

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

PHOENIX TECHNOLOGIES, INC. and : CIVIL ACTION
PTI SERVICES, INC., d/b/a PHOENIX
SERVICES TECHNOLOGIES, INC. :
v. :
QUOTRON SYSTEMS, INC. : NO. 94-2068

MEMORANDUM AND ORDER

THOMAS J. RUETER
United States Magistrate Judge

June 22, 1999

Presently before this court is defendant Quotron Systems Inc.'s motion for sanctions under Fed. R. Civ. P. 37 (Document No. 99). For the reasons that follow, the motion is denied without prejudice to defendant's right to refile it after defendant serves the underlying discovery requests upon plaintiffs and Vincent N. Tirendi, since they are now unrepresented in this action.

I. PROCEDURAL AND FACTUAL BACKGROUND

On July 20, 1999, the Clerk of the Court entered an order in favor of defendant and against plaintiffs taxing costs in the amount of \$85,848.03. (Def.'s Mot. Ex. 1.) In an effort to collect this amount, defendant served on plaintiffs through their counsel, James J. Rodgers, Esquire of the law firm of Dilworth Paxson, LLP (the "Dilworth Firm"), written discovery in aid of execution including, interrogatories (Def.'s Mot. Ex. 2), requests for production of documents (Def.'s Mot. Ex. 3), and requests for admission (Def.'s Mot. Exs. 4 and 5). These discovery materials are dated January 4, 1999. Defendant also noticed the deposition of Vincent N.

Tirendi, the president and principal shareholder of plaintiffs, for February 16, 1999. The notice of this deposition was served upon Mr. Rodgers. Plaintiffs have not answered the discovery requests and Mr. Tirendi did not appear for the deposition.

In the instant motion, defendant, citing the authority of Fed. R. Civ. P. 37(d), seeks sanctions against plaintiffs, plaintiffs' counsel, and Mr. Tirendi, including an order: (1) making Mr. Tirendi, in his personal capacity, jointly and severally liable with plaintiffs for the \$85,848.03 taxation of costs, plus post-judgment interest; (2) imposing joint and several liability on plaintiffs, their counsel, and Mr. Tirendi for all of the costs defendant incurred in connection with its discovery in aid of execution, including but not limited to attorneys' fees and court reporter fees; (3) imposing joint and several liability on plaintiffs, their counsel, and Mr. Tirendi for all costs defendant incurred in connection with this motion, including attorneys' fees; and (4) imposing any additional sanctions the court deems appropriate. (Def.'s Mot. at 2.)

In a telephone conversation on or about February 9, 1999, Mr. Rodgers informed defendant's counsel, Carolyn H. Feeney, Esquire, that: (1) the Dilworth Firm no longer represented plaintiffs or Mr. Tirendi; (2) defendant's discovery requests and deposition notice had been sent to Mr. Tirendi's last known address and were returned unopened; (3) he did not know if Mr. Tirendi would attend the deposition; and (4) Mr. Rodgers himself would not attend the deposition. The substance of this conversation was confirmed by a letter dated February 9, 1999 from Ms. Feeney to Mr. Rodgers. (Def.'s Mot. Ex. 7.) Also in this letter, Ms. Feeney stated that because the Dilworth Firm "still technically represent plaintiffs . . . we cannot contact them directly." Id. Ms. Feeney concluded that she would assume that Mr. Tirendi's deposition would take place as scheduled. Id. On February 25, 1999, Mr. Rodgers sent a letter to Ms.

Feeney by facsimile which gave her “express permission to contact Mr. Tirendi and/or any other representative of [plaintiffs].” (Dilworth Firm’s Mem. of Law Opp. Mot. Ex. A.)¹

The Dilworth Firm successfully moved to withdraw as counsel for plaintiffs in two other pending actions. The Dilworth Firm did not move to withdraw as counsel in this case because, Mr. Rodgers reasoned, the matter essentially had concluded with the Clerk’s entry of the taxation of costs and because it was reluctant to burden to court with additional filings.

(Dilworth Firm’s Mem. of Law Opp. Mot. at 3.)

II. DISCUSSION

Defendant moves for sanctions under Fed. R. Civ. P. 37(d), which provides in pertinent part as follows:

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer . . . of a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with proper notice, or (2) to serve answers or objections to interrogatories properly submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney’s fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

1. Request for Sanctions Against the Dilworth Firm.

¹ Mr. Rodgers explained that following the Third Circuit Court of Appeals’ December, 1997 Order affirming this court’s Findings of Fact and Conclusions of Law, Mr. Tirendi rebuffed all efforts by the Dilworth Firm to contact him. Plaintiffs ceased business operations in the Spring of 1997, and no longer maintain an office address or telephone listing. Certified mail sent by the Dilworth Firm to Tirendi’s last known address, including defendant’s discovery requests, has been returned unopened. (Dilworth Firm’s Mem. of Law Opp. Mot. at 2-3.)

Defendant requests that the Dilworth Firm be made jointly and severally liable with plaintiffs and Mr. Tirendi for all costs defendant incurred in connection with the discovery in aid of execution, the aborted deposition, and the instant motion, including but not limited to attorneys' fees and court reporter fees. Defendant's request is denied.

