

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 97-12062-JMD
Chapter 13

Matthew F. Judge and
Janice M. Judge,
Debtors

Matthew F. Judge and
Janice M. Judge,
Plaintiffs

v.

Adv. No. 99-1011-JMD

Harry Lomas IV,
Amy J. Lomas, and
Jeffrey A. Lomas,
Defendants

Raymond J. DiLucci, Esq.
RAYMOND J. DILUCCI, P.A.
Attorney for Debtors/Plaintiffs

Kathleen Walls, Esq.
PRATT VREELAND KENNELLY & ZONAY, LTD
Attorney for Defendants

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it the defendants' request for sanctions contained in their motion to compel discovery, which was filed with the Court on May 20, 1999 and argued by the parties on June 2, 1999. The defendants request that the plaintiffs and their attorney, Raymond DiLucci, be ordered to pay the attorney's fees and costs of Kathleen Walls, the defendants' attorney, in the amount of \$1,668.61. These fees and expenses were incurred as a result of the plaintiffs' failure to respond to the defendants' discovery request.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On April 2, 1999, the defendants served interrogatories on the plaintiffs. Pursuant to Federal Rule of Bankruptcy Procedure 7033 and Federal Rule of Civil Procedure 33(b)(2), the answers to these interrogatories were due on May 2, 1999.¹ Ms. Walls requested responses to the interrogatories in a letter to Mr. DiLucci dated May 6, 1999. Receiving no responses, Ms. Walls attempted to speak to Mr. DiLucci by telephone on May 11, 1999 to verbally request the same. Again, Ms. Walls received no responses.

On May 20, 1999, Ms. Walls filed with the Court a motion to compel interrogatory answers. She certified her attempts to contact Mr. DiLucci and his failure to respond. On May 25, 1999, Mr. DiLucci forwarded the requested interrogatory answers to Ms. Walls by certified mail. On May 27, 1999, Mr. DiLucci filed an objection to Ms. Walls’ motion to compel discovery indicating that the interrogatory answers had been served on the defendants and that their motion was moot.

On June 2, 1999, the Court held a hearing on the defendants’ motion to compel at which time Ms. Walls expressed dissatisfaction with several of the plaintiffs’ interrogatory answers. After argument, the Court ordered the plaintiffs to provide further answers to several interrogatories. At the hearing, Ms. Walls argued that the plaintiffs and their attorney should be ordered to pay the defendants’ attorney’s fees and costs associated with the motion to compel as a sanction under Federal Rule of Bankruptcy Procedure 7037. Ms. Walls submitted an itemized bill seeking \$1,875.50 in attorney’s fees and \$123.11 in costs for a total of \$1,998.61. At the conclusion of the hearing, the Court gave the parties the opportunity to further

¹ “The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories.” Fed. R. Civ. P. 33(b)(2).

brief the sanction issue and took the matter under advisement. Since the hearing, both parties have provided the Court with further written submissions regarding sanctions.

III. DISCUSSION

Federal Rule of Civil Procedure 37(a)(4)(A), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7037, provides:

If the motion [to compel] is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(4)(A) (emphasis added). Accordingly, the award of sanctions under this rule is mandatory unless (1) the movant has failed to make the required certification that he has made a good faith effort to obtain disclosure without court intervention; (2) the opposing party's nondisclosure was substantially justified; or (3) other circumstances make the award unjust. See Global Petroleum Corp. v. Torco Oil Co., 1987 WL 4785, at * 1, No. 85-0988-Mc (D. Mass. Apr. 30, 1987); M & D Builders, Inc. v. Peck, 109 F.R.D. 410, 411-12 (D. Mass. 1986); American Hangar, Inc. v. Basic Line, Inc., 105 F.R.D. 173, 176 (D. Mass. 1985); Parlow v. Bank of New York (In re Hunter Outdoor Prods., Inc.), 21 B.R. 188, 193 (Bankr. D. Mass. 1982); see also Cunningham v. Hamilton County, 1999 WL 380803, at * 7 n.5, No. 98-727 (U.S. June 14, 1999); Veale v. Town of Marlborough, 1994 WL 369545, at * 1, No. Civ. 92-355-SD (D.N.H. July 11, 1994). The rule is specifically designed to prevent a party seeking discovery from having to bear the costs of obtaining an order compelling discovery. See M & D Builders, 109 F.R.D. at 412. The party engaging in discovery abuses is directed to bear the costs. See id. The requirement of sanctions furthers the policy of discouraging litigation concerning the propriety of discovery. See Hunter Outdoor Prods., 21 B.R. at 193.

