

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

L.W. SURVEY ENGINEERING & DESIGN CO.,

Plaintiff,

v.

OPINION AND ORDER

10-cv-787-slc

GLOBAL LAND SERVICES, INC. and
RODNEY W. WOLF,

Defendants.

Before the court are two related motions: 1) Plaintiff L.W. Survey Engineering & Design Co.'s motion for sanctions under Fed. R. Civ. P. 37(b) for defendants' failure to obey a discovery order of the court entered on June 22, 2011, dkt. 16; and 2) defendant Global Land Services, Inc. Motion to dismiss its counterclaim without prejudice, brought pursuant to Fed. R. Civ. P. 41, dkt. 19. For the reasons stated below, I am dismissing defendant Global's counterclaim with prejudice as a sanction for its failure to provide discovery. Solely for the purpose of deciding the instant motions, I find the following facts from the record:

FACTS

I. The Parties

Plaintiff L.W. Survey Engineering & Design Co. (LWS) is an Illinois corporation with its principal offices located in Duluth, Minnesota. Leslie Welch owns 100% of the corporation's stock. LWS is engaged in the business of providing engineering as well as surveying services.

Defendant Global Land Services, Inc. (Global) is a Nevada Corporation with its principal offices located in Huntington Beach, California. It is engaged in the business of providing land surveying and related services.

Defendant Rodney W. Wolf is president of Global, one of its two directors and holds 50% of its outstanding common stock. Wolf resides in California. Leslie Welch is the only other director of Global and holds the other 50% of its stock.

II. Procedural History

In July 2010, LWS initiated this civil action for damages in the Circuit Court for Douglas County, Wisconsin. Plaintiff alleged that in February 2010 it had been obliged to pay nearly \$400,000 to the National Bank of Commerce when Global defaulted on a loan for which LWS was a co-guarantor. In Counts I and II, plaintiff sought repayment from Global and Wolf, who also had guaranteed this National Bank Loan. In Count III, LWS alleged that Global owed it an additional \$125,361 for various business expenses that LWS had incurred on Global's behalf, including equipment rent, balances due for equipment purchases, cash advances, fees and interest.

On December 10, 2010, defendants removed plaintiff's state lawsuit to this court, asserting federal diversity jurisdiction under 28 U.S.C. § 1332. *See* dkt. 1. Defendants filed their answer and affirmative defenses on December 17. Global also filed a counterclaim, in which it alleged that LWS had breached a November 2007 Accounting Services Agreement between the parties by failing to provide agreed-upon services. In addition, Global alleged that LWS had breached a fiduciary duty it owed to Global by using certain business information that it had obtained from Global to the benefit of LWS and detriment of Global.

On January 13, 2011, Global and Wolf, represented by California counsel, filed suit against Welch in the Superior Court in Orange County, California. On February 18, 2011,

Welch removed that case to the United States District Court for the Central District of California, then filed a motion to transfer the case to this court on the ground that the two actions were identical. *See* Third Dec. of Roy J. Christensen, dkt. 24, exh. A. In an order entered June 2, 2011, the federal district court in California agreed that the issues raised by Global and Wolf in the California complaint were identical to those in Global's Wisconsin counterclaim. It noted, however, that the parties in the two cases were not identical, insofar as Welch was not named as a counter-defendant in the Wisconsin action, nor was LWS named as a defendant in the California action. The court denied the transfer motion without prejudice and stayed the case for 90 days, or until August 15, 2011. *Id.*

Meanwhile, in the Wisconsin action, LWS served its first set of interrogatories on Global and Wolf on March 22, 2011. Second Dec. of Roy J. Christensen, dkt. 18, exh. 1. Ten of the 11 questions were contention interrogatories asking defendants to state in detail the facts underlying various allegations made in the counterclaim. Counsel for the parties agreed to a number of extensions of defendants' deadline for answering, with the final deadline set for June 8, 2011. Defendants did not submit their answers on that date. On June 13, 2011, after first attempting to meet and confer with defendants about their failure to answer the interrogatories, plaintiff brought a motion to compel. Dkt. 10.

At a June 22, 2011 telephonic hearing, I granted plaintiff's motion, ruling that:

Defendant shall have until June 30, 2011 to provide full answers to the pending interrogatories, with no objections except for bona fide claims of privilege. Failure to comply with this order will result in sanctions under Rule 37(b) as justice requires under the circumstances.

Dkt. 15, text only order.¹

Defendants served answers to the interrogatories on June 30, 2011. Dkt. 18, exh. 1. Wolf signed the answers individually and on behalf of Global. With the exception of Interrogatory No. 11, which asked about pending litigation, defendants answered the interrogatories with the following:

Global Land Services, Inc. is moving the Court to dismiss the counterclaim it has filed in this action. In the event that Global Land Services, Inc. seeks, at some future date, to bring this claim, it will then answer Interrogatories numbered 1 through 10.

On July 1, 2011, LWS filed a motion for sanctions pursuant to Fed. R. Civ. P. 37(b), alleging that defendants' non-response is a violation of this court's June 22 order. Plaintiff asks the court to strike not only defendant Global's counterclaim, but also to strike both defendants' answer and affirmative defenses and enter judgment in favor of plaintiff. Shortly thereafter, defendant Global moved to dismiss its counterclaim without prejudice. Both motions are now under advisal to the court.

OPINION

Federal Rule of Civil Procedure 37(b)(2) authorizes a court to impose a variety of sanctions up to and including dismissal of a case where a party "fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2). There are two limitations upon a court's discretion to impose sanctions under Rule 37(b)(2): the sanctions must be "just" and they must "relate to the particular claims to which the discovery order was addressed." *Morris v. United*

¹Although I did not specify to which defendant I was referring, the defendant was Global: Wolf did not file the counterclaim which was the subject of plaintiff's interrogatories.

States, 37 Fed. Cl. 207, 213 (1997) (citing *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)).

Global does not deny that it failed to comply with this court's June 22, 2011 order directing it to provide full and complete responses to plaintiff's discovery requests. It asserts, however, that it did not answer the questions is because it is no longer pursuing its counterclaim because of "a lack of resources." Defs.' Memorandum, dkt. 21, at 3. Global asks the court for permission to dismiss its counterclaim without prejudice under Rule 41(a)(2), made applicable to counterclaims by Rule 41(c), which allows voluntary dismissal only "by court order, on terms that the court considers proper."

Global further opposes the imposition of any sanction under Rule 37(b) for the reason that LWS's sole owner, Welch, also owns 50% of Global and has "ties and knowledge relating to [Global] . . . and may have as much information as [Global] relating to the business between them." Dkt. 21, at 4. In essence, Global argues that no sanctions should be imposed because LWS either does not need or already knows the answers to the interrogatories, and therefore suffered no prejudice as a result of Global's lack of compliance.

Global's response is flawed in three respects. First, Global does not cite and this court is not aware of any authority to support Global's contention that a party need not answer interrogatories when the party seeking the discovery may have prior knowledge concerning the matters in dispute. In any case, even if such authority existed, the time to have cited it was in opposition to the motion to compel. Raising such an argument after the court has unequivocally ordered complete and unqualified discovery responses is too much little, much too late.

Second, Global incorrectly assumes that Rule 37(b) sanctions are available only to penalize conduct that is unfair to the other party. Fairness to both sides is one concern, but Rule 37(b) sanctions also are available as a means to ensure compliance with the court's rules and procedures and to deter others who might be tempted to ignore those rules. *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam); *Dotson v. Bravo*, 321 F.3d 663, 667-668 (7th Cir. 2003).

Finally, Global's assertion that it "lacks resources" to continue to pursue its counterclaim is flat-out disingenuous in light of its pursuit of the very same claim against Welch in the California action. As LWS points out, Global has not moved in the California case for dismissal of its claims brought as a plaintiff in that action. By all indications, Global is not decamping and heading home, it is re-marshaling its resources in California to join battle there. Indeed, although it had the opportunity to do so, Global has failed to offer any reply to LWS's brief in opposition to the motion to dismiss, dkt. 23, at 3, in which LWS accuses Global of abusing the discovery process in furtherance of its forum-shopping scheme. In the face of this silence and on the record, I can only conclude that LWS's accusations have merit.

Taking into account Global's pellucid, unapologetic failure to comply with this court's June 22, 2011; the court's warning that Rule 37(b) sanctions would be forthcoming; Global's lack of candor in this proceeding; and the need to deter others from engaging in similar conduct, I find it just and necessary to dismiss Global's counterclaim with prejudice. To dismiss the counterclaim without prejudice, as Global asks, would amount to no sanction at all; indeed, it would allow Global to evade its responsibilities to plaintiff and to this court in this lawsuit.

I decline, however, to dismiss the answers and affirmative defenses filed by Wolf and Global in this case. As Global points out, the interrogatories that it failed to answer were clearly directed to the counterclaim. Although LWS contends that Global's counterclaim is simply the offensive mirror image of its answer and affirmative defenses, that contention is not borne out by a review of the pleadings or the joint pretrial conference report. Global's description in the pretrial report of the "issues of fact and law" to be resolved at trial appears to track only its counterclaim, not its defense to LWS's claims. *See* dkt. 8, at 2-3. As for the pleadings, Counts I and II of LWS's complaint seek reimbursement from Global and Wolf, respectively, for sums involuntarily paid by LWS as guarantor for a bank loan, whereas Global's counterclaim alleges that LWS breached an Accounting Services Agreement and a fiduciary duty that it owed to Global. In other words, Counts I and II of the complaint and the counterclaim appear to involve at least two separate business arrangements involving different facts. Although Count III of the complaint, which seeks repayment of sums allegedly extended by LWS to Global for business expenses, appears to have more in common with the counterclaim, I am unable to draw that conclusion with any certainty from the terse pleadings.

What is certain is that the interrogatories that Global failed to answer referred only to the counterclaim, and that is the only portion of the case that I will dismiss at this time. Striking Global and Wolf's entire pleadings would be an unduly severe sanction and would provide a windfall to plaintiff. That said, it would be highly inadvisable for Global or Wolf (its apparent controlling shareholder) to attempt to resurrect the counterclaim in the guise of a defense to the complaint, an attempt that certainly would prompt a motion from plaintiff.

In sum, plaintiff LWS's motion for sanctions under Rule 37(b) will be granted in part and denied in part. It is granted to the extent that plaintiff asks the court to dismiss defendant Global's counterclaim, but denied as to plaintiff's request to strike both defendants' answers and affirmative defenses and enter judgment for plaintiff. Global's motion for voluntary dismissal of its counterclaim is denied as moot.

Finally, pursuant to Rule 37(b)(2)(C), plaintiff is entitled to the reasonable expenses and attorney fees incurred in bringing its motion for sanctions unless defendant's failure was substantially justified or other circumstances make an award of expenses unjust. For the reasons already discussed in this opinion, I find that defendant Global lacked substantial justification for failing to comply with this court's June 22 order and I am not aware of any circumstance that would make an award of expenses unjust. Accordingly, the court will award reasonable fees to plaintiff. Plaintiff may submit its itemization of costs and expenses not later than August 24, 2011. Defendant Global may have until August 31, 2011 to respond to this fee specific request.

ORDER

IT IS ORDERED THAT:

1. The motion of plaintiff L.W. Survey Engineering & Design Co. for Rule 37 sanctions, dkt. 16, is GRANTED IN PART and DENIED IN PART:

(A) Defendant Global Land Services, Inc.'s counterclaim is DISMISSED WITH PREJUDICE;

(B) Defendant Global Land Services, Inc.'s answer and affirmative defenses, as well as those of defendant Rodney Wolf, remain in place.

2. The motion of defendant Global Land Services, Inc. for voluntary dismissal of its counterclaim, dkt. 19, is DENIED as moot.

3. Plaintiff shall submit its itemization of costs and expenses incurred in bringing the motion for sanctions not later than August 24, 2011. Defendant Global has until August 31, 2011 to respond to plaintiff's fee request.

Entered this 17th day of August, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge