

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JMJ ENTERPRISES, INC. : CIVIL ACTION  
 :  
 v. :  
 :  
 VIA VENETO ITALIAN ICE, INC. : NO. 97-CV-0652

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**May 27, 1998**

Presently before the Court is Defendant Via Veneto Italian Ice, Inc.'s ("Via Veneto") Renewed Motion for Judgment. For the reasons stated below, Defendant's motion is Granted.

**BACKGROUND**

Plaintiff JMJ Enterprises, Inc. ("JMJ") filed this case claiming breach of contract, detrimental reliance and intentional interference with existing and prospective business relations. JMJ seeks damages in "the range of \$500,000.00 to \$10,000,000.00." The history of the party's business relationship is set out in this Court's April 15, 1998, Memorandum and Order, and will not be repeated here. The unfortunate history of this litigation, however, is at the center of Via Veneto's present motion.

On August 20, 1997, Via Veneto filed a Motion to Compel self-executing disclosures and answers to interrogatories. JMJ did not respond. On September 10, 1997, the Court granted Via Veneto's Motion to Compel.

On September 19, 1997, Via Veneto filed a Motion to Compel the deposition of a representative of JMJ pursuant to Rule 30(b)(6). JMJ did not respond. On October 9, 1997, the Court granted Via Veneto's Motion to Compel and subsequently ordered JMJ to pay the Defendant's costs for bringing the motion. Fed. R. Civ. P. 37(a)(4).

On November 12, 1997, Via Veneto Filed a Motion to Strike Non-Responsive Answers and to Compel Complete Answers to its Interrogatories and Request for Production of Documents. JMJ did not respond. On December 5, 1997, the Court granted Via Veneto's Motion and again ordered JMJ to pay the Defendant's costs in bringing the Motion.

On December 15, 1997, JMJ's counsel filed "Objections to the Imposition of Sanctions." A hearing was held on January 15, 1998. JMJ's counsel offered no real reason for her failure to respond to Via Veneto's discovery requests and motions. She stated that over two thousand documents had been produced and that Via Veneto had been supplied with adequate discovery materials, but she did not explain the reason for her repeated failure to respond to discovery requests and motions. Counsel for Via Veneto pointed out that while JMJ produced some documents, they failed to identify which documents were responsive to certain interrogatories. JMJ's counsel could not explain this failure. I refused to vacate the orders imposing sanctions.

As part of the Court's September 10, 1997 Order, JMJ was directed to provide information on their damage claims in response to Via Veneto's Interrogatory 15. JMJ responded "To be supplied."<sup>1</sup> This response was one of the reasons for the November 12, 1997 motion to compel. The Court's December 5, 1997 Order directed JMJ to answer, inter alia, Interrogatory 15 "within ten (10) days or be barred from introducing evidence at trial sought by said interrogatories." JMJ's response was "See Expert Report."

JMJ's expert report on damages has a history of its own. Pursuant to this court's Standing Order on Pretrial and Trial Procedures, JMJ should have forwarded any expert reports to Via Veneto by September 1, 1997 (90 days before the close of discovery). On September 30, 1997, in response to Via Veneto's request for any expert reports, JMJ stated that it "has not retained any expert witness to date, and will supply such information as and when it becomes available." As of December 5, 1997, JMJ had not produced an expert report. The Court ordered that any expert reports were to be filed within ten days. JMJ filed its expert report on damages on December 15, 1997.

On April 15, 1998, I granted Via Veneto's Motion to Disallow Plaintiff's Expert Report and Bar Plaintiff From Presenting Expert Evidence, but denied its Motion for Summary Judgment. Despite Via Veneto's request, I did not bar the expert

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<sup>1</sup> The September 10, 1997 Order directed JMJ to respond within 15 days. JMJ served its responses on September 30, 1997.

report as a sanction for JMJ's conduct during discovery. The report was excluded because it lacked a sufficient basis in fact and because it was unreliable.

On April 21, 1998, Via Veneto filed a Motion for Reconsideration of Denial of Summary Judgment or In the Alternative Motion in Limine. Via Veneto contended that because JMJ's only response to its interrogatory requesting evidence of damages was "See Expert Report," and because the expert report had been excluded, there was no evidence of damages in the case.

On May 18, 1998, I denied Via Veneto's Motion for Reconsideration. While JMJ's failure to answer Via Veneto's interrogatory on damages was improper, I decided that a prompt answer would cure any prejudice. I ordered JMJ to respond to the interrogatory on damages within twenty-four hours of receiving the Court's order. This short deadline was necessary because trial was scheduled for May 26, 1998.

While the parties raised the issue of the timeliness of JMJ's response, the Court will not quibble over a few hours. What is important is the substance of JMJ's response.

## **DISCUSSION**

### **A. Sufficiency of Interrogatory Response**

The discovery process is designed "to make a trial 'less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible.'" Hansel v. Shell Oil Corp., 169 F.R.D. 303, 305 (E.D.

Pa. 1996) (citing United States v. Proctor & Gamble, 356 U.S. 677, 683 (1958)). Discovery is also intended "to narrow and clarify the issues in dispute." Hansel 169 F.R.D. at 305 (citing Hickman v. Taylor, 329 U.S. 495, 501 (1947)). Interrogatories are ineffective unless parties live up to their duty to "provide true, explicit, responsive, complete, and candid answers" to discovery requests. Hansel, 169 F.R.D. at 305.

Via Veneto's interrogatory on damages asks JMJ to: "set forth: (a) The dollar amount of Plaintiff's alleged damages." JMJ responded: "Plaintiff claims damages, including out-of-pocket expenses and lost profits, in the range of \$500,000 to \$10,000,000, plus punitive damages." Subpart (b) asks for the factual basis for the figure set out above. JMJ responded with four paragraphs describing its efforts under the alleged contract and mentioning some of the expenses its principals incurred. Subpart (c) asks for "all calculations, including alternative calculations, employed by you to arrive at the answers set forth above." JMJ responded: "Out-of-pocket expenses were added up" and that lost profits were determined by multiplying projected sales by a net profit figure. Subpart (d) requested "[a] description of each and every element of such damages and harm allegedly sustained." JMJ responded: "See response to subparts (b) and (c), above."

Considered in light of the purposes of discovery, JMJ's response is as useful as if it had not responded at all. The response that Plaintiff claims damages "in the range of \$500,000

to \$10,000,000, plus punitive damages" is outrageous. This answer does nothing to narrow the issues or provide the Defendant with a fair opportunity to respond to the claim.

JMJ should have listed each of its claimed out-of-pocket expenses and the specific documents which evidence that those expenses were incurred. Instead, JMJ generally discussed some of the expenses and stated "[o]ut-of-pocket expenses were added up." Yet, JMJ's answer does not even provide the sum of that calculation.

With respect to lost profits, JMJ responded: "[l]ost profits were determined by first analyzing the number of cartons of water ice per truckload, taking into account the purchase and resale price of the cartons and the expenses associated with the ordering and shipment of product. Based on that data, profit of \$10,000 per truckload is the conservative estimate for JMJ. JMJ then projected the number of cartons of water ice they were likely to sell over the 12-year life of the agreement, based on JMJ's actual sales during 1995 and 1996."

None of the data that JMJ relied on to arrive at its estimate of \$10,000 profit per truckload is revealed. The projections referred to, and any evidence that might support them, are also not revealed. The answer goes on to state that the range of JMJ's claimed lost profits is affected by a number of variables. The answer does not, however, specify how much profits JMJ claims that it lost under each hypothetical scenario.

In fact, as with its response relating to expenses, JMJ never specifies an amount of claimed lost profits.

JMJ's answer, considered as a whole, is evasive and incomplete. Rule 37(a)(3) states that such an answer "is to be treated as a failure to . . . answer." Fed. R. Civ. P. 37(a)(3).

B. Sanction for Misconduct During Discovery

Rule 37(b)(2) states: "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others . . . (C) An order . . . dismissing the action or proceeding." Fed. R. Civ. P. 37(b)(2)(C). In Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984), the Third Circuit set out a six part balancing test to be applied in situations where the Court is considering dismissal as a sanction for discovery abuses. The Court is to consider: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to . . . respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense. Id.; see also Comdyne I, Inc. v. Corbin, 908 F.2d 1142, 1148 (3d Cir. 1990).

1. The Party's Personal Responsibility

There is little evidence to indicate that the principals of JMJ contributed to the discovery abuses in this case. At the oral argument of this motion, Via Veneto's counsel suggested that JMJ's counsel call his clients, who were present, to explain the interrogatory answers they verified. JMJ's counsel failed to act on this suggestion or respond to it in any way. Nevertheless, giving the most favorable inferences that can be given to the Plaintiffs on this issue, "a client cannot always avoid the consequences of the acts or omissions of its counsel." Poulis, 747 F.2d at 868.

