

DIVISION OF ST. THOMAS AND ST. JOHN

Defendants.

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) **CASE NO. ST-15-CV-364**
) **CASE NO. ST-15-CV-110**
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Pending before the Court are the December 29, 2017 Motion to Compel¹ of V.I. Oral Surgery, Inc., and Plaintiff's January 24, 2018, Motion to Compel.² V.I.O.S.' motions to compel will be granted in part and denied in part, and Sheesley's motion to compel will be granted.

Under Virgin Islands Rule of Civil Procedure 26(b)(1), “...Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Information within this scope of discovery need not be admissible in evidence to be discoverable.” But, V.I. R. Civ. P. 26(b)(2)(C) permits the Court to limit the scope of discovery where:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the proposed discovery is not relevant to any party's claim or defense.

¹ Plaintiff opposed the motion on January 18, 2018, but Defendant has not replied.

² Defendants opposed the motion on February 9, 2018, and Plaintiff replied on February 20, 2018.

Under V.I. R. Civ. P. 37, a party may move for an order compelling disclosure or discovery, if the motion includes a certification that the movant has in good faith conferred or attempted to confer with the party failing to make disclosure of discovery in an effort to obtain it without court action. Specifically, V.I. R. Civ. P. 37(a)(3)(B) permits a party seeking discovery to “move for an order compelling an answer, designation, production, or inspection ... if ... a party fails to answer an interrogatory submitted under Rule 33 ... [or if] a party fails to produce documents ... as requested under Rule 34.”

Prior to filing a motion to compel, under V.I. R. Civ. P. 37-1(b), “[t]he party requesting resolution of a discovery dispute shall serve a letter on other counsel identifying each issue and/or discovery request in dispute, stating briefly the moving party's position with respect to each (and providing any legal authority), and specifying the terms of the discovery order to be sought.”³ V.I. R. Civ. P. 37-1(c)(1) and V.I. R. Civ. P. 37-1(c)(3) further require the requesting party to arrange a conference with opposing counsel, which, generally, must be completed within 15 days of service of a letter requesting the conference. Regarding the conference, V.I. R. CIV. P. 37-1(c)(2) encourages counsel to meet in person, but if not practicable, permits the parties to confer by telephone or video conference, but not via mail or e-mail exchange.

ANALYSIS

Defendant's Motion to Compel

V.I. Oral Surgery seeks disclosure and discovery regarding its First Demand for Production of Documents, First Requests for Admissions, and First Set of Interrogatories served on Sheesley on August 1, 2017, complaining that Sheesley's August 31, 2017, responses were

³ V.I. R. CIV. P. 37-1(b).

“predominantly evasive and incomplete”. The Court will discuss the discovery requests individually.

Defendant’s Demand for Production of Documents:

Request No. 6 seeks “All insurance policies, and health insurance cards, including but not limited to health insurance policies applicable to any and all medical treatments you have received related to this case.” After incorporating his Introduction, Reservation of Rights, and General Objections⁴, Sheesley claimed there were, “None in Sheesley’s possession.” In moving to compel, Defendant asserts Sheesley “intimated that he may have had health insurance for a brief rime during the period of time related to this case.” Sheesley asserts that his response is “proper and sufficient under the rules.”

Ruling: If Sheesley had health insurance coverage during any portion of the relevant period, he shall supplement his response by producing any insurance policies and health insurance cards in his possession, custody, or control.

Request No. 7 requests “All documents, financial statements, profit and loss statements, balance sheets, accounting information, and both federal and state tax returns for the years 2013 through the present.” Sheesley’s Opposition indicates he produced his tax returns for the years 2013 through 2016 on January 16, 2018.

Ruling: To the extent Request No. 7 demands production of financial statements, profit and loss statements, balance sheets, accounting information for the indicated period, the request is overbroad and unduly burdensome in the absence of a demonstrated need for the specific

⁴ Because Sheesley appears to have prefaced each of his responses with this phrase, the Court will not repeat it in the remainder of this Opinion.

information sought. To the extent the Request seeks production of Sheesley's tax returns, the Request is moot.

