Georgia State University College of Law

Reading Room

Georgia Business Court Opinions

11-7-2018

John Souza et al., Order on Plaintiffs' Second Motion to Compel and Motion for Sanctions

Elizabeth E. Long

Follow this and additional works at: https://readingroom.law.gsu.edu/businesscourt

Part of the Business Law, Public Responsibility, and Ethics Commons, Business Organizations Law Commons, and the Contracts Commons

Institutional Repository Citation

Elizabeth E. Long, *John Souza et al., Order on Plaintiffs' Second Motion to Compel and Motion for Sanctions*, Georgia Business Court Opinions 443 (2018)
https://readingroom.law.gsu.edu/businesscourt/443

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact gfowke@gsu.edu.

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

JOHN SOUZA and PARADISE MEDIA VENTURES, LLC Plaintiffs, v. DR. JEFFREY GALLUPS, MILTON HALL SURGICAL CENTER, LLC d/b/a/ ENT INSTITUTE, and JOHN BERBERIAN, Defendants.	)	Civil Action File No. 2016CV275265 Bus. Ct. Div. 2

ORDER ON PLAINTIFFS' SECOND MOTION TO COMPEL AND MOTION FOR SANCTIONS

The above styled matter is before the Court on Plaintiffs': (1) Second Motion to Compel Discovery ("Second Motion to Compel"), and (2) Motion for Sanctions Against Defendants Gallups and Milton Hall Surgical Associates, LLC ("Motion for Sanctions"). In their motions, Plaintiffs assert Defendants Jeffrey Gallups ("Dr. Gallups") and Milton Hall Surgical Center, LLC d/b/a ENT Institute ("ENT Institute") (collectively "Gallups Defendants") have failed to meet their discovery obligations under the Civil Practice Act, obstructed the discovery process, and willfully failed to comply with the Court's Nov. 7, 2017 Order on Plaintiffs' Motion to Compel ("Nov. 7, 2017 Order"). Having considered the record, the Court finds as follows:

I. PLAINTIFFS' SECOND MOTION TO COMPEL AND MOTION FOR SANCTIONS

A. Applicable Legal Standards

a. General Scope of Discovery

As previously noted by this Court, with respect to the general scope of discovery, O.C.G.A. §9-11-26(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is **relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought **appears reasonably calculated to lead to the discovery of admissible evidence**...

(Emphasis added). *See* Bowden v. The Med. Ctr., Inc., 297 Ga. 285, 291 (2015) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) ("The key phrase in this definition—'relevant to the subject matter involved in the pending action'—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case").

The powers of the trial court to control the time, place, scope and financing of discovery are construed broadly. *See* Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 589, 452 S.E.2d 159, 162 (1994); Bicknell v. CBT Factors Corp., 171 Ga. App. 897, 899, 321 S.E.2d 383, 385 (1984).

b. Discovery Sanctions

"A trial court has broad discretion to control discovery, including the imposition of sanctions." Exum v. Norfolk S. Ry., 305 Ga. App. 781, 781, 701 S.E.2d 199, 200 (2010).

> O.C.G.A. § 9-11-37(b)(2) grants trial courts "a very broad discretion...in applying sanctions against disobedient parties in order to assure compliance with the orders of the courts" with regard to the conduct of discovery. (Citations and punctuation omitted.) Joel v. Duet Holdings, 181 Ga. App. 705, 707, 353 S.E.2d 548 (1987). Such sanctions may include dismissing a complaint, entering default, declaring designated facts to be established for the purposes of the action, or ordering the disobedient party to pay the reasonable expenses, including attorney fees, caused by the failure to respond. O.C.G.A. § 9-11-37(b)(2). "As a general rule, the trial court should attempt to compel compliance with its orders through the

> imposition of lesser sanctions than dismissal." (Citation omitted.) Joel v. Duet Holdings, 181 Ga. App. at 707, 353 S.E.2d 548. The drastic sanctions of dismissal and default may be imposed only "in the most flagrant cases-where the failure is wilful, in bad faith or in conscious disregard of an order." (Citation and punctuation omitted.) Id.

Yarbrough v. Kirkland, 249 Ga. App. 523, 524, 548 S.E.2d 670, 671 (2001).

B. Remaining Discovery Issues

a. ENT Institutes' Rule 30(b)(6) Deposition

Dr. Gallups testified on behalf of ENT Institute in a Rule 30(b)(6) deposition conducted by Plaintiffs on Jan. 29, 2018. Plaintiffs assert Dr. Gallups did not properly prepare to testify on behalf of ENT Institute and was unprepared to discuss basic questions about certain topics designated by Plaintiffs.

As noted by Plaintiffs, a witness designated to testify on behalf of an organization pursuant to O.C.G.A. §9-11-30(b)(6) "shall testify as to matters known or reasonably available to the organization." Thus, the witness must have sufficient knowledge or preparation to testify on behalf of the organization with respect to the designated matters on which examination of the organization is requested. Mableton Parkway CVS, Inc. v. Salter, 254 Ga. App. 162, 163, 561 S.E.2d 478, 479 (2002). While Rule 30(b)(6) "is not designed to be a memory contest" and "absolute perfection in preparation" is not required thereunder, the organization "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by the requesting party and to prepare those persons in order that they can answer fully, completely, and unevasively, the questions posed...as to the relevant subject matters." Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 150 (S.D.N.Y. 1997)

(citations omitted); Prowess, Inc. v. Raysearch Labs. AB, No. CIV. WDQ-11-1357, 2013 WL 1352276, at *4 (D. Md. Apr. 1, 2013) (citations omitted).[1]

Here, having considered the deposition testimony of Dr. Gallups, the Court finds that he was largely able to testify about the matters designated for examination by Plaintiffs or testified that responsive documents regarding the topic had been produced. Although Dr. Gallups was unable to answer certain questions and did not recall certain matters inquired about, the Court finds Dr. Gallups did not answer evasively nor acted in bad faith but, instead, answered to the best of his ability. To the extent Plaintiffs felt Dr. Gallups' performance at the deposition was legally deficient, the Court is compelled to note that although ENT Institute's 30(b)(6) deposition took place on Jan. 29, 2018, the deficiency was not raised with the Court until Aug. 31, 2018 in the Plaintiffs' Second Motion to Compel—more than a month after the conclusion of discovery depositions of lay witnesses and more than six months after the deposition.

Nevertheless, because Dr. Gallups admitted that he did not speak with anyone other than his counsel about the deposition and did not review any documents in preparation for it[2] and whereas he testified that he would defer to individuals in the accounting department—in particular Jim Corput, ENT Institute's temporary accounting manager—regarding certain financial matters inquired about at the deposition[3], the Court will allow Plaintiffs an opportunity, if they so choose, to depose Mr. Corput at the Gallups Defendants' expense within fifteen (15) days of the entry of this order. The parties are directed to confer in good faith regarding the prompt scheduling of the deposition to avoid further delays in the adjudication of this matter.

---

[1] "Because Georgia's Civil Practice Act is modeled on the Federal Rules of Civil Procedure, decisions of the federal courts interpreting the federal rules are persuasive authority." WellStar Health Sys., Inc. v. Kemp, 324 Ga. App. 629, 638, 751 S.E.2d 445, 453 (2013) (citing Ambler v. Archer, 230 Ga. 281, 287(1), 196 S.E.2d 858 (1973)).

[2] ENT Institute 30(b)(6) Depo., p. 18.

[3] ENT Institute 30(b)(6) Depo., pp. 27, 117-120, 122.

b. Communications regarding negotiations of the 2016 UAS contract amendment

Plaintiffs assert that, although the Gallup Defendants produced the actual amended agreement, they failed to produce communications between Daniel King and UAS regarding their negotiation of the 2016 UAS amended contract. However, Plaintiffs have not identified and the Court cannot discern the relevance of these negotiations to Plaintiffs' remaining claim for unjust enrichment. Further, the Gallup Defendants assert they have produced all documents in their possession responsive to Plaintiffs' discovery requests. Given this affirmative representation, to which they will be held, and absent some showing to the contrary, there is nothing for the Court to compel regarding the amended contract.

c. Communications between Dr. Gallups and John Berberian

According to Plaintiffs, in the Gallups Defendants production "there are almost or entirely no email communications between Gallups and Berberian originated by Gallups rather Berberian" and they opine that "[i]t seems improbable that Gallups initiated no email communications."[4] Again, in light of the Gallups Defendants affirmative representation that all responsive documents have been produced and absent some affirmative showing to the contrary beyond mere speculation, there is nothing further for the Court to compel regarding communications between Dr. Gallups and Mr. Berberian.

d. Communication and documents regarding payments, billing, economics or finances

The Court previously ordered the Gallup Defendants to produce documents relating to financial, accounting, billing and other reports related to UAS' services and Defendants' financial documents. Although it appears the Gallups Defendants produced nearly 3,000 pages of documents in response, Plaintiffs assert their production is deficient because it omits documents

[4] Plaintiffs Reply in Support of their Motion for Sanctions, p. 5.

showing ENT Institute's total revenues collected as a result of its relationship with UAS or documents from which such revenues can be "calculated with certainty."[5] However, again, the Gallups Defendants represent that all responsive documents have been produced.

Plaintiffs also complain that the Gallups Defendants have not produced information regarding any increase in shareholder distributions or officers' salaries after September 2014 despite Dr. Gallups testifying such information should have been supplied during discovery. Although the Gallups Defendants assert this information was never previously requested nor ordered to be produced, the Court finds this information relevant to Plaintiffs unjust enrichment claim and reasonably encompassed within Plaintiffs' previous discovery requests. As such, the Gallups Defendants are ordered to produce any responsive documents in their possession, custody or control within fifteen (15) days of the entry of this order.

e. Text messages between Dr. Gallups and Mr. Berberian

Plaintiffs assert the Gallups Defendants have never produced any text messages between Dr. Gallups and Mr. Berberian that do not include Plaintiff Souza. They further allege the Gallups Defendants failed to preserve such text messages despite receiving a preservation letter on Feb. 9, 2015. In response the Gallups Defendants point to various text messages that have been produced and used as exhibits during depositions and in submissions to this Court. Nevertheless, Plaintiffs assert Mr. Souza has produced all of the text messages that have been exchanged in this case. Further, phone records indicate that 103 text messages were sent after Plaintiffs sent their litigation hold letter to counsel for the Gallups Defendants—text messages which the Gallups Defendants allegedly have failed to produce.[6]

---

5 Plaintiffs Reply in Support of their Motion for Sanctions, p. 5.

6 Id. at pp. 7-8.

The Court hereby orders that within fifteen (15) days of the entry of this order the Gallups Defendants shall produce any text messages between Dr. Gallups and Mr. Berberian that do not include Plaintiff Souza and which have not already been produced and they shall affirmatively advise Plaintiffs whether there were any other such text messages exchanged which are no longer in the Gallups Defendants' possession, custody or control.

Although a transcript of the deposition of Dr. Gallups as ENT Institute's corporate representative was filed as an attachment to Plaintiffs' Second Motion to Compel, that transcript does not include the deposition exhibits, including Exhibit 23 which appears to include phone records demonstrating 103 text messages were exchanged by Dr. Gallups and Mr. Berberian but not produced. Plaintiffs are ordered to file the complete deposition of Dr. Gallups as ENT Institute's 30(b)(6) representative, including exhibits, within fifteen (15) days of the entry of this order.

f. Requested Sanctions

In their Motion for Sanctions, Plaintiffs ask the Court to sanction the Gallups Defendants by striking their answer. Alternatively, they ask the Court to (1) bar the Gallups Defendants from arguing or introducing any evidence challenging Plaintiffs' damage calculations, and (2) ordering the immediate production of responsive documents, an award of attorney's fees, and any necessary additional depositions at the Gallups Defendants' expense.

Having considered the record and in light of the above rulings, the Court does not find this is the type of "flagrant" case for which the "drastic sanction" of default is reserved. Yarbrough, 249 Ga. App. at 524. Nevertheless, it appears that a considerable number of documents were produced by the Gallups Defendants nearly a year after the Court's Nov. 7, 2017 Order on Plaintiffs' Motion to Compel was issued and were produced only after Plaintiffs

filed the instant motions. Thus, the Court finds that an award to Plaintiffs of their reasonable and proper attorney's fees actually incurred in the filing of their Second Motion to Compel and Motion for Sanctions is appropriate. Plaintiffs are directed to submit their reasonable fees and costs incurred in filing the motions within fifteen (15) days of the entry of this order. The Court will hear from the parties regarding the reasonableness and necessity of Plaintiffs' attorney's fees and costs requested at the Jan. 15, 2019 summary judgment hearing (discussed below).

II. SCHEDULING AND CASE MANAGEMENT

Given the Court's rulings above and in light of Defendants' recently filed motions for summary judgment, the Court orders as follows:

- As noted previously, the parties have fifteen (15) days from the entry of this order to comply with the above rulings and instructions.
- Plaintiffs shall file any responses to Defendants' pending motions for summary judgment within forty-five (45) days of the entry of this order.
- Defendants shall have fifteen (15) days from the submission of Plaintiffs' responses to their motions for summary judgment to file a reply brief, if they so choose.

A hearing on Defendants' motions for summary judgment shall be held on **Tuesday, Jan. 15, 2019 at 10:00 AM** in Courtroom 9J of the Fulton County Courthouse, 136 Pryor Street, 9th Floor, Atlanta, Georgia 30303. A court reporter will not be provided. If the parties wish for the hearing or any other court proceeding to be taken down, counsel must confer and make appropriate arrangements to have a court reporter present.

SO ORDERED this 7 day of November, 2018.

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

Electronically served upon registered service contacts via eFileGA

Attorneys for Plaintiffs	**Attorneys for Defendants**
Ryan L. Isenberg ISENBERG & HEWITT, P.C. 6600 Peachtree Dunwoody Rd. 600 Embassy Row, Suite 150 Atlanta, GA 30328 Tel: (770) 351-4400 Fax: (770) 828-0100 ryan@isenberg-hewitt.com **Jeffrey D. Horst** **Halsey G. Knapp, Jr.** **Joshua I. McLaurin** KREVOLIN & HORST, LLC 1207 West Peachtree St., NW Suite 3250, One Atlantic Center Atlanta, Georgia 30309 Tel: (404) 888-9700 Fax: (404) 888-9577 horst@khlawfirm.com hknapp@khlawfirm.com mclaurin@khlawfirm.com	**Peter V. Hasbrouck** **Chris J. Perniciaro** MARTENSON, HASBROUCK & SIMON, LLP 3379 Peachtree Road, NE Suite 400 Atlanta, GA 30326 Tel: (404) 909-8100 Fax: (404) 909-8120 pvhasbrouck@martensonlaw.com cperniciaro@martensonlaw.com *Counsel for Dr. Jeffrey Gallups and Milton Hall Surgical Associates, LLC d/b/a ENT Institute* **David G. Carter** CARTER JEFFRIES, LLC 6065 Roswell Rd., Suite 415 Atlanta, Georgia 30328 Tel: (404) 872-5959 Fax: (404) 872-5979 dcarter@carterlaw.com *Counsel for John Berberian*