

FILED BY *Whe* D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

04 OCT 26 PM 4: 38

ROBERT R. DI TROLIO
CLERK, U.S. DIST. CT.
W.D. OF TN, MEMPHIS

AMERIGO V. STEVENSON,)
)
Plaintiff,)
)
v.)
)
RAYLOC,)
)
Defendant.)

03-2889 M1/P

REPORT AND RECOMMENDATION ON DEFENDANT'S SECOND MOTION TO COMPEL
AND MOTION FOR SANCTIONS

Before the Court is Defendant Rayloc's Second Motion to Compel and Motion for Sanctions, filed on September 13, 2004 (Dkt #23). In its motion, Rayloc contends that Plaintiff Amerigo V. Stevenson failed to produce various documents responsive to Rayloc's First Request for Production of Documents, and consequently, should be required to produce them. Additionally, because the documents at issue were the subject of a previous order entered by this Court compelling production, Rayloc also requests that the Court sanction Plaintiff by dismissing the complaint with prejudice and awarding attorneys' fees and expenses incurred by Rayloc as a result of having to file this motion. Stevenson, acting pro se, filed a response on October 1, 2004. The Court held a hearing on the motion on October 19, 2004. Stevenson and Rayloc both participated

via telephone. At the hearing, the parties informed the Court that, since the filing of Rayloc's second motion to compel, Stevenson has produced the documents in question, and therefore an order compelling production would not be necessary. Nevertheless, despite Stevenson's recent production, Rayloc maintains that the Court should sanction Stevenson by dismissing the case and awarding attorneys' fees.

For the reasons below, this Court submits that Stevenson did not timely produce discoverable materials and did not fully comply with this Court's order which was entered June 10, 2004. It is recommended that Stevenson be ordered to pay Rayloc's attorneys' fees in the reduced amount of one hundred dollars (\$100.00) to offset some of the cost associated with the filing of this motion. It is further recommended that Rayloc's motion to dismiss the complaint be denied.¹

I. PROPOSED FINDINGS OF FACT

Rayloc employed Stevenson from August 1994 until he was terminated on June 23, 2003. Stevenson claims Rayloc retaliated against him because he filed a complaint with the Equal Employment Opportunity Commission. On March 4, 2004, Rayloc served Stevenson with its First Request for Production of Documents. Stevenson's

¹Given the relief sought by Rayloc - that is, asking the Court to dismiss the complaint as a sanction for discovery abuse - this Court files a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) & (C).

responses were due on or before April 6. On April 13, Rayloc notified Stevenson via certified mail that his responses to the request were overdue. Receiving no responsive documents from Stevenson, Rayloc filed a Motion to Compel on May 7, 2004. On June 10, 2004, the Court granted Rayloc's Motion to Compel but denied its request for attorneys' fees.² In that order, Stevenson was instructed to produce the requested documents within eleven days from the date of the order.

Although Stevenson was required to produce these documents by June 21, the documents he sent to Rayloc were not postmarked until June 24. Within this response, Stevenson admitted having additional responsive documents - including a hand-written chronology on index cards, a note pad, scraps of paper, and a Napa Rayloc calendar ("Chronology documents") - but he informed Rayloc that he could not afford to make copies at that time.³ Stevenson stated that he would produce the Chronology documents sometime before the discovery deadline.

On July 13, 2004, Rayloc sent a letter to Stevenson, requesting him to produce copies of the Chronology documents.

²The Court warned that "Plaintiff is cautioned that future failure to timely comply with discovery or this Court's order may result in dismissal of this case with prejudice," and "Plaintiff is warned that future failure to participate in discovery may result in sanctions." Order Granting Defendant's Motion to Compel (dkt #22).

³Stevenson received an estimate of \$400 from a commercial copier to make the copies of the Chronology documents.

After receiving no response to that letter, Rayloc sent another letter on August 13. This letter requested Stevenson to contact Rayloc's counsel, so that they could arrange to have copies made at Rayloc's expense. Stevenson called Rayloc's counsel on August 26 and stated he would copy and send the documents by August 31. Rayloc did not receive the Chronology documents by August 31, and after unsuccessfully trying to contact Stevenson on multiple occasions, Rayloc filed this Second Motion to Compel on September 13, 2004. On September 30, 2004, Stevenson finally sent the requested documents to Rayloc.

II. PROPOSED CONCLUSIONS OF LAW

Rayloc requests that the Court dismiss the complaint with prejudice and award attorneys' fees and expenses incurred as a result of having to file this motion. Federal Rule of Civil Procedure 37 sets forth various sanctions that may be imposed against a party who abuses the discovery process. Specifically, Rule 37(b)(2)(C) includes dismissal of the case as a potential sanction against a party who fails to obey a court order, and Rule 37(a)(4) authorizes a party whose motion to compel discovery is granted to recover attorneys' fees and expenses. See Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990). "The use of dismissal as a sanction for failing to comply with discovery has been upheld because it accomplishes the dual purpose of punishing the offending party and deterring similar litigants from

such misconduct in the future." Bass v. Jostens, Inc., 71 F.3d 237, 241 (6th Cir. 1995). In deciding whether to dismiss a lawsuit as a sanction under Rule 37, this Court considers several factors: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether the party was warned that failure to cooperate could lead to the sanction; and (4) whether less drastic sanctions were first imposed or considered. Freeland v. Amigo, 103 F.3d 1271, 1277 (6th Cir. 1997) (citing Regional Refuse Systems, Inc. v. Inland Reclamation Co., 842 F.2d 150, 154-55 (6th Cir. 1988)); Bass, 71 F.3d at 241 (citing Bank One of Cleveland, 916 F.2d at 1073). The sanction of dismissal should be used as a last resort. Beil v. Lakewood Eng'g and Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994).

The Court submits that Stevenson failed to timely provide discovery to Rayloc, and did not fully comply with this Court's June 10 order compelling production of documents until September 2004. Stevenson's incomplete and untimely production warrants an imposition of sanctions, but not the ultimate sanction of dismissal. A monetary sanction in the form of attorneys' fees is a more appropriate sanction. Moreover, because the Chronology documents represent only a subset of a larger group of documents that Stevenson had in fact produced earlier, the Court will not award Rayloc its full attorneys' fees, but rather will impose a

sanction of \$100.00 to offset some of Rayloc's attorneys' fees.

III. RECOMMENDATION

It is recommended that Stevenson pay Rayloc's attorneys' fees in the reduced amount of \$100.00. It is further recommended that Rayloc's motion to dismiss the complaint be denied.

Plaintiff Stevenson is again warned that failure to timely comply with this Court's orders will result in dismissal of his complaint with prejudice.

Respectfully submitted,


TU M. PHAM
United States Magistrate Judge

Date

10/26/04

NOTICE

IF EITHER OR BOTH PARTIES HAVE ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT AND RECOMMENDATION, THE PARTIES MUST FILE THEIR OBJECTIONS WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT AND RECOMMENDATION. 28 U.S.C. §636(b)(1)(C). FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.



Notice of Distribution

This notice confirms a copy of the document docketed as number 32 in case 2:03-CV-02889 was distributed by fax, mail, or direct printing on October 28, 2004 to the parties listed.

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Honorable Jon McCalla
US DISTRICT COURT