UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

THOMAS C. MILLER and DENISE M. MILLER,

Debtors.
_____/

Case No. DT 08-01545
Hon. Scott W. Dales
Chapter 7

BOSSIO & ASSOCIATES LLC, CHM MANAGEMENT LLC, JON E. CABOT, FREDERICK GIORDANO, and MANAIA CAPITAL MANAGEMENT, INC.,

Plaintiffs,

v.

THOMAS C. MILLER and DENISE M. MILLER,

Defendants,

and

THOMAS C. MILLER and DENISE M. MILLER,

Third-Party Plaintiffs,

v.

MADDIN HAUSER WARTELL ROTH & HELLER, P.C., a Michigan Professional Corporation, and LAWRENCE G. MALO, an individual,

Third-Party Defendants.
_____/

Adversary Pro. No. 08-80224

ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

On November 4, 2009, the Defendants, Thomas and Denise Miller ("Defendants") filed their Motion for Sanctions for Violation of this Court's Orders, Including Dismissal of Plaintiffs' Complaint Pursuant to BR 7037(B)(2) (the "Motion," DN 115). The court issued a Scheduling Order (DN 116) directing the Plaintiffs[1] to respond to the Motion. On November 16, 2009, counsel for Plaintiffs filed Creditor-Plaintiffs' Response to Defendants' Second Motion For Sanctions & Brief in Support Thereof (the "Response," DN 123). As predicted in the Scheduling Order, the court will resolve the Motion and the Response without oral argument.

The Motion is the Defendants' third motion under Fed. R. Civ. P. 37 prompted by the Plaintiffs' refusal to comply with their discovery obligations generally under Fed. R. Civ. P. 26 and more specifically under Fed. R. Civ. P. 33 and 34. By order entered August 5, 2009 (the "First Discovery Order," DN 62), the court directed the Plaintiffs to comply with outstanding discovery within forty-five days from the entry of the order. This forty-five day extension was in addition to the time allowed under the rules, and the month the Plaintiffs had already arrogated to themselves by ignoring their discovery obligations in the first place.

After the court-ordered deadline expired without compliance, the Defendants filed another discovery motion under Fed. R. Civ. P. 37 (the "Second Discovery Motion"). From the bench on September 30, 2009, the court granted the Second Discovery Motion and directed the Plaintiffs to comply with these same discovery obligations on or before October 9, 2009. The court also ordered the Plaintiffs to pay the Defendants $1,553.90 to compensate them for having to make the Second Discovery Motion. This award of costs was less than the Defendants requested because the court was endeavoring to tailor the sanction to compensate the Defendants

[1] The Plaintiffs are Bossio & Associates, LLC ("Bossio"), CHM Management LLC ("CHM"), Jon E. Cabot ("Cabot"), Frederick Giordano ("Giordano"), and Manaia Capital Management, Inc. ("Manaia" and with Bossio, CHM, Cabot, and Giordano referred to collectively herein as "Plaintiffs").

and to encourage the Plaintiffs' compliance, rather than to punish their disobedience. The court embodied its ruling in an order dated October 9, 2009 (the "Second Discovery Order," DN 104).

In granting the Defendants' Second Discovery Motion, the court continued its retrained response to the Plaintiff's disobedience by extending the deadline for approximately nine more days. In addition, as an incrementally more severe sanction, the court forbid the Plaintiffs from interposing objections to the discovery that had gone unanswered since June. The modest monetary sanction and the forfeiture of objections did not obtain compliance, but somehow prompted the Plaintiffs to make a motion for a protective order, premised on a contrived procedural argument about the differences between the waiver provisions of Fed. R. Civ. P. 33 and 34. The court rejected the argument, reminding the Plaintiffs that the forfeiture of their right to object to the outstanding discovery requests was part of the court's sanction for discovery. See Order Regarding Motion for Protective Order (DN 106) (explaining that "the court forfeited Plaintiffs' right to object to specific requests as a measured sanction under Fed. R. Civ. P. 37(b)" for their non-compliance with the court's August 5, 2009 order).

To ensure that the Plaintiffs did not miss the point, the court frankly admonished them by warning that "in view of subsequent events in the case the court would be inclined to stiffen the penalty for Plaintiffs' contumacious resistance to the very procedures they invoked when they filed the complaint in this adversary proceeding." Id. at p. 4. This strongly-worded warning ought to have induced a serious litigant to honor its discovery obligations, but in this case, it did not. The court therefore concludes that after its measured though fruitless orders requiring the Plaintiffs to comply, the time for judicial restraint has passed because the Plaintiffs appear to be motivated by an illegitimate desire to harass the Defendants rather than to pursue claims against

them. The Response that the Plaintiffs' counsel filed confirms this conclusion, as it is infected with purposeful obfuscation.

According to the Response, Plaintiffs Manaia and Giordano have not signed answers to interrogatories as the federal rules require, and have not responded to their counsel's requests to do so.[2] It also appears the Plaintiffs have not remitted to the Defendants the $1,553.90 sanction even though the court's order required payment by October 9, 2009. Instead, counsel reports that he is attempting to avoid the sanction payment by negotiating, stating, "[o]bviously, if settlement fails, sanctions will have to be paid." See Response at p.5. This insouciant remark suggests, incorrectly, that compliance with the court's Second Discovery Order is negotiable. One might fairly infer that Plaintiffs regard compliance with their discovery obligations as similarly negotiable.

Moreover, although the Second Discovery Order clearly stated that the Plaintiffs waived any right to object to discovery as an additional discovery sanction, they persist in justifying their failure to respond to discovery by asserting in their Response the very objections the court's order precluded. See, e.g., Response at p. 3 ("Concerning the production request for tax returns, utterly interposed for harassment, confidential and in large part irrelevant . . ."), and id. at p. 4 ("The request [for banking information], which is largely irrelevant, and certainly confidential . . . and therefore harassment, not a bona fide Discovery request . . .").

In response to the Motion which challenged the sufficiency of answers to interrogatories and document production requests, the court would have expected the Plaintiffs at least to supply the court with the interrogatory answers and perhaps a list of documents produced. They have not. This leaves the court to speculate about the extent of the Plaintiffs' compliance with the

[2] See Response at p. 2-3. ("…Anthony Manaia and Frederick Giordano have not responded to the [Plaintiffs' counsel], notwithstanding transmission of notices and correspondences as recent as November 5, 2009.")

court's orders. In addition, the court cannot determine whether the three Plaintiffs who supposedly did answer the interrogatories gave their answers under oath, as Fed. R. Civ. P. 33(b)(3) requires. Instead, Plaintiffs' counsel reports that he "subsequently" faxed or emailed the signature pages of Bossio, Cabot, and Massoll, but he did not favor the court with any copies.

As for document requests, instead of an affidavit or other evidence of compliance, the Plaintiffs offer their counsel's statement that "the undersigned has provided all documents, in his possession, and *reasonably believed to be in the possession of Plaintiffs,* Bossio & Associates, LLC, John Cabot, and CHM Management." See Response at p. 3 (emphasis added). After two discovery orders, counsel's "reasonable belief," without an explanation of the basis for that belief, is not a suitable substitute for an affidavit or solemn declaration from the clients themselves that they have supplied all documents. Given the court's perception of counsel's role in the obfuscation and non-compliance, the statement is an inadequate response to the third discovery motion.

In addition, the Response specifically addresses only a few of the Defendants' interrogatories enumerated in the Motion. See Response at p. 5 (regarding banking information and tax returns). Regarding the tax returns, it appears that Bossio has not provided returns as Defendants' properly requested for 2003-2006 (the years closer in time to the events in question), but provided more recent returns. Tax information for prior years might have assisted the Defendants in defending themselves in this matter, and in the absence of more persuasive argument from Plaintiffs' counsel, such information seems "reasonably calculated to lead to the discovery of admissible evidence," even if the returns themselves may not be admissible at trial. See Fed. R. Civ. P. 26(b)(1) (scope of discovery).

Regarding the requests designed to discover the basis for claims against Mrs. Miller, the Plaintiffs did not meaningfully provide information about Mrs. Miller's role in the controversy. Nor did they provide information about their decision to invest in the underlying businesses or projects at the heart of this dispute, information bearing on reliance. Instead, according to the Defendants' unchallenged report, the Plaintiffs simply said they talked to the Defendants. The response is not plausible.

Similarly, because the complaint alleges Cabot "borrowed $500,000.00 against a home equity line of credit and has been paying interest at a variable rate on this credit draw since he made his investment," Defendants sought discovery concerning the home equity line. In their Response, after arguing (despite the court's prior decision to bar them from objecting to discovery), that the request for "banking information" is intrusive and burdensome, and irrelevant, their counsel states:

> Notwithstanding the paragraph [13 of the Complaint] concerning Mr. Cabot's home equity loan, he did not obtain that loan for this purpose, and therefore such documentation, confidential in nature in any event, is not responsive to the request. Therefore, Plaintiffs' response, as to the foregoing Plaintiffs as "none," is proper and responsive.

See Response at p. 4; compare id. with Complaint at ¶ 13. Given the Plaintiffs' own allegations in the Complaint, it is hardly surprising that "none" invited a discovery sanction motion. It certainly casts doubt on the veracity and diligence of the Plaintiffs and their counsel.

The balance of the Response, from page 6 onward, consists of legal argument in support of the timeliness of the Complaint more generally, argument utterly premature and unhelpful to the court in resolving this Motion. The purpose of a discovery motion practice is to compel or demonstrate compliance with the discovery rules, not to argue the merits of the case.

