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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FARID MASHIRI,
Plaintiff,
v.
OCWEN LOAN SERVICING,
LLC.,
Defendant.

Case No. 12cv2838-L (MDD)
**ORDER GRANTING
DEFENDANT'S MOTIONS TO
COMPEL AND FOR
SANCTIONS [55] AND
DENYING PLAINTIFF'S
MOTIONS TO TERMINATE
DEPOSITION AND FOR
SANCTIONS [54].**
[ECF NOS. 54, 55]

Before the Court are two Joint Motions. The first presents Plaintiff's Motions to Terminate Plaintiff's Deposition and for an Order Awarding Attorney's Fees and Costs. (ECF No. 54). The second presents Defendant's Motions to Compel Plaintiff to Attend Further Deposition, To Respond to Questions and Produce Documents, and for an Order Awarding Attorney's Fees and Costs. (ECF No. 55). Both were filed on August 21, 2014. As provided below, Defendant's Motions are GRANTED and Plaintiff's Motions are DENIED.

Background

Originally filed in Superior Court, this case was removed to this Court on November 27, 2012. (ECF No. 1). The operative pleading is

1 the First Amended Complaint filed on June 25, 2013. (ECF No. 18).
2 There are fourteen federal and state causes of actions alleged. (*Id.*). In
3 gross summary, Defendant is the current servicer of a mortgage on
4 Plaintiff's home. All of the allegations relate to Defendant's handling of
5 Plaintiff's mortgage including attempts to foreclose, collect the debt and
6 modify the loan. (*Id.*). A more detailed factual summary may be found
7 in the Order Denying Defendant's Motion to Dismiss filed on October
8 28, 2013. (ECF No. 29).

9 The instant dispute derives from the deposition of Plaintiff taken
10 on June 25, 2014. Plaintiff seeks an order terminating the deposition
11 asserting that counsel for Defendant asked repetitive questions which
12 served to harass and annoy Plaintiff and presented documents not
13 previously produced in discovery. Counsel for Plaintiff notes that
14 Plaintiff is undergoing treatment for advanced stomach cancer and
15 should not have to be subjected to further questioning. (ECF No. 54).

16 Defendant, on the other hand, seeks permission to further depose
17 Plaintiff alleging that counsel for Plaintiff obstructed the examination
18 and frequently instructed his client to not answer questions without
19 justification. Defendant also asserts that Plaintiff failed to produce
20 documents and information required at the deposition. (ECF No. 55).
21 Both sides seek costs and fees.

22 Analysis

23 The Court has reviewed the competing joint motions, the 185 page
24 deposition transcript and the additional documents submitted in
25 support of each motion. The Court agrees with Defendant that counsel
26 for Plaintiff obstructed the examination, often testified and frequently
27 and improperly instructed his client not to answer questions. The
28 Court also agrees with Defendant that Plaintiff is obligated to produce

1 either a verified copy of voice mail communications allegedly from
2 representatives of Defendant and stored on Plaintiff's mobile telephone
3 or produce a verified transcript of those calls. The Court disagrees with
4 counsel for Plaintiff that counsel for Defendant asked the same
5 questions repeatedly so as to harass and annoy Plaintiff. To the
6 contrary, the questioning by counsel for Plaintiff appears well within
7 the ambit of legitimate examination of a party-opponent, particularly
8 considering that the examination was conducted through an
9 interpreter.

10 1. Conduct of the Deposition

11 Rule 30 of the Federal Rules of Civil Procedure governs
12 depositions by oral examination. Rule 30(c)(2) relates to objections and
13 provides, in part:

14 A person may instruct a deponent not to answer only when
15 necessary to preserve a privilege, to enforce a limitation
16 ordered by the court, or to present a motion under Rule
17 30(d)(3).

18 A review of the deposition transcript reveals multiple objections with
19 instructions not to answer by counsel for Plaintiff. (See ECF No. 55-5
20 at 14-60 (using the ECF's page numbering)). Not a single objection that
21 the Court could find was necessary to preserve a privilege, to enforce a
22 court-ordered limitation or to present a motion under Rule 30(d)(3).

23 There were objections based upon privacy, based upon a claim that the
24 question previously had been asked and answered and based upon
25 counsel for Defendant presenting documents to Plaintiff not previously
26 provided in discovery. For a compilation, see the letter from counsel for
27 Defendant to counsel for Plaintiff at ECF No. 55-5 at 62-71. None of
28 those objections justifies an instruction not to answer under Rule
30(c)(2).

Plaintiff's objections based upon privacy concerns are obviated by

1 the existence of a Protective Order issued in this case on August 5,
2 2014. (ECF No. 47). Consequently, those objections are overruled and
3 Plaintiff must answer.

4 Plaintiff's objections to questions as "asked and answered" also
5 are overruled. In the context of questioning a party-opponent,
6 particularly through an interpreter, the examining attorney is
7 permitted to attempt to exhaust the deponent's memory on a given
8 topic. One of the ways to do that is to ask differently formulated
9 questions seeking basically the same information. The transcript
10 reflects that counsel for Defendant was using this technique and even
11 explained that to counsel to Plaintiff. (See ECF No. 55-5 at 25, page 42
12 of the transcript). If counsel for Plaintiff believed that counsel for
13 Defendant was asking the same question repeatedly in bad faith or to
14 unreasonably annoy, embarrass or oppress Plaintiff, counsel's option
15 was to move to terminate or limit the deposition under Rule 30(d)(3).
16 Plaintiff's current motion to terminate the deposition is untimely for
17 that purpose as Rule 30(d)(3) requires the motion be made during the
18 deposition. Fed.R.Civ.P. 30(d)(3)(A). In any event, the Court finds that
19 the questioning was not in bad faith and not intended to unreasonably
20 annoy or oppress Plaintiff.

21 2. Document Production

22 Counsel for Plaintiff also instructed his client not to answer
23 questions regarding a credit report presented to Plaintiff during his
24 deposition. Counsel asserts that the document was required to be
25 produced under Fed.R.Civ.P. 26 prior to the deposition justifying the
26 instruction. Specifically, Rule 26(a)(1)(A)(ii) requires a party to
27 disclose, without awaiting a discovery request:

28 a copy . . . of all documents, electronically stored
information, and tangible things that the disclosing party

1 has in its possession, custody or control and may use to
2 support its claims or defenses, unless the use would be
solely for impeachment.

3 First, the fact that a document presented at deposition may have been
4 subject to earlier production is no basis to instruct a client not to
5 answer. Second, it is unclear that this document was required to be
6 produced by Defendant under Rule 26(a)(1)(A)(ii). It is not obvious that
7 Defendant would use Plaintiff's credit report in support of its defenses
8 and, if it was to do so, whether it would be solely for impeachment.
9 And, even if the document was required to be produced earlier, the
10 correct response was to take the time to review it and later seek relief
11 from the court for the late disclosure.

12 Plaintiff's reliance on Rule 26(a)(1)(A)(ii) in this circumstance is
13 ironic. In support of his allegations of unlawful debt collection efforts
14 by Defendant in repeatedly calling Plaintiff's mobile telephone, it
15 appears likely that Plaintiff would use the recordings to support his
16 claims. If so, the recordings should have been disclosed by Plaintiff to
17 Defendant under Rule 26(a)(1)(A)(ii) without awaiting a discovery
18 request. In any event, Plaintiff was required to produce for deposition
19 "all recordings or transcripts of recordings made between [plaintiff] and
20 [defendant]." (ECF 55-5 at 9 (Request for Production 39)). Rather,
21 Plaintiff produced the Declaration of Cal Kik, a private investigator.
22 (ECF No. 55-5 at 84-86). Mr. Kik asserts that he listened to voice
23 recordings left on Plaintiff's mobile phone and summarized the
24 contents. (*Id.*). This does not satisfy the obligation to produce a copy of
25 the recording or a transcript. Consequently, the inadequate disclosure
26 may have been wrong on two counts.

