IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WHITEHALL SPECIALTIES, INC.,

Plaintiff, OPINION AND ORDER

v. 04-C-436-C

STEVEN J. DELAPORTAS, IONIAN FOODS, LLC, and DEL SUNSHINE, LLC,

Defendants.

Before the court is plaintiff Whitehall Specialties, Inc.'s renewed motion for discovery sanctions. Dkt. # 33. Plaintiff contends that the defendants violated this court's January 3, 2005 discovery order and that plaintiff has suffered prejudice as a result. Defendants disagree, contending that they substantially complied with the court's order and that no sanctions are warranted.

I find that defendants have violated the court's order, that they are continuing to withhold material information, that they have not been forthright with opposing counsel or this court and that their acts and omissions have prejudiced plaintiff's ability to pursue and obtain relief in this case. In short I find that defendant's misconduct displays willfulness, bad faith and fault. Therefore, I am granting plaintiff's motion and entering judgment against all three defendants jointly and severally.

Fed. R. Civ. P. 37(b)(2)C) provides authority for this court to enter default judgment against a party that fails to comply with a discovery order, although such a sanction is appropriate only in extreme situations. In re Golant, 239 F.3d, 931, 937 (7th Cir. 2001), Philips Medical Systems Int'l, B.V. v. Bruetman, 982 F.2d 211, 214 (7th Cir. 1992). It is not clear under the law of this circuit whether default can be entered only when a party displays willfulness, bad faith or fault, or whether default may be entered in response to a "clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing." In re Golant, 239 F.3d at 936 & 936 n.1 (citations omitted). In this case, it is not necessary to clarify the point because defendants' conduct meets either criterion. It is clear that any sanction must be one that a reasonable jurist, apprised of all the circumstances, would choose as proportionate to the infraction.

A court is not required to accept a party's proffered excuses for failing to comply with a discovery order; in fact, a lawyer who offers a specious argument "can't expect anything else he says in the litigation to be believed." Israel Travel Advisory Service, Inc., v. Israel Identity Tours, Inc., 61 F.3d at 1255 (lawyer did not produce client's checking account records because order to disclose "all corporate records" did not mention checks).

Plaintiff's current motion for default follows on the heels of two court orders critical of defendants' conduct in this case. First, on January 3, 2005 this court entered an order granting plaintiff's motion to compel discovery, noting the lack of extra time in the court's

firmly-set schedule, and the evidence that defendants had lulled plaintiff and then had misled the court by backdating a certificate of service. The court ordered defendants to show cause why they should not be held in contempt for filing a false certificate of service with the court and ordered defendants to provide plaintiff promptly with complete, thorough, unconditioned and true supplemental responses to all of plaintiff's first set of discovery demands. The court allowed defendants to preserve their objections for the record but forbade them to withhold any information or document. The court warned defendants that this was their "last chance to get it right: failure to provide all requested information shall result in swift, severe sanctions." In order to provide plaintiff with a legitimate opportunity to seek summary judgment, the court extended the motion deadline to January 24, 2005, which was as much leeway as the schedule permitted. The court warned both sides that if they committed a discovery violation that prejudiced their opponent's ability to support or defend against summary judgment, the court would sanction the offending party appropriately, which could include granting judgment against that party. The court emphasized that any subsequent failure to toe the line on discovery, motions practice or other procedures required by this court would result in commensurate sanctions under Rule 37(b). Jan. 3, 2005 Order, dkt. #22, at 3-4.

Thereafter, in response to the court's show-cause demand, defendants' attorney admitted that he had in fact submitted a back-dated certification. His excuse for filing the

false document was that it mimicked his client's properly dated certification that he had left in an automobile that was not immediately accessible when he tried to fax the certification form. I expressed skepticism but declined to hold a show-cause hearing at that time. I warned the parties that if similar problems arose again in this case, the consequences would be dire. Jan. 13, 2005 order, dkt. #27.

That same day, defendants filed a motion to quash a subpoena that plaintiff had served on third party Wal-Mart, arguing that defendants were entitled to protection of their confidential business information in Wal-Mart's possession. Dkt. 29. In light of this court's January 3, 2005 order that defendants provide all of this same financial information directly to plaintiff, it is not clear what defendants hoped to accomplish by filing this motion. It is not clear why, after months of discovery, defendants first sought such protection at the absolute last minute. I conclude it was a stalling tactic of the sort censured by the court of appeals in United States v. Lloyd, __ F.3d __, No. 03-3334, slip op. at 4-5 (7th Cir. March 1, 2005) ("instead of filing a brief on the due date, the appellee files something else, such as a motion to dismiss," in effort to gain "a self-help extension of time").

The next day, January 14, 2005, plaintiff filed the instant renewed motion for discovery sanctions, alleging that defendants had violated this court's January 3, 2005 order and prejudiced plaintiff's ability to seek summary judgment and to try this case. Plaintiff alleges that defendants still have not complied with plaintiff's requests for production of

documents. According to plaintiff, defendants have not produced any substantive financial information about their own financial situation, their dealings with plaintiff or their dealings with Wal-Mart. In response, defendants do not deny that they have provided virtually nothing; their excuse is that they have no substantive documents to disclose: they have no business records, no financial information, and no tax returns, either because these documents never were prepared, were destroyed in a flood, or were stolen from defendant Delaportas's car (perhaps the same car in which he left his discovery documents on December 17).

Have considered the parties' dueling submissions, I find it unnecessary to score each thrust, parry and riposte. A review of the major points of contention leads to the ineluctable conclusion that defendants have violated this court's discovery orders. Defendants are not participating in pretrial discovery in good faith, their excuses are unbelievable and the prejudice to plaintiff is manifest.

One example is the dispute over the "ten boxes of discovery." In a December 28, 2004, declaration to the court, defendants' attorney stated that one reason defendants were late responding to plaintiff's discovery demands was "the volume of documents responsive to Plaintiff's requests (which is approximately ten bankers boxes full of documents." Because there were so many responsive documents, defendants decided to send plaintiff "the most pertinent documents" and invite plaintiff's attorney to inspect the remaining

documents in Arizona. Shanaberger Declaration, dkt.#20, at 2. In his January 5, 2005 affidavit, Delaportas stated that "the documents requested are extremely voluminous and it would be too costly and expensive to ship all of the documents." Plt.'s Reply, dkt. #42, at 2. However, after this court ordered complete production of all responsive information, defendants produced just one box containing only 3000 documents; after plaintiff culled its own documents from the box, it was left with a stack of paper six inches high. When queried, defendants told plaintiff that these were all the documents defendant Delaportas was able to locate during his January 8, 2005 search.

Defendants' response ignored the passage of time since plaintiff had served its discovery demands on defendants in October 2004 and defendants' averments to the courts, referring unequivocally to ten boxes of responsive documents. How did the ten boxes shrink to one? Defendants' explanation to the court is that the documents responsive to plaintiff's requests were interspersed with other non-responsive materials stored in ten vertical file drawers of documents. According to defendants, this resulted in the production of the 3000 pages of documents.

This is a material change in defendants' story. Defendants did not state in December that they had not yet searched ten boxes of assorted documents to find the responsive documents; they stated that they had ten boxes of responsive documents. Their key point in December was that the sheer volume of responsive materials led them to produce the most

pertinent documents first, with plaintiff's inspection of the remaining documents to follow. Now it is clear that defendants were cozening the court. This is exactly the type of misdirection I ordered the parties to abandon in my January 12, 2005 order.[1]

Even in the context of the two court orders that preceded the box story, I would hesitate to grant default judgment on this misdeed alone. Of greater concern is defendants' failure to provide any substantive documents to plaintiff that it can use to prepare the substantive prosecution of its claims.

First, there are the missing invoices. According to plaintiff, defendants have failed to produce any invoices from Ionian or Del Sunshine to Wal-Mart or other customers for the years 2003 and 2004. These invoices are critical to this lawsuit. Whitehall shipped its non-dairy cheese products to customers such as Wal-Mart, then invoiced Ionian and Del Sunshine directly for the shipments. Ionian and Del Sunshine then would invoice Wal-Mart and other customers directly (adding a commission) and receive payment directly from the customers. The heart of this lawsuit is plaintiff's claim that defendants failed to pay over $2 million to plaintiff for goods that plaintiff shipped to Wal-Mart and other customers in

[1] As plaintiff asks in its reply brief, in light of defendants' current assertions that Ionian was not organized until late 2000, that Whitehall was defendants' exclusive supplier of products between 2002-04, that Ionian lost virtually all of its customers except for Wal-Mart in 2003-04, and that defendants do not have and cannot find their banking, tax, accounting and financial records, what do the ten vertical file drawers of documents contain? The question is rhetorical but it illustrates the opacity attendant to every attempt to pry information from defendants.

