UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION
CIVIL ACTION NO. [redacted]
Electronically Filed

Jane Doe [redacted] PLAINTIFF

v.

Our client [redacted] DEFENDANTS

DEFENDANTS' MOTION FOR COSTS AND FEES

Defendants, Our client [redacted] ("Client [redacted] and Our client [redacted] ("Mr. Client [redacted] by and through counsel, move this Court for an award from Plaintiff's counsel, Bard [redacted] and Smith Smith [redacted] of Defendants' costs and fees incurred: (i) in preparation for and participation in depositions taken in Philadelphia on February 26, 2013, of Defense Logistics Agency – Troop Support ("DLATS") employees [redacted] DLATS1 [redacted] and [redacted] DLATS2 [redacted] (ii) in connection with Defendants' efforts to have Lowry [redacted] admitted as counsel for Defendants pro hac vice, and (iii) in preparation for and participation in an emergency hearing before Magistrate [redacted] on February 25, 2013, on Defendants' Emergency Motion regarding the depositions. In support of this motion, made pursuant to 28 U.S.C.A. §1927, Client [redacted] and Mr. Client [redacted] state as follows:

COUNSEL'S UNREASONABLE AND VEXATIOUS CONDUCT

This motion arises out of the concealment by Mr. [redacted] and Mr. Smith [redacted] from the Court and counsel of Defendants, that counsel for DLATS would severely limit the scope of the depositions of Ms. DLATS1 [redacted] and Ms. DLATS2 [redacted] This resulted in the Court holding a useless hearing and counsel for Defendants preparing for and (in Ms. Defense [redacted]'s case traveling to

Philadelphia for) depositions which were so narrowly limited as to prevent questioning about a range of topics useful to Defendants' defense of Ms. [redacted] claims.

Subpoenas for the depositions of Ms. [redacted] and Ms. [redacted] to be taken at DLATS facilities in Philadelphia, were served by Mr. [redacted] and Mr. [redacted] on February 13, 2013. Copies of those subpoenas are attached hereto as Exhibit A. There is no indication in those subpoenas that the subject matter of the depositions was to be limited in any way. Notices of the depositions were filed and served on February 15, 2013 (Docket Entries 89 and 90 signed by Mr. [redacted] on behalf of Mr. [redacted] and Mr. [redacted] There is no hint in those notices that the subject matter of the depositions was to be limited in any way.*

Defendants wanted to engage attorney [redacted] whose office is in Philadelphia, who knows the witnesses, and who is familiar with DLATS procedures, regulations and terminology, to assist in the taking of the depositions. What should have been a routine motion to admit Mr. [redacted] pro hoc vice (Docket Entry No. 91 – filed at 9:30 am on February 22, 2013) was objected to by counsel to Ms. [redacted] Plaintiff's Response to Defendants' Motion for Admission Pro Hac Vice of [redacted] (Docket Index 92 – signed by Mr. [redacted] on behalf of Mr. [redacted] and Mr. [redacted]

* Counsel for Ms. [redacted] unilaterally subpoenaed Ms. [redacted] and Ms. [redacted] to give their depositions, without consulting counsel for Defendants about their availability on February 26, 2013. Ms. [redacted] and Ms. [redacted] both signed the "Justification and Authority" for the non-bid contract granted by the government to [redacted] which is at the heart of this lawsuit. Ms. [redacted] and Ms. [redacted] justified the contract award as being "designed to provide work for [redacted] so that a viable and valuable tent component manufacturer can be maintained." Justification For Other Than Full And Open Competition, dated June 17, 2011, at § 9. Attached hereto as Exhibit B.

As a consequence of this objection to Mr. [redacted] engagement, Defendants filed an Emergency Motion for Discovery on February 25, 2013 (Docket Entry No. 93). This motion stated, among other things:

> This aggressive use of the Protective Order raised the issue of whether counsel for Defendants will be able to ask these government witnesses questions about documents which, while provided by [redacted] to the government, were nonetheless marked confidential when produced by Ms. [redacted] to Defendants in this litigation. In particular, Defendants need to ask these witnesses about documents provided by [redacted] to the government for the purpose of calculating [redacted] Minimum Sustaining Rate and documents provided to the government for the purpose of being awarded a contract whose award was not subject to full and open competition.

