

VERMONT SUPERIOR COURT
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Middlebury VT 05753
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CIVIL DIVISION
Case No. 21-CV-00177

BTS, Inc. v. Joseph Romano et al

ENTRY REGARDING MOTION

Title: Motion for Sanctions (Motion: 3)
Filer: John M Mazzuchi
Filed Date: September 22, 2021

The motion is DENIED.

On July 6, 2021, Plaintiff BTS, Inc. ("Plaintiff") served its First Set of Discovery Requests to Defendant Joseph Romano ("Defendant"). No deadline for discovery had been decided on nor discussed amongst the parties or with the court.

Plaintiff's counsel sent two short emails to Defendant's counsel, on August 9 and August 13, 2021, to inquire about its responses to the set of interrogatories sent on July 6, 2021. Defendant's counsel did not respond.

On September 22, 2021, Plaintiff filed this Motion for Sanctions based on V.R.C.P. 37(d). Defendant filed its Opposition and a Discovery Certificate showing service on October 6, 2021 of Defendant's Answers to Plaintiff's First Set of Discovery Requests. Plaintiff filed a Reply to Defendant's Opposition.

Vermont Rule of Civil Procedure 37 generally provides for sanctions against parties that fail to properly participate in the discovery process. Rule 37(d) provides sanctions for a party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for production. V.R.C.P. 37(d).

In opposing the motion, Defendant, relying on V.R.C.P. 37(b)(2), argues that a court order to compel discovery must be moved for and failed to be complied with before a motion for sanctions under V.R.C.P. 37(d) may be properly filed and granted,. Further, Defendant argues that the instant case would not even be ripe for a motion to compel discovery, since no deadline had been established for the discovery responses. Defendant also argues that Plaintiff's counsel's affidavit does not satisfy the meet-and-confer requirement of V.R.C.P. 26(h), even if Plaintiff had filed a motion to compel.

Plaintiff argues that a motion to compel discovery is not a prerequisite to filing a motion for sanctions under V.R.C.P. 37(d), unless Defendant had improperly objected to the discovery requests or provided partial answers. Defendant did not do so in the instant case.

V.R.C.P. 26 lays out the general provisions governing discovery. Counsel is obligated “to make good faith efforts among themselves to resolve or reduce all difference relating to discovery procedures and to avoid filing unnecessary motions.” V.R.C.P. 26(h). Further, “no motions pursuant to Rules 26 and 37 shall be filed unless counsel making the motion has conferred with opposing counsel or has attempted to confer about the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution.” *Id.* “‘Confer’ means to meet, in person or by telephone, and make a genuine effort to resolve the dispute by determining ... (a) what the requesting party is actually seeking, (b) what the discovering party is reasonably capable of producing that is responsive to the request, and (c) what specific genuine issues, if any, cannot be resolved without judicial intervention.” *U.S. Bancorp Equip. Fin., Inc. v. Babylon Transit, Inc.*, 270 F.R.D. 136, 140 (E.D.N.Y. 2010). Rule 37 contemplates that lawyers will move beyond the initial rhetoric and make a more detailed assessment of each other’s position. 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 37.

Here, Plaintiff’s counsel sent two emails to Defendant’s counsel, to which there was no response. The two emails are short and do not indicate more than Defendant not having yet filed responses to the interrogatories. Plaintiff’s counsel did not propose a deadline for responding after which Plaintiff’s counsel intended to file a motion. Defendant’s counsel represents that there was a telephone conversation on August 27, 2021 in which Defendant’s counsel acknowledged the obligation to respond to the discovery requests and said they would be forthcoming. He represents that no firm deadline was established. Plaintiff’s counsel filed this motion approximately three weeks later without further attempts at communication.

V.R.C.P. 37 provides the rules for filing motions to compel discovery and identifies the types of discovery misconduct that will result in sanctions against parties. V.R.C.P. 37 (a) addresses failure to answer questions and provides for the filing of a motion to compel. If a motion to compel is granted, attorneys fees and expenses may be imposed. V.R.C.P. 37(d) addresses the situation where a party has not merely declined to answer specific questions or requests but has declined to participate in discovery at all. Reporter’s Notes, V.R.C.P. 37. The potential sanctions are much more serious and could affect the substantive claims in the litigation. For example, they include establishment of facts against the non-responsive party and preclusion of use of evidence. V.R.C.P. 37 (b)(2).

Even if a party has not violated a court order, a court can allow for sanctions pursuant to V.R.C.P. 37(d) if there is behavior that demonstrates “especially serious disregard of the obligations imposed by the discovery rules.” See 8B Wright & Miller, *Federal Practice & Procedure: Civil* § 2291 (3d ed.). In *Cornelius v. North Country Health Systems, Inc.*, the Vermont Supreme Court affirmed a trial court’s use of Rule 37(d) to strike a party’s statement of disputed facts and exhibits as a sanction for his failure to appear at his own deposition, even though the sanction was not preceded by a motion to compel or discovery order. No. 2018-143,

2018 WL 6721755, at *3 (Vt. Dec. 21, 2018). In that case, the plaintiff sued his former employer under various claims. *Id.* at *1. The defendants served a notice of their intent to depose the plaintiff, along with their answer, after the denial of their motion to dismiss. *Id.* After the plaintiff failed to appear for the deposition, the defendants filed a motion for sanctions and a motion for summary judgment. *Id.* The trial court set a hearing for the motion for sanctions and ordered plaintiff to attend in-person to show cause as to why the action should not be dismissed. *Id.* at *2. However, the plaintiff requested to participate by telephone, which the trial court denied, and on the day before the hearing, the plaintiff filed a belated response to the motion for sanctions, asserting that he never received the motion and that he was unable to attend the hearing “due to restraints on his personal liberty.” *Id.* The plaintiff did not appear at the hearing and the trial court imposed Rule 37(d) sanctions. *Id.*

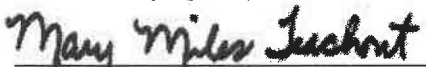
Here, Defendant’s counsel acknowledged the obligation to answer the discovery requests in the telephone call on August 27th, and indicated that discovery would be forthcoming. Plaintiff did not seek to establish a deadline with Defendant’s counsel or file a motion to compel discovery prior to the filing of the motion for sanctions under V.R.C.P. 37(d). While there is no explicit requirement that a motion for sanctions pursuant to V.R.C.P. 37 requires prior filing of a motion for a court order to compel, courts often find sanctions motions to be premature if filed before a motion to compel discovery.

In *Cornelius*, the plaintiff’s behavior showed “serious disregard of the obligations imposed by the discovery rules.” That is not the situation here. The court expects attorneys to exhaust simple informal communication efforts that minimize costs for all (telephone, email, letter), particularly where there has been a representation of intent to provide discovery responses. If those are not successful, a motion to compel should precede a motion for sanctions, which is a type of motion designed for parties showing disregard for the obligation altogether.

It is also noted that the obligation to meet-and-confer applies to any motion filed under Rule 37, whether filed under Rule 37 (a) (motion to compel) or Rule 37 (d) sanctions for failure to respond. The requirement was not satisfactorily met in this case.

Defendant was tardy in responding to discovery requests, but was not ignoring them, as he acknowledged the need to respond and represented that responses were forthcoming. It was premature of Plaintiff’s counsel to seek sanctions under Rule 37 (d) under this circumstance. Therefore, the motion is denied.

Electronically signed pursuant to V.R.E.F. 9(d) on December 2, 2021 at 10:52 AM.



Mary Miles Teachout
Superior Court Judge