

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

VANESSA NOEL GINLEY and VANESSA	:	CIVIL ACTION
NOEL GINLEY d/b/a VANESSA NOEL	:	
HOTEL	:	04-1986
	:	
v.	:	
	:	
E.B. MAHONEY BUILDERS, INC. and	:	
EDWIN B. MAHONEY	:	

MEMORANDUM AND ORDER

JOYNER, J.

January 31, 2006

Via the motions now pending before this Court, Plaintiffs Vanessa Noel Ginley and Vanessa Noel Ginley d/b/a Vanessa Noel Hotel ("Plaintiffs"), move for the imposition of sanctions against Defendants E.B. Mahoney Builders, Inc. and Edwin B. Mahoney ("Defendants") for failure to comply with Fed. R. Civ. P. 45. Defendants, in turn, move for the imposition of sanctions against Plaintiffs for seeking sanctions in bad faith. For the reasons outlined below, both motions shall be DENIED.

Background

Plaintiffs filed suit against Defendants seeking to recover for alleged defects in construction work performed by Defendants and Defendants' subcontractors. This case has been plagued by disputes over the scope and timeliness of discovery requests and responses. The instant dispute concerns the appropriateness of the notice provided to Plaintiffs' counsel of subpoenas duces tecum issued to non-parties. Plaintiffs contend that Defendants

failed to provide the notice required by Federal Rule of Civil Procedure 45 when serving subpoenas on non-parties demanding the production of documents and things without a deposition.

Defendants' response to this motion includes a counter-motion for sanctions against Plaintiffs for bad-faith filing of a sanctions motion. This Court held a status conference regarding, inter alia, the Rule 45 dispute, and, without making a finding as to sanctions or the legal sufficiency of notice, ordered that notice be given to opposing counsel three days prior to the serving of any subpoena duces tecum on a non-party not being deposed.

Defendants served subpoenas on non-parties seeking the production of documents and things. (Pls.' Mot. for Sanctions for Defs.' Repeated Failure to Comply with Fed. R. Civ. P. 45 ("Pl.'s Mot. for Sanctions") at 4 (Aug. 29, 2005 subpoena duces tecum to An Invitation to Travel, Inc.), 7 (Oct. 21, 2005 subpoena duces tecum to Corporate Flight Concepts), and 12 n.1 (Nov. 18, 2005 subpoena duces tecum to Sandor Electric and Nov. 22, 2005 subpoena duces tecum to Thomas Walsh, Carpenter).) Copies of each of these subpoenas were served on Plaintiffs' counsel via U.S. Mail sent on the same day as the subpoenas were mailed. Id. Plaintiffs' counsel received each notice and corresponded with Defendants' counsel regarding each subpoena before the responses to the subpoenas were due. (Pls.' Mot. for Sanctions at 4 (rec'd notice of Aug. 29, 2005 subpoena, contacted Defendants' counsel on Aug. 31, 2005, response due Sept. 16,

2005); 7-8 (rec'd notice of Oct. 21, 2005 subpoena on Oct. 24, 2005, contacted Defendants' counsel on Oct. 24, 2005, response due Nov. 7, 2005); 12-13 (rec'd notice of Nov. 18, 2005 subpoena on Nov. 21, 2005, received notice of Nov. 22, 2005 subpoena on Nov. 23, 2005, filed this motion on Dec. 1, 2005, response due Dec. 9 and 12, 2005).)

Plaintiffs claim that Defendants willfully and repeatedly violated Rule 45, particularly in light of Plaintiffs' counsel's extensive correspondence with Defense counsel regarding the requirements of the rule. (Pls.' Mot. for Sanctions at 12.) Plaintiffs claim that they filed this motion on December 1, 2005 only after repeated attempts to explain the rule's prior notice requirement failed to impact Defendants' actions. (Pls.' Resp. in Opp. to Defs.' Cross Mot. for Sanctions ("Pls.' Resp.") at 23-24.) Plaintiffs seek to require that notice of all subpoenas duces tecum to be served on non-parties that are not being deposed be sent ten days prior to the date on which the subpoena is actually served. (Pls.' Mot. for Sanctions at 13.) Plaintiffs also seek to recover attorneys fees associated with filing their motion, and ask this Court to impose sanctions on Defendants. Id.

Defendants, in their Cross-Motion for Sanctions allege that Plaintiffs sought Rule 45 sanctions in bad faith because (1) case law establishes that contemporaneous notice satisfies the requirements of the rule and (2) the timing of the motion was

intended to harass Defendants and prevent them from preparing for impending depositions. (Defs.' Resp. in Opp. to Pls.' Mot. for Sanctions and Cross-Mot. for Sanctions Against Pls. ("Defs.' Resp. and Cross-Mot.") at 25, 29.) Defendants ask this Court to impose sanctions against Plaintiffs for the filing of Plaintiffs' motion. Id.

Discussion

Federal Rule of Civil Procedure 45 requires that "[p]rior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)." Fed. R. Civ. P. 45(b)(1).¹ The question of what constitutes "prior notice" under Rule 45 is not as settled as either party would have us believe. Courts have clearly determined that "prior notice" is not accomplished merely by serving other parties before the response to the subpoena is due. See, e.g., Butler v. Biocore Med. Tech., Inc., 348 F.3d 1163, 1173 (10th Cir. 2003) (finding that "prior notice" requires notice "well in advance of the production date"). At the same time, courts have not specifically determined whether contemporaneously served notice fulfills the "prior notice" requirements of the rule itself. See Mann v. Univ. of Cincinnati, Civ. A. No. 95-3195, 1997 U.S. App. LEXIS 12482, *15 (6th Cir. 1997) (implying that contemporaneous service

¹Fed. R. Civ. P. 5(b) provides guidance as to how, but not when, service shall be accomplished.

might have been sufficient but for counsel's letter seeking early responses to subpoena); see also Schweizer v. Mulvehill, 93 F. Supp. 2d 376 (S.D.N.Y. 2000) (mentioning that contemporaneous service should have been made, but finding the issue moot as the subpoena had been withdrawn). Thus, the definition of "prior notice" remains surprisingly elusive, and, as such, hardly provides grounds for sanctions against either party based on "clear" language of the rule and decisional law.²

Courts have, however, made clear there is no prejudice where notice was actually served and the party had the opportunity to object. McCurdy v. Wedgewood Capital Mgmt., Civ. A. No. 97-4304, 1998 U.S. Dist. LEXIS 18875, *28 (E.D. Pa. 1998) (noting that "when opposing counsel have notice and sufficient time to object, they are not prejudiced by a violation of Rule 45 notice requirement") (internal citations omitted); Biocore Med. Tech. v. Khosrowshahi, 181 F.R.D. 660, 667-668 (D. Kan. 1998) *aff'd* Butler, supra. Thus, even if it were clear that Rule 45 requires notice to be sent before a subpoena is served, Plaintiffs must establish either that notice was not actually served or that they did not have the opportunity to object. Plaintiffs make no such showing. Plaintiffs do not dispute that they received notice of

²Although this Court does not make a determination as to whether "prior notice" under Rule 45 may be satisfied by contemporaneous notice, our order of December 14, 2005 requiring notice of non-party subpoenas to be served on opposing counsel three days prior to the service of such subpoena is not altered by our ruling on these motions.

each of the subpoenas by U.S. Mail. Nor do Plaintiffs dispute that these notices were sent contemporaneously with each subpoena. Plaintiffs clearly had the opportunity to object to each of the subpoenas, as Plaintiffs communicated with Defendants regarding each subpoena - even those that Plaintiffs' claim not to have seen until days after they were served³ - well before the responses were due. Because Plaintiffs actually received service of the notices, and had adequate opportunity to respond, they were not prejudiced and are not entitled to sanctions.

Defendants argue that Plaintiffs' timing in filing this motion reveals a bad faith motive. Plaintiffs' motion was indeed filed days before depositions were to begin in this case and only shortly before the period scheduled for discovery was to close. This Court will not, however, punish either party for attempting to resolve a portion of this dispute without the aid of the Court.⁴ The parties appear to have attempted to communicate regarding their differences, but neither found satisfaction. Plaintiffs filed their motion for sanctions within ten days of their receipt of the second set of subpoenas that they felt were

³Plaintiffs' counsel is reminded that, pursuant to Rule 5(b), "service by mail is complete on mailing." That Plaintiffs' counsel was on vacation has no effect on that rule, and certainly caused no prejudice here.

⁴Although the Court prefers that parties resolve such issues on their own, this situation involved a clash of inapposite interpretations of a procedural rule. Much of the energy and money expended on these motions might well have been saved had the parties brought this issue to the Court's attention when it became clear that differences were not being resolved.

improperly noticed. This timing does not rise to the level of harassment such that sanctions might be appropriate.

Conclusion

Sanctions against Defendants are inappropriate in light of the lack of clarity as to the definition of "prior notice" and the lack of any prejudice to Plaintiffs as a result of any violations that may have occurred. Although Plaintiffs might have more thoroughly read and understood the cases cited in support of their motion, this Court will not impose sanctions for filing a motion with no basis in law or fact where the law, and therefore the facts required in support thereof, remains unclear. Further, the timing of Plaintiffs' motion for sanctions, in light of the ongoing discourse between counsel regarding the proper procedure, does not constitute harassment or bad faith.

For all of the reasons set forth above, Plaintiffs' Motion for Sanctions and Defendants' Cross-Motion for Sanctions are both denied pursuant to the attached order.

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v.	:	
	:	
E.B. MAHONEY BUILDERS, INC. and	:	
EDWIN B. MAHONEY	:	

ORDER

AND NOW, this 31st day of January, 2006, upon consideration of Plaintiffs' Motion for Sanctions for Defendants' Repeated Failure to Comply with Federal Rule of Civil Procedure 45 (Doc. No. 42) and Defendants E.B. Mahoney Builders, Inc. and Edwin B. Mahoney's Response in Opposition to Plaintiffs' Motion for Sanctions for Failure to Comply with Federal Rule of Civil Procedure 45 and Cross-Motion for Sanctions Against Plaintiffs (Doc. No. 45), and all responses thereto (Docs. No. 49, 50), it is hereby ORDERED as follows:

- (a) Plaintiffs' Motion for Sanctions (Doc. No. 42) is DENIED.
- (b) Defendants' Cross-Motion for Sanctions (Doc. No. 45) is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.