(Emphasis supplied.)

A hearing on Defendants' Emergency Motion was held before Magistrate [redacted] at 5:00 pm on February 25, 2013. That hearing lasted approximately one hour and, during the hearing, Mr. [redacted] argued forcefully that the Court should not allow Mr. [redacted] to be engaged by Defendants and that he should not participate in the depositions of Ms. [redacted] and Ms. [redacted] Mr. [redacted] also argued vigorously that Defendants should not be able to use documents produced by Plaintiff and marked "Confidential" to question the witnesses, even if those documents had been previously furnished to DLATS. At no time during that hearing did Mr. [redacted] or Mr. [redacted] inform the Court or counsel for Defendants that these issues were moot because the subject matter of the depositions was to be severely limited and that counsel for DLATS would not allow questioning of these witnesses about any of the documents which Defendants' counsel desired to use.

Defendants' counsel [redacted] attended the depositions in Philadelphia, Mr. Cook and [redacted] participated by telephone. Mr. [redacted] attended the depositions but,

[†] Magistrate [redacted] ruled that Mr. [redacted] could attend the depositions, but not participate in the depositions.

consistent with Magistrate [redacted]'s preliminary ruling the day before, Mr. Lowry did not ask questions. Attending for Plaintiff were [redacted] Bard and [redacted] The witnesses were represented by [redacted] with DLATS.‡

Immediately prior to the beginning of the deposition of Ms. DLATS2 Ms. [redacted] handed Ms. Defense a letter dated February 12, 2013,§ from [redacted], Counsel to DLATS, addressed to Mr. Bard and announced that the witnesses would be allowed to testify only about two subjects: (a) the conversations that took place between Mr. Client Ms. DLATS2 and Ms. DLATS1 during an April 4, 2011** meeting, and (b) the questions of whether Client had requested and/or received a minimum sustaining rate-based or warstopper funded contract, order or award. This was the first time counsel for Defendants had any clue that the scope of the questioning of these witnesses would be so severely limited.

Counsel for Defendants were advised by counsel for DLATS that the "Touhy requirements" gave counsel to DLATS the authority to approve or not approve the taking of the depositions of Ms. DLATS1 and Ms. DLATS2 and the authority, if the depositions were allowed at all, to limit the scope of the questioning. The February 12, 2013, letter to Mr. Bard (Exhibit D) states:

> Through emails, dated February 8, and February 11, 2013, from Mr. Smith of your firm, it has been clarified, that testimony will be limited to information that may have been discussed by Mr. Client Ms. DLATS2 and Ms. DLATS1 in connection with Ms. Doe Mrs. Doe family and/or DoeCo as well as information concerning whether Client ever requested and/or received a MSR or warstopper contract or requested a portion of the sole source contract work awarded to DoeCo in 2011. . . .

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‡ The factual allegations regarding what took place during the depositions are supported by excerpts from the rough transcript of those depositions attached as Exhibit C hereto.

§ A copy of this letter is attached hereto as Exhibit D.

** The meeting actually took place on August 4, 2011, not April 4, 2011, but counsel for DLATS allowed questioning about the August 4 meeting in spite of the limitations found in the letter.

> Your letter of February 7, 2013, as further clarified in Mr. [redacted] emails dated February 8 and 11, 2013, on behalf of Plaintiff, meets the Touhy requirements. The request to take the depositions of Ms. [redacted] and Ms. [redacted] is approved.

The February 12, 2013, letter to Mr. [redacted] suggests that DLATS, on the one hand, and Mr. [redacted] and Mr. [redacted] on the other, engaged in a series of negotiations over the topics that could be raised in the depositions. In fact, counsel for DLATS – to the detriment of the Defendants -- did not allow Ms. [redacted] to ask questions that deviated in any material way from the questioning of the witnesses by Mr. [redacted]

The February 12, 2013, letter makes clear that Mr. [redacted] and Mr. [redacted] knew before the subpoenas were served for the depositions (on February 13) that the subpoenas would not be honored by the DLATS witnesses, and Mr. [redacted] and Mr. [redacted] knew before the notices of deposition were served (on February 15) that the depositions would not be taken "upon oral examination, for purposes of discovery, cross-examination and all proper purposes under the Federal Rules of Civil Procedure" as the notices of deposition provide. The February 12, 2013, letter to Mr. [redacted] makes clear that Mr. [redacted] and Mr. [redacted] knew before the hearing on the Defendants' Emergency Motion that the use of [redacted] financial records during the Deposition would not be allowed. Moreover, their objections to the engagement of Mr. [redacted] meant that the one possible representative of Defendants who might be familiar with DLATS regulations and the "Touhy requirements" was prohibited from participating in the depositions.

During the depositions Mr. [redacted] was allowed to question the witnesses about the material regarding Ms. [redacted] financial circumstances delivered by Mr. [redacted] at the meeting and the witnesses were allowed to render the opinion (repeatedly) that Ms. [redacted] personal financial circumstance was irrelevant to the consideration of whether [redacted] Manufacturing, Inc.

qualified for a no-bid contract.[††] However, Ms. [Defense] was not allowed to effectively pursue the question of whether unusually large distributions from [DoeCo] to Ms. [Doe] might be relevant to the question of whether [DoeCo] qualified for a no-bid contract.

These two women are perhaps the most important witnesses in the case. They knew why [DoeCo] was awarded a non-competitive contract, and they knew the impact of the bid protest on the reputation of [DoeCo] and Ms. [Doe] within DLATS. Counsel for Defendants were prepared to ask a series of questions tending to show that Ms. [Doe] personal financial circumstances were, in fact, relevant to the question of whether [DoeCo] qualified for a no-bid contract. Some of those questions are outlined in Exhibit E hereto. For example, the non-competitive award was made to [DoeCo] within weeks after Ms. [Doe] wrote a June 3, 2011, letter to DLATs in which she represented that, beginning in 2010, [DoeCo] had cut costs as much as it could, but claimed: "We have no means to sustain the company until these awards are made. Consequently, we have made the decision to close the company." (This letter is attached as Exhibit F.)

Defendants assert that distributions to Ms. [Doe] by [DoeCo] were relevant to the determination that [DoeCo] be awarded a non-competitive contract. Defendants' counsel should have been allowed to ask what the DLATS decision would have been had they realized that, contrary to Ms. [Doe] letter of June 3, 2011, [DoeCo] did not take steps to cut costs in at least one area -- [DoeCo] December 31, 2010, income statement shows that in **December of 2010,** [DoeCo] **paid an owner bonus of $7,500,000**. (See, Exhibit G.) Counsel for Defendants should have been allowed to ask if the 2010 [DoeCo] financial statements looked like the financial statements of a company that had no means to sustain itself.

[††] Both of the witnesses testified, however, that they did not tell Mr. [Client] that Ms. [Doe] personal financial information was not relevant to their consideration of the no-bid contract.

However, because of the silence of Mr. [redacted] and Mr. [redacted] about the limits placed by DLATS counsel (silence which, together with the subpoenas, notices of deposition, and arguments during the emergency hearing, amount to positive misrepresentations to counsel and this Court), counsel wasted a trip to Philadelphia for short depositions, which could have been done over the telephone, without the presence of Mr. [redacted] or Ms. [redacted] in the DLATS offices in Philadelphia.

Even with these limitations, the depositions were very useful. Both witnesses testified that: (a) they did not tell Mr. [redacted] that Ms. [redacted] personal financial information was not relevant in consideration of the award of the no-bid contract to [redacted] (Exhibit C Depo. of Lou Ann [redacted] 28:24–29:4, 30:16–30:24; Depo. of [redacted] 17:13–18:20, 31:10–32:17) and (b) the information presented by Mr. [redacted] did not change their opinions about [redacted] or Ms. [redacted] or harm [redacted] with respect to any future decisions by the agency (Exhibit C Depo. of [redacted] 61:8–61:19; Depo. of Maria [redacted] 39:22–40:8). Additionally, [redacted] also testified that it did not appear to her that Mr. [redacted] was trying to harm Ms. [redacted] (Exhibit C Depo. of [redacted] 62:19–63:5). However, the depositions could have been so much more useful had Defendants' counsel been able to fully explore the decision of these witnesses to award [redacted] the no-bid contract. Even a brief review of Defendants' counsel's outline for the deposition (Exhibit E) will reveal what a blow it was to Defendants' defenses that these depositions were so limited.

