

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

UNITED STARS INDUSTRIES, INC.,
d/b/a UNITED INDUSTRIES, INC.,

Plaintiff,

v.

PLASTECH ENGINEERED
PRODUCTS, INC.,

Defendant.

OPINION AND ORDER

06-C-0349-C

This civil case arising out of a dispute over the supply of welded stainless steel tubing is before the court for resolution of the last remaining issue, that of sanctions. Plaintiff United Stars Industries, Inc. is asking for an award against defendant Plastech Engineered Products, Inc. under Fed. R. Civ. P. 37 and 28 U.S.C. § 1927 for eight particular instances of alleged misconduct. Plaintiff contends that defendant (1) asserted a baseless counterclaim as a means of protracting the litigation; (2) withheld documents without justification; (3) failed repeatedly to comply with its obligations with respect to Rule 26 witness disclosures; (4) identified four potential trial witnesses never before listed on any Rule 26(a) disclosures after discovery had closed and only four weeks before trial; (5) asserted an untimely and

contradictory damages theory; (6) interposed baseless objections to documents that it had previously stipulated to be admissible; (7) filed a baseless motion in limine; and (8) relied in its post-trial brief upon evidence that was not admitted at trial.

After briefing on this motion was completed, defendant moved for leave to file a surreply brief, ostensibly to respond to “new matter” raised in plaintiff’s reply brief. Its motion was granted and the brief was filed on August 24, 2007. On August 27, plaintiff filed a motion to strike the brief on the ground that it was filed on the inaccurate premise that plaintiff raised new matter in its reply brief. Plaintiff is correct; defendant begins its surreply brief by attacking plaintiff for doing nothing more in its reply brief than “rehash how it should be reimbursed for fees.” The surreply will be stricken as unsupported by any need to respond to new matters.

Fed. R. Civ. P. 37(c)(1) authorizes a court to impose sanctions against parties that, without substantial justification, fail to disclose discoverable information or to amend a prior response to discovery. 28 U.S.C. § 1927 gives courts the power to impose sanctions against any lawyer “who . . . so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” It applies in cases in which “counsel acted recklessly, counsel raised baseless claims despite notice of the frivolous nature of these claims, or counsel otherwise showed indifference to statutes, rules, or court orders.”

Kotsilieris v. Chalmers, 966 F.2d 1181, 1184-85 (7th Cir.1992). The absence of subjective bad faith is not enough to avoid a sanction under § 1927, if the lawyer's actions meet the standard of objective unreasonableness. Claiborne v. Wisdom, 414 F.3d 715, 721 (7th Cir. 2005).

1. Assertion of baseless counterclaim

Plaintiff is correct in characterizing defendant's counterclaim as baseless. Although defendant alleged that plaintiff had overcharged defendant by approximately \$890,000, it never produced any evidence that it had a legitimate basis for the claim. At the same time, it used the counterclaim as the basis for discovery requests related to the alleged overcharges.

Although defendant made many requests directed to the overcharges, when it came to its own disclosures, it identified only one employee, Scott Ryan, as having information about them. It told plaintiff that Ryan had performed an "in-depth audit" and was knowledgeable about the alleged overcharges. In fact, at his deposition, Ryan expressed his ignorance of any damages. He denied having ever conducted an audit or even knowing what an "internal audit staff" was. Undaunted, defendant named Ryan as a witness at trial and called him despite his lack of knowledge about the alleged overcharges. It produced no other witnesses to testify about its counterclaim.

Even now, defendant cannot point to any evidence to show that its counterclaim had

any kind of foundation. It quotes the testimony of Rodney Turton that “[W]e had our finance team conduct audits in order to [see] what we were being charged, how much we paid, et cetera, to understand where this disconnect came about,” Tr. 2- 80: 16-25, but says nothing about the results of the audits.

Defendant argues that plaintiff would have incurred the fees incurred during discovery in any event because it had to prove the terms of the parties’ agreement, “which generally consisted of multiplying an applicable tube weight by an applicable surcharge rate.” It asserts that the ultimate questions for plaintiff’s claim and defendant’s counterclaim were identical (apparently because both related to the calculation of surcharges). This is an ingenious argument but not one that stands up to scrutiny. For plaintiff to explain how it calculated the surcharges took almost no work because it did these calculations regularly. On the other hand, it would have had to engage in extensive efforts to try to understand how and why defendant believed the surcharges to be improper. One can appreciate the difficulty (and futility) of those efforts now that it is clear that defendant itself cannot explain the basis for its belief.

