

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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EARL KELLY and ANNETTE KELLY
Plaintiffs

vs.

ROBERT LYNCH and KELVIN GONZALEZ
Defendants

CIVIL NO. 375/1983

DESMOND L. MAYNARD, Esq.
P. O. Box 8388
St. Thomas, Virgin Islands
(Attorney for Plaintiffs)

PATRICIA D. STEELE, ESQ.
Law Offices of R. Eric Moore
P. O. Box 3086
St. Thomas, Virgin Islands
(Attorney for Defendants)

MEMORANDUM OPINION AND ORDER
(December 30, 1983)

FEUERZEIG, J.

Plaintiffs have filed a motion to compel further response to their first set of interrogatories and request for production of documents. The defendants oppose the motion, contending that as discovery progresses and further information comes to light, the defendants will supplement their response to reflect such information. In addition they contend that the "defendant must, as a matter of law, raise all affirmative defenses in his answer or waive the defense. Thus, a defendant has a right to raise any defense which may be applicable under the allegations of the complaint and to deny any allegations in the complaint which are incorrect."

The court is troubled by the motion and the defendants' response for two reasons. First, there appears to be no indication that either side has attempted to resolve their differences through discussion among counsel. As Chief Judge Christian said in Johnson v. Sagarra, Civil No. 80-421 (D.V.I. St. Thomas and St. John, August 4, 1981):

The court is concerned that prior to filing this motion counsel did not first communicate with opposing counsel, making inquiry about the lack of response. Although there is no rule in the Federal Rules of Civil Procedure which so requires, this court feels that it is implied that attorneys should try to work out their misunderstandings before bringing them before the court.

The court is concerned for a second reason and that is the new requirement of Rule 11 of the Federal Rules of Civil Procedure, effective August 1, 1983. The signature of an attorney on every pleading motion or other paper now constitutes a certificate by the attorney

that to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The Advisory Committee's note to the new rule, 97 F.R.D. 165, 198, states:

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. . . . This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading motion or other paper was based on a plausible review of the law; or whether he depended on forwarding counsel or another member of the bar.

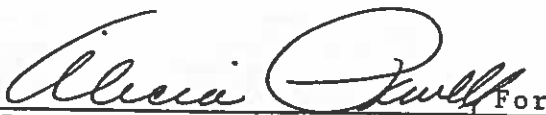
With this backdrop, the response of counsel for the defendants, particularly at this stage of the proceedings, six months after the filing of defendants' answer, is troublesome. The interrogatories at issue, which are few in number, go to the very heart of the defendants' denial of allegations in the plaintiff's complaint. Merely to state that defendants "will leave plaintiff . . . to his proof" raises a question as to the propriety of the signature on the original answer, let alone on the answers to interrogatories.

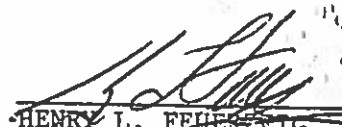
However, as stated, before the court will enter an order compelling discovery, counsel will be required to satisfy the court that attempts were made to resolve the dispute before filing the motion.

Accordingly, it is

ORDERED that plaintiffs' motion to compel is denied without prejudice.

ATTEST:


VIOLA E. SMITH
Administrator/Clerk of the Court


HENRY L. FEUERZEIG
Judge of the Territorial Court