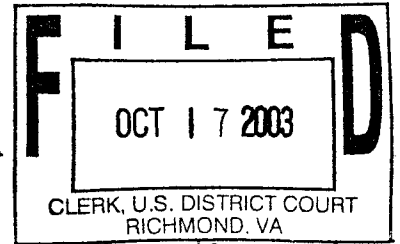


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



DIRECTV, INC.,

Plaintiff,

v.

Civil Action No. 3:03CV321

LARRY KEY,

Defendant.

MEMORANDUM OPINION

Plaintiff brought this action under the Federal Communications Act, alleging Defendant engaged in the unauthorized reception of satellite signals, the unauthorized interception of electronic communications, the possession of a pirate access device, and the use of a pirate access device. On August 5, 2003, Plaintiff moved to compel discovery, asserting that Defendant had failed to respond to Plaintiff's June 24, 2003 interrogatories and requests for production. Plaintiff filed a Notice of Hearing setting the matter for oral argument on August 21, 2003 at 10:00 a.m. Defendant did not respond to the motion to compel, nor did Defendant appear at the hearing.¹ The Court granted Plaintiff's unopposed motion to compel and scheduled a sanctions hearing for August 29, 2003 at 10:00 a.m. At defense counsel's request, the hearing was rescheduled for August 27, 2003.

¹See infra p. 4, note 3.

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All counsel of record appeared before the Court on August 27, 2003. Plaintiff's counsel, Brian Pumphrey, informed the Court that the costs associated with the motion to compel, minus the costs incurred by a partner reviewing his work, totaled \$3,400 to \$3,500. Defense counsel, Curtis Brown, adamantly denied receiving the discovery requests prior to August 7. He acknowledged that his secretary had signed a Federal Express receipt for a package from Plaintiff's law firm, but insisted it contained only a single piece of paper. Mr. Brown told the Court that he never received any phone calls or messages from Mr. Pumphrey prior to the motion to compel. Mr. Brown told the Court that only two people work in his office, himself and his secretary, M. Williams.

The Court informed counsel that, due to the divergent stories, an evidentiary hearing would be held on the matter and the attorneys' secretaries would have to testify. Both attorneys assured the Court that their secretaries would be present. Indeed, during oral arguments, Mr. Brown stated that Plaintiff should examine his secretary under oath. See Transcript of August 27, 2003, Hearing, p. 4. By Order entered September 4, 2003, the evidentiary hearing was scheduled for 9:00 a.m. on October 1, 2003, and counsel were ordered to attend and to produce all necessary witnesses.

Following the August 27 hearing, Defendant moved to vacate the Order granting the motion to compel. On September 11, 2003,

Plaintiff filed a second motion to compel, arguing that Defendant's responses to the initial discovery requests were contradictory and his objections were untimely. Defendant failed to respond to the motion to compel. Both the motion to vacate and the motion to compel were noticed for the October 1 hearing.

The October 1 evidentiary hearing convened at 9:13 a.m. due to Mr. Brown's late arrival in the courtroom. In addition to a number of exhibits, Plaintiff presented the testimony of Mr. Pumphrey; Debbie Holcomb, Mr. Pumphrey's secretary; and Sharyn Mann, a senior operations manager with Federal Express in Richmond. Defendant had no evidence.² Based on the evidence presented at the hearing, the Court makes the following findings of fact:

1. On June 24, 2003, at the direction of Mr. Pumphrey, Debbie Holcomb sent Mr. Brown a cover letter, a request for production of documents, interrogatories, and Rule 26 initial disclosures in a package to be delivered by Federal Express.
2. The package weighed approximately six pounds.
3. The package was delivered to Mr. Brown's reception/front desk area on June 26, 2003 at 11:37 and was signed for by M. Williams.
4. M. Williams is Mr. Brown's secretary and the only employee in Mr. Brown's office.

²Mr. Brown attempted to offer the affidavit of his secretary. The Court refused to accept the affidavit, as the Court had specifically instructed Mr. Brown to have his secretary present to testify. Mr. Brown's suggestion that he misunderstood the Court's order to produce his secretary is belied by the record and is simply one more misrepresentation to the Court. See Order, September 4, 2003; see also, Transcript of August 27, 2003 Hearing, pp. 4, 7, 10-11.

