed simply to stall.

Turning to the issue of good cause, the court notes that Rule

33(b)(4) states that "[a]ll grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." In considering "good cause," a persuasive case has ruled that a court

should look into the circumstances behind the failure to object, whether it was inadvertent, defiant, or part of a larger calculated strategy of noncompliance. The Court may also look at subsequent actions by the party to ascertain whether it was acting in good faith, as opposed to acting in a disinterested, obstructionist or bad faith manner. The court should always take into account any resulting prejudice or lack thereof, and the need to preserve the integrity of the rules by serving as a warning to other litigants. Finally, the Court may assess lesser sanctions should that be more appropriate.

Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc., 200 F.R.D. 255, 259 (M.D. N.C. 2001).

As discussed above, Plaintiffs, by failing to file a reply, did not substantively address their failure to respond to the discovery requests timely. Plaintiffs have failed to respond to Defendant's argument and have offered no cause, good or bad.

Based on the foregoing, the court finds that Plaintiffs failed to serve responses, that all objections which Plaintiffs could have posed are waived, and that Plaintiffs have failed to show good cause to be excused from that waiver. Accordingly, pursuant to Rule 26(c)(2), it is hereby **ORDERED** that Plaintiffs shall serve responses to the interrogatories and requests for production of documents no later than **June 2, 2008**. The court notes that a

motion is pending before the court with respect to the requests for admissions, but it is not yet ripe.

The court declines to address Defendant's fourth assertion, concerning the behavior of counsel for Plaintiffs in another case. The court is familiar with these attorneys.

Defendant has requested an award of its costs incurred in responding to Plaintiffs' motion. Rule 26(c)(3), *Fed. R. Civ. P.*, provides that Rule 37(a)(5) applies to the award of expenses. Rule 37(a)(5) is worded with respect to a motion to compel. The basic premise of Rule 37(a)(5) is that a court shall award reasonable expenses, including attorney's fees, if there was a failure to meet and confer. Accordingly, counsel for Defendant may file an affidavit of his reasonable expenses incurred in responding to Plaintiffs' Motion for Protective Order. Counsel for Plaintiffs is placed on notice that he has five business days after the affidavit is filed to be heard on the matter, and shall file a response which indicates whether he and/or his clients are responsible for the filing of the Motion without attempting to resolve the dispute.

The Clerk is directed to transmit copies of this Memorandum Opinion and Order to all counsel of record, and to mail a copy of it to Plaintiffs.

ENTER: May 15, 2008



Mary E. Stanley
United States Magistrate Judge