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3-25-2015

Rudy Blake Frazier et al., Order on Defendant's  
Emergency Motion for Sanctions

Elizabeth E. Long  
*Fulton County Superior Court, Judge*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



RUDY BLAKE FRAZIER and  
BUILDING TECHNOLOGY  
CONSULTING, INC.

Plaintiffs,

v.

MATTHEW LIOTTA and PODPONICS,  
LLC,

Defendants.

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) Civil Action File No.  
) 2014-CV-244363  
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**ORDER ON DEFENDANTS' EMERGENCY MOTION FOR SANCTIONS**

Before the Court is Defendants' Emergency Motion for Sanctions and Supporting Memorandum (the "Motion") and Plaintiff's Response thereto. Defendant PodPonics first served its Request for Production of Documents on August 27, 2014. Following Plaintiff's failure to respond to the Request for Production of Documents, Defendants filed a motion to Strike the Complaint as a sanction for Plaintiff's clear violation of the rules of discovery. In its Order dated December 8, 2014, the Court denied the ultimate sanction of dismissal, but ordered Plaintiff to serve his responses to the Request for Production by December 17, 2014, or be subject to the imposition of sanctions. Under the Court's Case Management Order, discovery expired February 2, 2015 and Plaintiff was to be deposed on February 13, 2015. On March 4, 2015, at the continuation of Plaintiff's deposition, Plaintiff acknowledged that he had thousands of documents he had not produced. Approximately 2,400 pages of documents, including design drawings, emails, Excel files, and photographs were produced on March 9, 2015, in clear violation of the deadlines set in this Court's Orders. Defendants argue that Plaintiff's noncompliance is willful and seek the ultimate sanction of striking the pleadings and dismissal.

Alternatively, they ask the Court to prohibit Plaintiff from introducing the documents withheld until March 9 in evidence or allow Defendant to depose Plaintiff again at Plaintiff's expense regarding the new evidence.

In response, Plaintiff and Plaintiff's Counsel, Mr. Richelo, provided Affidavits explaining that the discovery violations were not willful, but rather the result of miscommunication between attorney and client. Plaintiff, as a layperson, avers that he did not understand the broad scope of the requests, and produced only critical documents that he thought would be meaningful to the dispute. Mr. Richelo, on the other hand, admits that he should have communicated the scope of discovery requests to his client, but failed to do so for a myriad of reasons, such as his sleep disorder, his computer problems, personal and professional time pressures, and his client's health condition and treatments. Mr. Richelo also states that many of the "new" documents were (1) early drafts or duplicates of drawings already produced, or (2) emails with Defendants that would also be in Defendants' possession.

While it is understandable that a non-lawyer would not fully understand discovery obligations under Georgia's Civil Practice Act, Mr. Richelo's failure to consult with his client in a timely manner runs afoul of O.C.G.A. § 9-11-34 and the Court's orders, including an order compelling a response to discovery. While there has not been a showing of willfulness on the part of Plaintiff or Mr. Richelo as required to strike the pleadings and dismiss the Complaint,<sup>1</sup> the excuses provided by Mr. Richelo are unacceptable and Mr. Richelo's failures are not substantially justified. As such, Defendants' Motion for Sanctions is **GRANTED**. Plaintiff is prohibited from admitting into evidence any document produced on March 9, outside the time

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<sup>1</sup> See *McFarland & McFarland, P.C. v. Holtzclaw*, 293 Ga. App. 663, 664 (noting that court is not required to hold hearing on every motion for discovery sanctions, but rather is only obligated to hold hearing when contemplating the ultimate sanction of dismissal or default judgment which requires wilful failure to comply with a court's discovery order.)

for discovery, to support or oppose any claim or defense pursuant to O.C.G.A. § 9-11-37(b)(2)(B). The parties are expected to comply with the existing deadlines listed in the Amended Case Management Order filed January 30, 2015, in particular the deadline for filing dispositive motions.

**SO ORDERED** this 25<sup>th</sup> day of March, 2015.



ELIZABETH E. LONG, SENIOR JUDGE  
Fulton County Superior Court – Business Case Division  
Atlanta Judicial Circuit

**Copies to:**

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