IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KATHY A. KEITH, an individual	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. N18C-07-107 PRW**
	)	
CHARVONNE DANIELLE LAMONTAGNE, an individual	)	
	)	
	)	
Defendant.	)	

ORDER DENYING
PLAINTIFF'S MOTION FOR SANCTIONS

AND NOW, this 20th day of September, 2021, having fully considered Kathy A. Keith's Motion for Sanctions (D.I. 85), Defendant Charvonne Danielle Lamontagne's Response in Opposition (D.I. 86), the complete record, and applicable case law,

IT IS HEREBY ORDERED that Plaintiff's Motion for Sanctions is **DENIED** in part, as moot, and in part, on its merits. Defendant Charvonne Lamontage *did* provide her Response to Plaintiff's Request for Production of Documents on May 18, 2021 (D.I. 83). The Court notes that single response only partially satisfies Defendant's discovery obligations as nothing has been provided in answer to Plaintiff's Request for Interrogatories as of this date. Still and all, the Court is satisfied from the record that Defense counsel has engaged in good faith efforts to answer those long-delinquent interrogatories.

But it is not lost on the Court that to trigger any update or communication from Defense counsel, Plaintiff had to resort to the extraordinary measures of filing both a Motion to Compel (D.I. 81) and now this pending Motion for Sanctions (D.I. 85). It was only upon the threat of imminent hearing of each that Defense counsel

imparted anything as to the status of efforts to answer the pending (no, overdue) discovery.

For instance, only after Plaintiff's Motion to Compel was docketed and the hearing on such loomed did Defense counsel provide a partial discovery response (D.I. 83). Three months after this Court's Order Granting Plaintiff's Motion to Compel (D.I. 84)—and with no docket and/or discovery activity during those intervening three months—Plaintiff filed the instant Motion for Sanctions (D.I. 85). As best the Court can tell, during those three months Defense counsel took absolutely no steps to communicate why the continued delay. And Plaintiff's counsel did nothing to directly inquire. Instead, it appears to the Court both were content to endure stony silence on the issue—and neither sought to engage the simple courtesy of person-to-person communication to discuss what was going on. Rather, Defendant again responded at the eleventh hour to Plaintiff's instant Motion for Sanctions (D.I. 86) by docketing a pleading. That pleading pointed to his earlier, partial production, and explained the reasons for the continued delinquency of the outstanding interrogatory responses.

Under Delaware discovery rules, a party (and its counsel) "must deploy the resources necessary to meet deadlines. If meeting a deadline appears difficult or impossible, then the party [(and its counsel)] facing the deadline *needs to confer with the other side* or seek a modification of the schedule."[1]

And, before awarding sanctions for a discovery violation, this Court will want to assess whether efforts engaged by the now-complaining party to obtain missing discovery were reasonable.[2] Take *McDaniel v. Cyntellex*, for instance. Before

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[1] *In re ExamWorks Group, Inc. S'holder Appraisal Litig.*, C.A. No. 12688-VCL, 2018 WL 1008439, at *8 (Del. Ch. Feb. 21, 2018) (emphasis added).

[2] *McDaniel v. Cyntellex Series 8 LLC*, C.A. No. N17C-09-026 JAP, 2018 WL 3801717, at *4 (Del. Super. Ct. Aug 8, 2018).

seeking judicial intervention, there the defendants tried "all means of communications" to obtain the requested discovery from the plaintiff—including letters, emails, telephone, *and* facsimile—all to no avail. The Court found defendants' efforts to contact plaintiff's counsel were reasonable, and while plaintiff's lack of response did not warrant dismissal of the case, monetary sanctions were appropriate and assessed accordingly.[3]

Here, though Plaintiff did make *some* efforts—the terse emails that are now all-too-commonly appended to motions such as these—to communicate with Defendant about the outstanding discovery, the Court is not convinced Plaintiff deployed the "resources necessary" to warrant sanctions against Defendant. Plaintiff's discovery motions are devoid of any indication that other means of communication, such as letters, telephone calls, facsimiles, and/or voicemails were made to Defense counsel's office. Plaintiff relied solely on a few e-mails to prod Defendant on the status of discovery.[4]

That said, this Order ***in no way*** absolves Defense counsel of his dilatoriness, nor should it be read to place undue onus on the non-offending Plaintiff to pursue outstanding discovery requests. The bottom line is this: Defense counsel should have *actively* and *regularly* updated Plaintiff's counsel on why the outstanding discovery was delayed; Plaintiff's counsel should have engaged some real-time communication with Defense counsel to try to sort it out before filing the instant motion. No doubt the now quaint notion of using Mr. Bell's invention likely would have obviated the need to take out a few more trees and misspend party and judicial resources.

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[3] *Id.*

[4] Pl. Mot. for Sanctions, Exs. A-F.

SO IT IS ORDERED that neither a sanction in the form of default judgment nor a penalty in the form of costs and attorney's fees will be awarded. Either would be unjust.[5] This Court's Civil Rule 37(b) "offers a menu of different sanctions when a party fails to comply with a previously issued discovery order. Those sanctions may include orders establishing certain facts as true, refusing to allow a party to present certain evidence, or striking particular pleadings. In egregious cases, the Court even may enter default judgment against the disobedient party. But, any sanction must be 'just and reasonable' and must be tailored to the disobedient party's degree of culpability and the prejudice the complaining party suffered."[6]

The Court must exercise care when imposing any sanction, and such sanction must always be "tailored to [a] specific discovery violation and its prompt cure; that includes consideration of the intent of the party opposing discovery, and of whether and to what extent the party seeking discovery has been prejudiced . . . but should always be viewed in light of [the] proper functions that sanctions are intended to serve."[7]

Plaintiff has asked this Court to enter default judgment against Defendant and to award costs.[8] Default judgment is improper here because Defense counsel's dilatoriness—though not to be excused or tolerated—isn't egregious enough to warrant such punition. And an award of costs is not being assessed at this time because the circumstances found renders an award of attorney's fees unjust.

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[5] *Wileman v. Signal Finance Corp.*, 385 A.2d 689, 690 (Del. 1978); s*ee also* Del. Super Ct. Civ. R. 37(b) (providing that the Court should not require payment of an opponent's expenses where "circumstances make an award of expenses unjust").

[6] *Fortis Advisors, LLC v. Dematic Corp.*, 2020 WL 6784129, at *3 (Del. Super. Ct. Nov. 18, 2020).

[7] *In re Rinehardt*, 575 A.2d 1079 (Del. 1990).

[8] Pl. Mot. for Sanctions, ¶ 21.

IT IS ORDERED, THEREFORE, that Defendant must produce her substantively-responsive Responses to Plaintiff's Request for Interrogatories **no later than October 8, 2021**.

LASTLY, **IT IS FURTHER ORDERED** that the parties are to meet and confer on a schedule for any additional discovery with the goal of keeping the current dates for the Pretrial Conference and Trial. If a stipulation can be reached, the Court will enter an order to implement the agreed-on schedule. But if the parties find that some adjustment must be made to the Pretrial Conference and Trial scheduling, the parties shall notify chambers immediately so a scheduling conference can be conducted.

IT IS SO ORDERED.

Paul R. Wallace, Judge

Original to Prothonotary
cc: All counsel via File & Serve