In this case, Ms. Walls has certified that she attempted twice to contact Mr. DiLucci regarding the missing interrogatory answers and twice Mr. DiLucci failed to respond or to forward his clients' answers. At the hearing, Mr. DiLucci did not deny that he failed to respond to Ms. Walls' requests and that his clients did not answer the interrogatories timely. Mr. DiLucci indicated that the "press of other business" prevented him and his clients from providing answers to the interrogatories prior to the defendants' filing their motion to compel. However, the difficulty experienced by the plaintiffs and their counsel in answering the interrogatories was not communicated to counsel for the defendants and no request was made of Ms. Walls for a reasonable extension of time to respond. The plaintiffs did not take the position at the hearing that their failure to timely or to adequately respond to the interrogatories was substantially justified. Further, no circumstances are present in this case that make the award of expenses unjust. For these reasons, the Court will award sanctions pursuant to Federal Rule of Civil Procedure 37(a)(4)(A).

The award of sanctions for discovery abuse is limited, however, to an award for reasonable expenses incurred by the movant in making the motion. See Fed. R. Civ. P. 37(a)(4)(A); Global Petroleum, 1987 WL 4785 at * 2; M & D Builders, 109 F.R.D. at 412; American Hangar, 105 F.R.D. at 178; Hunter Outdoor Prods., 21 B.R. at 193. At the hearing, Ms. Walls submitted an itemized bill of fees and expenses totaling \$1,998.61. The bill contained the following fees which total \$1,875.50:

\$44.00 for drafting a letter to Mr. DiLucci regarding the late interrogatories (.4 hours);
\$66.00 for reviewing letter and telephoning Mr. DiLucci regarding discovery/motion (.6 hours);
\$440.00 for researching and drafting the motion to compel (4.0 hours);
\$22.00 for filing an office copy of the motion to compel (.2 hours);
\$27.50 for reviewing the interrogatory responses (.25 hours);
\$297.00 for preparing for the hearing (2.7 hours);
\$209.00 for reviewing local fee approval requirements and rules of discovery (1.9 hours);
\$660.00 for travel to and from office in Vermont and court in New Hampshire (6.0 hours); and
\$110.00 for attendance at the hearing on the motion to compel (1.0 hour).

The bill also contained the following expenses which total \$122.11²:

\$1.05 for telephone toll calls for May 1999;
\$4.73 for postage expenses for May 1999;
\$4.73 for postage expenses for May 1999; and

² In the itemization submitted to the Court, Ms. Walls mistakenly indicated that the expenses total \$123.11.

\$111.60 for mileage for travel to and from office in Vermont and court in New Hampshire.

In the supplemental memorandum filed by the defendants in support of their application for sanctions, Ms. Walls agreed to reduce her travel time charge by half, resulting in a reduction of \$330.00 in requested fees.

The Court finds that only a portion of the fees and expenses claimed by the defendants are reasonable. First, the \$22.00 charge for filing an office copy of the motion to compel is secretarial in nature and should not be paid by the plaintiffs or their attorney. Second, the amount of time spent researching and drafting the motion to compel is excessive. The motion to compel was two and a half pages long. It cited the applicable bankruptcy rule but no case law. Attached to the motion were a one page discovery certification and the May 6, 1999 letter to Mr. DiLucci. The defendants did not file a separate memorandum of law. The Court finds that \$220.00 (or two hours at \$110 per hour) is a reasonable request for attorney's fees for researching and drafting the motion to compel.

Third, the 2.7 hours spent preparing for the hearing and the 1.9 hours spent reviewing local fee approval requirements and rules of discovery is also excessive. The facts relating to the discovery dispute are straightforward, and Ms. Walls previously researched the discovery issues. Because this is not a formal fee application, the time spent reviewing the local rules regarding fee applications should have been minimal. For these reasons, the Court finds that \$165.00 (or one and one-half hours at \$110 per hour) is a reasonable request for preparing for the hearing and reviewing local fee approval requirements.

Fourth, the Court denies any request for travel time between Ms. Walls' office in Vermont and the Bankruptcy Court in New Hampshire. The defendants chose their attorney and must bear the cost of her travel time to the court, particularly where local counsel might otherwise have been used. See Hunter Outdoor Prods., 21 B.R. at 193. For this same reason, the Court finds that the defendants' request for mileage is also unreasonable.

Lastly, the \$4.73 cost for postage appears twice on the expense itemization. Because this is duplicative, the Court will award costs for only \$4.73 in postage.

IV. CONCLUSION

Pursuant to Federal Rule of Bankruptcy Procedure 7037 and Federal Rule of Civil Procedure 37(a)(4)(A), the defendants' request for sanctions for plaintiffs' failure to timely and to adequately respond to their interrogatories is allowed. The plaintiffs and their attorney are ordered to pay attorney's fees in the amount of \$632.50³ and costs in the amount of \$5.78⁴ to the defendants by August 18, 1999.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 18th day of June, 1999, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge

³ These fees include \$44.00 for drafting a letter to Mr. DiLucci, \$66.00 for reviewing a letter and telephoning Mr. DiLucci's office, \$220.00 for researching and drafting the motion to compel, \$27.50 for reviewing interrogatory answers, \$165.00 for preparing for the hearing and reviewing local fee requirements, and \$110.00 for attendance at the hearing on the motion to compel.

⁴ These costs include \$1.05 for telephone toll charges for May 1999 and \$4.73 for postage for May 1999.