5. On July 29, 2003, Mr. Pumphrey wrote and mailed a letter to Mr. Brown asking him for his responses to the initial discovery requests.
6. On July 29, 2003, Mr. Pumphrey also called Mr. Brown's office and left a detailed message with Mr. Brown's secretary, asking that Mr. Brown return the call because discovery was late.
7. On August 4, 2003, Mr. Pumphrey placed a second telephone call to Mr. Brown's office and left the same message with Mr. Brown's secretary.
8. On August 5, 2003, Mr. Brown called Mr. Pumphrey and told him that he had never received the discovery requests.
9. On August 6, 2003, a courier hand-delivered a letter from Mr. Pumphrey to Mr. Brown. The letter notified Mr. Brown of Plaintiff's motion to compel, listed the Court's available hearing dates, and requested Mr. Brown select a hearing date by August 7.
10. Mr. Pumphrey received no response from Mr. Brown, and on August 8, sent a second letter to Mr. Brown noticing the hearing for 10:00 a.m. on August 21, 2003.
11. Mr. Brown did not object to the hearing date, nor did he file a response to the motion to compel.
12. Mr. Brown did not appear at the August 21 hearing and made no reasonable effort to notify the Court or Plaintiff of his unavailability.³
13. Mr. Brown did not respond to the second motion to compel.
14. Mr. Brown made a material misrepresentation to the Court during oral argument and in his motion to vacate when he stated that he did not receive Plaintiff's discovery requests

³Following the hearing, the Court received a letter from Mr. Brown dated August 18, 2003, in which Mr. Brown stated that he was unavailable for the hearing due to previously scheduled matters and that Plaintiff had not cleared the hearing date with Mr. Brown prior to noticing the hearing. Mr. Brown's letter was not reasonably calculated to reach the Court or Mr. Pumphrey prior to the scheduled hearing. Moreover, contrary to Mr. Brown's representations, he was given an opportunity to select the hearing date but he failed to respond in a timely fashion.

on June 26, 2003.

15. Mr. Brown received the discovery requests on June 26th and knowingly failed to timely respond to them.
16. As of October 1, 2003, Plaintiff had incurred \$9178 in fees and \$707.43 in costs in connection with the first motion to compel.

Rule 37 of the Federal Rules of Civil Procedure sets forth the consequences for failure to comply with discovery and authorizes the imposition of sanctions in cases in which there has been an abuse of the discovery rules. See Stillman v. Edmund Scientific Co., 522 F.2d 798, 801 (4th Cir. 1975). The Rule is flexible in its nature and a court has broad discretion in its choice of the type and degree of the sanctions to be imposed. Id. If a motion to compel is granted, "the court shall, after affording an opportunity to be heard, require the party ... whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified." Fed. R. Civ. P. 37(a)(4). The Fourth Circuit has enunciated a four-part test to use in determining what sanctions should be imposed under Rule 37: "[t]he court must determine (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that non-compliance

caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would be effective." Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001).

In determining the amount of monetary sanctions, the Court has considered Mr. Pumphrey's affidavits detailing his fees and costs associated with the first motion to compel as well as the affidavit of James W. Morris, III.⁴ The Court finds that Plaintiff's fees and costs are reasonable in light of the three court appearances on Plaintiff's behalf, the necessary engagement of another attorney to conduct the evidentiary hearing so that Mr. Pumphrey could testify, and the necessary preparation and production of correspondence, briefs, affidavits, exhibits and witnesses. It is clear to the Court that Mr. Brown acted in bad faith and prejudiced Plaintiff when he failed to respond to Plaintiff's discovery requests, telephone calls, and letters; failed to appear for the August 21st hearing; failed to produce his secretary for examination on October 1; and made material misrepresentations to the Court. Mr. Brown had a number of opportunities to remedy his errors and misrepresentations, and he chose not to do so. Clearly, Mr.

⁴Three affidavits from Mr. Pumphrey were filed with the Court. In updating his fees and costs, Mr. Pumphrey submitted Mr. Morris' affidavit as well as two more of his own which, although not actually filed with the Court, were copied to Mr. Brown via Federal Express. The Court finds that Mr. Brown had sufficient notice of the affidavits and has therefore considered all of them.

Brown's egregious behavior warrants deterrence, and the Court finds that nothing less than a full award of Plaintiff's fees and costs would be effective.

The Court has reviewed Plaintiff's second motion to compel. Defendant's objections are untimely, as the time for objections expired fifteen days after the receipt of discovery on June 26, 2003. Moreover, the Court finds that Defendant has provided inconsistent and incomplete answers to the interrogatories. Plaintiff's second motion to compel will be granted, and Defendant will be ordered to amend his responses to the discovery requests as detailed in the second motion to compel.

Virginia Rule 3.3, Candor Toward the Tribunal, states in part that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal." Virginia Rules of Professional Conduct, Rule 3.3. Rule 83.1(I) of the Local Rules of the United States District Court for the Eastern District of Virginia adopts the Virginia Rules as the ethical standards relating to the practice of law in this Court. Mr. Brown made misrepresentations of fact to this Court in violation of Rule 3.3 and Rule 83.1(I). Accordingly, the Court finds it necessary to refer the matter to the Virginia State Bar for further disciplinary proceedings, as appropriate, and shall do so forthwith.

Plaintiff's motion for sanctions will be granted in the amount of \$9885.43 to be paid by Mr. Brown personally. Defendant's motion

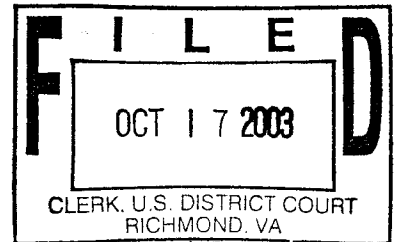
to vacate will be denied, based not only on the Court's factual findings but also on counsel's failure to file a response to the motion to compel, failure to appear for oral argument on the motion to compel, and failure to submit a brief in support of his motion to vacate as required by the Local Rules. Mr. Brown's egregious conduct in the case at bar has seriously jeopardized whatever defenses his client may have had. If Defendant wishes to submit a motion to substitute counsel, or even to proceed pro se, the Court will give it due consideration.

Let the Clerk send a copy of the Memorandum Opinion and accompanying Order to Defendant, the Virginia State Bar, and all counsel of record.


UNITED STATES MAGISTRATE JUDGE

Richmond, Virginia
Date: OCT 17 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



DIRECTV, INC.,

Plaintiff,

v.

Civil Action No. 3:03CV321

LARRY KEY,

Defendant.

ORDER

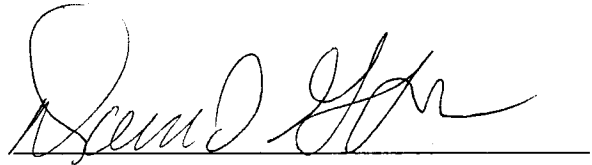
In accordance with the accompanying Memorandum Opinion, it is ORDERED that:

1. Plaintiff's motion for sanctions is GRANTED in the amount of \$9885.43.
2. Defendant's counsel, Mr. Brown, shall be personally responsible for the payment of all monetary sanctions.
3. Defendant's motion to vacate is DENIED.
4. Plaintiff's second motion to compel is GRANTED.
 - A. Defendant is DIRECTED to answer Interrogatory No. 12 and Request for Production No. 11;
 - B. Defendant is DIRECTED to supplement and/or amend his answers to Interrogatory Nos. 4, 5, 6, 7, 8, 10, 14, and 16 and Requests for Production Nos. 1 and 3 to alleviate the inconsistencies detailed in Plaintiff's Second Motion to Compel;
 - C. Defendant's responses are due no later than eleven (11) days from the date of entry hereof.
5. Plaintiff is ADVISED that this matter will be referred to the Virginia State Bar for further disciplinary proceedings, as

appropriate, in regard to the conduct of Attorney Brown in this case.

Let the Clerk send a copy of the Order and accompanying Memorandum Opinion to Defendant, the Virginia State Bar, and all counsel of record.

And it is so ORDERED.

A handwritten signature in cursive script, appearing to read "David J. H. [unclear]", written over a horizontal line.

UNITED STATES MAGISTRATE JUDGE

Richmond, Virginia
Date: OCT 17 2003