

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

EPMG OF OHIO, INC. P.A.,  
Plaintiff,

vs.

SOUTHWEST HEALTHCARE  
SERVICES, LLC, *et al.*,  
Defendants.

Case No. 1:11-cv-842

Bertelsman, J.  
Litkovitz, M.J.

**ORDER AND  
REPORT AND  
RECOMMENDATION**

Plaintiff, EPMG of Ohio (EPMG), brings this diversity action pursuant to 28 U.S.C. § 1332 against defendants Southwest Healthcare Services, LLC and Southwest Healthcare of Brown County, Ohio, LLC, raising various state law contract and tort claims. (Doc. 1). Default judgment was granted in favor of EPMG in April of 2012. (Doc. 13). Defendants moved to vacate the default judgment, but following a hearing held June 14, 2012, the District Judge denied defendants' motion. (Doc. 20). EPMG subsequently filed notices of depositions for Fed. R. Civ. P. 30(b)(6) witnesses for each defendant entity which included requests for production of documents under Fed. R. Civ. P. 34. *See* Docs. 21, 22. This matter is before the Court on EPMG's motion for sanctions and to compel defendants' compliance with these discovery requests. (Doc. 23). To date, defendants have not responded to EPMG's motion.

Following the Court's entry of default judgment in favor of EPMG, the parties executed a settlement agreement whereby defendants were required to make monthly payments to EPMG. (Doc. 23 at 2). Defendants failed to timely make the three final payments. *Id.* at 3. EPMG therefore filed deposition notices in May 2013 requiring defendants to produce witnesses and documents pursuant to Fed. R. Civ. P. 30(b)(6) and 34 for depositions scheduled on July 9, 2013. (Doc. 23 at 2). The day before the noticed depositions, counsel for defendants informed counsel

for plaintiff that defendants did not intend to produce any witnesses or documents. (Doc. 23 at 3). Indeed, on July 9, 2013, defendants failed to appear at the depositions. (Doc. 23, Ex. 3, Affidavit of Robert G. Palmer, EPMG's counsel). Defendants have provided no explanation for their failure to appear at the properly noticed depositions.

Fed. R. Civ. P. 37 provides that “[a] party seeking discovery may move for an order compelling an answer, designation, production or inspection” if a party fails to provide discovery responses. Fed. R. Civ. P. 37(a)(3). Motions to compel are proper where a corporate entity fails to designate witnesses as required under Fed. R. Civ. P. 30(b)(6) and when a party fails to permit inspection of documents requested pursuant to Fed. R. Civ. P. 34. Fed. R. Civ. P. 37(a)(ii), (iv). If a motion to compel discovery is granted “or if the disclosure or requested discovery is provided after the motion was filed – the court must . . . require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses, including attorney’s fees.” Fed. R. Civ. P. 37(a)(5)(A).

EPMG seeks an order compelling defendants to produce the requested documents and witnesses for deposition. EPMG also seeks an award of monetary sanctions for the expenses and attorneys’ fees incurred due to defendants’ failure to appear at the noticed depositions. Specifically, EPMG seeks \$108.90 in costs which represents the amount charged to counsel for EPMG by the court reporter service hired to attend the July 9, 2013 depositions and attorneys’ fees in the amount of \$2,710.00 for a total sanctions amount of \$2,818.90. (Doc. 23 at 4). In support of its request for costs, EPMG has provided the court reporter service’s invoice in the amount of \$108.90. *See* Doc. 23, Ex. 3 at 3. EPMG supports its request for \$2,710.00 in attorneys’ fees with the affidavit of its attorney, Robert G. Palmer, who states that the “fees reflect 3.8 hours of work by Robert G. Palmer at \$425.00 per hour and 7.3 hours by his associate,

Emily Jackson, at \$150.00 per hour.” (Doc. 23, Ex. 3 at 2).

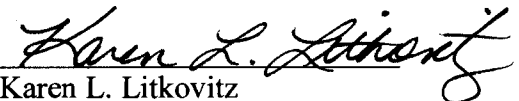
As defendants have failed to respond to EPMG’s motion or provide any rationale for their failure to participate in the discovery process, EPMG’s motion to compel is well-taken.

Defendants are **ORDERED** to produce the documents requested by EPMG in their deposition notices, *see* Doc. 23, Ex. 1 and 2, and to identify Fed. R. Civ. P. 30(b)(6) witnesses who shall appear for depositions on or before **October 17, 2013**.

EPMG’s request for sanctions is also well-taken. The Sixth Circuit directs courts to consider four factors in determining whether an award of sanctions is appropriate: (1) whether the party’s failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the party’s failure to cooperate in discovery; (3) whether the party was warned that failure to cooperate could lead to the sanction; and (4) whether less drastic sanctions were first imposed or considered. *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997). Here, all factors weigh in favor of awarding sanctions. First, as evidenced by the email communications attached to EPMG’s motion, it is clear that defendants’ failure to appear at the depositions was willful. *See* Doc. 23, Ex. 3 at 1 (one day before the depositions were set to proceed, defendants informed their attorney that they would not be producing any witness for the deposition despite counsel’s advice to them that EPMG would likely seek sanctions for their failure to appear). Second, EPMG has been prejudiced by defendants’ failure to participate in discovery as it has been required to expend money by filing the instant motion to obtain defendants’ compliance with the Federal Rules of Civil Procedure. Third, defendants in this matter are well aware of the consequences for failing to participate in this litigation as such failure was the basis for the entry of default judgment against them. Lastly, the Court finds that awarding attorney’s fees and expenses to EPMG for the expenses associated with the aborted

depositions is the least drastic sanction available to ensure defendants' future compliance with their duties to participate in discovery. Accordingly, the Court **RECOMMENDS** that EPMG's request for sanctions in the amount of \$2,818.90 be **GRANTED**.

Date: 9/18/13

  
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).