

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: July 11, 2012)

NAYSHA BERRIOS, INDIVIDUALLY :
AND AS ADMINISTRATRIX OF THE :
ESTATE OF CASSANDRA BERRIOS :

v. :

C.A. No. PC 2004-2390

JEVIC TRANSPORTATION, INC.; :
CRAIG G. BENFIELD; :
FIRST STUDENT, INC.; :
ILBA BERRIOS, ALIAS; :
SAIA, INC.; SAIA MOTOR FREIGHT :
LINE, LLC, ALIAS; AND :
NATIONAL UNION FIRE INSURANCE :
COMPANY OF PITTSBURGH, PA :

DECISION

GIBNEY, P.J. In this wrongful death action, Plaintiff Naysha Berrios (“Plaintiff”) moves for an Order of Conditional Default against Defendants Saia, Inc. and Saia Motor Freight Line, LLC (collectively “the Saia Entities”). Plaintiff’s claims arise from an automobile accident involving Plaintiff, Defendant Jevic Transportation, Inc. (“Jevic”), and various other parties. The instant motion pertains to a dispute over the Saia Entities’ duty to produce (1) certain documents and (2) a deponent with the most knowledge of records regarding the Saia Entities’ financial obligations to Jevic. Jurisdiction is pursuant to Super. R. Civ. P. 37 (“Rule 37”). For the reasons stated herein, this Court grants Plaintiff’s Motion for an Order of Conditional Default in part and denies it in part.

I

Facts and Travel

On the morning of September 5, 2001, a school bus owned by Defendant First Student collided with an eighteen wheel tractor-trailer owned by Jevic. Plaintiff and Plaintiff's infant daughter, Cassandra Berrios, were passengers on the First Student bus and were injured in the collision. The infant Cassandra ultimately died from her injuries.¹ Plaintiff subsequently filed the instant wrongful death action against First Student, Jevic, and various other parties.

Jevic and the Saia Entities have a complex corporate history and are contractually obligated to each other in numerous ways. The Saia Entities—specifically, Saia, Inc.—previously owned Jevic and were parties to an indemnity and guaranty agreement (“the Indemnity Agreement”) with Jevic’s insurer, United States Fidelity and Guaranty Company (“USF&G”). The Indemnity Agreement obligated the Saia Entities and Jevic to make certain deductible and self-insured retention payments to USF&G relating to insurance claims arising from Jevic’s operations from March 1, 2000 to June 30, 2006. The Saia Entities also contracted to assume joint and several liability for all of Jevic’s liabilities. It is unclear, however, whether the Saia Entities agreed to do so under the Indemnity Agreement or another contract.²

On June 30, 2006, Saia, Inc. entered a stock purchase agreement (“Stock Purchase Agreement”) to sell all of the shares of Jevic to a holding company. Pursuant to the

¹ For a more detailed description of the accident, see Berrios v. Jevic Transportation, Inc., PC-2004-2390, 2012 WL254974, slip op. at 2 (R.I. Super. Jan. 23, 2012).

² Neither the Saia Entities, nor Plaintiff, provided this Court with copies of all of the contracts and orders relevant to Plaintiff’s Motion. The absence of such documents limits this Court’s summary of the Saia Entities’ contractual relations with Jevic.

Stock Purchase Agreement, Jevic agreed to indemnify the Saia Entities for the Saia Entities' payments under the Indemnification Agreement. Jevic also contracted to post a letter of credit for \$15.3 million to secure Jevic's indemnification obligations.

On May 20, 2008, Jevic filed a voluntary petition for bankruptcy under Chapter 11 of Title 11 of the United States Code. Nearly four months later, on September 19, 2008, Jevic and the Saia Entities entered into a bankruptcy settlement agreement ("Bankruptcy Settlement"). Under the Bankruptcy Settlement, the Saia Entities agreed to (1) assume all of Jevic's liability for Jevic's share of the self-funded retention payments set forth in the Indemnity Agreement with regard to insurance claims against Jevic; (2) draw all funds remaining under the letter of credit to satisfy insurance claims against Jevic; and (3) provide Jevic with a general release of all claims. In December 2009, Plaintiff obtained permission to amend her Complaint to add counts against the Saia Entities. She alleges that the Saia Entities agreed to assume liability for all of her claims against Jevic.

In March 2010, Plaintiff thrice noticed the deposition of the Saia Entities official with the most knowledge concerning matters involving the Indemnity Agreement, the Stock Purchase Agreement, the letter of credit, and other documents related to the Saia Entities' assumption of Jevic's liabilities (collectively "the Guaranty Documents"). The Saia Entities designated Lou Taber as the person most knowledgeable regarding the Guaranty Documents, but declined to produce him on three occasions. Plaintiff subsequently filed a Motion to Default the Saia Entities, but allowed the Motion to pass when the Saia Entities produced documents responsive to her Notice of Deposition.

In May 2012, Plaintiff renewed her efforts to discover information relative to the Saia Entities' assumption of Jevic's liabilities. First, Plaintiff requested that the Saia Entities produce a variety of documents in a letter dated May 23, 2012 ("May 23 RFP"). Second, on May 31, 2012, Plaintiff sent a Notice of Deposition ("May 31 Notice") to the Saia Entities via subpoena duces tecum and asked them to designate the person with the most knowledge of the Guaranty Documents for a deposition on June 18, 2012. In Schedule A to the May 31 Notice, Plaintiff listed a number of documents ("Schedule A Records") that she wanted the Saia Entities to produce at the time of the deposition pursuant to Super. R. Civ. P. 30(b)(5) ("Rule 30(b)(5)").

The Saia Entities, however, did not respond to the May 23 RFP, nor did they offer a deponent for examination on June 18, 2012 or produce the Schedule A Records. On June 25, 2012, Plaintiff moved for an Order of Conditional Default against the Saia Entities. Following Plaintiff's Motion, the Saia Entities sent a letter to Plaintiff outlining the resources from which the Saia Entities might pay any judgment against Jevic.

At a hearing on June 27, 2012, Plaintiff asked this Court to default the Saia Entities unless they complied with the May 23 RFP, the May 31 Notice, and the Rule 30(b)(5) request for the Schedule A Records. In response, the Saia Entities argued that Plaintiff had previously indicated that she considered the letter an acceptable alternative to a deposition and production of documents. The Saia Entities also contended that the discovery Plaintiff sought was unnecessary because the Saia Entities had sufficient assets and insurance to cover any judgment(s) against Jevic.³

³ This Court's Decision of June 29, 2012 ("June 29 Decision") established guidelines for parties to follow when arguing discovery disputes before this Court. Plaintiff and the Saia Entities, however, argued Plaintiff's Motion for Conditional Default prior to the

II

Analysis

Through discovery, Rhode Island litigants can obtain information “regarding any matter, not privileged, which is relevant to the subject matter” of the pending action. Super. R. Civ. P. 26(b). Thus, the scope of discovery is “very broad.” Cunningham v. Heard, 667 A.2d 537, 538 (R.I. 1995). The instant controversy involves three modes of discovery: (1) a request for production of documents pursuant to Super. R. Civ. P. 34 (“Rule 34”); (2) a notice of deposition pursuant to Super. R. Civ. P. 30(b)(6) (“Rule 30(b)(6)”); and (3) a subpoena duces tecum seeking production of documents at the time of deposition pursuant to Rule 30(b)(5). In discovery disputes, the party resisting discovery bears the burden of persuasion as to its objections. See Vázquez-Fernández v. Cambridge Coll., Inc., 269 F.R.D. 150, 155-56 (D.P.R. 2010).⁴

When a party fails to respond to a discovery request, the party seeking discovery may move for sanctions pursuant to Rule 37(d). Super. R. Civ. P. 37(d); see Travelers Ins. Co. v. Builders Res. Corp., 785 A.2d 568, 569 (R.I. 2001) (finding Rule 37(d)

filing of the June 29 Decision. Berrios v. Jevic Transp., Inc., PC-2004-2390, slip op. at 25-26 (R.I. Super. June 29, 2012). Accordingly, this Court shall not consider whether Plaintiff and the Saia Entities met standards that this Court had yet to announce. This Court nonetheless expects all parties to comply with the June 29 Decision as this litigation proceeds. Moreover, although the June 29 Decision dealt with Motions to Compel, the guidelines it lays out are equally applicable to other discovery-related Motions, including Motions for Protective Orders and Motions for Rule 37 sanctions. See id. (Emphasizing the importance of explaining a party’s reasoning for filing or objecting to discovery motions).

⁴ Our Supreme Court has “repeatedly stated that federal-court interpretations of a procedural rule that is substantially similar to one of our own state rules of civil procedure should serve as a guide to the construction of our own rule.” See Hall v. Ins. Co. of N. Am., 727 A.2d 667, 669 (R.I. 1999) (citing Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985)). As such, this Court shall refer to federal precedent where appropriate. See Smith, 489 A.2d at 339.

sanctions proper where defendant refused to answer interrogatories and attend a “duly noticed deposition”). Rule 37(d) provides in pertinent part:

“If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) . . . to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice . . . or (3) to serve a written response to a request for inspection submitted under Rule 34 . . . the court on motion may make such orders in regard to the failure as are just . . .” Super. R. Civ. P. 37(d) (emphasis added).

Accordingly, an order for a conditional default is a sanction within this Court’s “wide discretion” under Rule 37(d).⁵ See Travelers Ins. Co., 785 A.2d at 569; see also Corvese v. Medco Containment Servs., Inc., 687 A.2d 880, 881-82 (R.I. 1997) (holding that trial court has “broad discretion” in granting and denying discovery orders).

Plaintiff moves for an Order of Conditional Default against the Saia Entities with regard to (1) the Saia Entities’ non-response to the May 23 RFP and (2) the Saia Entities’ failure to respond to the May 31 Notice and produce the Schedule A Records. This Court shall address each matter in turn.

A

The May 23 RFP

Plaintiff’s Motion relative to the May 23 RFP implicates Rule 34 and Rule 37(d). Rule 34 authorizes any party to serve on another party a request to produce any

⁵ A Motion for an Order of Conditional Default is distinct from a Motion to Compel. The former Motion seeks a sanction available only where a party has failed to appear for a deposition and/or has not provided a written response to a discovery request. Super. R. Civ. P. 37(d). The latter Motion, conversely, has a much broader application. Parties seeking discovery may move to compel not only where parties resisting discovery do not respond at all to a discovery request, but also where the parties seeking discovery deem the response inadequate. As Rule 37(d) sanctions are generally only available where a party refuses to comply with its discovery obligations, a Motion to Compel is the more common vehicle to address discovery disputes. See Travelers Ins. Co., 785 A.2d at 569.

designated documents which are within the other party's "possession, custody or control" and are relevant to the subject of the litigation. Super. R. Civ. P. 34. The party receiving the request has forty days to respond. Id. Where the receiving party does not respond to the Rule 34 request at all, this Court may sanction such behavior under Rule 37(d). Super. R. Civ. P. 37(d).

Having examined the conditions surrounding Plaintiff's Motion for an Order of Conditional Default relative to the May 23 RFP, this Court denies Plaintiff's Motion as untimely. Rule 34 provides in pertinent part: "[t]he party upon whom the request is served shall serve a written response within 40 days after the service of the request" Super. R. Civ. P. 34 (emphasis added); see 1 Robert B. Kent et al., Rhode Island Civil and Appellate Procedure § 34:5 (West 2004 & supp. 2011). Plaintiff sent the May 23 RFP to the Saia Entities on May 23, 2012. She filed her Motion for an Order of Conditional Default on June 25, 2012. At the time of her Motion, only thirty-three days had elapsed. The Saia Entities, therefore, still had a week to respond to the May 23 RFP before they became vulnerable to Rule 37(d) sanctions. See Super. R. Civ. P. 34. Accordingly, this Court denies Plaintiff's Motion as seven days premature.⁶

B

The May 31 Notice and the Schedule A Records

Plaintiff's Motion for an Order of Conditional Default relative to the May 31 Notice and the Schedule A Records implicates Rule 30(b)(6), Rule 30(b)(5), and Rule 37.

⁶ Plaintiff's Motion is not denied with prejudice. If the Saia Entities do not respond to the May 23 RFP within seven days of today's Decision, Plaintiff may renew her Motion for an Order of Conditional Default. This Court does not decide whether the letter that the Saia Entities sent to Plaintiff following Plaintiff's Motion constitutes a written response to the May 23 RFP.

Rule 30(b)(6) defines a procedure whereby a party may depose a public, private, or government organization. Super. R. Civ. P. 30(b)(6). Under Rule 30(b)(6), the deposing party names the organization as deponent in a notice of deposition or a subpoena and describes “with reasonable particularity the matters on which examination is requested.” Id. The organization must then designate one or more persons to testify on the organization’s behalf “as to matters known or reasonably available to the organization” regarding the deposing party’s stated areas of interest. Id. Rule 30(b)(5) addresses requests for production of documents at the time of deposition. Rule 30(b)(5) states: “If documents are requested to be produced at a deposition, the notice to a party deponent shall be accompanied by a copy of a subpoena duces tecum or a request made in compliance with Rule 34 for the production of documents” Super. R. Civ. P. 30(b)(5).⁷

Rule 37(d) authorizes this Court to make such orders “as are just” when a party fails to respond to discovery requests. Super. R. Civ. P. 37(d). The rule, moreover, expressly provides that a failure to respond to a request to produce a Rule 30(b)(6) designee “may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order” Id. When confronted with a Rule 30(b)(6) notice of deposition therefore, a party must

⁷ Super. R. Civ. P. 45 (“Rule 45”) governs responses to Rule 30(b)(5) document requests via subpoena duces tecum. Rule 45 provides that the subpoenaed party must object to production within fourteen days after service of the subpoena or a time specified in the subpoena, whichever is earlier. Rule 45 also states that a party who fails to obey the subpoena may be deemed in contempt of court. Super. R. Civ. P. 45. Plaintiff, however, has not asked this Court to hold the Saia Entities in contempt for their apparent failure to obey Plaintiff’s subpoena. Rather, Plaintiff seeks an Order of Conditional Default. Accordingly, this Court focuses on the remedy Plaintiff seeks and declines to discuss matters of contempt. Cf. State v. Lead Indus., Ass’n, Inc., 951 A.2d 428, 467 (R.I. 2008) (acknowledging the “severe consequences” of a civil contempt finding).

comply with the request for discovery or seek a protective order. 1 Kent et al., supra, § 30:6. Where the party fails to take such action, this Court may issue an order placing the party in conditional default. See Super. R. Civ. P. 37(d); Travelers Ins. Co., 785 A.2d at 569. As Rule 30(b)(5) requests for production of documents at the time of a deposition are subsumed within Rule 30(b)(6) notices, failures to respond to Rule 30(b)(5) requests are vulnerable to the same type of sanction. See Corvese, 687 A.2d at 881-82 (holding that the trial court has broad discretion in its approach to resolving discovery disputes).

After due consideration of the circumstances surrounding Plaintiff's Motion for an Order of Conditional Default, this Court grants Plaintiff's Motion as it relates to the May 31 Notice and the Rule 30(b)(5) request for the Schedule A Records. Plaintiff noticed the deposition of the Saia Entities official with the most knowledge relative to the Guaranty Documents on May 31, 2012. She requested Rule 30(b)(5) production of the Schedule A Records within the May 31 Notice. The Saia Entities did not respond to either request, nor do they argue that they never received the May 31 Notice. Instead, the Saia Entities assert that Plaintiff considered the letter an acceptable alternative to the deposition and production of the Schedule A Records. The Saia Entities, however, have not demonstrated that Plaintiff assented to receipt of the letter in lieu of compliance with the May 31 Notice. Nothing in Plaintiff's brief, moreover, evinces such an intention. What is clear is that the Saia Entities did not respond to the May 31 Notice or the Rule 30(b)(5) document request therein, nor did they seek a protective order relative to these discovery requests. This Court may sanction such behavior under Rule 37(d). Super. R. Civ. P. 37(d); see Travelers Ins. Co., 785 A.2d at 569.

Nonetheless, the Saia Entities argue that a deposition regarding the Guaranty Documents is unnecessary because the Saia Entities have sufficient assets and insurance to cover any judgment against Jevic. While the Saia Entities may ultimately be correct in their coverage estimates, they are not the arbiters of the scope of discovery. Determining the proper bounds of discovery is a task exclusive to the courts. See, e.g., In re “Agent Orange” Product Liability Litigation, 517 F.3d 76, 103 (2d Cir. 2008) (“A district court has wide latitude to determine the scope of discovery”); Johnston by Johnston v. Lynch, 574 A.2d 934, 945 (N.H. 1990) (“[A] trial court has the authority to determine the scope of discovery”).

At present, however, this Court need not decide whether the May 31 Notice and the Rule 30(b)(5) request for the Schedule A Records seek information beyond the scope of discovery. A failure to respond to a request to produce a Rule 30(b)(6) designee and/or Rule 30(b)(5) documents “may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order” See Super. R. Civ. P. 37(d). The Saia Entities did not file a Motion for a Protective Order ahead of their failure to comply with the May 31 Notice and have yet to file such a Motion. Accordingly, this Court declines to consider the Saia Entities’ arguments as to the ultimate relevancy/necessity of the deposition and document production.⁸ See id.

In sum, the Saia Entities failed to respond to the May 31 Notice or the Rule 30(b)(5) document request therein. Such conduct merits sanctions under Rule 37(d). Accordingly, this Court grants Plaintiff’s Motion for an Order of Conditional Default

⁸ This Court does not comment on the merits of such a Motion for a Protective Order and nothing in this Decision should be construed as doing so.

against the Saia Entities with regard to the May 31 Notice and the Rule 30(b)(5) request for the Schedule A Records. The Saia Entities shall produce the person with the most knowledge of the Guaranty Documents for deposition, as well as the Schedule A Records, or be defaulted. The Saia Entities have twenty days from the date of this Decision to comply.⁹

III

Conclusion

For the foregoing reasons, this Court grants Plaintiff Naysha Berrios' Motion for an Order of Conditional Default against Defendants Saia, Inc. and Saia Motor Freight Line, LLC in part and denies it in part. The Motion is granted as it relates to the May 31 Notice of Deposition and the Rule 30(b)(5) request for production of the Schedule A Records at the time of deposition. The Saia Entities have twenty days from the date of this Decision to produce a deponent with the most knowledge of the Guaranty Documents and the Schedule A Records. The Motion is denied with respect to the May 23 RFP. Plaintiff may renew her Motion relative to the May 23 RFP, however, if the Saia Entities do not respond to that request within seven days from the date of this Decision. Counsel shall submit an appropriate Order for entry.

⁹ At oral argument, the Saia Entities indicated that the parties had previously discussed stipulating to the Saia Entities' assumption of liability for any judgment against Jevic. Nothing in today's Decision forecloses the parties from pursuing this option.