

NOT FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

NICKEY DAVIS,

Plaintiff,

v.

HOVENSA, L.L.C. AND UHP PROJECTS, INC.,

Defendants.

SX-02-CV-333

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER came before the Court on Defendant UHP Projects, Inc.'s (hereinafter, "UHP") Motion to Compel and Motion for Sanctions for Plaintiff's Failure: (1) To adequately answer and supplement the answers to UHP's First Set of Interrogatories to Plaintiff; and (2) To adequately respond to and supplement the responses to UHP's First Set of Requests for Production of Documents to Plaintiff, filed on December 8, 2003. On January 12, 2004, Plaintiff filed an Opposition to Defendant UHP's Motion to Compel and Motion for Sanctions. Simultaneously on January 12, 2004, Plaintiff also filed a Motion to Strike Defendant UHP's Motion to Compel and Motion for Sanctions.

FACTS

On May 21, 2002, Plaintiff filed a Complaint against Defendant HOVENSA, L.L.C. (hereinafter, "HOVENSA") and Defendant UHP, alleging that he suffered physical injuries, medical expenses, loss of income, loss of capacity to earn income, mental anguish, pain and suffering and loss of enjoyment of life as the direct and proximate result of Defendant HOVENSA and Defendant UHP's negligent acts and omissions while Plaintiff worked at Defendant HOVENSA's refinery on St. Croix, U.S. Virgin Islands.

Defendant UHP propounded its First Set of Interrogatories to Plaintiff on February 12, 2003 and First Set of Requests for Production on February 27, 2003. On July 27, 2003, Plaintiff served his answers and responses. Plaintiff served supplemental responses on September 5, 2003 (Plaintiff's medical records) and November 3, 2003 (Plaintiff's Worker's Compensation file). On October 2, 2003, Defendant UHP sent Plaintiff a letter, in attempt to comply with Fed. R. Civ. P. 37, to resolve discovery disputes without Court intervention.

DISCUSSION

Defendant UHP filed its Motion to Compel and Motion for Sanctions pursuant to Fed. R. Civ. P. 33, 34, 37(a)(2)(B), 37(a)(4)(A) and 37(b)(2). Plaintiff filed an Opposition arguing that Defendant UHP's Motion to Compel and Motion for Sanctions is improper and simultaneously filed a Motion to Strike Defendant UHP's Motion to Compel and Motion for Sanctions.

Motion to Compel

Fed. R. Civ. P. 37 requires that the party moving for an order compelling disclosure or discovery must include "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Local Rules of Civ. P. 37.1 also provides that:

Prior to filing any motion relating to discovery pursuant to Federal Rules of Civil Procedure 26-37, other than a motion relating to depositions under Federal Rule of Civil Procedure 30, counsel for the parties shall confer in a good faith effort to eliminate the necessity for the motion or to eliminate as many of the disputes as possible. It shall be the responsibility of counsel for the moving party to arrange for this conference. To the extent practicable, counsel are encouraged to meet in person at a mutually convenient location. If, in the consideration of time and/or resources, counsel agree that meeting in person is not practicable, the conference may take place telephonically or electronically. Unless otherwise provided by stipulation or by written order of the Court, the conference shall be completed within thirty (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. *Emphasis added.*