Asserting and maintaining a counterclaim for which there is no evidentiary basis and resisting efforts to disclose the basis for that counterclaim is conduct of the sort that § 1927 is designed to prevent. Fed. R. Civ. P. 11 is useless in such a situation because the lack of any foundation for the counterclaim is not obvious to the opposing party early enough in

the litigation to make a Rule 11 motion efficacious. Therefore, plaintiff will be granted some of its requested attorney fees. (It has not asked for an award of costs in connection with this claim.). Plaintiff's revised itemization of excess attorney fees and costs supports an award of \$21,754.00 for the time its counsel spent answering questions regarding the asserted claim, preparing for and taking the deposition of Scott Ryan, preparing for Ryan's trial testimony and cross-examining him at trial. (I have eliminated from plaintiff's request fees for what appears to be duplicative or unnecessary work or where it is not clear that the charges were limited to obtaining information on the alleged overcharges.)

Defendant takes particular issue with the claim for sanctions as it seems to relate to time spent in settlement discussions. Its concern is appropriate. I am not approving any fees for time spent by counsel in connection with the baseless counterclaim unless I can tell that it was spent on something other than participation in settlement discussions.

2. Wrongful withholding of responsive documents

Although the magistrate judge ruled on defendant's alleged withholding of responsive documents, as well as other discovery disputes in this case, plaintiff wants the court to reconsider those rulings now that both plaintiff and the court have the full picture of defendant's wrongdoing. This an easy invitation to decline. Although the resolution of discovery disputes is necessarily inexact and imperfect because of the judicial officer's

inevitably incomplete understanding of the parties' disputes, it does not follow that those rulings should be subject to reconsideration at the end of the proceedings. The purpose of discovery rulings is to move the parties off dead center so that discovery may proceed. That purpose was accomplished in this case, albeit not always in the manner plaintiff would have preferred. I understand that plaintiff contends that the discovery disputes contributed to the expense of prosecuting the case, which is obviously true. Nevertheless, I am not inclined to review them now in an effort to determine whether they had some merit or none at all.

3. Failure to comply with expert witness obligations

_____ Defendant tried to name an expert witness after the time for naming experts had expired. Plaintiff seeks an award for the time it spent responding to defendant's untimely disclosure and defendant's later attempt to turn the expert into a lay witness, but it has failed to show a persuasive reason why its request should be granted. These sorts of things are common in litigation. Defendant's actions in this regard are not admirable but they are not so improper as to be sanctionable under § 1927.

4. Late disclosure of lay witnesses

For the same reasons that defendant's late disclosure of an expert witness does not

justify an award of sanctions, no award is appropriate for defendant's late disclosure of lay witnesses. Plaintiff moved to exclude the witnesses; its motion was granted. Defendant's conduct in trying to slip in an untimely witness was nothing unusual in hard-fought litigation. It certainly does not rise to the level of conduct that is reckless or indicative of indifference to statutes, rules or court orders.

5. Assertion of untimely and contradictory damages theory

In contrast to the conduct discussed in sections 3 and 4 above, defendant's untimely assertion of a claim that was not only without merit but in contradiction of the position it had taken throughout the litigation is sanctionable. Defendant's last minute contention that plaintiff was in default of its delivery obligations under the purchase orders came out of left field. Nowhere in the trial evidence was there any evidence of default on plaintiff's part. As defendant knew, the entire dispute was over its own obligation to pay plaintiff for the tubing it was producing and shipping. Accordingly, I will award plaintiff attorney fees in the amount of \$4000.00 and costs of \$900.97 for the extra work involved in preparing to defend against this baseless claim.

6. Interposition of baseless objections to documents previously stipulated to be admissible

Defendant's objections to documents to which it had previously agreed was annoying but not so serious as to be sanctionable. Plaintiff's request for sanctions for this conduct will be denied.

7. Filing of baseless motion in limine

Defendant's filing of its in limine motion to bar plaintiff from offering evidence of its calculations of surcharges was based on a reckless misrepresentation of the facts. Defendant alleged that plaintiff had never provided it the formula it used to calculate surcharges when in fact defendant had received a detailed explanation of the method in an amended response to interrogatories.

Plaintiff is entitled to some portion of the attorney fees it seeks for the extra work it engaged in to defend against defendant's assertions. However, its claim of more than \$5000 is unwarranted; half of that, or \$2500, would be reasonable for the work that would have been necessary to respond to the motion, plus costs in the amount of \$1,098.96.

8. Reliance in its post-trial brief on evidence that was not admitted at trial

_____ No attorney fees will be awarded for defendant's attempted reliance on an exhibit

(Dft.'s Exh. #619) that was not received into evidence at trial. The conduct is not so reckless, frivolous or indifferent to court rules as to be sanctionable. The misstatement did not mislead the court; it was just as evident to the court as it was to counsel that the document was not in evidence.

ORDER

IT IS ORDERED that plaintiff United Industries, Inc.'s request for an award of sanctions against defendant Plastech Engineered Products, Inc. is GRANTED in part. Plaintiff is entitled to an award of attorney fees in the total amount of \$28,254.00 and costs in the amount of \$1999.93. Plaintiff's motion to strike defendant's surreply brief is GRANTED.

Entered this 27th day of August, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge