

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

THE EUCLID CHEMICAL COMPANY,
Plaintiff,

Case No. 1:11-cv-135
Dlott, J.
Litkovitz, M.J.

vs.

ROBERT WARE, d/b/a
ROBERT KELLY CONSTRUCTORS--RKC, et al.,
Defendants.

**ORDER AND REPORT AND
RECOMMENDATION**

Plaintiff The Euclid Chemical Company (“Euclid Chemical”) brought this action in March 2011 against defendants Robert Ware d/b/a Robert Kelly Constructors and RKC Increte Systems, Inc., alleging claims for trademark violations under the Lanham Act and state law claims for breach of contract, unfair competition, and violations of the Ohio Deceptive Trade Practices Act. (Doc. 1). For the reasons that follow, it is recommended that a show cause order be issued to non-parties Robert Ware and R Kelly Constructors, LLC to appear before the district judge on a date certain and show cause why they should not be held in contempt of court.

I. MAGISTRATE JUDGE’S AUTHORITY ON MOTION FOR CONTEMPT

Section 636(e) of the United States Magistrate Judges Act governs the contempt authority of magistrate judges. 28 U.S.C. § 636(e)(1). That section provides that a “magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.” In civil cases where the parties have not consented to final judgment by the

magistrate judge, contempt is governed by § 636(e)(6)(B):

(6) Certification of other contempts to the district court.--Upon the commission of any such act--

. . . .

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6)(B).

The magistrate judge's role on a motion for contempt in non-consent cases is to certify facts relevant to the issue of contempt to the district judge. *See, e.g., International Brotherhood of Electrical Workers, Local 474 v. Eagle Electric Co., Inc.*, No. 06-2151, 2007 WL 622504, at *1, n.1 (W.D. Tenn. Feb. 22, 2007); *U.S. v. Ivie*, No. 05-2314, 2005 WL 1759727, at *1, n.1, and *2 (W.D. Tenn. June 14, 2005). *See also NXIVM Corp. v. Bouchey*, No. 1:11-mc-0058, 2011 WL 5080322, at *3 (N.D. N.Y. Oct. 24, 2011) (and cases cited therein). "The certification of facts under section 636(e) serves to determine whether the moving party can adduce sufficient evidence to establish a prima facie case of contempt." *Telebrands Corp. v. Marc Glassman, Inc.*,

No. 3:09cv734, 2012 WL 1050018, at *1 (D. Conn. March 28, 2012) (quoting *Church v. Steller*, 35 F. Supp.2d 215, 217 (N.D. N.Y. 1999)).

II. CERTIFIED FACTS

The following facts are certified to the district court: Plaintiff Euclid Chemical commenced this action in March 2011 against defendants Robert Ware d/b/a Robert Kelly Constructors and RKC Increte Systems, Inc., alleging claims for trademark violations under the Lanham Act and state law claims for breach of contract, unfair competition, and violations of the Ohio Deceptive Trade Practices Act. In February 2012, the Court granted Euclid Chemical default judgment against defendant RKC Increte Systems, Inc.¹ (Doc. 22). Euclid Chemical was awarded permanent injunctive relief against RKC Increte Systems, Inc. and compensatory damages in the amount of \$44,106.23 for breach of contract, plus prejudgment interest at a contractual rate of 12% per annum from October 1, 2010 through the date of the Court's Order; costs, expenses and reasonable attorney fees in an amount to be determined by further order of the Court; and post-judgment interest to accrue at the statutory rate in accordance with Ohio Rev. Code § 1343.03(B). The Court retained jurisdiction for the purpose of adjudicating any disputes regarding the interpretation, implementation or enforcement of the provisions of the Order.

After RKC Increte Systems, Inc. failed to pay any of the damages it was ordered to pay by the Court, Euclid Chemical conducted a debtor's examination of RKC Increte Systems, Inc.'s principal, Robert Ware, on December 18, 2012. (Doc. 46). Euclid Chemical subsequently served subpoenas on Mr. Ware and R Kelly Constructors, LLC, both non-parties to this lawsuit, on March 28, 2013, to obtain documents relevant to Euclid Chemical's attempted enforcement of its judgment against defendant RKC Increte Systems, Inc. (Doc. 49). Euclid Chemical

¹ Default judgment was also granted against defendant Robert Ware d/b/a Robert Kelly Constructors. (Doc. 22). However, the judgment against this defendant was subsequently withdrawn. (Doc. 34).

thereafter filed a motion for the Court to issue an order pursuant to Fed. R. Civ. P. 45 compelling non-parties Mr. Ware and R Kelly Constructors, LLC to comply with the subpoenas served on them in March 2013. (Doc. 50). In the alternative, plaintiff moved the Court to hold Mr. Ware and R Kelly Constructors, LLC in contempt of court for failing to respond to the subpoenas. Plaintiff asserted that R Kelly Constructors, LLC is a successor entity to defendant RKC Increte Systems, Inc., and that Mr. Ware is both defendant RKC Increte Systems, Inc.'s principal and the founder of R Kelly Constructors, LLC. (Doc. 50 at 2). Plaintiff submitted documentation showing that counsel for Euclid Chemical contacted counsel for Mr. Ware and R Kelly Constructors, LLC by email twice on May 3, 2013 and July 11, 2013, regarding the subpoenas. (See Doc. 50, attachments). However, Mr. Ware and R Kelly Constructors, LLC neither responded to the subpoenas nor timely filed objections pursuant to Fed. R. Civ. P. 45. Mr. Ware and R Kelly Constructors, LLC likewise failed to respond to the motion to compel compliance with the subpoenas.

