

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: November 5, 2010

Date Decided: February 23, 2011

Marc S. Casarino, Esquire
White and Williams LLP
824 N. Market Street, Suite 902
Wilmington, DE 19801

Margaret F. England, Esquire
Eckert Seamans Cherin & Mellott, LLC
300 Delaware Avenue, Suite 1210
Wilmington, DE 19801

Re: *Elaine Mickman v. American International Processing,
L.L.C., et al.*, Civil Action No. 4368-VCP

Dear Counsel:

In a hearing held October 28, 2010 (the “Hearing”) on Plaintiff, Elaine Mickman’s (“Elaine”), motion to either strike the answers of Defendant, American International Processing, LLC (“AIP”), to discovery, or alternatively, to compel compliance with an order of this Court regarding that discovery, I awarded attorneys’ fees against both AIP and its counsel. On November 5, 2010, AIP moved for reargument on my decision as to attorneys’ fees. AIP responds that its delays in responding to the discovery in question were brief, the discovery requests were duplicative, and the delay did not cause Elaine prejudice. For the reasons stated below, I deny AIP’s motion.

I. BACKGROUND AND PROCEDURAL HISTORY

This discovery dispute arises in the context of Elaine's claims relating to AIP, a Delaware limited liability company she owns along with Richard Mickman ("Richard"). Elaine seeks, among other things, information relating to the operation and ownership of AIP, and redress for alleged breaches of contract and of fiduciary duties.¹ On July 2, 2009, Elaine propounded a request for production of documents and interrogatories. In August 2009, AIP responded to those requests. Elaine considered the responses unsatisfactory, however, and filed a motion to compel on October 14, 2009.²

On October 26, 2009, in the context of a hearing on Elaine's motion to compel, I stayed this action, including discovery, pending the result of a divorce action between Elaine and Richard in Pennsylvania involving the same subject matter.³ When the Pennsylvania action did not proceed as expeditiously as anticipated, Elaine moved to lift the stay on discovery on January 11, 2010.⁴ On March 5, 2010, I heard argument on that motion and granted the motion in part and denied it in part. On March 16, 2010, I

¹ Compl. ¶¶ 12, 26, 33, 39-42.

² Docket Item ("D.I.") 23, at 2.

³ D.I. 28, Tr. of Arg. on Def.'s Mot. to Dismiss, Pl.'s Mot. for TRO, and Pl.'s Mot. to Compel, 23-24.

⁴ D.I. 31, at 1.

entered an order, stipulated as to form by the parties, directing AIP to respond or object to specific discovery requests within thirty days of that order – *i.e.*, by April 15, 2010.⁵

On April 12, 2010, AIP phoned Elaine informing her that, due to extenuating circumstances, responses to the ordered discovery would be delayed.⁶ Elaine, subsequently, granted AIP an extension to April 27, 2010.⁷ AIP missed this extended deadline as well and Elaine, after having heard nothing from Defendant for an additional week beyond the extended deadline, emailed AIP on May 6, 2010, giving it another extension, this time until May 10.⁸ AIP failed to meet this deadline as well, and again made no effort to communicate with Plaintiff about it.⁹ On May 17, 2010, a week after the last deadline, Elaine moved to either strike the answers of AIP or, alternatively, to

⁵ D.I. 40 (the “March 16 Order”).

⁶ These circumstances included additional delays in the Pennsylvania action and a death in defense counsel’s family. D.I. 41, Pl.’s Mot. to Strike the Answer of Def. or Compel Compliance with Disc. Order (“Plaintiff’s Motion”) 4; *see also* D.I. 53, Def.’s Mot. for Rearg. (“DMR”), ¶ 3. Additionally, Richard, as well as his accountants and attorneys whose input was necessary to complete the discovery request, were out of the country and unavailable to AIP’s counsel. *Id.*; *see also* D.I. 47, Def.’s Opp. to Pl.’s Mot. to Strike the Answer of Def. or Compel Compliance with Disc. Order ¶ 8.

⁷ Pl.’s Mot. 4.

⁸ Pl.’s Mot. 4, Ex. 2. The email informed AIP that its extended deadline had passed and warned that if responses were not received by May 10, 2010 Elaine would file a motion to compel. *Id.*

⁹ *Id.*

compel compliance with this Court's March 16 Order.¹⁰ On June 18, 2010, AIP filed its opposition to Elaine's motion to strike as well as responses to the disputed discovery requests.

On October 28, 2010, I held the Hearing on Elaine's motion to strike the answer of AIP or compel compliance with this Court's March 16 Order. At the Hearing, I assessed attorneys' fees in the amount of \$2,500 against both Defendant and Defendant's counsel for violating this Court's Order by failing to respond to the subject discovery requests in a timely manner.¹¹ On November 5, 2010, AIP moved for reargument regarding the assessment of attorneys' fees. No opposition papers have been filed by Plaintiff. This Letter Opinion constitutes my ruling on the motion for reargument.

II. ANALYSIS

A. Standard for Reargument Under Rule 59(f)

The standard applicable to a motion for reargument under Court of Chancery Rule 59(f) is well settled. To obtain reargument, the moving party must demonstrate either that the court overlooked a controlling decision or principle of law that would have controlling effect, or the court misapprehended the facts or the law so that the outcome of

¹⁰ *Id.*

¹¹ D.I. 55, Tr. of Hr'g on Pl.'s Mot. to Strike or Compel Discovery ("Tr.") 18.

the decision would be different.¹² It is the moving party's burden to show that "the court's misunderstanding of a factual or legal principle is both material and would have changed the outcome of its earlier decision."¹³

B. Awarding of Attorneys' Fees Under Rule 37

"Pursuant to Chancery Court Rule 37, when a party fails to comply with discovery orders of the Court . . . the award of attorneys' fees and expenses to the opposing party is mandatory, absent a showing by the wrongdoer that his actions were substantially justified or that other circumstances make the award unjust."¹⁴ As such, the only way I could have misapprehended the facts or law in assessing attorneys' fees against AIP such that the outcome would have been different here, is if they, in fact, were not in violation of the March 16 Order of this Court, which neither party asserts,¹⁵ or, if that violation was substantially justified. Certain of AIP's remaining arguments fairly can be read as offering reasons why its violation of the March 16 Order was substantially justified. I address each of those reasons in turn.

¹² See, e.g., *Medek v. Medek*, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007).

¹³ *Medek*, 2009 WL 2225994, at *1 (internal quotation marks omitted).

¹⁴ *Bader v. Fisher*, 504 A.2d 1091, 1096 (Del. 1986); see also *Wileman v. Signal Fin. Corp.*, 385 A.2d 689, 690 (Del. 1978). Rule 37 reads in pertinent part: "If a party . . . fails to obey an order to provide or permit discovery . . . the Court may make such orders in regard to the failure as are just In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable

1. AIP's failure to provide discovery was not substantially justified

AIP asserts that circumstances, including a death in its counsel's family and Richard being abroad, caused the delay in providing discovery.¹⁶ It further argues that the delay was brief and caused Elaine no prejudice.¹⁷

No one disputes that a death in counsel's family provides a reasonable justification for an extension of a discovery deadline. Yet, Plaintiff's counsel granted a reasonable extension when that situation was raised. Moreover, I did not base my award of fees on that circumstance. Instead, I found that the overall failure of AIP to communicate with Elaine to work out an agreement was not substantially justified. The March 16 Order lifted a disputed stay of discovery that had been in effect for several months. The Order also gave AIP a full thirty days from its date to provide that discovery. If more time was needed to provide the discovery, it was AIP's duty to inform

expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust." Ct. Ch. R. 37(b)(2).

¹⁵ See DMR ¶¶ 2-4 (acknowledging that AIP missed the discovery deadline imposed by the March 16 Order); see also Pl.'s Mot. 3-4.

¹⁶ DMR ¶ 12.

¹⁷ *Id.*

Elaine of this, and if that did not yield results, then to ask this Court for relief.¹⁸ Not only did AIP not communicate with Elaine's counsel again regarding any potential issues it may have had with the discovery timeframe after the initial extension was granted, AIP ignored Elaine's overtures to it until after the filing of Plaintiff's Motion.

Upon being informed a few days before the original deadline of the death in counsel's family, Elaine granted AIP a ten-day extension.¹⁹ AIP missed this extended deadline, and offered no explanation. Elaine's counsel again reached out to AIP, sending an email setting a third deadline of May 10, 2010 and warning that a failure to supply the Court-ordered discovery responses by that date would result in a motion to compel.²⁰ Again, AIP did not respond and let this latest deadline pass without taking any action. While I recognize the need for the initial extension, I do not understand or condone the subsequent missed deadlines and complete lack of communication on the part of AIP.²¹ If Richard's being abroad or some other circumstance made more time necessary, AIP should have communicated this to Plaintiff's counsel. Therefore, I did not misapprehend

¹⁸ I mentioned this point during the hearing. "If bad circumstances occur, as it obviously did at the beginning, it's imperative that counsel communicate with one another, get the appropriate extensions. If they can't agree on the extensions, seek relief from the Court." Tr. 19.

¹⁹ Pl.'s Mot. 4.

²⁰ *Id.* at 4, Ex. 2.

²¹ Tr. 18 ("[D]ue to the conduct of the defense in not responding to the discovery requests pursuant to the Court order of March 16, 2010, or within the time frame

the facts or law in finding that these delays and lack of communication provided no substantial justification for AIP's violation of the schedule prescribed in the March 16 Order.

AIP further argues that any discovery sought by Elaine in this matter is duplicative of the discovery obtained in the Pennsylvania action, and is intended "to harass . . . and to drive up litigation costs."²² According to AIP, it was incumbent on Elaine's counsel to "take an affirmative step to obtain a stipulation allowing him access to these documents" from the Pennsylvania action.²³

This does not constitute a substantial justification for AIP's failure to comply with the Order, however. AIP did not communicate this objection to Plaintiff, make objections to the specific discovery questions it found objectionable in a timely manner, or otherwise make overtures to Elaine's counsel to try to work out a solution. Rather, it apparently chose to ignore the due date for the discovery responses with the intention of responding when it deemed reasonable under the circumstances. I did not misapprehend the facts or law in finding this behavior was not substantially justified.²⁴

of the three extensions that were offered, there has been a failure to comply with the Court order and no substantial justification.").

²² DMR ¶ 14.

²³ *Id.*

²⁴ Indeed, this issue was addressed in the March 5, 2010 hearing. This Court acknowledged that the Pennsylvania action included "substantially the same parties and issues." D.I. 45, Tr. of Arg. on Pl.'s Mot. to Lift Stay and Allow

III. CONCLUSION

For the foregoing reasons, AIP's Motion for Reargument of this Court's decision to assess attorneys' fees of up to \$2,500 under Rule 37 for failing to comply with the March 16 Order is denied.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Vice Chancellor

Discovery, 16. Nevertheless, I allowed "a very limited lifting of the stay solely for purposes of getting answers to the particular interrogatories that will have to be identified specifically." *Id.* at 14.