2003-04. According to plaintiff, without defendants' invoices to Wal-Mart and other customers for 2003-04, plaintiff cannot support a summary judgment motion because plaintiff cannot correlate its direct shipments to customers with defendants' invoices to customers for payments from the customers to the defendants. Plaintiff complains that the problem is compounded by defendants' redaction of the few 2002 invoices that were produced: such redactions violate the January 3, 2005 order prohibiting defendants from withholding any information or document.

Defendants disagree with plaintiff's contentions. First, they point to their production of Ionian's invoices to Del Sunshine in 2003-04 as proof that they have complied with plaintiff's discovery demand. According to defendants, because of plaintiff's accusations against Ionian, Ionian was blackballed in the industry. Accordingly, Delaportas set up Del Sunshine to become Ionian's customer and to deal directly with the grocers. Thus, say defendants, their production of invoices from Ionian to Del Sunshine for the years 2003-04 was responsive to plaintiff's document requests.

As plaintiff points out in its reply, defendants' production of invoices from Ionian to Del Sunshine is meaningless: defendant Delaportas was the sole manager and member of Ionian and he was the sole manager and member of Del Sunshine; he admits that he set up Del Sunshine essentially to "front" for Ionian. Delaportas was passing invoices from his left hand to his right. What plaintiff needs for prosecution of its claims are the invoices from

Ionian/Del Sunshine to Wal-Mart and to other customers. These are the documents that would disclose defendants' invoice numbers, quantity and price information, permitting plaintiff to reconstruct each transaction to figure out where the money went.

Defendants justify their failure to provide information regarding their dealings with Wal-Mart by claiming that plaintiff has no right to view defendants' confidential financial information such as vendor numbers, mark-ups, price points and gross profits. Even so, claim defendants, they offered "to stipulate that their customers paid to them, each and every dollar charged by plaintiff to defendants, subject only to set-offs, charge-backs and other recoupments alleged." Dfts.' Resp., dkt. #40, at 4-5. According to defendants, because plaintiff would not accept this stipulation, defendants filed a motion for a protective order and motion to quash. According to defendants, they then produced "redacted versions of the disputed documents in the meantime," and plaintiff agreed in advance to accept such production without waiving the right to object. Id at 5.

In fact, all that defendants produced were 251 invoices from Ionian to Wal-Mart in 2002. They did not produce any invoices to Wal-Mart for the years 2003-04, a year in which plaintiff sent defendants a total of 1,601 invoices relating to shipments to third party customers. 1,520 of those invoices related to Wal-Mart. According to plaintiff, these missing invoices are the heart of this lawsuit: almost $2 million of plaintiff's claim for payment pertain to this time period. Without this information, plaintiff cannot correlate

its shipments of product to Wal-Mart and its invoices to defendants with defendants' separate invoices to Wal-Mart or with Wal-Mart's payment of defendants' invoices (and any credits or deductions taken). According to plaintiff, these missing documents relate directly to its claims and defendants' defenses; therefore, defendants' failure to produce these documents has prejudiced plaintiff's ability to seek summary judgment or otherwise prosecute its lawsuit.

Where are the invoices? Because defendants' position keeps changing, it is not clear whether defendants are claiming they do not have them, cannot find them or are withholding production while seeking a protective order. As for any claim that the 2003-04 invoices do not exist, plaintiff argues that because defendants created these invoices on a computer, "it is inconceivable that they do not have those invoices in their possession, either in hard copy or electronically." Plt.'s Reply, dkt. #42, at 3. Plaintiff asks why defendants were unable to produce these 1,600 invoices when they could and did produce the 2002 invoices which presumably were created using the same computer program and were sent to Wal-Mart and other customers.

Plaintiff has established that defendants are shifting their story as circumstances catch up to them: plaintiff notes that the redacted documents to which defendants refer in their opposition brief to the current motion are not from 2003-04. Plaintiff asked defendants to explain this discrepancy; defendants claimed that they have an "ongoing dispute concerning

production of Wal-Mart's '03-04 invoices & we have sought relief from the court pertaining to those documents." Id. This response seems to establish that defendants actually possess the invoices but have chosen not to produce them yet.

This constitutes a willful violation of the January 3, 2005 order requiring prompt, unconditional production of all requested information. Apart from this, defendants' e-mail to plaintiff is inaccurate and misleading: defendants' motion for protection or to quash was directed toward the subpoena plaintiff directed to Wal-Mart for that company's documents. Dfts.' Not. of Mot. and Mot., dkt. #29. There is no pending motion that justifies defendants' failure to provide this information as ordered by the court. Even if defendants had moved to protect their own Wal-Mart information from disclosure, the answer would have been an emphatic "No." This information is at the crux of this contract dispute and it had to be disclosed. This court's previous order was unequivocal: defendants had no option other than to provide all of the requested information. I conclude that defendants are engaging in yet another discovery shell game in defiance of this court's explicit order.

Plaintiff also complains that defendants have not yet produced their tax, banking and other financial records. In a similar vein, plaintiff complains that defendants have failed to produce complete payment records and related documents. According to plaintiff, defendants did not produce any documents in specified categories: Ionian/Del Sunshine cash receipts reports listing amounts received from Wal-Mart; Ionian/Del Sunshine

transaction lists for the relevant time period; documents regarding the resolution of customer credit requests and the ultimate disposition of returned product; purchase orders for Del Sunshine product; documents relating to slotting fees and other marketing costs; mail and other correspondence with Wal-Mart buyers. Tsao Aff., dkt. #35, at ¶ 6.

Defendants' response to these complaints reveals a feckless attitude toward civil discovery, record-keeping, business relations and tax obligations. Apparently defendant Delaportas first contacted his bank to request his records on January 5, 2005, no doubt prompted by this court's January 3 order. Ionian advised plaintiff that it would produce its federal and state tax records but it has not done so. Ionian further advised plaintiff that it cannot locate any quarterly or year-end financial statements, balance sheets or income statements from 1999 forward. Del Sunshine advised plaintiff that it does not have any tax or business documents.

Even so, defendants contend that they are in full compliance with all of their discovery obligations and should not be sanctioned. Defendants justify their failure to produce tax and financial records on the ground that "no such documents exist" and they cannot produce nonexistent documents. Dfts.' Resp., dkt. #40, at 8. Defendants explain that because Ionian Foods was not organized until November 2000, it has no tax returns for 1999 and 2000. Because Ionian "essentially ceased doing active business" in early 2004 it will not need to file a 2004 tax return. Ionian was responsible for filing tax returns only for

2002 and 2003 but those returns "were not timely filed." Defendants explain that Del Sunshine was formed in late 2002, so that there are no tax returns for 1999-2001. Because Del Sunshine's first year in business was the 2003 calendar year, no 2002 tax return exists either. Del Sunshine has yet to file its 2003 tax return, having requested and received an extension to file, and its 2004 tax return is not yet due. As for their failure to produce any other financial documents, defendants proffer that

> Moreover, the fact that defendants produced no financial statements, income statements and balance sheets, or the like does not equate to a refusal to produce such documents. Plaintiff assumes that such documents were prepared and, in fact, exist. Plaintiff is wrong. Presently, the documents plaintiff is requesting either do not exist or, as disclosed in defendants' discovery responses, cannot be located. For example, in prior litigation with one of plaintiff's own witnesses, Mr. Delaportas testified that his car was broken into and many of Ionian's business records were stolen; that most of the other documents were damaged, lost, or destroyed in a flood at its previous commercial business premises. Ionian is presently in the process of trying to recreate those accounting records to enable it to file belated tax returns, but that process has not yet been completed.

Dfts.' Resp., dkt. #40, at 8-9. Finally, defendants assert that they produced all bank records and cancelled checks that "they were able to locate," while admitting the existence of other

bank documents from a "previous banking relationship" that they do not currently possess. Id. at 9.

Plaintiff challenges defendants' claim that theft and flood are responsible for the lack of paperwork. It points out that defendants have not submitted sworn affidavits as to either proposition. When plaintiff asked defendants to produce copies of defendant Delaportas's alleged testimony about the flood and the break-in, defendants refused to do so, claiming they had no obligation to do so. Plaintiff notes that defendants never raised the alleged break-in or flood in their Rule 26(a)(1) disclosures, during the December 3, 2004 Rule 37 meeting, in their December 17, 2004 written discovery responses, in their December 28, 2004 opposition to plaintiff's motion to compel, in their January 7, 2005 supplemental written discovery responses, in their January 12, 2005 second supplemental discovery responses, during the January 11, 2005 Rule 37 conference or in any of the e-mails exchanged between counsel following the January 11 meeting.

