

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

DAVID M. SEKERAK)	CASE NO. CV 10 744047
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY</u>
)	
GT BENEFITS, INC.)	
)	
Defendant.)	

John P. O'Donnell, J.:

The defendant GT Benefits, Inc., has moved under Rule 37 of the Ohio Rules of Civil Procedure for sanctions after the plaintiff David M. Sekerak failed to comply with the court's July 14, 2011 order compelling discovery. For the reasons that follow, the motion is granted.

STATEMENT OF THE FACTS

The complaint and counterclaim

The plaintiff filed this lawsuit on December 21, 2010. By his causes of action for breach of contract, breach of a separate commission agreement, unjust enrichment, and conversion he claims that the defendant failed to pay him money that he is owed for selling insurance policies to the defendant's customers.

The defendant answered generally denying the plaintiff's allegations and filed a counterclaim with the following causes of action: breach of contract, breach of fiduciary duty, breach of the duty of loyalty, tortious interference with business relationships, and fraud. The defendant claims that while Sekerak was serving as its agent he began selling insurance for another brokerage firm and used the leads provided by GT to sell insurance policies for other insurance carriers. The defendant also claims that the plaintiff solicited current clients of GT to

change their insurance to carriers serviced by the other brokerage. As to customers the plaintiff did bring to GT, the defendant claims that Sekerak intentionally omitted pertinent health information from those customers' applications to ensure that coverage would be extended and he would earn a commission. Finally, the counterclaim alleges that the plaintiff sold an unlicensed insurance product to the defendant's customers.

Written discovery and the first motion to compel

On March 28, 2011¹ GT served the plaintiff with written discovery requests, including 21 requests for production of documents. Sekerak produced zero documents in response. Instead, to 17 of those requests, the plaintiff objected on the basis of relevance and responded that he "will supplement answer with court protections in place."² To another request, the plaintiff did not object but repeated that he "will supplement answer with court protections in place."³ In response to two other requests, the plaintiff asserted simply that responsive documents were possessed by the defendant.⁴ Finally, in response to a request for the *curriculum vitae* of any anticipated expert witnesses, the plaintiff responded that he "will provide in accordance with the court's scheduling order and the local civil rules."⁵

Based on the plaintiff's responses – or, more accurately, non-responses – the defendant, on June 22, filed a motion to compel. That motion was granted by an entry journalized July 14.

That entry ordered as follows:

The plaintiff is ordered to serve substantive responses to the unanswered requests for production of documents no later than 08/04/2011. Where the plaintiff claims that the documents sought are already in the defendant's possession then his duty of production is satisfied if he identifies, in writing and with specificity, each document that defendant has.

¹ All dates are in 2011 unless otherwise noted.

² Requests for production of document numbers 3 through 15 inclusive, 17, and 19 through 21 inclusive.

³ Req. for prod. no. 2.

⁴ Req. for prod. nos.1 and 16.

⁵ Req. for prod. no.18.

The entry also warned that failure to comply with the order would result in the imposition of a Civil Rule 37 sanction.

The plaintiff's continued refusal to produce documents

On August 4 the plaintiff, through counsel, corresponded to the defendant's counsel concerning the overdue responses to the requests for production of documents. Once again no documents were produced. Rather, the plaintiff argued that he had already provided all "relevant documentation."⁶ In particular, the plaintiff asserted that his "business interests – which have occurred after the termination date of his contract – have no relevance and cannot lead to discoverable information."⁷

After receiving correspondence from defense counsel reminding him of the court's entry ordering production of documents, the plaintiff, again through counsel, continued to resist production. In correspondence dated August 26 to GT's counsel he claimed that the documents sought "are simply irrelevant to any of the claims you have made in the counterclaim and we will not produce them."

That last letter triggered GT's motion for sanctions, filed August 29. In opposing the motion for sanctions, the plaintiff claims to have "provided all documentation it has that has been requested"⁸ except for documents that he "does not believe are relevant"⁹ despite the previous court order compelling production of those same documents.

LAW AND ANALYSIS

The discovery of documentary and other tangible evidence in a civil lawsuit is covered by Civil Rule 34. That rule allows a party responding to requests for production of documents

⁶ August 4, 2011, correspondence from Brian Moriarty to Mark Fusco and Susan Anderson.

⁷ Id.

⁸ Plaintiff's 9/7/2011 brief in opposition, p. 4.

⁹ Id.

to object to a request as long as the reason for the objection is given. If objections are made, then the requesting party may move the court, under Civil Rule 37, for an order compelling production.

That is exactly what happened in this case. The plaintiff objected to the defendant's requests, the defendant filed a motion to compel, and the court ordered that the plaintiff produce "substantive responses" to the requests for production. Despite that, the plaintiff continues to resist production on the same basis that was already overruled by the court.

This court recognizes a litigant's right to disagree with its ruling. Nevertheless, the orderly administration of civil justice would be nearly impossible if parties to lawsuits were free to decide, without consequence, which orders of a court they would obey and which they would not.

Here, the plaintiff declined to produce documents, claiming they were irrelevant. The defendant filed a motion to compel their production and the court overruled the plaintiff's objections. Ordinarily, the plaintiff would have then produced the requested documents, if grudgingly. In this case, the plaintiff simply asserted the same objections that had already been overruled. Therefore, a sanction is appropriate.

Where a party fails to produce requested documents, Civil Rule 37 allows the court to "make such orders in regard to the failure as are just." The rule also sets forth three kinds of possible orders. The first is an order establishing designated facts in favor of the moving party. Second is an order prohibiting the disobedient party from introducing evidence. The third category is, essentially, an order entering judgment against the disobedient party. Whatever sanction is ordered should be the least severe sanction that is consistent with the purposes of the discovery rules. *Maddox v. City of East Cleveland*, 8th Dist. No. 96390, 2012-Ohio-9, ¶7.

In this case, each party has affirmative claims and the documentary evidence supporting each party's claims appears to be primarily in the possession of the other party, so that each side cannot easily prove its own claims without documents from the other.

The documents at issue in the motion to compel and succeeding motion for sanctions are mostly necessary for the defendant to prove its counterclaims. For example, GT has requested all correspondence since 2009 between Sekarak and "any client or lead of GT Benefits"¹⁰ and between Sekerak and brokers he has worked for since leaving GT.¹¹ These documents could tend to prove GT's claim that Sekerak was working on behalf of other brokers while still employed by GT and the claim that he lured GT's clients to other brokers. On the question of its own damages, the information about which would be in possession of the plaintiff, GT asked Sekerak for commission agreements entered into with other companies.¹² The plaintiff produced nothing, even when asked by request for production of documents number 17 to produce "any document relevant" to the counterclaim.

As to these requests, an order dismissing the plaintiff's affirmative claim would not accomplish what the discovery requests were designed for: to uncover evidence supporting the defendant's counterclaims. Moreover, an order that the plaintiff produce the documents would simply be redundant of the order that has already been ignored and which remains in effect. Yet, any money judgment entered on the counterclaim against the plaintiff as a discovery sanction would only be a guess as to the amount of damages: if the guess is too low, the plaintiff is rewarded for his obstreperousness; if it is too high then the sanction is out of proportion to the offense. Therefore, instead of entering a judgment for money against the

¹⁰ Req. for prod. no. 2.

¹¹ Req., for prod. nos. 3, 4 and 5.

¹² Req., for prod. nos. 6-13 and 15.

plaintiff, an order finding the plaintiff liable to GT on its counterclaims, with the amount of judgment reserved for a later evidentiary hearing, is apt.

The other category of documents sought by the defendant through the document discovery requests is evidence relating to the plaintiff's affirmative claims. Toward this end GT asked for "all documents which support or form the basis for the damages claimed by the plaintiff,"¹³ all documents that "relate in any way"¹⁴ to the plaintiff's claim that GT still owed him commissions, the report of any expert witness the plaintiff intended to call at trial,¹⁵ and "any document intended by the plaintiff to be introduced at trial."¹⁶ Since none of these documents were produced after the court granted the motion to compel, an order prohibiting the plaintiff from admitting into evidence at trial any documents or expert testimony supporting his complaint is appropriate.

CONCLUSION

The defendant's motion for sanctions, filed August 29, 2011, is granted. Judgment is hereby entered in favor of defendant GT Benefits, Inc. and against plaintiff David M. Sekerak on the defendant's counterclaims for breach of contract, breach of fiduciary duty, breach of the duty of loyalty, tortious interference with business relationships and fraud. However, this judgment extends only to the elements of breach of duty and causation of damages on each of those claims. An evidentiary hearing to determine the amount of the damages incurred by the defendant will be scheduled by a subsequent entry. The plaintiff's complaint remains pending¹⁷ and will be scheduled for a trial to take place before the evidentiary hearing on the

¹³ Req. for prod. no. 1.

¹⁴ Req. for prod. no. 16.

¹⁵ Req. for prod. no. 18.

¹⁶ Req. for prod. no. 19.

¹⁷ Other than the claims for unjust enrichment and punitive damages, which were resolved by summary judgment.

defendant's counterclaim damages. At trial the plaintiff is not permitted to admit into evidence any document and any witness testimony other than his own.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this Journal Entry was sent by email, this _____ day of January, 2013, to the following:

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Judge John P. O'Donnell