John Wiley & Sons, Inc. v. Supap Kirtsaeng et al Doc. 38

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SAM P. ISRAEL, ESQ.

BY HAND
Hon. Donald Pogue
U.S. Court of International Trade
One Federal Plaza
New York, New York 10278-0001

September 21, 2009

Re: Wiley & Sons v. Kirtsaeng, et. al., 08 Civ. 7834

Dear Judge Pogue:

On behalf of Supap Kirtsaeng, the defendant in the above referenced matter, I write this letter in response to that of the Plaintiff's counsel of even date. The Plaintiff has made a series of misstatements to the Court in its letter. First, it need be noted that I am not the subject of a contempt motion (notwithstanding the Plaintiff's suggestion to the contrary); I am legal counsel for the Defendant. I am also not a party to this action, nor have I been served with a subpoena. In order to avoid a contest as to my deposition, I agreed to appear for a deposition at my office. It is my belief that under the circumstances the deposition should be minimally invasive of my practice—especially since, unlike the Plaintiff's counsel—I am a solo practitioner and have a cluttered week. I need frequent contact with my files and have no support staff whatsoever.

Second, I have advised counsel that I did not convey the order to the Defendant upon receipt by reason of computer problems. Without any basis whatsoever, the Plaintiff's counsel has accused me of lying. I have requested an affidavit from my computer consultant, Kai Lui, who, as it happens, is also a member of the New York State Bar. He will confirm the problem.

Equally false is the suggestion that we have withheld documents. We produced all of the Defendant's telephone records for the two day period at issue (which reflects our speaking after the withdrawal) and his single email during that period from me (which notes that I could not reach him by his phone since it was apparently disconnected and that I needed him to call me). The email was transmitted from my *backberry* (not surprisingly, in view of my computer problems).

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We also produced copies of the checks reflecting payment to my computer consultant and my diary entries reflecting the fact that I did not speak to the defendant until the next day--after the money was withdrawn.

The Plaintiff is trying to use this process, however, to exceed the scope of the issues at hand and *end run* a ruling already made by Judge Lynch that it was premature for post-judgment asset discovery. There has been no judgment as yet and, as Judge Lynch recognized, controlling cases prohibit asset discovery (undertaken for the purposes of enforcing a judgment) prior to the issuance of the judgment. Hence, other than the bank records already in the Plaintiff's hands (evidencing any withdrawals during the relevant period), there is no need for the Plaintiff to discover what disposition was made of such funds.

At the same time we are entitled to the deposition of Plaintiff's counsel since there are issues as to when the order was transmitted, what efforts were made to assure its receipt by me, why the Defendant was served belatedly and in a manner different than the service on Bank of America and why service was not made upon defendant in accordance with Judge Lynch's Order (i.e., by hand). In terms of the last point, we submit that the defect in the Plaintiff's service dooms its motion against the Defendant in its entirety—just as was the case with the motion against Bank of America. Even if the Plaintiff did not serve the right person in the case of the bank, at least it was served by hand. We were served by email (contrary to the Judge's Order) —a far less reliable methodology.

Respectfully submitted:

By: _____

Sam P. Israel (SPI0270)

Cc. William Dunnegan, Esq.