

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ASHRAF BAZZAR,

Plaintiff,

v.

NASER SALEM d/b/a FASHION SOURCE,

Defendant.

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CASE NO. ST-14-CV-370

MEMORANDUM OPINION

Pending before the Court is Defendant's April 1, 2016, Motion to Compel and for Rule 37 Sanctions.¹ For the following reasons, Defendant's Motion will be denied.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

On March 3, 2016, the Court granted Plaintiff's November 13, 2015, Motion to Amend the First Amended Complaint and denied Defendant's July 10, 2015, Motion to Dismiss. Additionally, the Court ordered the parties to conduct a Scheduling Conference pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and to submit a proposed discovery plan as the Scheduling Order for the case by March 30, 2016. On December 3, 2015, the parties had filed a Joint Proposed Scheduling Plan indicating that all Federal Rule of Civil Procedure 26(a)(1) disclosures would be made by December 16, 2015, but the parties failed to submit a revised scheduling plan by the March 30, 2016, deadline. As a result, on April 14, 2016, the Court largely approved the December 3, 2015, plan. Then, on April 21, 2016, the parties filed a Joint Stipulation to Extend Discovery Deadlines that did not address the Rule 26(a)(1) disclosures.

¹ Plaintiff responded on April 4, 2016, and Defendant replied on April 15, 2016. The Court references the dates the pleadings were filed, whereas the parties refer to the dates the pleadings were signed.

STANDARD

The Supreme Court of the Virgin Islands recognizes, “[a] motion to compel is controlled by Federal Rule of Civil Procedure 37(a), which permits the Superior Court to compel any person to answer objected to or inadequately answered discovery so long as it is within the permissible scope of discovery....”² Further, under Local Rules of Civil Procedure 37.1 and 37.2³, a moving party must closely follow the procedural and filing requirements prior to filing a motion to compel.⁴ These rules require parties to at least meet and confer in a “good faith effort to eliminate the necessity for the motion or to eliminate as many of the disputes as possible.”⁵ If the parties are unable to “resolve all of their differences, they shall formulate and sign a written stipulation to that effect, expressly certifying their compliance with LRCi 37.1.”⁶ Alternatively, if the parties fail to sign a written stipulation, the moving party may resort to the procedures set forth in Local Rule of Civil Procedure 37.2(c), which allows counsel for the moving party to file a declaration indicating that opposing counsel refused to cooperate.⁷

² *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 169 (V.I. 2012) (recognizing that Super. Ct. R. 39 makes the Federal Rules of Civil Procedure 26 through 37 applicable for the purposes of discovery); FED. R. CIV. P. 37.

³ Since the Superior Court does not have a rule addressing the procedures preceding a motion to compel, the Superior Court has relied on LRCi 37.1 and 37.2. See *Penn v. Whitecap Inv. Corp.*, 2012 V.I. LEXIS 63, *2-4 (V.I. Super. Ct., Dec. 12, 2012) (“Here, LOCAL R. OF CIV. P. 37.1 and 37.2...apply because the primary purpose behind LOCAL R. OF CIV. P. 37.1 and 37.2 is in no way inconsistent with the Superior Court Rules....In fact, LOCAL R. OF CIV. P. 37.1 and 37.2 are entirely complimentary with the discovery rules applicable to this jurisdiction under FED. R. CIV. P. 26-37...”).

⁴ See *Demming v. V.I. Water & Power Auth. & Regatta Point Watergate Villas Condo. Assoc.*, 2013 V.I. LEXIS 3, *1-3 (V.I. Super. Ct., Jan. 20, 2013)(citations omitted).

⁵ LRCi 37.1.

⁶ LRCi 37.2(a).

⁷ LRCi 37.2(c) provides that “[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).”

Under Local Rule of Civil Procedure 37.3, “[t]he failure of any counsel to comply with or cooperate in...the forgoing procedures may result in the imposition of sanctions.”⁸ Additionally, Federal Rules of Civil Procedure 37(b)(2) and 37(c)(1) allow a Court to impose sanctions against a party or an attorney for failure to comply with a Court’s discovery order or failure to provide information required by Rule 26(a) or (e).⁹ Before sanctions can be imposed, the party must be given reasonable notice and an opportunity to be heard, after which the court must then determine whether sanctions are appropriate, and, if so, the type of sanctions that should be imposed.¹⁰

ANALYSIS

Plaintiff argues that the Motion to Compel is now moot because Plaintiff filed and served the requested discovery. “A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion.”¹¹ In Defendant’s Reply, Defendant acknowledges that the discovery responses were received, but asserts that they were severely delinquent and were not received until after the Motion to Compel was filed. While the parties dispute the date the discovery was served, it is clear that Plaintiff filed his discovery responses on March 21 and March 22, 2016, over a week before Defendant filed the April 1, 2016, Motion to Compel.¹² As a result, the Court agrees with Plaintiff that the Motion is moot.

