

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
5:07cv140**

PERFORMANCE SALES &)
MARKETING, LLC, a North Carolina)
Limited Liability Company; PSM)
GROUP, INC., a North Carolina)
Corporation; an GREG SEREY, an)
individual,)
))
Plaintiffs,)
))
v.)
))
LOWE’S COMPANIES, INC.,)
))
Defendant.)
_____)

ORDER

Previously, the Court granted Plaintiffs’ Motion to Compel the depositions of three executives employed by Defendant. (Order, Nov. 9, 2011.) Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, Defendant filed objections to the Court’s Order [# 171]. In addition, Plaintiffs filed a Motion for Sanctions and to Hold Defendant Lowe’s Companies, Inc. in Contempt of Court [# 174].

Subsequently, the Court stayed discovery in the case pending a ruling from the District Court on Defendant’s objections. (Order, Nov. 28, 2011.) In that Order, the Court also indicated that the Court would issue a ruling on the pending discovery motions upon the entry of an order from the District Court.

Accordingly, the Court denied with leave to renew the motions [# 161, # 168, # 174, and # 176] and granted the parties five (5) days from the entry of an Order by the District Court on Defendant's Objection [# 171] to renew these motions. (Order, July 6, 2012.)

On September 14, 2012, the District Court entered an Order sustaining Defendant's objection to this Court's Order granting Plaintiff's Motion to Compel. (Order, Sept. 14, 2012.) The District Court denied the Plaintiffs Motion to Compel [# 149]. (Id.) Subsequently, on September 21, 2012, Plaintiff moved to renew its Motion for Sanctions [# 174], Motion for Extension of Time [# 176], and Motion to Compel [# 168]. The Court **DENIES** the renewed motions.

I. Analysis¹

As a threshold matter, after reviewing the entire record in this case, the Court finds that Plaintiff is not entitled to an order finding Defendant in contempt or an order sanctioning Defendant. On November 9, 2011, the Court entered an Order compelling the deposition testimony of three of Defendant's employees. Plaintiff then noticed the deposition of the employees to be taken on November 17, 2011, and November 21, 2011. On November 15, 2011, counsel for Defendant

¹ The Court notes that the Plaintiff failed to renew the motions within the five day time period set forth in the Court's prior Order, and the motions could be denied for that reason alone.

informed Plaintiff that Defendant intended to appeal the Court's Order and would not participate in the depositions. Defendant appealed the Court's Order on November 16, 2011. The witnesses, however, did not appear for the noticed depositions. As a result, Plaintiff brought a motion for contempt and for sanctions.

Although the Court finds that Defendant should have, in an abundance of caution, moved the Court to stay this Court's Order pending resolution of the discovery issue by the District Court, the Court finds that the facts of this case do not warrant a finding of contempt or other sanctions. Defendant timely appealed the Court's discovery Order, and the District Court found that it was clear error for this Court to compel the depositions at issue. The Court finds that neither sanctions nor a contempt order is warranted based on the facts of this case. The Court **DENIES** the Motion for Sanctions [# 174 & # 206].

Moreover, in light of the District Court's September 14, 2012, Order finding that the Court's prior Order was in clear error, that the record in this case is fully developed, and that discovery is closed, and after a review of the record in this case and the parties' briefs, the Court **DENIES** the Motion to Compel [# 168 & # 207] and Motion for Extension of Time [# 176 & # 204]. Discovery in this case is closed, and the Court **DIRECTS** Plaintiff to respond to Defendant's Motion for Summary Judgment [# 180] within thirty (30) days of the entry of this Order.

II. Conclusion

The Court **DENIES** the Motion for Sanctions [# 174 & # 206], the Motion to Compel [# 168 & # 207], and Motion for Extension of Time [# 176 & # 204]. The Court **DIRECTS** Plaintiff to respond to Defendant's Motion for Summary Judgment [# 180] within thirty (30) days of the entry of this Order.

Signed: October 22, 2012



Dennis L. Howell
United States Magistrate Judge