Request No. 8 demands "All documents, invoices, bills, notices, inter-office memos, intra-office memos, reports, chronicles, letters, correspondence, computerized records or writings that mention, concern, discuss or pertain to any expenses incurred by you, whether on a daily, weekly, monthly, and or annual basis." Sheesley's Opposition submits Sheesley has produced the expert report of Peter D. Wrobel, managing director of the Berkley Research Group, "which proves damages in excess of \$860,000.00".

Ruling: Because the expert report is not attached to the Motion or the Opposition, the Court cannot evaluate the extent to which the report is responsive to the Request. Defendant is entitled to production of the invoices, bills, or other financial records demonstrating Sheesley's expenses incurred in connection with this matter.

Request No. 9 asks for "All policy numbers, documents, inter-office memos, intra-office memos, reports, chronicles, letters, correspondence, computerized records or writings that mention, concern, discuss or pertain to any policy of insurance regarding property, casualty, liability, health, employment and/or life issued to you." Sheesley's Opposition asserts that "with respect to the health insurance information Sheesley has already stated that he does not have any of this information in his possession, custody or control."

Ruling: If Sheesley had health insurance coverage during any portion of the relevant period, he shall supplement his response by producing any insurance policies and health insurance cards in his possession, custody, or control. To the extent the request demands production of any policy of insurance regarding property, casualty, liability, employment and/or

life issued to Sheesley, the request is overbroad in the absence of a demonstrated need for the specific information sought.

Request No. 13 solicits "Execute copies of the enclosed Social Security Benefits Release forms." Sheesley answered, "Social Security has nothing to do with this case and releases for such information will not be provided."

Defendant argues that the requested production is relevant to Sheesley's claim for loss of income and to establish his earning's history, while Sheesley's Opposition relies upon the production of his tax returns, asserting the information sought is duplicative.

Ruling: Sheesley shall execute an appropriate release prepared by Defendant, which form and all information obtained through its use shall be subject to the Confidentiality Agreement previously executed by the parties.

Defendant's Request for Admissions:

Request No. 5 commands Sheesley to "Admit that at some time prior to March 16, 2013, you consulted with a dentist, endodontist, pediatric dentist, periodontist, or prosthodontist, oral surgeon or maxillofacial surgeon related to your jaws (maxillary and mandibular bones) and/or face." Sheesley answered "Sheesley cannot admit or deny this Request. This Request seemingly asks for medical information without defining words and Sheesley is a lay person. Sheesley admits to seeing medical professionals as set forth in his answers to Interrogatories."

Ruling: Because Sheesley listed 19 medical service providers seen in the 15 years before Defendant's request in his response to Interrogatory No. 1, Sheesley's response to the Request for Admissions is sufficient upon the information provided to the Court. Sheesley need supplement his response to this request only if he has seen medical professionals other than those

listed in his response to Interrogatory No. 1 in the 15 years prior to the alleged malpractice regarding treatment of conditions of his jaws or face.

Request No. 6 requires Sheesley to “Admit that you have used drugs, including but not limited to cocaine or crack or heroine [sic] or marijuana.” Sheesley avers “Sheesley has been given various drugs and medication related to the malpractice and negligence of Dr. Griffith, V.I. Oral surgery and Roy Lester Schneider Hospital which are reflected in his medical records.” Defendant claims the response is evasive and that the use of controlled substances “would determine if there was a counterindication with medication administered during the procedure that Plaintiff alleges was negligent.”

Ruling: The information requested appears to be irrelevant to the issues involved in this case, since Defendant provides no medical authority supporting its “counterindication” theory as regard to any of the medications administered to Sheesley by Defendants. In the absence of that authority, Sheesley need not supplement his response.

Requests Nos. 7, 8, 10, 11, 12 provide, in turn, “Admit that on March 13, 2013, you had malpositioned teeth.”, “Admit that on March 13, 2013, you had malaligned teeth.”, “Admit that on March 13, 2013, you had an occlusion.”, “Admit that on March 13, 2013, you had a crossbite.”, and “Admit that on March 13, 2013, you had an openbite.” Sheesley denied each of these requests.

Ruling: The existence or nonexistence of a medical condition at the time Sheesley consulted with or received treatment from Defendants would be reflected in his medical or dental records and the history collected when Sheesley received treatment and are, thus, available from another, more reliable source than a response to a request for admission. Sheesley’s

“knowledge” of any such condition is not probative of any issue in this case. Sheesley need not supplement these responses.

Request No. 14, 15, 16, and 17 similarly read, in turn, “Admit that prior to March 15, 2013 you had x-rays taken of your oral cavity and/or face.”, “Admit that prior to March 15, 2013 you had impressions taken of your oral cavity and/or face.”, “Admit that in the ten years prior to March 15, 2013 you [had] a consultation with a dentist, orthodontist, oral and maxillofacial surgeon, endodontist, pediatric dentist, periodontist, or prosthodontist regarding your teeth.”, “Admit that in the ten years prior to March 15, 2013 you [had] consultation with a dentist, orthodontist, oral and maxillofacial surgeon, endodontist, pediatric dentist, periodontist, or prosthodontist regarding your malaligned or malpositioned teeth.” Sheesley denied Request No. 14. Sheesley indicated “Sheesley cannot admit or deny this Request” as to Requests Nos. 15, 16, and 17, but admitted to seeing medical professional as set forth in his answers to Interrogatories .

Ruling: The scope of discovery is limited by V.I. R. Civ. P. 26(b)(2) where information can be obtained from another source that is more convenient and less burdensome. The existence or nonexistence of a medical condition at the time Sheesley consulted with or received treatment from Defendants would be reflected in his medical or dental records and are, thus, available from another, more reliable source than a request for admission. Since Defendant has not specifically claimed that Sheesley’s recovery is limited by a preexisting condition, Sheesley’s “knowledge” of such a condition at a time in the past is not probative of any issue in this case. Because Sheesley listed 19 medical service providers seen in the 15 years before Defendant’s request in his response to Interrogatory No. 1, Sheesley’s response to these Request for Admissions is sufficient based upon the limited information provided to the Court. Sheesley need supplement his responses to these requests only if he has seen medical professionals other than those listed in

his response to Interrogatory No. 1 in the 15 years prior to the alleged malpractice regarding treatment of conditions of his jaws or face.

Defendant's Interrogatories.

Interrogatory No. 6 inquires whether "At any time, prior to the incident alleged in the Second Amended Complaint, have you ever been diagnosed or treated by a dentist, endodontist, pediatric dentist, periodontist, or prosthodontist, oral surgeon or maxillofacial surgeon for any condition related to your jaws (maxillary and mandibular bones) and/or face? If so, state the date of your first diagnosis, the date of all subsequent diagnosis, the nature of treatment, date and length of treatment, and the name address, e-mail and telephone number of your treating health care providers."

Interrogatory No. 7 asks "Prior to the facts alleged in the Second Amended Complaint have you ever consulted with a dentist, endodontist, pediatric dentist, periodontist, or prosthodontist, oral surgeon or maxillofacial surgeon for any condition related to your jaws (maxillary and mandibular bones) and/or face? If so, state the date of your first consultation, the date of all subsequent consultations, the nature of treatment, date and length of treatment, and the name address, e-mail and telephone number of your treating health care provider(s)."

Sheesley responded to each of these interrogatories, "...this interrogatory contains medical terms which are not defined. Ms. Sheesley has seen dentists and medical professionals as outlined in his answers to these Interrogatories."

Defendant argues that Sheesley's reference to the 19 identified physicians sends Defendants "on a goose chase wasting time and resources. This questions is specific to medical practitioners who diagnosed Plaintiff with a condition that bears directly upon this cause for medical malpractice." Sheesley's Opposition first relies on V.I. R. Civ. P. 33(d) and summarizes

that Rule as providing “a party may answer an interrogatory by referring to documents.” Sheesley then interposes that “the answers to many of the Interrogatories that VI Oral took issue with could only be answered by an examination of Sheesley’s medical records”, which Sheesley claims are not in his possession, custody or control.

Ruling: V.I. R. Civ. P. 33(d) declares:

An answer must be given to each interrogatory as provided in subpart (b) of this Rule unless the responding party represents in good faith in its response that it cannot – in the exercise of reasonable efforts – prepare and answer from information in its possession or reasonably available to the party. In that instance, and if the answer to an interrogatory may be determined by examining, auditing, compiling abstracting, or summarizing a party’s business records (including electronically stored information) – and if the burden of deriving or ascertaining the answer will be substantially the same for either party – the responding party may answer by:

- (1) Specifying the records that must be reviewed, providing sufficient detail and explanation to enable the interrogating party to identify and understands the records as readily as the responding party could; and
- (2) producing copies of the records, compilations, abstracts, or summaries with the answer to the interrogatory, unless duplicating such materials would be unduly burdensome.

Sheesley’s interpretation and reliance upon Rule 33(d) is erroneous to the extent Sheesley seeks to avoid specifically responding to each interrogatory on that basis. Sheesley’s medical records are not Sheesley’s “business records”, as contemplated in the Rule. Even were that the case, Sheesley has not specified the records that must be reviewed in sufficient detail to enable Defendant to identify the applicable records. Nor has Sheesley produced copies of the records or alleged that duplicating them would be unduly burdensome. Nonetheless, Sheesley’s indication that many of the interrogatories “could only be answered by an examination of Sheesley’s medical records”, which Sheesley asserts he “does not and did not have...in his possession, custody or control”, when coupled with Sheesley’s repeated efforts in this litigation to have Defendants produce copies of his medical records, offers an arguably sound basis for his response.

Unless Sheesley can accurately respond to these interrogatories based upon his independent recollection in the absence of possession of his medical records, Sheesley need not further respond to these interrogatory until 30 days after he is in possession of his medical records. Once he is in possession of those records, he shall respond with the specificity required by Rule 33(d).

Interrogatory No. 9⁵ says "Please provide the names, addresses, email addresses, websites, telephone numbers, and fax numbers of all dentists, endodontist [sic], pediatric dentists, periodontists, or prosthodontists, oral surgeons or maxillofacial surgeons and/or healthcare providers who have compiled or taken : pictures, x-rays, impressions, models, and any medical or dental documents related to your oral cavity and/or face." Sheesley again responded by referencing his answer to Interrogatory No. 1.

Ruling: Unless Sheesley can accurately respond to this interrogatory based upon his independent recollection in the absence of possession of his medical records, Sheesley need not further respond to this interrogatory until 30 days after he is in possession of his medical records. Once he is in possession of those records, he shall respond with the specificity required by Rule 33(d).

Interrogatory No. 11 queries "What caused you to sustain a broken jaw in St. Croix? Please describe the circumstances surrounding the cause of your broken jaw including the date and time of the incident, the location, and whether any complaints, grievances or police reports were filed in connection with the assault that caused your broken jaw."

Sheesley answered "Mr. Sheesely was assaulted on St. Croix in the area of Christiansted. This Interrogatory # 11 actually answers its own question in the second part when it acknowledges that an assault caused the broken jaw. No police report was filed."

⁵ In its Motion to Compel, Defendant mistakenly refers to this request as Interrogatory No. 8.

Ruling: The response is adequate, except that Sheesley must supplement his response with the date and time of the alleged assault.

Interrogatory No. 12 queries “Set forth all facts upon which you claim permanent damages, including, but not limited to medical expenses, mental anguish, disfigurement, pain and suffering, loss of ability to earn money and loss of enjoyment of life. If you are relying on any written documents or records, identify these documents and records, and state the material in each document which you contend demonstrates malpractice against V.I. Oral.” Defendant asserts that Sheesley’s response discussing the impact upon his life is vague and that Sheesley must “explain what life activities Plaintiff participated in prior to the alleged incident giving rise to this case, that Plaintiff cannot participate in as a result of the alleged incident.”

Ruling: Interrogatory No. 12 does not request that Sheesley “explain what life activities...Plaintiff cannot participate in as a result of the alleged incident” as Defendant contends, and the response is adequate

Interrogatory No. 16 requests “Please identify the facts, health care providers, and/or publications that support your averment that ‘a minimum of two (2) additional surgeries to place implants and caps into [the] mandible’ are needed as alleged in paragraph 79 of your Second Amended Complaint.” Sheesley indicated “this information is set forth in detail in the medical records of Mr. Sheesley.”

Ruling: Based on reasoning similar to Interrogatories Nos. 6. and 7, unless Sheesley can accurately respond to this interrogatory based upon his independent recollection in the absence of possession of his medical records, Sheesley need not further respond to these interrogatory until 30 days after he is in possession of his medical records. Once he is in possession of those records, he shall respond with the specificity required by Rule 33(d).

Interrogatory No. 17 says "Identify and describe in detail your claims for lost wages including the wages you earned in 2013 through to 2017, include in your response the amount earned on your 2013 – 2017 tax returns. Sheesley relies upon the production of his tax returns and the expert report of Peter D. Wrobel outlining his damages.

Ruling: While Sheesley's initial response was inadequate, in the absence of review by the Court of the tax returns and the expert report that Sheesley has now produced, Sheesley's response appears to have become adequate. No supplementation will be required unless Sheesley intends to base a claim for lost wages upon information other than that contained in his tax returns and expert report.

Interrogatory No. 19 states "Provide the factual basis for the contention that doctors, agents and employees of V.I. Oral failed to comply with the standard of due care required to treat your jaw." Sheesley indicated "the medical malpractice of Defendants speaks for itself. Defendants botched numerous surgeries on Mr. Sheesley." V.I.O.S. contends that neither the Complaint nor this Interrogatory alleges how V.I.O.S. failed to meet the standard of care. Sheesley replies that V.I.O.S. negligently employed, failed to supervise and manage an unlicensed doctor (Griffith) causing injury to Sheesely.

Ruling: The Court has not been made aware by either party of whether Sheesley has presented an expert report on the issue of liability. If a report has been provided, Sheesley need not supplement this response. If no expert report on liability has been produced, Sheesley shall supplement this response with the specificity required by Rule 33(d) within 30 days after Sheesley is in possession of his medical records.

Interrogatory No. 21 demands “Prior to this incident, did you take any medication for any disease, illness or condition? If so, what did you take, how long did you take it, was it prescribed and if so, who prescribed it, and why?” Sheesley stated “None regularly. Medication has been taken by Attorney Sheesley in the 33 plus years he had been alive before”...[this incident].

As drafted, the request is overbroad. The motion to compel claims that during the parties Rule 37 conference, V.I.O.S. agreed to narrow this inquiry to the medications Sheesley was taking “1) at the time of the first surgery, and 2) at the time of the second surgery alleged in the Complaint.” Sheesley’s Opposition indicates “Sheesley answered V.I. Oral’s interrogatory and during the 37.1 conference indicated that he [sic] answer was correct. Sheesley stated that he might occasionally take Tylenol or Advil.”

Ruling: If Sheesley was taking only Tylenol or Advil at the time of each of the surgeries, his response need not be supplemented.

Plaintiff’s Motion to Compel

Sheesley wants disclosure and discovery regarding his Requests for Production of Documents served on Dr. Horace Griffith and Roy Lester Schneider Hospital on May 9, 2016, Requests for Admissions served on the Hospital on May 9, 2016, and Interrogatories served on Griffith and the Hospital on August 10, 2017. Sheesley asks that default judgment be entered against Defendants for “their longstanding, intentional refusal to answer Sheesley’s discovery.”

On July 6, 2016, Sheesley submitted a Notice of Failure to Answer Requests for Admissions regarding Griffith and V.I.O.S. Sheesley also filed a Motion to Compel Discovery from Griffith and V.I. Oral Surgery, Inc., on September 12, 2016, and a Notice of Failure to Answer Requests for Admissions regarding the Hospital on September 16, 2016. On October 17, 2016, Sheesley filed a Notice of Filing Complaint with Office of Civil Rights at the Department

of Health and Human Services for a Violation of Michael L. Sheesley's Rights Under HIPPA, complaining that Griffith and V.I.O.S. had refused to provide Sheesley with Sheesley's medical records.