Having waded through the muddy waters of the Response, and with the benefit of observing the Plaintiffs' conduct of their case in person and on paper, the court is convinced that the Plaintiffs have little interest in pursuing a judgment under 11 U.S.C. §523. Although the Plaintiffs filed their complaint in May, 2008, they did not meaningfully pursue prosecution until after the court issued its notice of intent to dismiss for failure to prosecute, in November, 2008. Thereafter, the Plaintiffs moved for default judgment. The court denied the motion, but conditioned the denial on the Defendants' payment of the Plaintiffs' costs. Then, the Plaintiffs' original co-counsel moved to withdraw, citing the Plaintiffs' failure to abide by the terms and conditions of the retainer agreement. Their attitude toward their discovery obligations further evidences a dearth of legitimacy in their prosecution of this case: although the Defendants served discovery requests on the Plaintiffs on June 4, 2009, the requests remain largely unanswered as of today, after several court orders directing them to fully respond. The Plaintiffs have also failed to respond to the Defendants' Request to Admit within the time prescribed by Fed. R. Civ. P 36, or at least have not challenged Defendants' report of this failure. Consequently, because of the rule's self-effectuating provisions, the Plaintiffs may be deemed to have admitted everything in the admission request. Indeed, in the Response, Plaintiffs' counsel admits that two of the Plaintiffs, Manaia and Giordano, have even failed to respond to his request that they sign the interrogatory answers, prompting counsel to announce his intention to seek permission to withdraw from representing them.

Further, in response to the Defendants' cross-motion for dismissal, which came on for hearing in Traverse City on October 20, 2009, the Plaintiffs initially filed no response. Instead, their counsel merely stated on the record that he did not "believe" the dismissal was warranted. Given the strictures of Fed. R. Civ. P. 56, the casual response was risky. Nevertheless, the court

afforded the Plaintiffs another opportunity to properly oppose the cross-motion for dismissal, see Order Regarding Plaintiffs' Summary Judgment Motion and Defendants' Request For Dismissal (DN 111). But even then the Plaintiffs filed a short response, unadorned by specific citations to the record, which would have required the court to comb through the file to ferret out support for the Plaintiffs' position.[3]

Likewise, Plaintiffs pursued another revealing litigation strategy with respect to the modest sanction the court ordered them to pay by October 9, 2009. It appears the Plaintiffs were willing to risk dismissal of their supposedly multi-million dollar lawsuit under Fed. R. Civ. P. 37(b) to avoid paying $1,553.90 on or before October 9, 2009.

Even though the Plaintiffs have ignored numerous deadlines prescribed in the rules and by court order, they half-heartedly insist upon obtaining relief from the court in the form of a judgment excepting various debts from discharge. On several occasions on the record, the court has reminded Plaintiffs' counsel that his clients have asked the court to grant relief, so they should not be surprised if the court enforces the very rules they invoked. Despite these warnings, Plaintiffs have still failed to satisfy the court that they have complied with its orders or their basic obligations with respect to discovery requests that have been pending for over five months.

Their Response to the present Motion is similarly half-hearted and generally not worthy of the moniker "Response." With as many warnings as the court has given to Plaintiffs' counsel, the court can no longer attribute his obstreperous behavior to idiosyncratic litigation style. Given the recurring motif evincing the Plaintiffs' lack of interest in their claims against the Defendants,

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[3] For example, when responding to the argument that the Plaintiffs failed to support their claims against Mrs. Miller, the Plaintiffs stated: "[A] review of the Complaint filed in this matter, that filed with the Oakland County Circuit Court, and subsequently entered as an exhibit to a number of pleadings filed in this Court, and in the Plaintiff's Response Brief filed in opposition to Defendants' Motion for Summary Disposition in the Oakland County Circuit Court matter, Plaintiffs set forth, with specificity, supported by deposition testimony or various documents" [sic]. See Creditor-Plaintiffs' Response to Defendants' Motion to Dismiss their Adversary Action (DN 118, pg.10).

and given the destitute state of the Defendants (their schedules suggest any victory in this litigation would be financially meaningless), the court surmises the Plaintiffs are pursuing this lawsuit to harass the Defendants and multiply their legal expenses rather than to achieve any meaningful recovery. Such purposes are anathema to the court, and may subject counsel to sanction. 28 U.S.C. § 1927.

Having resorted on several occasions to less severe sanctions, and being convinced the Plaintiffs' discovery obstruction cannot be remedied and that they are not pursuing this case in good faith, the court shall dismiss the Plaintiffs' claims as a sanction under Fed. R. Civ. P. 37(b)(2)(A)(v). This dismissal however, does not end the litigation because the Defendants' third-party complaint against Lawrence G. Malo and their former law firm remains pending. See Fed. R. Civ. P. 54(b).

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiffs' Complaint is DISMISSED under Fed. R. Civ. P. 37(b)(2)(A)(v).

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Curtis R. Willner, Esq., Wallace H. Tuttle, Esq., Lawrence P. Hanson, Esq., J. Leonard Hyman, Esq., and David C. Anderson, Esq.

IT IS SO ORDERED.

Scott W. Dales
United States Bankruptcy Judge

Dated: November 20, 2009