⁸ LRCi 37.3.

⁹ FED. R. CIV. P. 37(b)(2); FED. R. CIV. P. 37(c)(1).

¹⁰ FED. R. CIV. P. 37(c)(1) provides that “the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney’s fees, caused by the failure;

(B) may inform the jury of the party’s failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).”

¹¹ *Der Weer v. Hess Oil Virgin Islands Corp.*, 60 V.I. 91, 99, [WL], at *3 (V.I. Super. Ct. 2014) (citations omitted); *Haynes v. Otley*, 61 V.I. 547, 558 (V.I. 2014) (“[T]he mootness doctrine in the Virgin Islands is a non-jurisdictional claims-processing rule that has been incorporated into Virgin Islands law only as a matter of judicial policy.” (citations omitted)).

¹² Defendant notes that several of the responses were incomplete or state improper objections, but recognizes that these issues are not ripe for the court’s consideration since the parties have not yet complied with the requirements of LRCi 37.1.

Nevertheless, Defendant argues that sanctions are still justified because the responses were not received by mail until after the Motion was filed, combined with the five month delay caused by Plaintiff's failure to respond. Defendant served the initial discovery request on November 13, 2015. At some time thereafter, the parties met and agreed to the December 3, 2015, scheduling order, establishing December 16, 2015, as the deadline for the Rule 26(a)(1) disclosures. After Plaintiff failed to meet the deadline, Defendant, by letters dated February 17, 2016, and March 3, 2016, requested a meet and confer with Plaintiff to discuss the outstanding discovery requests.¹³ On March 4, 2016, Plaintiff indicated that the discovery responses would be forthcoming, and Plaintiff filed the responses by March 22, 2016.¹⁴

While the Court recognizes that both parties stipulated to the December 3, 2015, scheduling plan, it was never ruled on by the Court.¹⁵ As a result, the Court is unable to issue sanctions based on a violation of a Court ordered discovery plan. Additionally, under Federal Rule of Civil Procedure 37(a)(5)(B), when the Court denies a motion to compel, the Court must order the moving party to pay the reasonable expenses incurred by the party opposing the motion, unless the Court finds the motion to be substantially justified.¹⁶ Here, the Court is sympathetic to Defendant's frustration regarding the delay with discovery, and find that the motion was initially justified. Specifically, since Defendant met the procedural requirements under Local Rules of Civil Procedure 37.1 and 37.2, and was unaware of the discovery disclosures by Plaintiff when filing

¹³ Def.'s April 1, 2016, Mot. to Compel, Ex. A, Ex. B.

¹⁴ *Id.* at Ex. C.

¹⁵ Pursuant to FED. R. CIV. P. 16(b)(4), a scheduling order "may be modified only for good cause and with the judge's consent." In the absence of a local statute, case law, or Superior Court of the Virgin Islands rule addressing the issue adequately, the Federal Rules of Civil Procedure are applicable to the Superior Court by V.I. Super. Ct. R. 7.

¹⁶ See FED. R. CIV. P. 37(a)(5)(B).

the Motion to Compel. As a result, the Court does not find the award of sanctions to be appropriate under Fed. R. Civ. P. 37(a)(5)(B).

Further, on March 3, 2016, based on the Court's denial of the motion to dismiss, the Court ordered the parties to submit a revised scheduling order by March 30, 2016. Both parties failed to meet or address this deadline. Instead, the parties waited until April 21, 2016, a week after the Court issued the April 14, 2016, scheduling order to file a joint stipulation to extend certain discovery deadlines. Therefore, the Court is also unable to impose sanctions based on Local Rule of Civil Procedure 37.3, since both parties failed to fully cooperate in creating a revised discovery schedule in an attempt to avoid the current motion.

CONCLUSION

For the forgoing reasons, Defendant's April 1, 2016, Motion to Compel and for Rule 37 Sanctions is denied. An Order consistent with this Memorandum Opinion shall issue.

Dated: June 13, 2016

ATTEST: Estrella H. George
Acting Clerk of Court

by:

for Lori Boynes-Tyson
Court Clerk Supervisor 6/14/2016


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

CERTIFIED A TRUE COPY

DATE:

6-14-16
ESTRELLA H. GEORGE
Acting Clerk of the Court

By:


Camell A. Clarke
Court Clerk II