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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO
CLERK OF COURTS

CHRISTINA M. BRASHEAR,)	CASE NO.: CV 2008 04 2729
)	
Plaintiff,)	JUDGE CALLAHAN
)	
v.)	
)	<u>ORDER</u>
ELLORA'S CAVE PUBLISHING, INC., et al.,)	
)	
Defendants.)	

This matter came before the Court for a show cause hearing held on November 23, 2009 at 9:00 a.m. regarding Plaintiff / Third-Party Defendants' Motion to Impose Sanctions. Counsel for Plaintiff / Third-Party Defendants and Defendants appeared along with the named individual parties.

1. History of Discovery

Plaintiff filed a motion to compel outstanding discovery responses from Defendants on August 26, 2009. The Court held a status conference on September 18, 2009, at which time the motion to compel and outstanding discovery issues were discussed. Defendants retained new counsel, Attorney Krueger, who was in attendance at the status conference. Defense counsel conceded that discovery responses were outstanding / required supplementation and agreed to provide supplemental discovery responses by October 9, 2009. The Court ordered Defendants to supplement their discovery responses by October 9, 2009 and held the imposition of sanctions in abeyance. As of October 15, 2009, Plaintiff had not received the discovery responses despite

various inquiries with defense counsel and thereby filed her Motion to Impose Sanctions / Motion to Show Cause and Request for Hearing.

a. Supplemental Discovery Responses

Defense counsel conceded that they were unable to meet the October 9, 2009 deadline. Defendants, however, did not move the Court for additional time to submit supplemental discovery responses or move for a protective order as to any of the discovery requests. Instead, Defendants randomly forwarded their discovery responses after the expiration of the deadline. Defendants Awbridge, Hanwell & Hartley, Inc. and Lady Jaided, Inc. submitted their supplemental discovery responses to Plaintiff on October 21, 2009, 12 days beyond the deadline. Defendants Brennon-Engler Properties, Ltd., Gothic Grounds, Inc., and Patricia Marks sent their supplemental discovery responses to Plaintiff on November 2, 2009, 24 days past the court-ordered deadline. Defendants Tina Engler, Elloras Cave Publishing, Inc. and Jasmine Jade Enterprises, Inc. put forth their supplemental discovery responses to Plaintiff on November 20, 2009, 42 days after the deadline expired.

Plaintiff asserts these supplemental discovery requests are still inadequate because they refer Plaintiff to see documents that she has not received and the responses assert, "Defendants' search for information is ongoing." While a party has a continuing obligation to supplement its discovery responses, such supplementation needs to be timely. The Court recognizes that there is voluminous discovery in this matter. While Defense counsel has only been involved in this matter for a short time, his clients, the Defendants have been involved in this matter from the start and should be assisting their counsel in the discovery process in order to comply with court-ordered deadlines. Defendants cannot hide behind "ongoing discovery" and "will

supplement” responses. In light of the age and the tenuous history of this case, Defendants should be familiar with the documents in their possession and be able to produce them as requested and ordered. Based upon the above, the Court does not find the supplemental responses to have been made in good faith. Accordingly, Defendants are ordered to review their supplemental discovery responses and fully answer the discovery requests, including any concerns raised by Plaintiff’s counsel in his November 9, 2009 letter (Exhibit 28) by the close of business on December 7, 2009. If Defendants object to any discovery requests, they should have the answer and/or documents available for the Court’s review and inspection.

b. August 7, 2009 Letter Requesting Documents

While Defendants submitted supplemental discovery responses, their discovery responses did not address Plaintiff’s request for additional documents contained in a letter dated August 7, 2009 (Exhibit 9). Defendants assert that they did not need to address the August 7, 2009 list of outstanding documents because they believed Plaintiff had received all of those documents on a compact disc. Defense counsel, however, had not reviewed the contents of the compact disc to confirm that the documents contained therein were in fact the same documents Plaintiff requested in her August 7, 2009 letter. Plaintiff’s counsel confirmed that the August 7, 2009 list was a separate request for documents than received on the compact disc. The Court finds that Defendants did not exercise due diligence in verifying their compliance with the August 7, 2009 letter. Accordingly, Defendants are ordered to produce the requested documents contained in Plaintiff’s August 7, 2009 letter (Exhibit 9) by the close of business on December 7, 2009. If Defendants object to any discovery request on the August 7, 2009 list, they should have the answer and/or documents available for the Court’s review and inspection.

c. Electronic Discovery

As of the show cause hearing, Plaintiff was still awaiting access to the electronic discovery responsive to Plaintiff's discovery requests. The parties also were in disagreement as to the initial production of key words relative to the electronic discovery. Plaintiff felt it was Defendants' duty to provide a list of key words from which Plaintiff would chose the words to search by, while Defendants believed Plaintiff should provide the initial set of key words for the search. Based upon Defendants' representations there are approximately 94,000 electronic documents that they plan on turning over to Plaintiff for her to search on her own. There is no indication which electronic documents are responsive to which discovery requests. The Court does not find the production of 94,000 electronic documents without key word analysis to be responsive to any one particular discovery request. Accordingly, Defendants are to provide Plaintiff with a list of key words by December 7, 2009.

2. Legal Analysis

Plaintiff moves the Court to dismiss Defendants' counterclaims and third-party complaint; grant default judgment as to Plaintiff's complaint; award attorney fees related to the discovery dispute; and award any other sanctions, as the Court deems appropriate. Civ.R. 37(B)(2) and 37(C) permit each of the above sanctions when a party fails to obey an order or permit discovery and such failure is not due to an inability such as illness, but rather willfulness, bad faith or any other fault of the non-complying party. *Sagen v. Thrower* (April 8, 1999), 8th Dist. No. 73954, at *12; *Bank One v. O'Brien* (Dec. 31, 1991), 10th Dist. Nos. 91AP-166 and 91AP-441, at *8-11. The Court recognizes that a dismissal of Defendants' counterclaims and

third-party complaint is a harsh remedy. However, Defendants' actions in this matter have shown a flagrant disregard for the Court's orders regarding discovery since the inception of the case.

This case has been pending for twenty months. Plaintiff has made various efforts to obtain discovery and documents in this case, but have been constantly met with resistance. Discovery issues were present in September 2008 when Plaintiff filed her first motion to compel and went before the Magistrate for a hearing. Discovery issues were still present when the parties came in for a status conference before this Court in March 2009. Discovery issues arose again in August 2009 with Plaintiff's filing of a second motion to compel and persisted into October when Plaintiff moved for sanction. Each of these instances involved Defendants' failure to produce various documents and discovery. Not only have the Defendants stonewalled the production of documents, they have violated the Court's orders for discovery deadlines. Based on the foregoing, the Court finds Defendants have not acted in good faith in answering the discovery at any stage of the proceedings and sanctions are warranted.

Prior to dismissing a case with prejudice, notice must be given to the non-complying party of the potential for dismissal and give the non-complying party an opportunity to correct the deficiency or to explain why the case should not be dismissed with prejudice. *Quonset Hut v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 48. The Court's September 21, 2009 Order – Modified Case Management Schedule granted Plaintiff's second motion to compel and ordered Defendants to submit supplemental discovery responses by October 9, 2009. This Order advised Defendants that sanctions were being held in abeyance in order to allow them to time to comply with the discovery order. Further, the Order contained a warning that failure to comply

with any orders of this court may result in sanctions being imposed, including adverse judgment for failure to prosecute or defend. Despite giving Defendants the opportunity to cure their prior failures and the Court's consideration of holding sanctions in abeyance and warning that sanctions were possible in event of their failure to comply, Defendants did not supplement their discovery responses by the October 9, 2009 deadline. In fact, 42 additional days passed before all of their supplemental discovery responses were submitted. And even then, the supplemental responses were not complete. Defendants did not avail themselves of the opportunity to correct their prior deficiencies and were on notice of the potential for dismissal.

Based on the foregoing, Defendants' counterclaims and third-party complaints are dismissed with prejudice. The Court denies Plaintiff's request for default judgment as to her Complaint. However, the Court will grant default judgment on Plaintiff's Complaint if Defendants fail again to correct their discovery deficiencies as outlined in this Order. Further, the Court awards Plaintiff attorney fees related to the ongoing discovery dispute. The amount of such award shall be determined at a later date. See generally, *Spragling v. Oriana House, Inc.*, 9th Dist. No. 23501, 2007-Ohio-3245.

3. Conclusion

Based on the foregoing, Defendants are ordered to review their supplemental discovery responses and fully answer the discovery requests, including any concerns raised by Plaintiff's counsel in his November 9, 2009 letter (Exhibit 28) by the close of business on December 7, 2009. If Defendants object to any discovery requests, they should have the answer and/or documents available for the Court's review and inspection.

Further, Defendants are ordered to produce the requested documents listed in Plaintiff's August 7, 2009 letter (Exhibit 9) by the close of business on December 7, 2009. If Defendants object to any discovery request on the August 7, 2009 list, they should have the answer and/or documents available for the Court's review and inspection.

Further, it is ordered that Defendants provide Plaintiff with a list of key words to search the electronic discovery by the close of business on December 7, 2009.

Further, Defendants' counterclaims and third-party complaints are dismissed with prejudice. The Court denies Plaintiff's request for default judgment as to her Complaint. Lastly, the Court awards Plaintiff attorney fees related to the ongoing discovery dispute: the amount of such award shall be determined at a later date.

IT IS SO ORDERED.


JUDGE LYNNE S. CALLAHAN

cc: Attorney Irving B. Sugarman
Attorney Jeffrey W. Krueger