

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

PETRA RICHTER, individually
and on behalf of all others
similarly situated,

Plaintiff,

v.

Case No: 2:11-cv-695-FtM-29DNF

WELLS FARGO BANK NA,

Defendant.

OPINION AND ORDER

This matter comes before the Court on plaintiffs'¹ Appeal, Objection and Motion to Partially Overturn Magistrate Judge's Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel Wells Fargo to Produce Documents Responsive to Plaintiff's Second Request for Production (Doc. #180) filed on March 6, 2014. Defendant filed a Response on April 3, 2014.

On February 20, 2014, the Magistrate Judge entered an Order (Doc. #165) granting in part and denying in part plaintiffs' Motion to Compel Wells Fargo to Produce Documents Responsive to Plaintiffs' Second Request for Production (Doc. #113). More specifically, the motion was granted as to Request Nos. 9 through 15 and 30 and plaintiffs were directed to provide a precise

¹ At the time of its filing, Franz Lesti was still a named party in the case. Therefore, for the sake of consistency, the Court will maintain the reference to plaintiffs in the plural.

definition of the information they were requesting from the reports; the motion was granted as to Request No. 20 to the extent that Wells Fargo was directed to produce a privilege log for the documents withheld; the motion was denied as to Request Nos. 2, 3, 4, 6, 7, 8, 19 and 33; and the motion was denied as to Request No. 39 and 40, except that Wells Fargo was directed to provide the Bates Stamp numbers of the responsive documents previously provided. Pursuant to 28 U.S.C. § 636(b)(1)(A), the Court may reconsider or review the Magistrate Judge's Order on a pretrial matter if shown that it was clearly erroneous or contrary to law. "The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." Id.

Plaintiffs object to the denial of the Motion to Compel with regard to Request Nos. 6, 7, 8, because defendant produced the documents after the motion was filed but before the entry of the Order. The Magistrate Judge denied the motion to compel without prejudice to plaintiffs reviewing the production because the Court could not ascertain whether the production satisfied the Requests. The objection is overruled. The Magistrate Judge recognized and considered that the production was not made until February 10, 2014. (Doc. #165, p. 5.) The denial without prejudice to file another motion was not overly burdensome and plaintiffs had the opportunity to seek additional relief in the form of fees, if a

second motion was required. The decision was not clearly erroneous or contrary to law.

Plaintiffs further object that the Magistrate Judge failed to make a finding with regard to an award of fees and costs under Fed. R. Civ. P. 37(a). This objection is sustained to the extent that the request for attorney's fees and costs in the Motion to Compel (Doc. #113) was not addressed. The issue will be recommitted to the Magistrate Judge to consider the request in the first instance. Although plaintiffs argue to the contrary, the granting of fees and costs are not required if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(A). Therefore, the Magistrate Judge will have the opportunity to consider if an award is appropriate.


Accordingly, it is hereby

ORDERED:

Plaintiffs' Appeal, Objection and Motion to Partially Overturn Magistrate Judge's Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel Wells Fargo to Produce Documents Responsive to Plaintiff's Second Request for Production (Doc. #180) is **OVERRULED IN PART, SUSTAINED IN PART, AND RECOMMITTED IN**

PART. The objection to the denial of the Motion to Compel Request Nos. 6, 7, and 8 is overruled. The objection to the failure to address attorney's fees and costs pursuant to Fed. R. Civ. P. 37(a) is sustained and the issue is recommitted to the Magistrate Judge for consideration.

DONE and ORDERED at Fort Myers, Florida, this 28th day of May, 2014.



JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Hon. Douglas N. Frazier
Counsel of Record