

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

HEARTLAND RECREATIONAL)
VEHICLES, LLC,)
Plaintiff,)
)
)
v.)
)
FOREST RIVER, INC.,)
Defendant.)

CASE NO.: 3:08-cv-490

**HEARTLAND'S RESPONSE TO FOREST RIVER'S OBJECTIONS TO
MAGISTRATE ORDER REGARDING FOREST RIVER'S MOTION TO COMPEL
DEPOSITION OF HEARTLAND ON GAIN FROM USE OF THE MASTER LIST**

INTRODUCTION

Forest River, Inc.'s (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) (the "Motion for Review") alleges only one error on the part of Magistrate Judge Nuechterlein. Forest River claims Judge Nuechterlein never read Forest River's reply in support of its Motion to Compel Deposition of Heartland on Gain From Use of the Master List (the "Motion to Compel"). However, for the reasons outlined in Heartland's Response to Forest River's Motion to Compel (DE #151) and briefly stated herein, nothing in Forest River's reply justifies its desire to seek additional deposition testimony from Heartland. Judge Nuechterlein noted three independent reasons why Forest River's Motion to Compel should be denied: (1) the Motion was filed well after the close of discovery and was therefore untimely; (2) Forest River already has the information it needs to assess its damages, if any; and (3) Heartland's corporate representative was prepared to testify on all topics contained in the Notice of Deposition, and the additional questions Forest River wishes to ask are outside the

scope of the Notice. For each of these three reasons, Judge Nuechterlein's decision to deny Forest River's Motion to Compel was correct. Neither Forest River's Motion to Compel nor its Motion for Review has a sound legal basis, and both motions simply delay a summary judgment ruling on Forest River's unmeritorious claims in this matter. The Court should deny Forest River's Motion for Review and compel Forest River to respond to Heartland's pending Motion for Summary Judgment.

I. The Standard of Review of a Magistrate Judge's Opinion is Extremely Deferential

When reviewing a magistrate's order on a nondispositive issue, a district court must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). "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.*, 2010 WL 1138973, at *1 (N.D. Ind. Mar. 17, 2010) (citations omitted), *rev'd on other grounds*. "Under the 'contrary to law' standard, the district court conducts a plenary review of the magistrate judge's purely legal determinations, setting aside the magistrate judge's order only if it applied an incorrect legal standard or if it 'misapplied relevant statutes, case law, or rules of procedure.'" *Id.* (quoting *Jensen v. Solvay Chem., Inc.*, 520 F.Supp.2d 1349, 1351 (D.Wyo. 2007); *DeFazio v. Wallis*, 459 F.Supp.2d 159, 163 (E.D.N.Y. 2006)). When reviewing an alleged mistake in the magistrate judge's factual analysis under the "clear error" standard, "the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made." *Id.* (quoting *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 943 (7th Cir. 1997)).

II. Because Forest River Waited Until the Due Date for Its Response to Heartland's Motion for Summary Judgment to File its Motion to Compel, the Motion was Untimely

Magistrate Judge Nuechterlein correctly denied Forest River's Motion to Compel as untimely. As Judge Nuechterlein noted, "Although the 'Federal Rules of Civil Procedure place no time limit on the outside date for the filing of a motion to compel discovery,...motions to compel filed after the close of discovery generally are deemed untimely.'" (Order, DE #164, p. 3) (quoting *Vision Ctr. Nw., Inc. v. Vision Value, LLC*, No. 3:07-cv-183, 2008 WL 5191456, at *3 (N.D. Ind. Dec. 10, 2008)). More specifically, "when the movant fails to give a reasonable justification [for a delayed filing], courts' general aversion to unjustified delays usually result in denials of the motions." *Fast Food Gourmet, Inc. v. Little Lady Foods, Inc.*, No. 05 C 6022, 2007 WL 1673563, at *3 (N.D. Ill. June 8, 2007).

Judge Nuechterlein properly applied the above-outlined law to Forest River's untimely Motion to Compel. The deposition of Mr. Donat occurred on September 24, 2010. The discovery period closed on October 15, 2010. As Judge Nuechterlein noted, "[t]he deposition concluded more than three weeks before the close of the discovery period. Forest River waited almost two months after the close of the discovery period to file the motion." (Order, DE #164, p. 3.) Forest River argues that it provided reasonable justification for this delay in its reply brief. Forest River then argues that the Court's refusal to accept that justification must mean that its reply brief was never read.

However, Forest River's reply brief provided no reasonable justification for waiting until the due date for its response to Heartland's Motion for Summary Judgment to file the Motion to Compel. Forest River claims that Heartland refused to conduct a Rule 37 discovery conference with Forest River until November 8, 2010, implying that Heartland intentionally evaded its attempts to resolve this issue informally. (Reply Supp. Mot. to Comp., DE #162, p. 8.) That

claim is false. In fact, the parties held a lengthy Rule 37 conference on October 5, 2010, a date that fits squarely between Mr. Donat's September 24 deposition and the October 15, 2010 deadline for discovery. Hence, Forest River had an opportunity to seek Heartland's agreement to additional deposition testimony from Mr. Donat, which Heartland would have continued to steadfastly refuse. Therefore, Forest River has no excuse for waiting until the due date for its response to Heartland's Motion for Summary Judgment to request that the Court compel Heartland to provide further discovery.

Forest River also alleges that Heartland has not been significantly prejudiced by the delay. Yet, for the second time in this litigation, Heartland has filed its Motion for Summary Judgment on all claims in compliance with the Court's scheduling order, only to have Forest River ignore its need to respond to that Motion by filing tardy motions to compel. This tactic prejudices Heartland in at least three ways: (1) it allows Forest River months of extra time to formulate its response to Heartland's Motion for Summary Judgment; (2) it causes Heartland to expend further time and money defending itself against Forest River's claims; and (3) it allows Forest River to avoid a ruling on Heartland's Motion for Summary Judgment, which unmask Forest River's claims for what they truly are: baseless accusations unsupported by any evidence revealed during discovery.¹

¹ Indeed, the outstanding discovery issues perpetuated by Forest River's untimely motions to compel pertain solely to the issue of damages. However, Heartland's argument with respect to damages comprises only one of several reasons why none of Forest River's counterclaims can survive summary judgment. Briefly, the issue of damages pertains only to Forest River's Lanham Act and criminal deception counterclaims, and it is therefore completely irrelevant to Forest River's counterclaim of inequitable conduct. Furthermore, the Lanham Act and criminal deception counterclaims cannot survive summary judgment because they are based on a false claim that Heartland employees lied to hotel employees. Not only does such a claim fall entirely outside the Lanham Act's purview, but more importantly, **Forest River has failed to provide any evidence that a Heartland employee made any misrepresentations to hotel employees, thereby revealing that Forest River based its counterclaims solely on conjecture.** Forest River's continued insistence on belaboring the issue of damages when it knows that it has failed to obtain any evidence supporting its claim of liability wastes the time, money, and other resources of both Heartland and this Court.

In accordance with applicable law, there can be no reasonable justification for waiting until the deadline for responding to a motion for summary judgment to file a motion to compel further evidence. Forest River's Motion to Compel should have been filed before the close of discovery so that it could have been briefed and decided prior to Heartland's filing of its Motion for Summary Judgment. The Motion to Compel was untimely, and for that reason alone the Magistrate Judge appropriately denied it.

III. The Magistrate Judge Correctly Determined that Further Deposition Testimony from Mr. Donat is Unnecessary

In denying Forest River's Motion to Compel, the Magistrate Judge recognized the extensive, detailed information that Heartland has provided to Forest River on the issue of damages:

Heartland has offered evidence showing that it has already given Forest River all the information requested in the form of sales information, specifically, the number of sales completed in the relevant time period, the name of the RV dealer placing the order, the model of trailer ordered, the purchase order number, the invoice price, the costs of the manufacture of the trailer ordered, and whether the dealer was listed on Forest River's master list. Furthermore, if the dealer was listed on Forest River's master list, then Heartland noted whether the dealer was an existing Heartland customer, an entirely new customer, or an existing customer purchasing a new model for the first time. If the dealer was not on Forest River's master list, Heartland noted that, as well. Because Forest River is trying to discover the extent of its damages, it is difficult for this Court to see how the information provided by Heartland does not serve that purpose.

(Order, DE #164, pp. 3-4.)

To the extent that Forest River believes that even further detail is needed, its own failure to participate in discovery has made it unreasonably burdensome for Heartland to provide that detail. Heartland has provided Forest River with a list of every sale it made from the day of the so-called "Hotel Incident" until December 3, 2008. It has provided the names of the dealers to

whom those sales were made. These dealers are also dealers of Forest River products. Accordingly, Forest River can easily contact them at any time to ask whether they were affected by Heartland's conduct. Heartland has provided its internal and external email communications with and about these dealers during the relevant time periods. Heartland has presented for deposition two Heartland salespeople chosen by Forest River after Forest River reviewed Heartland's internal and external correspondence. Yet, when Heartland issued a simple request that Forest River provide any documents supporting its claims for damages, Forest River incredibly refused to provide a single document. (Forest River's Resp. to Heartland's Second Req. for Prod., Exh. A, Resp. to Req. No. 14.) More importantly, when asked in a straightforward interrogatory to identify the sales that it believes were caused by Heartland's alleged conduct in the case, Forest River refused to identify a single sale, going so far as to argue that such information is "irrelevant." (Forest River's Resp. to Heartland's Second Interrogs., Exh. B, Resp. to Interrog No. 12.) Now, discovery has closed, Heartland has filed its dispositive motions, and Heartland still has no idea what dealer Forest River believes was affected by Heartland's alleged conduct or what sales Forest River believes Heartland gained by its alleged conduct.

If Forest River had identified a group of sales to certain dealers that it believed Heartland gained as a result of its alleged conduct, the discovery pertaining to the financial issues in this case could have been narrowed. Instead, the parties and the Court are left quarreling over the minute details pertinent to a universe of more than 1,400 sales made by Heartland during the relevant time period, only a handful of which are even remotely connected to Forest River's allegations in this case.

After analyzing the amount of information Heartland has provided in discovery, Judge Nuechterlein recognized that Forest River's desire for further deposition testimony on the issue of damages is not warranted. That decision was neither contrary to law nor clearly erroneous, and therefore should not be overturned under the highly deferential standard governing Forest River's Motion for Review. *Lafayette Life Ins. Co.*, 2010 WL 1138973, at *1.

IV. The Further Deposition Testimony Sought by Forest River is Outside the Scope of the Deposition Notice

Magistrate Judge Nuechterlein also denied the Motion to Compel because "Donat was prepared to discuss Topic No. 2 as noticed, but not the questions asked in the deposition that went beyond the scope of the topic." (Order, DE #164, p. 4.) For the reasons outlined below and in Heartland's opposition to Forest River's Motion to Compel, that decision was neither contrary to law nor clearly erroneous.²

On July 19, 2010, Forest River issued its Confirmation of Forest River's Notice of Deposition of Heartland's Financial Representative (the "Notice of Deposition"). (*See* Notice of Deposition, Exh. C.) The Notice of Deposition requested Heartland to produce a witness to testify on seven separate topics, each of which pertained to Heartland's accounting records and financial condition. (*See generally* Exh. C.) The nature of these topics, as well as Forest River's explicit request to depose Heartland's "financial representative," led Heartland to believe that the subject matter of the deposition would be focused entirely on accounting issues. Based on that belief, Heartland provided its Chief Financial Officer, Dennis Donat, to testify on all seven of the topics, and it prepared him accordingly.

Forest River contends that Heartland failed to provide a witness who could adequately testify as to topic number 2 in the Notice of Deposition. That topic requested that Heartland's

² The remaining paragraphs of Section IV repeat the arguments on this issue from Heartland's opposition to the Motion to Compel (DE #151) and are included for the convenience of the Court.

financial representative be prepared to discuss: "Heartland's sales of products as a result of obtaining the list of Forest River dealers who were planning to attend the private Forest River trade show in October 2008, **including the revenues received from such sales, the actual costs of producing those products, and the marginal profits obtained by Heartland from such sales ('marginal profits' meaning profits without allowance for costs or services which would have been incurred regardless of those specific sales).**" (*See* Exh. C, Notice of Deposition, topic #2) (emphasis added.)

Because Heartland had previously produced detailed information about the 250 sales that Heartland made between October 22, 2008 to December 2, 2008, including notations indicating which of the sales were made to dealers on Forest River's "Master List," Heartland assumed that Forest River had used this information, along with the other discovery Heartland had provided, to identify the specific sales that it believed to have been caused by Heartland's allegedly unlawful conduct in this matter. Heartland also assumed that Forest River planned to identify specific sales to Mr. Donat, and that Mr. Donat would then discuss the accounting information associated with those specific sales, i.e. "the revenues received from such sales, the actual costs of producing those products, and the marginal profits obtained by Heartland from such sales." (*See* Notice of Deposition, Exh. C, topic #2, requesting a witness to discuss this information.)

However, Forest River apparently failed to conduct any independent analysis to determine which sales it believes were proximately caused by Heartland's allegedly unlawful conduct, even though it is Forest River's burden to prove that it suffered pecuniary loss or that Heartland received pecuniary gain from that conduct. Instead, Forest River's counsel repeatedly asked Heartland's Chief Financial Officer to draw a legal conclusion as to what sales were proximately caused by Heartland's conduct and to essentially concede that element of Forest

River's claims. For example, Forest River asked the following questions: (1) "As a result of Heartland contacting Forest River dealers using that dealer list, did Heartland obtain any particular gain?" and (2) "Do you know how many sales Heartland got as a result of anything that happened on October 22nd and 23rd?" (*See* Donat Dep., Exh. D, p. 201, ll. 22-23, p. 202, ll. 1-2, p. 203, ll. 10-12.)

Mr. Donat was prepared to talk about the accounting information related to **any** of the 250 sales that took place between October 22, 2008 and December 2, 2008, including the 51 sales that were specifically made to dealers who were included on Forest River's "Master List." Hence, it properly prepared a witness to testify on the second topic in Forest River's Notice of Deposition. Forest River might be frustrated that Mr. Donat did not admit that any of those sales were proximately caused by Heartland's alleged wrongful conduct. However, Forest River is well aware of Heartland's position that it did not make any sales as a proximate result of the conduct at issue in this lawsuit, and stalling these proceedings further to compel Heartland to produce a witness to reiterate that position once more is not warranted.

The Magistrate Judge properly surmised that Forest River's attempts to ask Heartland's Chief Financial Officer/accountant to opine on issues of causation and liability fell outside the apparent scope of Forest River's Notice of Deposition of Heartland's Financial Representative. Judge Nuechterlein's decision was neither contrary to law nor clearly erroneous, and it deserves the deference required under Rule 72.

CONCLUSION

Judge Nuechterlein cited three reasons for denying Forest River's Motion to Compel, each of which independently supported his decision. Forest River failed to cite a single error of law or fact, instead filing this Motion for Review based on its conjectural belief that maybe the

Court had not read Forest River's reply brief. The Court should stop Forest River's repeated use of motions to compel to avoid responding to Heartland's Motion for Summary Judgment. No legal or factual basis exists for overturning Judge Nuechterlein's decision and the Court should deny Forest River's Motion for Review.

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CERTIFICATE OF SERVICE

The undersigned counsel for plaintiff Heartland Recreational Vehicles, LLC, hereby certifies that a copy of the foregoing was served upon the following, this 24th day of February, 2011, by operation of the Court's electronic filing system:

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/s/ David P. Irmscher

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