

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)	
T-Peg, Inc. and Timberpeg East, Inc.)	
)	
Plaintiffs,)	
)	
v.)	No. C-03-462-M
)	
Stanley J. Isbitski, Vermont Timber Works, Inc.)	
and Douglas Friant,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS' RESPONSE TO
NOVEMBER 19 SHOW CAUSE ORDER**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg") and respectfully submit their response to this Court's show cause order dated November 19 ("Order"), and state as follows:

1. On November 19, this Court granted in part and denied in part defendant's, Vermont Timber Works, Inc. ("VTW"), motion to compel. In the Order, this Court Ordered Timberpeg to show cause why it should not be required to pay VTW's costs in obtaining the partial relief this Court granted to VTW, pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure. Timberpeg has moved for reconsideration of this Court's Order, which motion is currently pending. As set forth below, regardless of this Court's disposition of Timberpeg's motion for reconsideration, Timberpeg should not be required to pay VTW's costs, both for legal and equitable reasons.

2. The Order and this show cause pleading center on a motion to compel VTW filed that sought broad documentary discovery. Through a combination of VTW's

motion and Timberpeg's objection, both sides recited their respective versions of the chain of events that led to the motion. Timberpeg will not reiterate that background, but will refer to it as necessary to explain why an order to pay VTW's costs is unwarranted under Rule 37(a)(4).

I. Each Side Should Bear Its Own Costs Because The Motion Was Granted In Part And Denied In Part And Timberpeg's Conduct Was Substantially Justified

3. In ordering Timberpeg to show cause, this Court referred to Rule 37(a)(4) of the Federal Rules of Civil Procedure. Rule 37(a)(4)(A) provides that this Court shall award the successful moving party's reasonable costs "incurred in making the motion" unless this Court finds that the opposing party's position was "substantially justified," or other circumstances make an award of expenses unjust. Rule 37(a)(4)(C), however, provides that if a motion is granted in part and denied in part, this Court may apportion the reasonable expenses incurred in a just manner. As mentioned, this Court granted in part and denied in part the motion to compel, placing this inquiry within the discretion provided to this Court in Rule 37(a)(4)(C). As set forth below, a fair and reasonable apportionment would be for each side to bear its own costs, both under governing law and in light of the particular circumstances of this discovery dispute.

A. The Motion Was Granted In Part And Denied In Part

4. Rule 37(a)(4)(C) of the Federal Rules of Civil Procedure provides that if "a motion is granted in part and denied in part, the court may . . . apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Generally, under Rule 37(a)(4)(C), courts order each side to bear its own costs incurred in the making of the motion. See, e.g. Pulsecard, Inc. v. Discover Card Services,

Inc., 168 F.R.D. 295, 311 (D. Kan. 1996); Caruso v. The Coleman Company, 157 F.R.D. 344, 350 (E.D. Pa. 1994); Greater Rockford Energy & Technology v. Shell Oil Co., 138 F.R.D. 530, 536 (C.D. Ill. 1991); see also Tri-Star Pictures, Inc. v. Unger, 171 F.R.D. 94, 103 (S.D.N.Y. 1997).

5. The decision of the Eastern District of Pennsylvania in Caruso v. The Coleman Company, 157 F.R.D. 344 (E.D. Pa. 1994) is closely on point. In Coleman, the defendant moved to compel documents, among other relief, contending that the plaintiff's responses to discovery requests were really "attempts to stonewall" in discovery. 157 F.R.D. at 346. The court granted the motion in part and denied the motion in part. With respect to the defendant's request for the costs incurred in making the motion, the court noted that its decision was "mixed" and pointed out that neither party was "an overall 'winner' or 'loser'." Id. That, and the fact that the court did not find the plaintiff's conduct substantially unjustified, drove the court's decision that each party should bear its own costs. See id.

6. In this action, as in Coleman, an apportionment requiring both parties to bear their own expenses is appropriate under Rule 37(a)(4)(C). In its disposition of VTW's motion to compel, this Court denied VTW the bulk of the discovery VTW sought because this Court found the discovery irrelevant. See Order at 3 (denying request to compel "broadened discovery"). At the time of the motion, Timberpeg had informed VTW that Timberpeg would forego seeking its own lost profits, and, therefore, VTW knew prior to filing the motion that the discovery it sought was irrelevant, yet filed the motion anyway. This Court ordered only a small subset of the documents VTW sought in its motion, namely with respect to six, specific projects. See id. As such, neither

VTW nor Timberpeg is an overall “winner” or “loser” and Timberpeg should not bear the costs VTW incurred in making the motion. See Coleman, 157 F.R.D. at 350. As set forth below, Timberpeg’s conduct was substantially justified.

B. Timberpeg’s Conduct Was Substantially Justified

7. Timberpeg and its counsel take their discovery obligations seriously and have endeavored throughout this litigation to meet those obligations. Timberpeg regrets that this situation came before this Court, and that this Court may believe that Timberpeg stonewalled the discovery process. As set forth below, in detail, Timberpeg’s conduct falls within what courts have determined to be substantially justified under Rule 37(a) because Timberpeg operated in good faith and in reliance on what it believes to be governing law.

8. In addition to the fact that neither party was an overall “winner” or “loser,” the Coleman Court determined the plaintiff’s conduct was substantially justified. See 157 F.R.D. at 350. While the Court did not elaborate on the meaning of “substantially justified” in the context of Rule 37(a)(4), other courts and authors have. An opposing party’s conduct is substantially justified if that party raised a genuine issue upon which reasonable people could disagree. See 8A Wright, Miller, Marcus Federal Practice & Procedure, § 2288 at 665-666. Stated alternatively, a party’s conduct is substantially justified, even if not convincing to the court, if it was “not completely without basis in the law.” Frazier v. S.E. Pa. Transp. Authority, 161 FRD 309, 314 (E.D. Pa. 1995) (emphasis added). This Court ordered Timberpeg to show cause on the basis of what this Court viewed as failure to comply with Rules 26 and 33, and stonewalling in discovery. See Order at 3-4. As discussed below, Timberpeg’s actions were not without

basis in the law, much less “completely without basis.” Frazier, 161 F.R.D. at 314.

Accordingly, Timberpeg’s conduct was substantially justified.

1. Rule 26(a)

9. This Court took the position that Timberpeg failed to comply with Rule 26(a)(1). See Order at 3. Timberpeg, however, believes, on the basis of the advisory committee notes to the Federal Rules of Civil Procedure and other treatise authority, that the mandatory disclosures under Rule 26(a)(1), in the wake of the 2000 amendments narrowing the scope of the rule, require a party to disclose only information that the disclosing party may use to support its position at trial. See Fed. R. Civ. P. 26 advisory committee notes, 2000 amendment; see also Baicker-McKee, Janssen, Corr, Federal Civil Rules Handbook at 569 (2004 ed.). In approaching its Rule 26(a) disclosures, Timberpeg actually believed that it was exceeding the scope of the rule in that Timberpeg produced virtually every document Timberpeg possessed concerning the Isbitski project, not just those documents on which it planned to rely at trial. Much of the documentation produced allows for the calculation of Timberpeg’s profits, including documents concerning pricing and expenses. More importantly, Timberpeg did not intentionally fail to disclose anything. Timberpeg was not even aware that VTW considered Timberpeg’s mandatory disclosures inadequate until August, five months after making them.¹ This Court may disagree with respect to the scope of Rule 26(a), and Timberpeg and its counsel will adopt and follow this Court’s view of the scope of Rule 26(a) going forward,

¹ VTW, for example, filed a motion to compel additional document production in April, after a meet and confer, that made no mention of any inadequacies in Timberpeg’s Rule 26(a) disclosures.

but Timberpeg's position up until now cannot be characterized as "completely without basis in the law," Frazier, 161 FRD at 314, and, therefore, was substantially justified.²

2. Rule 33

10. This Court also took the position that Timberpeg failed to comply with Rule 33, through stonewalling in discovery. See Order at 3. Timberpeg, however, respectfully disagrees and submits that the record demonstrates that, even if this Court believes Timberpeg failed to comply with Rule 33, Timberpeg did not act with any intent to do so. Rather, Timberpeg believed that it complied with Rule 33 as it understood what VTW sought and any delays were the product of circumstances not relating to a dilatory intent or attitude toward discovery. Later, when Timberpeg elected to forego its own lost profits, Timberpeg based that decision on what Timberpeg in good faith believes to be governing law that allowed Timberpeg to make that election.

11. After the Rule 26(a) disclosures, an extensive production of documents demanded in deposition notices, and a series of depositions of Timberpeg personnel, VTW propounded broad discovery requests to which Timberpeg responded in May. Counsel for the parties underwent a detailed "meet and confer" in June, which included discussion of Interrogatory 17. The discussion about Interrogatory 17 concerned VTW's desire for a more detailed explanation of the calculation, not that VTW sought documents. VTW's own memo to file confirms Timberpeg's counsel's recollection of that discussion. See VTW's Memo To File, attached hereto as Exhibit A. The discussion occurred in the context of VTW's broad interrogatories, some of which consumed extensive time and resources to answer even though they were not necessarily geared to

² Until recently, this district opted out of Rule 26(a), and, therefore, the contours of the rule have not been developed extensively in this Court.

achieve any goal other than to burden Timberpeg. See id. (stating with respect to Interrogatories 11 and 12: “I am not really sure why you want the info., other than to make them work which is a good thing.”).

12. It was not until August that VTW asserted a need for documents concerning Interrogatory 17. While Timberpeg may have misunderstood VTW’s position, and regrets any misunderstanding if that was the case, Timberpeg did not intentionally stonewall and fail to comply with Rule 33.

13. The delays, moreover, were not the product of Timberpeg’s unilateral and intentional delaying of discovery. After the parties met and conferred, Timberpeg was unable to supplement its production for approximately a month – from June 19 until July 13. This was due, as explained to VTW’s counsel, to a trial in the Merrimack County Superior Court that consumed the balance of June for Timberpeg’s counsel. See Exhibit B (email from Attorney Will to Attorney Whittington dated June 16).

14. Once Timberpeg supplemented in July, it did not hear from VTW for a month, until August. In August, VTW for the first time demanded documents associated with Interrogatory 17 and also propounded a series of new document requests for the “broadened discovery” that this Court denied. Under the ordinary rules, Timberpeg would have had 30 days to respond to the new requests. At that time, VTW represented to Timberpeg that VTW’s expert disclosure deadline created some urgency for Timberpeg’s response. On August 24, the parties agreed that Timberpeg would not immediately respond to VTW’s August requests and in exchange, VTW would have 35 days from Timberpeg’s response to disclose its expert. See Exhibit C (email dated August 24). The parties, in other words, agreed that Timberpeg’s response would not be

immediately forthcoming, but also that VTW would not be prejudiced because VTW's expert deadline would be extended. It was shortly thereafter that Timberpeg elected to forego its own lost profits. The passage of time from August until Timberpeg elected to forego its own lost profits was based on an agreement between the parties and not due to Timberpeg's unilateral delaying of discovery.

15. Finally, Timberpeg's decision to forego its own lost profits, and the timing of that decision, was based on what Timberpeg believes to be governing law. When Timberpeg elected to forego its own lost profits, it did so on the basis of good faith reliance on what Timberpeg believes to be the state of existing copyright law: Timberpeg may forego Timberpeg's profits, but still seek VTW's profits or statutory damages, and that Timberpeg may make that election at any time up until jury deliberation. See Timberpeg's Motion for Reconsideration at ¶4. Timberpeg believes that position renders discovery concerning Timberpeg's lost profits irrelevant. Even if this Court disagrees, Timberpeg's position cannot be characterized as completely without basis in the law. See Frazier, 161 F.R.D. at 314.

16. In short, this is not a situation in which Timberpeg did not respond to VTW, flatly refused to produce information, or acted outside of the bounds of what Timberpeg believes existing law provides. Timberpeg thought it complied with Rule 33 in the context of what Timberpeg understood that VTW sought. Timberpeg did not intentionally delay discovery. Throughout, Timberpeg operated in good faith, did its best to respond to VTW, and, when response was not immediately possible, notified VTW and acknowledged that VTW should seek relief from this Court if it felt it necessary. Both Timberpeg and its counsel take their responsibilities to this Court and the litigation

process seriously and with concern. On no prior occasion has counsel for Timberpeg run afoul of this Court's rules or the Federal Rules of Civil Procedure. For all of these reasons, Timberpeg's conduct was substantially justified, and an award of costs would be unjust. See Fed. R. 37(a).

III. VTW Seeks Excessive Fees

17. If this Court orders Timberpeg to pay VTW's costs associated with the motion to compel, Timberpeg respectfully submits that VTW's fee summary is excessive and unsubstantiated. Rule 37(a) limits costs to "reasonable expenses incurred in making the motion, including attorneys fees." In that regard, VTW has submitted a summary of time, without verification of the billing rate or further explanation, that purports to justify 21.7 hours and nearly \$4,000 of costs. See Exhibit C hereto. While counsel for VTW claims a standard rate of \$200 per hour, he does not establish that \$200 per hour is the rate VTW actually pays.

18. Rule 37(a)(4)(A) allows for an award of costs, including reasonable attorneys fees, incurred in making the motion. The vast majority of the costs VTW seeks were, by their own description, not incurred in making the motion to compel. At most, VTW claims a total of 8 hours over four months for preparation of the motion. See 6/14, 6/18, 9/29, 10/8, 10/17 entries. Half of that time occurred prior to the parties' meet and confer. See 6/14 and 6/18 entries; see also, e.g., Fed. R. Civ. P. 37(a)(4)(A) (precluding fee award where motion was filed without good faith effort to obtain discovery first). Eight hours is unreasonable considering the complexity of the motion actually filed. In short, the motion consists primarily of VTW's recitation of the history, no legal citation, and a series of attachments. VTW also seeks an additional 1.7 hours for its request to this

Court for clarification of the Order, a four page document without legal citation. That motion has neither been granted, nor should its costs be borne by Timberpeg. See 11/3 entry.

19. In addition, in two separate entries, VTW seeks payment for time spent preparing interrogatories. Rule 37(a) does not require a party to pay the other party's costs for preparing discovery requests. Timberpeg submits that VTW would have undergone that expense separate and apart from this discovery dispute, and therefore, Timberpeg should not bear VTW's costs to prepare standard paper discovery. In total, VTW seeks 1.5 hours for preparation of interrogatories. See 4/2 and 8/12 entries.

20. VTW also seeks several hours of research into evidence on lost profits, deductions from same, and related issues, all of which VTW would have borne regardless of this discovery dispute. In total, VTW seeks 3.5 hours for this research. See 8/6, 8/11, 9/29 entries.

21. VTW seeks 1.2 hours for "review of Timberpeg's information on job costs and computation of damages." See 8/5 entry. As with some of the prior entries, VTW would have to have undergone this activity as well (assuming it means review of Timberpeg's document production), regardless of this discovery dispute. Rule 37(a) does not contemplate reimbursement for expenses incurred in reviewing discovery.

22. Many of the entries lack any sufficient description to ensure that they can fairly be attributed to the motion to compel. For example, on 10/18, VTW seeks time spent concerning an email from the undersigned denying an extension. See 10/18 entry (.2 hours). On 10/1, VTW seeks 1 hour for "summary letter to D. Will." See 10/1 entry. On 8/11, VTW seeks .4 of an hour for "research in Nimmer on job cost."

23. VTW also seeks time it spent reviewing this Court's Order, discussing it with the client, assessing the Order's impact on other pending issues and motions, among other items. See 11/19 entry (2.2 hours). All of that time comes after this Court's ruling on the motion to compel and cannot fairly be characterized as bearing on the issues in the motion or as incurred in obtaining the discovery this Court ordered.

24. In short, VTW seeks far more in costs than it actually incurred in preparing the motion. It is hard to imagine that its preparation reasonably consumed any more than 3 to 4 hours.

Conclusion

25. Given that this Court granted in part and denied in part VTW's motion to compel, apportionment of costs so that each party bears its own costs is fair, particularly in light of the fact that Timberpeg relied in good faith on its understanding of applicable law and the parties' discussions. Timberpeg never intended to delay or otherwise hamper discovery and requests that this Court not order Timberpeg to pay VTW's costs incurred in making the motion to compel.

26. Due to the extensive argument and authority herein, no accompanying memorandum of law is necessary. See L.R. 7.2.

27. If it would assist this Court, Timberpeg respectfully requests a hearing on these issues.

Respectfully submitted,

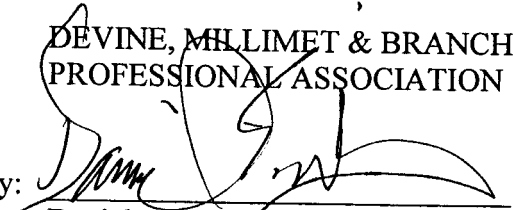
T-PEG, INC. AND TIMBERPEG
EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: December 9, 2004

By:


Daniel E. Will (#12176)
111 Amherst Street
P.O. Box 719
Manchester, NH 03105-0719
(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)
General Counsel for Plaintiffs
Timberpeg East, Inc.
c/o 68 Lyme Road
Hanover, NH 03755
(603) 643-6200

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.


Daniel E. Will (#12176)

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