The Court finds Defendant UHP has failed to comply with both Fed. R. Civ. P. 37(a)(1) and LRCi 37.1 because Defendant UHP, as the moving party, had the responsibility to arrange for a meeting to confer in good faith but have not done so. Additionally, this means that Defendant UHP also failed to provide the Court with the necessary certification that the parties have good faith conferred or attempted to confer to resolve the discovery disputes, as required by Fed. R. Civ. P. 37(a)(1). In *Ference v. Unisen, Inc.*, the court ruled that the defendant-moving party's correspondence to the plaintiff requesting contact within the next ten (10) days to discuss the issue" is inadequate to demonstrate compliance with LRCi 37.1 and stricken the defendant's motion to compel. 2004 WL 2280361, *1 (D.V.I. 2004). The *Ference* court further stated that the plaintiff's non-response to the defendant's request may not be interpreted as an outright refusal and "[I]n this particular instance, a follow-up telephone call or correspondence offering alternate dates on which Defendant's counsel was available to meet, at the very least, were required." *Id.* Upon inspection of Defendant UHP's October 2, 2003 Letter to Plaintiff, the Court finds that while Defendant UHP discussed at length the discovery request in dispute, Defendant UHP never requested or arranged or attempted to arrange for a conference to meet with Plaintiff to resolve said discovery disputes. Defendant UHP's October 2, 2003 Letter stated:

This letter is being sent to you in accordance with my obligations under Fed. R. Civ. P. 37 and LRCi. 37.1, both of which are made applicable by Terr. Ct. R. 7 and 39, in an effort to resolve discovery disputes without Court intervention. In this regard we are asking that your client supplement his responses to UHP's Requests for Production Nos. 1, 5, 9, 12, 14 and 16. Specifically the Plaintiff has failed to provide the following information...

In regards to Mr. Davis' answers to UHP's Interrogatories, we are asking him to supplement his incomplete answers to Interrogatory Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 14, 15, 20, 21, 22, 25, 26, 28, 29, and 30. Specifically, the Plaintiff has failed to provide the following information...

Because the Court finds that the parties have not met and conferred as required by Fed. R. Civ. P. 37(a)(1) and LRCi 37.1, nor was an adequate attempt made, the Court will deny Defendant UHP's Motion to Compel, grant Plaintiff's Motion to Strike Defendant UHP's Motion to Compel and strike Defendant UHP's Motion to Compel at this time. If Defendant UHP arranges a conference for the parties to discuss the discovery requests in dispute and the parties are still unable to reach an agreement, then Defendant UHP may re-file its Motion to Compel, detailing the results of the conference.

Motion for Sanctions

Pursuant to Fed. R. Civ. P. 37(d)(1)(A)(ii), the Court may order sanctions if "a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response." However, in this matter, Defendant UHP failed to provide the Court with the necessary certification required by Fed. R. Civ. P. 37(d)(1)(B). Fed. R. Civ. P. 37(d)(1)(B) provides that: "A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action." As discussed above, the Court finds that Defendant UHP have not conferred or made an adequate attempt to confer with Plaintiff to resolve the discovery disputes. Accordingly, the Court will deny Defendant UHP's Motion for Sanctions, grant Plaintiff's Motion to Strike Defendant UHP's Motion for Sanctions and strike Defendant UHP's Motion for Sanctions at this time.

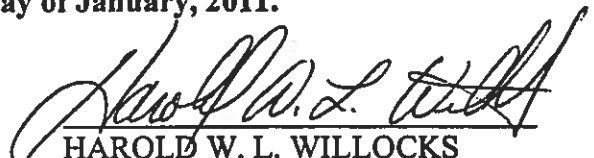
CONCLUSION

The Court finds that Defendant UHP has failed to comply with the requirements under Fed. R. Civ. P. 37(a)(1) and 37(d)(a)(B) and LRCi 37.1. Accordingly, the Court will deny Defendant UHP's Motion to Compel and Motion for Sanctions and grant Plaintiff's Motion to Strike Defendant UHP's Motion to Compel and Motion for Sanctions.

DONE and so ORDERED this 3rd day of January, 2011.

ATTEST:

Venetia Harvey-Velazquez
Clerk of the Court


HAROLD W. L. WILLOCKS
Judge of the Superior Court

By: 
Deputy Clerk

Dated: 2/2/11

CERTIFIED TO BE A TRUE COPY

This 4th day of Feb 2011

VENETIA H. VELAZQUEZ, ESQ.

CLERK OF THE COURT

By:  Court Clerk IV