27 3. Request for Sanctions

28 Both parties have requested costs and fees as sanctions for the

1 other's transgressions. Fed.R.Civ.P. 30(d)(2) provides:

2 The Court may impose an appropriate sanction – including
3 the reasonable expenses and attorney's fees incurred by any
4 party – on a person who impedes, delays, or frustrates the
5 fair examination of the deponent.

6 The Court finds that counsel for Plaintiff impeded, delayed and
7 frustrated the fair examination of the deponent. Counsel for Plaintiff
8 repeatedly testified, stated argumentative and suggestive objections
9 and wrongfully instructed his client not to answer questions. Sanctions
10 under Rule 30(d)(2) are appropriate in this case.

11 Moreover, inasmuch as Defendant's motion constitutes a motion
12 to compel under Fed.R.Civ.P. 37(a)(3)(B)(i), the granting of the motion
13 requires the court to order the party or lawyer or both responsible for
14 the conduct requiring the motion to pay the movant's reasonable
15 expenses incurred in making the motion, including attorney's fees,
16 unless the opposing party's nondisclosure or objection was substantially
17 justified or other circumstances make the award unjust. *See*
18 Fed.R.Civ.P. 37(a)(5)(A)(ii-iii). The Court finds that counsel for
19 Plaintiff is responsible for the conduct necessitating the motion and
20 that his objections and nondisclosures are not substantially justified.
21 The Court is unaware of any other circumstances that would make the
22 award unjust.

23 According to the Declaration of Defendant's counsel, four hours
24 were spent meeting and conferring with counsel for Plaintiff regarding
25 the instant motion and preparing the motion and related documents.
26 Counsel asserts that his billing rate is \$240 per hour which appears
27 reasonable. (ECF 55-2). Accordingly, counsel for Plaintiff will be
28 required to reimburse Defendant \$960.00. In addition, counsel for
 Plaintiff will be required to pay the costs of the further deposition
 limited to the cost of the reporter, the cost of the interpreter and the

1 cost of the deposition facility if there is a cost attending to the use of
2 the facility.

3 Conclusion

4 1. The Joint Motion presenting Plaintiff's Motion to Terminate
5 Plaintiff's Deposition and For Sanctions is **DENIED**. (ECF No. 54).

6 2. The Joint Motion presenting Defendant's Motion to Compel
7 Plaintiff to Attend Further Deposition; to Respond to Questions and
8 Produce Documents; and For Sanctions is **GRANTED**. (ECF No. 55).

9 3. Plaintiff is **ORDERED** to appear at a further deposition for
10 no longer than four hours at a date to be agreed upon by the parties.
11 Although the deposition may occur later, the parties must agree on a
12 date, time and location within seven days of the filing date of this
13 Order.

14 4. Plaintiff is **ORDERED** to produce a complete and accurate
15 copy of the voice mail recordings allegedly made to his mobile telephone
16 by persons he believes to be representatives of Defendant no later than
17 ten days following the filing date of this Order.

18 5. Counsel for Plaintiff is **ORDERED** to reimburse Defendant
19 the sum of \$960.00 representing the costs and fees for Defendant
20 preparing and bringing ECF No. 55 no later than thirty days following
21 the filing date of this Order.

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6. Counsel for Plaintiff is **ORDERED** to bear the cost of the official reporter and interpreter for the further deposition of Plaintiff. Counsel for Plaintiff also is **ORDERED** to pay the cost of any facility necessary to conduct the further deposition if a cost normally would apply.

IT IS SO ORDERED.

DATED: September 15, 2014


Hon. Mitchell D. Dembin
U.S. Magistrate Judge