THE REQUIREMENTS OF 28 U.S.C. §1927

Under 28 U.S.C. § 1927, an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." A court may

sanction an attorney under § 1927 even in the absence of any "conscious impropriety." *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 (6th Cir.2009). The proper inquiry is not whether an attorney acted in bad faith; rather, a court should consider whether "an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." *Id.* (quoting *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir.1997)). An award of fees under the statute thus requires "a showing of something less than subjective bad faith, but something more than negligence or incompetence." *Id.* (quoting *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir.2006)). See, also *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987):

> [S]imple inadvertence or negligence that frustrates the trial judge will not support a sanction under section 1927. There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.

Ruben, 825 F.2d at 984.

Given any warning about the position counsel for DLATS was taking, Defendants counsel could have taken steps to make sure that the depositions were more productive and would not have to be duplicated. For example, counsel might have engaged in the same negotiations with DLATS counsel as did counsel for Ms. Doe [redacted] and obtained an agreement to broaden the scope of the deposition. Alternatively, counsel might have approached this Court for an order compelling the witnesses to testify fully under the authority of cases like *Resource Investments, Inc. v. United States*, 93 Fed. Cl. 373 (2010) in which the Court confronted and denied the government's efforts to block the testimony of an employee of the Army Corps of Engineers:

> [A]bsent clear congressional intent to the contrary, no federal regulation may contravene or otherwise impede the operation of the Federal Rules or the Rules of the Court. The Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Evidence ("FRE") are "as binding as any statute duly enacted by Congress," *Bank of N.S. v. United States,* 487 U.S. 250, 255, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), and "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect," 28 U.S.C. § 2072(b).

Resource Investments, Inc. v. United States, 93 Fed. Cl. 373, 379 (Fed. Cl. 2010). See, also, Hirsch, "The Voice Of Adjuration": The Sixth Amendment Right To Compulsory Process Fifty Years After United States Ex Rel. Touhy V. Ragen", 30 Fla. St. U. L. Rev. 81 (2002):

> Given the foregoing jurisprudence, the civil litigant in federal court who issues a subpoena in good faith to a federal agent or agency, calling for testimony or documents not privileged and which the subpoena recipient is capable (in fact and in law) of providing, should have every expectation that his subpoena will be honored or, if necessary, enforced. If the subpoena is ad testificandum, resistance based on Touhy regulations is unjustifiable. If the subpoena is duces tecum and directed to the officer identified in Touhy regulations, resistance is unjustifiable. If resistance purports to be based on the unwritten constitutional doctrine of sovereign immunity, the private litigant will properly urge the inapplicability of that doctrine, and may counter with the assertion of an unwritten constitutional doctrine of his own: separation of powers. Federal courts, not federal agencies, must decide what evidence shall be produced before those courts.

Id. at 111. (Emphasis supplied.)

CONCLUSION

The conduct of Mr. Bard and Mr. Smith in this matter goes far beyond mere mistake or inadvertence. Their conduct "falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." They tailored the scope of the depositions to suit their clients' own desires and engaged in litigation tactics which they knew would result in additional expense to Defendants and would cripple the efforts of Defendants to fully question these witnesses. Moreover, Mr. Bard and Mr. Smith wasted the Court's time in what they knew was a pointless emergency hearing. Defendants' motion for fees and costs should be granted. Defendants' counsel will then promptly present the Court with

a detailed accounting of their fees, costs and expenses incurred in the matters listed in the initial paragraph of this motion.

Respectfully submitted,

/S/ D. Duane Cook
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[redacted]

Co-counsel for Our client *Corp. and* Our client

and

[redacted]

Co-Counsel for Defendant, Our client

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing MOTION via electronic mail and the CM/ECF system which will automatically send notification to the attorneys for Plaintiff, who are participants in the CM/ECF system, on this the 13th day of March, 2013.

/S/ D. Duane Cook
D. Duane Cook

EXHIBITS

Exhibit A - Subpoenas

Exhibit B - Justification for Other than Full and Open Competition

Exhibit C - Rough Deposition Transcripts

Exhibit D -April 12, 2013 Letter from Ms. [redacted] to Mr. [redacted]

Exhibit E - Outline of Possible Deposition Questions

Exhibit F - Ms. [redacted] June 3, 2011 Letter to DLATs

Exhibit G - [redacted] 12/31/2013 Income Statements