Fed. R. Civ. P. 37 allows an award to be made against the "party failing to act or the attorney advising that party or both." Courts have concluded that an award against the attorney should be made "only when it is clear that discovery was justifiably opposed principally at his instigation." See Humphreys Exterminating Co., Inc. v. Poulter, 62 F.R.D. 392, 395 (D. Md. 1974). In addition to the powers granted by Rule 37, courts possess an independent, inherent power to discipline attorneys who appear before them. Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 914 F. Supp. 1172, 1179 (E.D. Pa. 1996) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)). "Courts can exercise this inherent power to impose sanctions where an attorney behaves vexatiously." Id. (citing Chambers, 501 U.S. at 45-46.) See also In re Tutu Wells, 120 F.3d 368, 383 (3d Cir. 1997) (The court's inherent powers should be exercised with restraint and discretion.)²

Defendant contends that the conduct of the Dilworth Firm warrants severe sanctions because the Dilworth Firm, along with plaintiffs and Mr. Tirendi, "deliberately and willfully ignored [defendant's] discovery in aid of execution." (Def.'s Mem. of Law Supp. Mot. at 4.) The conduct of the Dilworth Firm does not warrant this court to impose sanctions under Rule 37 or this court's inherent powers. Mr. Rodgers from the Dilworth Firm forwarded

² "Vexatious" has been defined as "Irritating; annoying; distressing; troublesome." New Webster's Expanded Dictionary 367 (1994).

defendant's discovery requests and deposition notice to Mr. Tirendi's last known address and they were returned unopened. Mr. Rodgers promptly notified Ms. Feeney that he no longer represented the plaintiffs or Mr. Tirendi, that he would not attend the deposition, and that he did not know if Mr. Tirendi would attend the deposition. Mr. Rodgers also gave Ms. Feeney his "express permission" to contact Mr. Tirendi or another representative of plaintiffs directly. This honest and forthright behavior is not the sort of conduct that Rule 37 or the court's inherent powers seeks to sanction.

If Mr. Rodgers can be faulted at all, it is for his failure to formally seek leave of the court to withdraw as counsel for plaintiffs and Mr. Tirendi in accordance with Local R. Civ. P. 5.1(c). However, even though he did not formally withdraw, Ms. Feeney cannot deny that she knew one week before the scheduled February 16, 1999 deposition that Mr. Rodgers and the Dilworth Firm no longer represented plaintiffs or Mr. Tirendi, that Mr. Rodgers would not attend the deposition, and that he did not know if Mr. Tirendi would attend. Moreover, Ms. Feeney admitted that she did not attempt to contact Mr. Tirendi directly, even though she acknowledged that Mr. Rodgers gave her permission to do so. (Def.'s Reply Mem. Supp. Mot. at 3 n.1.)

Therefore, for all the above reasons, this court will deny defendant's request to impose sanctions on the Dilworth Firm.³ Additionally, this court will construe Mr. Rodgers' response to defendant's instant motion as a formal request of the Dilworth Firm pursuant to Local R. Civ. P. 5.1(c) to withdraw its representation of plaintiffs and Mr. Tirendi. The court grants that request.

³ The court's reference to the Dilworth Firm includes Mr. Rodgers, Mr. Thomas Groshens, and any other attorney(s) from the Dilworth Firm who have been involved in representing plaintiffs or Mr. Tirendi in the above-captioned matter.

2. Request for Sanctions Against Mr. Tirendi and the Plaintiffs.

It appears that neither the plaintiffs nor Mr. Tirendi received defendant's discovery requests in aid of execution, including the notice of the deposition, or the instant motion. Mr. Rodgers forwarded these items to Mr. Tirendi's last known address, and they were returned unopened. This court cannot conclude that plaintiffs and Mr. Tirendi improperly failed to respond to the discovery requests or appear for the deposition when they never received the requests. For this reason, this court will deny defendant's motion for sanctions against plaintiffs and Mr. Tirendi without prejudice to defendant's right to refile its motion after plaintiffs and Mr. Tirendi have been served with the discovery requests.

An appropriate order follows.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge

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

PHOENIX TECHNOLOGIES, INC. and : CIVIL ACTION
PTI SERVICES, INC., d/b/a PHOENIX :
SERVICES TECHNOLOGIES, INC. :
v. :
QUOTRON SYSTEMS, INC. : NO. 94-2068

ORDER

AND NOW, this 22nd day of June, 1999, upon consideration of defendant Quotron Systems Inc.'s motion for sanctions under Fed. R. Civ. P. 37 (Document No. 99), it is hereby

ORDERED

1. The motion is DENIED with respect to the law firm of Dilworth Paxson, LLP and its attorneys;
2. The law firm of Dilworth Paxson, LLP and its attorneys are permitted to withdraw as counsel for plaintiffs; and
3. The motion is DENIED in all other respects without prejudice to defendant's right to refile it after proper service of the underlying discovery requests are made upon the plaintiffs and Vincent N. Tirendi.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge

