

DIVISION OF ST. THOMAS AND ST. JOHN

Defendants.

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) **CASE NO. ST-11-CV-586**
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¹ Defendant responded on January 3, 2013.

have discoverable information --- along with the subjects of that information --- that the disclosing party may use to support its claims or defenses”²

However, discovery is also governed “. . . by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court, [and] the Federal Rules of Civil Procedure. . . .” Thus, as this Court has previously held in *Penn v. Whitecap Inv. Corp. et al.*,³ under Local R. of Civ. P. 37.1 and 37.2, a moving party must closely follow the procedural and filing requirements prior to filing a motion to compel discovery by, at least, (1) arranging or attempting to arrange for a conference of the parties to resolve the dispute,⁴ (2) confer during the conference in “a *good faith effort* to eliminate the necessity for the motion or to eliminate as many of the disputes as possible”⁵ (emphasis added); and (3) “[w]here ‘counsel are unable to resolve all of their

² Fed. R. Civ. P. 26(a)(1)(A). Rule 26(b)(1) further states that a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,” including “the identity and location of persons who know of any discoverable matter.” However, only nonprivileged information is discoverable. Thus, under the Model Rule of Professional Conduct 4.2 and *Mendez v. Hovensa*,

[c]ounsel for an opposing party may not contact any employee of a corporate party represented by counsel (1) who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or (2) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or (3) who has authority to obligate the organization with respect to the matter.

Nathaniel v. Am. Airlines, 2008 WL 5046848, *3 (D.V.I. Nov. 20, 2008) (citing *Mendez v. Hovensa, LLC*, 49 V.I. 949, 855-56 (D.V.I. 2008)).

³ 2012 WL 6596123, 2012 Lexis 63 (Sup. Ct. Dec. 12, 2012).

⁴ LRCi 37.1 (“It shall be the responsibility of counsel for the moving party to arrange for this conference. . . . Unless otherwise provided by stipulation or by written order of the Court, the conference shall be completed within (30) calendar days after the moving party serves a letter requesting such conference. The moving party’s letter shall identify each issue and/or discovery request in dispute, state briefly with respect to each the moving party’s position (and provide any legal authority), and specify the terms of the discovery order to be sought.”)

⁵ LRCi 37.1.

differences [at the conference], they shall formulate and sign a written stipulation to that effect.”⁶

ANALYSIS

Here Plaintiff’s December 20, 2012, motion seeks to compel the production of an extensive number of documents and contact information of numerous individuals, including, but not limited to, “management employees,” employees who had “last worked on the subject electrical line,” and employees who had knowledge of “all actions taken by [Defendant] . . . to ensure [Defendant] . . . secured/marked the subject electrical line.”⁷ The Parties held a brief conference call on October 11, 2012, regarding the disputed discovery materials, at which no consensus was reached with the exception that Defendant agreed to provide color copies of certain previously disclosed photographs.⁸ Defendant served color copies of the photographs on January 8, 2013, rendering the corresponding portion of Plaintiff’s December 20, 2012, Motion to Compel moot. The Court will now discuss the merits of the remaining portions of Plaintiff’s motion.

Following the October 11, 2012, conference call, Defendant’s counsel immediately wrote Plaintiff a letter dated October 11, 2012, expressing dissatisfaction with the 3 to 4 minute conference call and requested to schedule a subsequent “solid

⁶ LRCi 37.2(a). Further, under Local R. of Civ. P. 37.2(c), “[t]he Court will not consider any discovery motion in the absence of (1) the signed stipulation and certification required by LRCi 37.2(a), or (2) a declaration from counsel for the moving party establishing that opposing counsel:

(1) failed to confer in a timely manner after receipt of a letter requesting a conference under LRCi 37.1; or
(2) failed to sign the stipulation and certification required by LRCi 37.2(a).”

⁷ Plaintiff’s Motion to Compel Defendant WAPA to Supplement Discovery, December 20, 2012, at pages 1, 5, 7.

⁸ Plaintiff’s Motion to Compel Defendant WAPA to Supplement Discovery, December 20, 2012, Exhibit 2, Letter dated October 15, 2012.

substantive conversation” to confer on Plaintiff’s Motion to Supplement Discovery.⁹ Specifically, Defendant’s October 11, 2012, letter and Attorney Mark A. Kragel’s January 3, 2013, affidavit¹⁰ both state that no meaningful discussion was had during the October 11, 2012, conference call because “Plaintiff[’s counsel] did, on every occasion and without hesitation, cut WAPA’s counsel’s statement off in mid-sentence by curtly interjecting ‘fine. I will just compel.’”¹¹ Plaintiff ignored Defendant’s request for another conference in an October 15, 2012, letter which simply summarized the parties’ October 11, 2012, conference call.¹² In an October 29, 2012, letter, Plaintiff subsequently sought a joint stipulation pursuant to Local R. Civ. P. 37.2(a),¹³ which Defendant’s counsel did not sign. Defendant’s counsel states that he could not sign the proposed joint stipulation in good faith because Plaintiff’s counsel refused to engage in “a meaningful good faith conference,” and thus, Defendant’s counsel could not conclude that the parties were “unable to resolve the issues.”¹⁴ Plaintiff’s December 20, 2012, Motion to Compel is silent regarding Defendant’s allegations that Plaintiff’s counsel was dilatory in its obligations under Local R. of Civ. P. 37.1.

⁹ Defendant’s Response to Plaintiff’s Motion to Compel Supplemental Discovery Responses, January 3, 2013, Exhibit C, at page 2, Letter dated October 11, 2012.

¹⁰ Defendant’s Response to Plaintiff’s Motion to Compel Supplemental Discovery Responses, January 3, 2013, Exhibit B.

¹¹ Defendant’s Response to Plaintiff’s Motion to Compel Supplemental Discovery Responses, January 3, 2013, Exhibit C, at page 1, Letter dated October 11, 2012; Defendant’s Response to Plaintiff’s Motion to Compel Supplemental Discovery Responses, January 3, 2013, Exhibit B, at page 2.

¹² Plaintiff’s Motion to Compel Defendant WAPA to Supplement Discovery, December 20, 2012, Exhibit 2, Letter dated October 15, 2012.

¹³ Plaintiff’s Motion to Compel Defendant WAPA to Supplement Discovery, December 20, 2012, Exhibit 3, Letter dated October 29, 2012.

¹⁴ Defendant’s Response to Plaintiff’s Motion to Compel Supplemental Discovery Responses, January 3, 2013, at page 4.

Here, Plaintiff's counsel failed to abide by the Local R. of Civ. P. 37.1 and 37.2 because Plaintiff's counsel did not engage in "a good faith effort to eliminate the necessity for the motion or to eliminate as many of the disputes as possible."¹⁵ Unlike *Penn v. Whitecap Inv. Corp. et al.*¹⁶ where the moving party prematurely resorted to the procedures set forth in Local R. of Civ. P 37.2(c), Plaintiff did first attempt to seek a joint stipulation prior to submitting her Motion to Compel. However, Defendant's October 11, 2012, letter and Attorney Mark A. Kragel's January 3, 2013, affidavit both indicate that Plaintiff's counsel failed engage in any *good faith* meaningful dialogue because Plaintiff's counsel continually cut Defendant's counsel off and refused to discuss the matter further, despite Defendant's counsel's willingness to do so. While the Court recognizes that an endless time-consuming discussion where the parties are unable to agree would be fruitless, refusing to allow opposing counsel to even explain his or her factual or legal reasoning for refusing to disclose certain discovery material precludes any opportunity for the parties to resolve a discovery dispute. Further, in the absence of any evidence presented by Plaintiff to the contrary, the Court finds that one 3 to 4 minute conversation¹⁷ regarding Plaintiff's extensive Motion to Supplement Discovery, which requested a broad range of documents, contact information, and other matters central to the adjudication of this case, was an insufficient good faith "meet and confer" within the meaning of Local R. of Civ. P. 37.1.

¹⁵ LRCi 37.1.

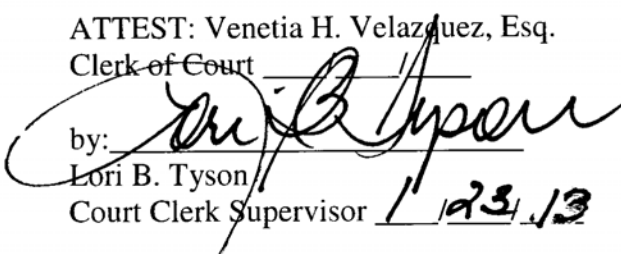
¹⁶ 2012 WL 6596123, at *2.

¹⁷ Defendant's Response to Plaintiff's Motion to Compel Supplemental Discovery Responses, January 3, 2013, Exhibit B, at page 2.

Thus, while the Court recognizes that the language of Local R. of Civ. P. 37.1 and 37.2 is largely procedural, a party may not simply go through the motions to fulfill these step-by-step requirements. The purpose behind these procedures is absolutely clear: to compel *both* parties to engage in a *good faith* effort to resolve the discovery dispute prior to resorting to a motion to compel before the court. Accordingly, Plaintiff's Motion to Compel is denied without prejudice to re-filing. An Order consistent with this Opinion shall follow.

Dated: January ~~20~~, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: 

Lori B. Tyson

Court Clerk Supervisor

1/23/13


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

DIVISION OF ST. THOMAS AND ST. JOHN

Defendants.

) CASE NO. ST-11-CV-586

Court Clerk Supervisor

7/23/13