UNITED STATES DISTRICT COURT

Northern District of Indiana
South Bend Division

HEARTLAND RECREATIONAL VEHICLES, LLC, Plaintiff,	)	
v.	)	CASE NO.:3:08-cv-490
FOREST RIVER, INC., Defendant.	)	JURY DEMAND

(MOTION FOR REVIEW OF) FOREST RIVER'S OBJECTIONS TO MAGISTRATE'S ORDER (DE#164) REGARDING FOREST RIVER'S MOTION TO COMPEL DEPOSITION OF HEARTLAND ON GAIN FROM USE OF THE MASTER LIST (DE#145)

Pursuant to Fed. R. Civ. P. 72(a), Forest River objects to the Magistrate's Order of January 19, 2011, Docket Entry No. 164 ("DE#164") and seeks correction of an oversight or omission revealed in that Order. The Order denied Forest River's Motion to Compel Deposition of Heartland on Gain from Use of the Master List (DE#145). A proposed form of Order for the present motion is forwarded to chambers herewith.

Summary of Motion:

It appears that Forest River's Reply (DE#162) was misplaced or otherwise omitted from consideration in connection with the subject motion to compel. That Reply provided the specific information which the Order indicated was omitted from the Motion, in light of Heartland's grounds for opposition, and answer the inquiries which the Order indicated were its basis for decision. The Reply was timely filed, although under seal, and was specifically linked on the CM/ECF system to

Heartland's Response in opposition to the motion (DE#151).

Background Facts:

The issues remaining in this lawsuit relate to claims against Heartland under the "exceptional case" doctrine of 35 U.S.C. §285[1] and for unfair competition under Indiana law in connection with Heartland's deceptive acquisition and use of the Master List of Forest River's dealers attending a private trade show in Elkhart, Indiana on October 22-23, 2008. These issues are the subject of two pending summary judgment motions, DE#134 and DE#130 (both filed on November 2, 2010, one by Forest River and the other by Heartland). A key factual issue in dispute in both summary judgment motions is the extent of damage Forest River sustained or gain Heartland obtained from Heartland's use of the Master List.[2]

Forest River has sought evidence of the gain Heartland so obtained both by documentary and deposition discovery. However, although this lawsuit has been pending for over two years, Heartland failed to provide the requested documents until late in the case, July-August, 2010, and

[1] In general, Heartland's defense against this doctrine focuses only upon the "inequitable conduct" issues arising under 37 C.F.R. §1.56, while Forest River's claim is based both upon inequitable conduct before the U.S. Patent Office and upon instances of abuse of process before this Court (see DE#149, at pages 24-25). Even as to the inequitable conduct issues, the parties are examining the facts under different legal standards. For example, Heartland's defense against the charge of inequitable conduct is based upon a line of case law that dealing with the requirements of disclosure to the U.S. Patent Office of prior art which is actually known to the attorneys. In contrast, Forest River's analysis is based upon case law dealing with the penalties for conduct taken by attorneys in order to avoid obtaining actual knowledge of prior art and other statutory requirement information. *See, FMC Corp. v. Hennessy Inds., Inc.*, 836 F. 2d 521, 526 fn.6 (Fed. Cir. 1987)("one should not be able to cultivate ignorance . . . merely to avoid actual knowledge of that information or prior art")

[2] Further factual background is set forth in the subject motion to compel, DE#145, pages 2 - 9.

even then only after being ordered to do so by this Court on March 31, 2010 (DE#112), and even now Heartland has not provided all of those documents (see DE#165, January 25, 2011 Order of this Court granting in part Forest River's motion to enforce the March 31, 2010 Order and further compelling email document production from Heartland).

As to deposition evidence, Forest River served Heartland with a Rule 30(b)(6) Notice on July 19, 2010, but Heartland refused to be deposed prior to September 24, 2010 and then refused to testify as to certain of the listed topics. Heartland thereafter refused to participate in a Rule 37 conference to attempt to resolve that discovery dispute until November 8, 2010, and even then only after Forest River filed a motion to compel that Rule 37 conference (DE#137)! One last attempt to resolve the matter without court intervention, by limiting summary judgment issues directly on point to the refused topics, was made on December 1, 2010. When that failed, the subject motion to compel (DE#145) was filed on December 8, 2010. The issues of this motion to compel were fully briefed by January 13, 2011, with the filing of Forest River's Reply (DE#162) to Heartland's Response in opposition (DE#151). Due to the specific discussion of Heartland's confidential information and exhibits, that Reply was filed under seal, although it was specifically linked to the Response in the CM/ECF system.

The Magistrate's Order of January 19, 2011:

The Order refers to the Motion and to the Response, DE#164, page 1, but makes no express reference to the Reply. Forest River's Motion to compel was expressly denied for three reasons:

1. Forest River's motion was considered "untimely" because "Forest River offers no excuse for late filing" of the motion to compel. DE#164, page 3.

2. "Forest River fail[ed] to persuade the Court of the necessity of a second deposition," DE#164, page 3, because "it is difficult for this Court to see how the information [in documents] provided by Heartland does not serve [the same] purpose," DE#164, page 4.

3. The questions asked in the deposition were, in effect, considered to go beyond the scope of the listed deposition topic. DE#164, page 4.

The Reply of DE#162:

1. The issue of timeliness was first raised by Heartland's Response. The Reply specifically addressed the timeliness issue with detailed explanation and exhibits. DE# 162, pages 8 - 10.

2. The defense of "duplicativeness" was also first raised by Heartland's Response. The Reply expressly refuted that defense with a background analysis of the documents Heartland had already given, DE#162, pages 1 - 6, and then specifically addressed what testimony was still needed, DE#162, pages 6 - 8.

3. The defense as to the scope of the deposition topics was first raised by Heartland's Response. The Reply also specifically addressed that matter. DE#162, at page 10, Item # 2.

Applicable Rules of Law for Review of Magistrate's Order:

When reviewing a Magistrate's Order[3] on a non-dispositive matter, Fed. R. Civ. P. 72(a)

[3] The error complained of herein would seem to be an obvious "oversight or omission," literally within the scope of Fed. R. Civ. P. 60(a), which provides that "the court may correct . . . a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." However, that Rule has been interpreted to apply only to "clerical" or "mechanical" type errors, rather than those of substantive impact. *United States v. Griffin*, 782 F. 2d 1393, 1396-97 (7th Cir. 1986); *Moore's Federal Practice 3d*, 2010, Vol. 12, §60.11. Accordingly, proceeding under Rule 72(a) appears to be the only recourse in this instance.

requires that the district court "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law." *See also* 28 U.S.C. §636(b)(1)(A); *Weeks v. Samsung Heavy Indust.Co.,*126 F. 3d 926, 943 (7th Cir. 1997). "The district court reviews the magistrate's factual determinations under the 'clear error' standard, and the legal determinations under the 'contrary to law' standard." *Lafayette Life Ins. Co. v. City of Menasha,* 2010 WL 1138973, at *1 (N.D. Ind. Mar. 17, 2010)(citations omitted). "Clear error is an extremely deferential standard of review, and will only be found to exist where 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Pinkston v. Madry*, 440 F. 3d 879, 888 (7th Cir. 2006)(quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)). An order is contrary to law "when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *In re Fedex Ground Package Sys., Inc.*, 2009 WL 5217341, at *3 (N.D. Ind. Dec 28, 2009)(citing *In re Comverse Tech., Inc.,* 2007 WL 680779, at *2 (E.D. N.Y. Mar 2, 2007)). When the reviewing Court examines the entire record and is left with a definite and firm conviction that a mistake has been made or when the magistrate judge has misinterpreted or misapplied applicable law, the order must be overturned. *Marks v. Struble*, 347 F. Supp. 2d 136, 149 (D.N.J. 2004).

In determining whether the Magistrate's Order was contrary to law by misapplying applicable procedural law with respect to any motion seeking discovery, it must be kept in mind that the scope and purpose of discovery is to obtain information "regarding any non-privileged matter that is relevant to any party's claim or defense," and relevance is defined as that which is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). It has long been the rule that when a party objects to discovery of information, the court must weigh the interests of the parties and of the public policy to arrive at an appropriate discovery compromise. *Memorial*

Hospital for McHenry County v. Shadur, 664 F. 2d 1058, 1061-72 (7th Cir. 1981)(per curiam). Generally, broad discovery is available under the Federal Rules of Civil Procedure. *See Blancha v. Raymark Industries*, 972 F. 2d 507, 514 (3d Cir. 1992)("Thus the rule, while giving judges great freedom to admit evidence, diminishes substantially their authority to exclude evidence as irrelevant"). Privileges excluding relevant evidence are to be construed narrowly because the they constrict the fact-finding process. *Ryan v. Commissioner of Internal Revenue,* 568 F. 2d 531, 542-3 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978). In fact, "even when the information is not directly related to the claims or defenses identified in the pleadings, the information still may be relevant to the broader subject matter at hand and meet the rule's good cause standard." *Manufacturer Direct, LLC v. DirectBuy, Inc.*, 2007 WL 4224072, *1 (N.D. Ind. Nov. 27, 2007).

In the present case, the applicable procedure rule of law is Local Rule 7.1(a), providing Forest River with the right to file a Reply to any Response in opposition to a motion.

Analysis of the Objections:

The Reply was timely filed, as per this Court's Order, DE#159, granting an extension of time until January 13, 2011 for service and filing of the Reply. The Reply, although filed as a sealed document, was expressly linked to the Response.

The Order stated that "Forest River offers no excuse for late filing" of the motion to compel, and yet the Reply did expressly give reasons why the late filing should be excused. For the Order to make this statement, the Reply must not have been considered at all, either by omission or oversight. The Order did not say that the Magistrate found Forest River's reasons inadequate or unpersuasive. The Order said, instead, they did not exist: *"offers no excuse*." But reasons did exist

and Forest River did offer those to "excuse," in the Reply. Failing to consider the Reply was clearly and unquestionably a mistake, or clear error, as a matter of procedural law.

Since the Reply was not considered as to timeliness, it is not surprising that the Order indicates the Court did not understand the necessity of resuming the deposition or why the proposed questions did not go beyond the scope of the listed topic. Had the Reply been considered in full, these other reasons for not granting the motion would not have been found since the explanation of the Reply in that regard would have been sufficient. Again, as a matter of procedural law, not considering the Reply in this regard as a clear error of law.

Conclusions:

The text of the Order clearly indicates that the Reply was not considered in any respect. That omission was a clear error of procedural law. The Order should be vacated and remanded to the Magistrate for reconsideration in light of the arguments and evidence presented in the Reply.

Dated: February 7, 2011

Respectfully submitted,

s/Ryan M. Fountain

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Certificate of Service

I certify that on February 7, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF system, which sent notification of such filing to all of the parties through at least the following counsel of record:

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s/Ryan M. Fountain
_____
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