Finally, plaintiff complains that defendants have mischaracterized the resolution of specific production disputes. In its reply brief, plaintiff says that defendants have not provided their reports of customer transactions, payment history or accounts receivable records. To the extent that defendants did provide a few documents responsive to plaintiff's requests, this raises the question: where are the rest of the documents, particularly those related to Wal-Mart? Plt.'s Reply, dkt. ## 9-11. In short, defendants' excuses for their

failure to produce these various categories of documents are unsupported and unbelievable. Having continuously misled plaintiff and the court during this lawsuit, defendants have no credibility left. Even if defendants were to produce a transcript of defendant Delaportas's prior assertions of broken car windows and broken water pipes, I would be disinclined to believe those assertions.

As a parting shot, plaintiff brings up defendant Delaportas's criminal and civil woes in other courts. Defendants' words and deeds in the instant case have besmirched their credibility sufficiently to obviate the need to rely on the this information. Even so, Delaportas's dubious track record provides helpful context for defendants' conduct in the instant case. On January 4, 2005, Delaportas was indicted for fraud in Arizona. In May, 2004, a Colorado court entered a $1.8 million default judgment against him that remains unexecuted because that plaintiff cannot find defendant Delaportas. Delaportas responds that the indictment is not evidence against him and he did not know about the Colorado judgment because he never was served in that case. Plaintiff challenges this second assertion: how could the court enter default judgment against a party that never had been served? True, the fact that a grand jury found probable cause that Delaportas engaged in fraud will not be used at his criminal trial to prove guilt and there may be innocuous reasons why the Colorado plaintiff cannot find Delaportas to execute his default judgment, but this court is not required to take leave of its common sense when drawing reasonable inferences from the

evidence. United States v. Starks, 309 F.3d 1017, 1023 (7th Cir. 2002). Even assuming that Delaportas has predicted correctly that he will be vindicated in Arizona and Colorado, the fact that he even had dust-ups of this nature makes defendants' far-fetched explanations in the instant case just that much less believable. Whether Delaportas is the upscale equivalent of a three-card monte dealer remains to be seen, but he most definitely is not some hapless naïf whose irreproachable business practices are undermined constantly by an unremitting string of bad luck. Nevertheless, Delaportas's legal woes in other courts are an insignificant footnote to defendants' material misstatements and misdeeds in this case.

In sum, having considered both sides' submissions and arguments, I conclude that defendants have withheld and continue to withhold material information from plaintiff in contravention of the Federal Rules of Civil Procedure and in defiance of this court's January 3, 2005 order. Defendants have misled the plaintiff and the court. They have prejudiced plaintiff's ability to investigate and litigate this case. Defendants have acted willfully, in bad faith and with fault. Therefore, I am granting plaintiff's motion and entering judgment against all three defendants jointly and severally.

It is not necessary to hold a hearing to determine the amount of the default judgment. The parties agree that plaintiff shipped approximately $2,200,000 worth of cheese products to Wal-Mart and other customers, that plaintiff sent invoices to defendant Ionian for the shipments, that defendant Ionian received at least $2,200,000 from Wal-Mart and other

customers and failed to pay plaintiff the amounts on the invoices. Delaportas Aff., dkt.#31, at 3. In the same documents, defendants said that they were reserving the right to prove credits, recoupments, offsets related to customers' rejected shipments, charge-backs, deductions and set-offs for plaintiff's failure to credit defendant Ionian for proper shipping and trucking charges, a five cent per pound accrual charge, plaintiff's distribution and sale of defendants' products to unauthorized retailers and customers and plaintiff's loss of business attributable to plaintiff's breach of the parties' agreement. Id. That "right" has evanesced. It is apparent from their responses to plaintiff's discovery requests that defendants have no documents with which they could prove their right to any deductions from the $2,200,000 due plaintiff.

ORDER

For the reasons and in the manner stated above, it is ORDERED that

1. Plaintiff's renewed motion for discovery sanctions is GRANTED;

2. Judgment is entered in favor of plaintiff Whitehall Specialties, Inc. against defendants Steven J. Delaportas, Ionian Foods, LLC and Del Sunshine, LLC on plaintiff's claims in the amount of $2,200,000.00; and

3. Defendants' motion for a protective order and to quash or in the alternative, modify the Wal-Mart subpoena, dkt. #29, is DENIED as moot.

The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 10th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge