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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

E&E CO., LTD.,
Plaintiff,
v.
DIVATEX HOME FASHION, INC., et al.,
Defendants.

Case No.: C 08-5660 RMW (PVT)
INTERIM ORDER RE DIVATEX HOME FASHION, INC.'S MOTION TO COMPEL DEPOSITIONS OF EDWARD JIN AND PEI LEI

On January 11, 2010, Defendant Divatex Home Fashion, Inc. filed a motion to compel the depositions of Edward Jin and Pei Lei.¹ Based on the moving papers,

IT IS HEREBY ORDERED that Defendant's motion is DENIED as premature as to Edward Jin. From the moving papers, it appears that Jin has not yet failed to appear for his deposition. Defendant cites no legal authority for a motion to compel *before* a party fails to appear for a duly noticed deposition.

Rule 37(a) of the Federal Rules of Civil Procedure provides, in relevant part:

“(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make

¹ The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

1 disclosure or discovery in an effort to obtain it without court action.

2 * * * *

3 “(3) ***Specific Motions.***

4 * * * *

5 “(B) *To Compel a Discovery Response.* A party seeking
6 discovery may move for an order compelling an answer,
7 designation, production, or inspection. This motion may
8 be made if:

9 “(i) a deponent fails to answer a question
10 asked under Rules 30 or 31;”

11 Under the rules, a motion to compel is authorized only after a party “fails to make discovery”
12 or “fails to answer a question asked under Rules 30 or 31.” Nothing in the rule authorizes the court
13 to issue an order compelling a deposition *before* the party fails to appear and answer questions.

14 The rule that governs a situation where a party fails entirely to appear for a duly noticed
15 deposition is Rule 37(d), which provides in relevant part:

16 “(1) ***In General.***

17 “(A) *Motion; Grounds for Sanctions.* The court where the
18 action is pending may, on motion, order sanctions if:

19 “(i) a party or a party's officer, director, or managing agent
20 — or a person designated under Rule 30(b)(6) or
21 31(a)(4) — fails, after being served with proper notice,
22 to appear for that person's deposition; or

23 * * * *

24 “(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule
25 37(d)(1)(A) is not excused on the ground that the discovery sought was
26 objectionable, unless the party failing to act has a pending motion for a
27 protective order under Rule 26(c).”

28 Thus, unless and until Jin fails to appear for his properly noticed deposition, a motion to
29 compel is premature.

30 It appears from the moving papers that Plaintiff served an “objection” to the deposition on
31 Defense counsel. However, under Rule 37 a failure to appear for deposition is not excused unless a
32 actual motion for a protective order has been filed. The court cautions Plaintiff that a belated motion
33 for protective order does not automatically excuse a failure to appear for deposition. A strong

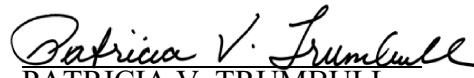
1 showing that the deposition notice was actually objectionable, and that Plaintiff made good faith
2 efforts to resolve the issue with Defendant, will be required.

3 IT IS FURTHER ORDERED that this order is without prejudice to a renewed motion to
4 compel, and a separate motion for sanctions pursuant to Rule 37(d), if Jin fails to appear for his
5 properly noticed deposition without first filing a meritorious motion for a protective order under
6 Rule 26(c)).

7 IT IS FURTHER ORDERED that the motion to compel remains on calendar for February 16,
8 2010 with regard to the deposition of Pei Lei.

9 IT IS FURTHER ORDERED that the request for sanctions is DENIED without prejudice to a
10 motion brought separately, as required by Civil Local Rule 7-8(a). However, any such motion shall
11 not be filed until after the court rules on the remainder of the present motion.

12 Dated: *Jan. 14, 2010*

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14 PATRICIA V. TRUMBULL
15 United States Magistrate Judge
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