

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID RUDOVSKY and
LEONARD SOSNOV,

Plaintiffs,

v.

WEST PUBLISHING CORPORATION,
WEST SERVICES INC., AND
THOMSON LEGAL AND REGULATORY
INC. t/a THOMSON WEST

Defendants.

:
: CIVIL ACTION –
: JURY TRIAL DEMANDED

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:
:
: NO. 09-CV-727

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS’ MOTION IN LIMINE/MOTION FOR SANCTIONS**

Plaintiffs David Rudovsky and Leonard Sosnov (“plaintiffs”), by and through their undersigned counsel, respectfully submit this memorandum of law in support of their motion in limine / motion for sanctions to preclude defendants from introducing affirmative evidence of the April 2009 Supplement.

INTRODUCTION

In this motion, as a sanction for defendants’ discovery misconduct and/or spoliation of evidence plaintiffs seek to preclude defendants from introducing any affirmative evidence about the purported “quality” of the April 2009 Supplement that defendants prepared after this lawsuit was initiated, and which they rushed to press in order to mail it prior to the preliminary injunction hearing in this case. This motion was precipitated by defendants’ repeated refusal to produce communications between the author of that Supplement -- Ms. Chris Gimeno, a West contractor -- and West’s Attorney Editor/Principal Attorney supervising her on the project, Mr.

Jerome Kahnke. Although plaintiffs requested these documents in October, and defendants claimed that all documents had been produced, it was not until Friday night, May 7 (after the close of business), that defendants produced a small number of email communications between defendants and Ms. Gimeno. These documents, which referred to “shortcomings” in the original 2008-09 Supplement prepared by West, and which also referred to other correspondence and materials “sent” by West to Ms. Gimeno, were produced far too late for plaintiffs to be able to use them at depositions in this case, and would have changed plaintiffs’ deposition strategy and its list of deponents.

Plaintiffs have demanded that West produce all other communications between West and Ms. Gimeno, but West has refused, claiming, in part, that such documents do not exist.

Because West has violated its discovery obligations, plaintiffs move to preclude defendants from introducing any affirmative evidence about the April 2009 Supplement authored by Ms. Gimeno. In addition, plaintiffs request that the jury be instructed that they can draw an adverse inference from defendants’ refusal to produce the remaining documents.

BACKGROUND

Plaintiffs filed this case in February 2009, asserting a variety of claims related to defendants’ publication of a sham supplement to plaintiffs’ treatise Pennsylvania Criminal Procedure. Shortly thereafter, West contacted Chris Gimeno,¹ (a former West employee who now does writing on a contract basis for West), to prepare a new supplement to replace the sham supplement that was the initial subject of this action.

In plaintiffs’ discovery requests, plaintiffs served a number of requests that encompassed any communications between Ms. Gimeno and West, most specifically Request # 52:

¹ Ms. Gimeno is also known as “Chris Davis,” and was identified as such by defendants in their amended initial disclosures.

All documents written, authored, sent, or received by Chris Davis concerning the Treatise and any pocket part thereto or any agreement to which David Rudovsky and Leonard Sosnov is a party.

See Exhibit 1 hereto.

Defendants' response to Request #52 was the following:

West incorporates each of the above General Objections and Reservation of Rights and further objects to the request on the grounds that it is overly broad. Subject to and without waiving the foregoing objections, West will produce responsive non-privileged documents, if any, within its possession, custody or control that were written by, authored by, or sent to Chris Davis concerning the Treatise and any pocket part thereto.

See Exhibit 2 hereto. In addition, communications between Chris Gimeno [Davis] and West would have been responsive to plaintiffs' request for production nos. 1, 2, 4, 5, 9, 10, 12, 13, 14, and 34. (See Ex. 1).

Despite having agreed to produce these communications, "if any" existed, defendants' document production did not include any such documents. Obviously, the reasonable conclusion was that no such documents existed. In reliance upon that conclusion, plaintiffs saw no reason to depose Ms. Gimeno or Mr. Kahnke.

At the March 3, 2010 deposition of West employee Catherine Smith, however, Ms. Smith testified that she had been "copied in" on some communications between West and Chris Gimeno. See Smith Deposition 60:20 - 61:5 (Ex. 3 hereto). Ms. Smith also testified that there was a written contract between West and Ms. Gimeno. *Id.* at 59:23-60:7. On the record at that deposition, plaintiffs' counsel requested production of all such correspondence and agreements. *Id.* at 61:6-12. Of course, plaintiffs were unable to question Ms. Smith about these documents.

Despite this request, defendants still failed to produce these documents. On April 15, 2010, plaintiffs' counsel again requested the documents. See Exhibit 4. Still, defendants'

counsel did not produce them. Finally, on April 30, defendant produced a copy of West's contract with Ms. Gimeno, but still did not produce any other documents. Plaintiffs' counsel made further requests, including on May 2, May 3, May 5 and May 6, 2010. See Ex. 4. It was not until Friday night, May 7, 2010, at 7:13 p.m., that defense counsel produced a copy of West's contract with Gimeno, and several emails exchanged between Ms. Gimeno and West employees, including Jerome Kahnke, whose title is apparently Senior Principal Attorney. See Ex. 5 (5/7/10 email) and Ex. 6 (Gimeno/Kahnke emails).

The few emails that West did produce strongly suggest that other correspondence and documents exist, and that the documents would be very helpful to plaintiffs. For example, Mr. Kahnke's March 30, 2009 email to Ms. Gimeno refers to "materials that I sent you." See Ex. 6. No such documents were produced. In addition, Mr. Kahnke refers to "shortcomings" in the 2008-09 Supplement that West had sent out—a statement upon which plaintiffs certainly would have followed up.

Moreover, there is a lengthy gap in documents from March 2, the date on which West contacts Chris Gimeno, and March 30 (Mr. Kahnke's email). This month-long gap is suspicious, to say the least. In addition, although defendants produced Ms. Gimeno's transmittal of the first ten chapters of the draft supplement, they have not produced the remaining transmittals and any comments from Mr. Kahnke about them. Finally, there are a number of other categories of documents concerning Ms Gimeno and the 2009 Pocket Part which have not been produced, including documents concerning the internal process, including budgeting, leading to her contract with West, her qualifications, and documents concerning the decision to publish a 2009 Pocket Part. See Plaintiffs' First Request For Production of Documents, paragraphs 5, 12, 13, 14 and 34 (Ex. 1).

Upon receipt of the few documents which defendants finally produced, plaintiffs' counsel demanded that West produce the remaining documents. See 5/8/10 email from N. Charlson to A. Zeisler (Ex. 4). On May 11, 2010, defendants' counsel responded by claiming that counsel has "confirmed" that plaintiffs' "possess all written communication between west and chris gimeno davis." (See Ex. 5). West's counsel also now claims that the "materials" were sent to Ms. Gimeno by first class mail. However, West has not produced any transmittal letter, or any verification or affidavit from either Mr. Kahnke or Ms. Gimeno attesting to the truth of these statements. Nor has West produced the actual documents sent by Mr. Kahnke to Ms. Gimeno, because such documents may well have had notes or markings on them that would have been relevant to this matter. Since such documents were sent by West, to a West contractor during the pendency of this litigation (one who is represented by West's counsel in this matter), it is clear that such documents should have been preserved.

DISCUSSION

I. DEFENDANTS VIOLATED THEIR OBLIGATION TO PRODUCE THE GIMENO DOCUMENTS DURING DISCOVERY

There can be little doubt that defendants violated their discovery obligations. Although defendants responded to plaintiff's Requests for Production stating that they would produce any communications with Gimeno, they simply did not do so. Nor can there be any dispute about the relevance of the documents. The communications with Ms. Gimeno about the Treatise, including the 2008-09 Pocket Part, and the April 2009 Pocket Part that she was preparing, are unquestionably relevant to plaintiffs' claims. In particular, statements by West to Ms. Gimeno about "shortcomings" in the 2008-09 Pocket Part go to the heart of this matter.

Although defendants purported to produce the Gimeno documents "without waiver of claims of attorney-client privilege," there is no privilege to communications between West and a

third party (Gimeno is not a West employee) with respect to a pocket part that was published. In any event, West never even produced a privilege log documenting the existence of these documents.

Even now, defendants continue to refuse to produce the remaining Gimeno communications. Plaintiffs do not know whether the documents exist and West is refusing to produce them, or they have instead been destroyed. In either case, the documents should have been produced.

In sum, the Gimeno communications were clearly requested in discovery, were not privileged, and were directly relevant to this case, and defendants agreed to produce any communications that existed, but failed to do so.

II. PLAINTIFFS HAVE BEEN PREJUDICED BY DEFENDANTS' DISCOVERY VIOLATIONS

Defendants' willful failure to produce these documents until a week before trial (and, in the case of the non-produced documents, not at all), has caused serious prejudice to plaintiffs' case. For example, had West produced the Gimeno documents in a timely fashion consistent with its discovery obligations, plaintiffs would have known the following:

1. That Jerome Kahnke was in contact with Chris Gimeno on March 2.
2. That on or about March 30, Jerome Kahnke left a "too lengthy voice-mail" for Ms. Gimeno regarding the "pressures" to publish a supplement.
3. That Kahnke had sent materials to Ms. Gimeno, apparently intending that Gimeno use plaintiffs' Complaint in this action as a guide. Had we been able to depose Ms. Gimeno about this, her testimony would have been very useful to plaintiffs.
4. That there is a strong implication that Kahnke and Gimeno had discussed "shortcomings" in the 2008-09 Pocket Part.
5. That West was purporting to cloak its communications with Ms. Gimeno as "Privileged Attorney Client Communication."

Had these facts been known to plaintiffs, they would have had a very different picture than the one which West intentionally allowed to prevail, i.e., that there was no substantive communication between West and Gimeno, and that she simply prepared a supplement from scratch as a contract author. Although West had disclosed the existence of these witnesses in their initial disclosures, West did not disclose that these substantive communications had taken place. Had West made full disclosure, plaintiffs would have had a reason to depose these witnesses, as well as had documents with which to tie down their testimony. The reason that documents are almost always requested and produced before depositions, is so that parties can (a) determine which witnesses have value; and (b) to use the documents as a guide for the deposition. West's willful failure to produce these documents prevented plaintiffs from doing either.²

III. THIS COURT SHOULD SANCTION DEFENDANTS PURSUANT TO FED. R. CIV. P. 37(C)(1)

The court has substantial power to sanction parties for discovery misconduct. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 2132-33 (recognizing inherent power of a district court to sanction parties in appropriate cases); Fed. R. Civ. P. 37(c).

Rule 37(c) provides for sanctions “[i]f a party fails to provide information . . . as required by Rule 26(a).” While under normal circumstances, a motion to compel would be the appropriate way to deal with this situation, given the fact that trial begins on May 17, only five days from the filing of this motion, a motion to compel will not remedy the prejudice that plaintiff has suffered. Accordingly, plaintiffs are forced to seek sanctions in the form of a motion to preclude evidence, and to give an adverse inference instruction to the jury.

² Plaintiffs did serve a deposition notice for Ms. Gimeno, but after obtaining testimony from other West witnesses, did not see any value in taking her deposition. This decision would have been different if the Gimeno documents had been produced.

Here, there is no dispute that defendants withheld relevant documents until less than 10 days remained before trial. The evidence strongly suggests that West continues to withhold documents concerning Ms. Gimeno and the 2009 Pocket Part, or that such documents have been destroyed. Rule 37(b) and (c) provide for a variety of possible sanctions, including the following:

- “prohibiting the disobedient party from . . . introducing designated matters in evidence.” (Rule 37(b)(2)(A)(ii));
- prohibiting the party from using withheld information or supplying evidence at trial (Rule 37(c)(1)); and
- “inform[ing] the jury of the party’s failure.” (Rule 37(c)(1)(B)).

In addition, in the analogous situation of spoliation of evidence (and there is at least a suggestion that relevant documents have “disappeared” in this case), an adverse inference instruction is also appropriate:

Sanctions for spoliation of the evidence include: “(1) dismissal of a claim or granting judgment in favor of a prejudiced party; (2) suppression of evidence; (3) an adverse inference, referred to as the spoliation inference; (4) fines; [and] (5) attorneys' fees and costs.” *Paramount Pictures Corp.*, 234 F.R.D. at 110 (quoting *Mosaid Techs., Inc.*, 348 F.Supp.2d at 335).

Chauncey v. PECO, Inc., 2010 WL 737139 (E.D. Pa. Feb. 16, 2010).

Here, plaintiffs request that the Court issue the following sanctions:

1. Preclude West from presenting evidence from any of its witnesses concerning the manner of preparation, quality or adequacy of the 2009 Supplement.
2. Permit plaintiffs to read to the jury, and move into evidence, any of the several documents containing communications with Chris Gimeno or otherwise sent to Chris Gimeno.
3. Order that West obtain and submit affidavits by Jerome Kahnke and Catherine Smith that (1) state whether all documents responsive to Plaintiffs’ First Request For Production Of Documents, paragraphs 5, 12, 13, 14 and 34, have been produced, (2) specifically answer the question as to whether any such documents existed, but have not been produced, and,

if so, the reason therefore, including whether any such documents have been destroyed or otherwise not retained, and (3) whether they were advised that West had a duty to retain documents relevant to this case, and, if so, when they were so advised.

4. Issue an adverse inference instruction (also known as the “spoliation” inference) to the jury. Specifically, plaintiffs request that the Court instruct the jury that West has failed to produce relevant communications between itself and Ms. Gimeno, and that the jury should infer from that failure that the contents of the documents would have been adverse to West.

Only by issuing these sanctions can the Court remedy the severe prejudice to plaintiffs’ ability to present their case caused by defendants’ discovery violations.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant the Motion and enter an Order in the form submitted herewith.

Respectfully submitted,

s/ Noah H. Charlson

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Dated: May 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2010, I served a true and correct copy of the foregoing Plaintiffs' Motion in Limine/Motion for Sanctions, together with the supporting Memorandum of Law and Proposed Order upon the following counsel for defendants, as follows:

via the Court's Electronic Case Filing system:

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