V.I.O.S. filed a Notice of Service of its responses to Sheesley's First Interrogatories on September 12, 2017. Relying on V.I. R. Civ. P. 26(f), Griffith and the Hospital opposed the Motion to Compel on February 9, 2018, claiming that the motion was premature because the parties have not met and conferred and asserting that the discovery was sought before service of the Summons and Complaint on Griffith. With regard to the interrogatories promulgated on August 10, 2017, those Defendants claim that "Defendant has been working in an attempt to locate the information requested, however, the search was interrupted by the storm and has been made more difficult by the fact that the information being sought is five years old and RLSH was physically and operationally disrupted by the storm."

In his February 20, 2018, Reply, Sheesley points out that Sheesley and Defendants filed a Report of Parties' Planning Meeting and Joint Proposed Discovery Plan on April 1, 2016, indicating that they had met and conferred regarding their dispute with regard to carry out a scheduling conference while motions were pending. Attached to the Report was a proposed scheduling and discovery plan signed only by Sheesley that would have called for written discovery to be exchanged by April 15, 2016. Further, Griffith and the Hospital requested a 30 or 45-day extension of time to respond to Plaintiff's requests for admissions on May 18, 2016. Neither of those filings contains any objection to Plaintiff's discovery requests on the basis of the date upon which they were propounded. Further, the Motion to Compel filed by V.I.O.S. makes repeated reference to the parties' "Rule 37 conference".

The Court is extremely disappointed that some two and a half years after this case was filed Defendants assert procedural objections to providing the most basic discovery. Although counsel is correct that V.I. R. Civ. P. 37-1(c)(1) and V.I. R. Civ. P. 37-1(c)(3) require the requesting party to arrange a conference with opposing counsel before moving to compel, it is clear that Plaintiff has brought this dispute to the attention of the Court and Defendants on numerous occasions and that the parties have had ample opportunity to amicably resolve it. While appropriate objections to specific discovery requests are to be expected, an outright refusal to provide any responses smacks of obstructionism. And, to require the parties to meet and confer at this late date would not only be a futile exercise, but would elevate form over substance and unnecessarily delay the completion of discovery that is woefully delinquent. Accordingly, Sheesley's motion to compel will be granted.

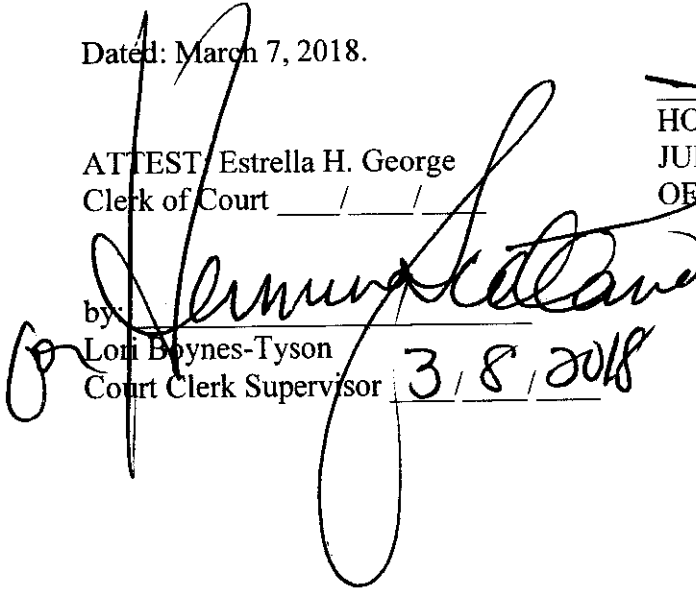
CONCLUSION

For the foregoing reasons, Defendants' Motion to Compel will be granted in part and denied in part, and Plaintiff's Motion to Compel will be granted. An Order consistent with this Memorandum Opinion shall follow.

Dated: March 7, 2018.

ATTEST Estrella H. George
Clerk of Court

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

by 
Lori Boynes-Tyson
Court Clerk Supervisor

3/8/2018