On November 5, 2013, the Court issued an Order granting Euclid Chemical's motion to compel compliance with the subpoenas. (Doc. 51). The Court ordered non-parties Mr. Ware and R Kelly Constructors, LLC to comply with the subpoenas, or show cause why they could not comply with the subpoenas, within 20 days of the date of the Order. The Court deferred ruling on Euclid Chemical's request for attorney fees incurred in filing the motion to compel pending an opportunity by Mr. Ware and R Kelly Constructors, LLC to respond to the Order. Mr. Ware and R Kelly Constructors, LLC have not responded to the Court's Order to show cause to date.

III. ANALYSIS

The conduct of Mr. Ware and R Kelly Constructors, LLC constitutes disobedience of the November 5, 2013 Order of the Court compelling compliance with the post-judgment subpoenas.

“The court for the district where compliance is required . . . may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.” Fed. R. Civ. P. 45(g). The Court’s use of its contempt power “enforce[s] the message that court orders and judgments are to be complied with in a prompt manner.” *IBEW v. Gary’s Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003) (citing *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987)). In a contempt proceeding, the moving party must demonstrate “by clear and convincing evidence that the party to be held in contempt violated a court order.” *U.S. v. Conces*, 507 F.3d 1028, 1041-42 (6th Cir. 2007); *Gary’s Elec. Serv. Co.*, 340 F.3d at 379. “Once the movant establishes his prima facie case, the burden shifts to the contemnor who may defend by coming forward with evidence showing that he is presently unable to comply with the court’s order.” *Gary’s Elec. Serv. Co.*, 340 F.3d at 379 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)). To satisfy this burden, “a defendant must show ‘categorically and in detail’ why he or she is unable to comply with the court’s order.” *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996). The Court must consider whether the defendant “took all reasonable steps within [its] power to comply with the court’s order.” *Gary’s Elec. Serv. Co.*, 340 F.3d at 379 (quotation omitted).

In the instant case, the failure of non-parties Mr. Ware and R Kelly Constructors, LLC to respond to the Court’s Order compelling compliance with the subpoenas after being ordered to do so by the undersigned magistrate judge constitutes disobedience of a lawful court order and thus contempt before the magistrate judge. Mr. Ware is responsible for taking all reasonable steps to comply with the Court’s Orders, both in his personal capacity and as the principal of R Kelly Constructors, LLC. In *Wilson v. United States*, 221 U.S. 361 (1911), the Supreme Court

observed:

A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

Id. at 376. *See also Gary's Elec. Serv. Co.*, 340 F.3d at 379 (sole owner of company, “as an officer of the corporation and the one responsible for the corporation’s affairs, was subject to the court’s order just as the corporation itself was” and district court had authority to hold owner in contempt for his failure to take appropriate action within his power for performance of the corporate duty); *Williamson v. Recovery Ltd. Partnership*, No. C2-06-292, 2009 WL 3172656, at *7 (S.D. Ohio Sept. 30, 2009) (citing *Wilson* and concluding that the “same is undoubtedly true as to a limited partnership or a limited liability corporation”), *aff’d in part and rev’d in part on other grounds*, *Williamson v. Recovery Ltd. Partnership*, Nos. 09-4253, 09-4255, 2012 WL 171385 (6th Cir. Jan. 30, 2012). Mr. Ware and R Kelly Constructors, LLC have neither complied with the subpoenas by providing the requested documents nor proffered an excuse for failing to obey the subpoenas.

Accordingly, it is submitted that the district judge should issue a show cause order to non-parties Mr. Ware and R Kelly Constructors, LLC to appear at a date certain before the district judge to show cause during a hearing why they should not be held in contempt of court for failing to obey the Court’s November 5, 2013 discovery Order.

In addition, Euclid Chemical should be granted attorney fees and expenses incurred in obtaining the November 5, 2013 Order to show cause why the non-parties should not be found in contempt of court. (Doc. 51). The Court deferred ruling on Euclid Chemical’s request for


attorney fees incurred in filing the motion to compel pending an opportunity by Mr. Ware and R Kelly Constructors, LLC to respond to the Court's Order to show cause. *Id.* Euclid Chemical's request for attorney fees should be granted due to Mr. Ware and R Kelly Constructors, LLC's failure to respond to the Order to show cause.

IV. CONCLUSION

It is hereby **RECOMMENDED**: (1) that the district judge issue a show cause order to non-parties Robert Ware and R Kelly Constructors, LLC to appear at a date certain before the district judge to show cause during a hearing why they should not be held in contempt of court for failing to obey the Court's November 5, 2013 discovery Order; and (2) that Mr. Ware and R Kelly Constructors, LLC be ordered to pay Euclid Chemical's expenses incurred in connection with its motion to compel compliance with subpoenas.

It is hereby **ORDERED** that plaintiff shall have **fourteen (14) days** from the filing date of this Order to submit an affidavit setting forth its reasonable expenses, including attorney's fees, incurred in connection with the motion to compel. Mr. Ware and R Kelly Constructors, LLC shall have **twenty-one (21) days** from the filing date of plaintiff's affidavit to file a response to the affidavit.

Date: 12/17/13


Karen L. Litkovitz
United States Magistrate Judge

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NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).