2. Prejudice to the Adversary

The failure to provide information on damages prejudices Via Veneto's ability to defend against JMJ's claims. Via Veneto has the right to question JMJ's claimed expenses and lost profits. It has the right to know what JMJ will claim as damages and what it intends to offer in support of those claims. Via Veneto needs this information to prepare for cross examination and the presentation of its case. The importance of the evidence of damages is demonstrated by Via Veneto's repeated attempts to obtain it. See Bedwell v. International Fidelity Ins. Co., 842 F.2d 683, 694 (3d Cir. 1988). Via Veneto would be seriously prejudiced if it were forced to react to each element of damages as it is raised at trial.

### 3. History of Dilatoriness

"Time limits imposed by the rules and the court serve an important purpose for the expeditious processing of litigation. . . . A history by counsel of ignoring these time limits is intolerable." Poulis, 747 F.2d at 868. As detailed above, there is an extensive history of dilatory conduct in this case. The conduct of JMJ's counsel necessitated motions to compel initial disclosures, the deposition of a corporate representative under Rule 30(b)(6) and responses to interrogatories and discovery requests. JMJ's counsel did not even respond to the motions to compel.

### 4. Whether the Attorney's Conduct Was Willful or in Bad Faith

I have reluctantly come to the conclusion that the conduct of JMJ's counsel was willful. JMJ was afforded an opportunity, on the eve of trial, to correct its prior failure to provide information on damages. JMJ's response, that it claims damages "in the range of \$500,000 to \$10,000,000, plus punitive damages" indicates a willful refusal to provide a meaningful response to Via Veneto's interrogatory.

"Willfulness involves intentional, self-serving or strategic behavior." United States v. Osteopathic Medical Ctr. Of Philadelphia, No. 88-CV-9753, 1997 WL 666295 (E.D. Pa. Oct. 23, 1997). JMJ has repeatedly explained its conduct in discovery by contending that Via Veneto has been provided with sufficient information to present its case. In other words, JMJ has decided

what type and amount of discovery is appropriate, without regard for the Federal Rules of Civil Procedure or the Orders of this Court.

5. The Effectiveness of Alternative Sanctions

Alternative sanctions are not appropriate in this case. The conduct of JMJ's counsel was unaffected by two previous monetary sanctions. See November 14, 1997 Order (imposing \$647.00 sanction for failure to designate representative for Rule 30(b)(6) deposition); December 5, 1997 Order (imposing \$250.00 sanction for failure to properly respond to interrogatories and document requests). There is no reason to believe that a monetary sanction would compel JMJ's counsel to fulfill its discovery obligations.

Exclusion of evidence is impractical in this case. JMJ failed to provide key evidence on damages. This failure affects its contract, detrimental reliance and tort claims. Exclusion of the Plaintiff's damages evidence would be tantamount to dismissal. Therefore, dismissal is the only appropriate sanction.

6. The Meritoriousness of the Claim

"A claim will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff." Poulis, 747 F.2d at 869-70. Other than a claim for attorney's fees, JMJ's claims survived a Motion for Summary

Judgment. For purposes of this analysis, JMJ's claims are meritorious.

#### CONCLUSION

After weighing the factors set out by the Court of Appeals, I am satisfied that dismissal is appropriate in this situation. The principals of JMJ apparently had meritorious prima facie claims and they may not be responsible for the discovery abuses in this case. Nevertheless, their counsel repeatedly failed to answer an appropriate interrogatory. JMJ's answer in response to the Court's Order was woefully inadequate. JMJ's counsel's failure to provide information on damages was willful. The failure to answer the interrogatory prejudiced Via Veneto's ability to defend against JMJ's claims and it was part of a pattern of dilatory conduct.

Dismissal is a sanction of last resort. This case has reached the unfortunate stage where dismissal is the only appropriate sanction. Pursuant to Rule 37(b)(2)(C), JMJ's claims are dismissed. Fed. R. Civ. P. 37(b)(2)(C).

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ORDER

AND NOW, this 27th Day of May, 1998, upon consideration of Defendant's Renewed Motion for Judgement and Plaintiff's response, and for the reasons stated above and the reasons stated in court, Defendant's motion is GRANTED.

JUDGMENT is ENTERED in this matter in favor of Defendant Via Veneto Italian Ice, Inc. and against Plaintiff MJM Enterprises, Inc. This case is closed.

BY THE COURT:

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JAMES MCGIRR KELLY, J.