

IN THE STATE COURT OF FAYETTE COUNTY
STATE OF GEORGIA


Sheila Studdard, Clerk
Fayette County, Georgia

██████████,

Plaintiff,

v.

Civil Action No.: 2015SV-0270

SUSAN HOWSE, AND NATIONWIDE
AFFINITY INSURANCE COMPANY OF
AMERICA,

Defendants.

**PLAINTIFF'S REPLY REGARDING
PLAINTIFF'S MOTION TO COMPEL**

A pattern has emerged. It is not a good pattern.

Sanctions are required. O.C.G.A. § 9-11-37(a)(4)(A).

FACTS

The first discovery 'dispute' emerged when Plaintiff sought copies of medical records that Nationwide had received from third parties. As discussed in the Motion to Compel that Plaintiff ultimately filed on November 23, 2016, Plaintiff sought these records in discovery, but Nationwide did not produce them. Nationwide ignored Plaintiff's first follow-up attempt to get the evidence without involving the Court. After Plaintiff followed up again, Nationwide promised on October 7 to produce the records. Nationwide did not do as it had promised. Nationwide ignored Plaintiff's renewed, subsequent attempts to resolve the issue without Court involvement on November 14, 17, and 21. On November 23, Plaintiff moved to compel.

Because this was the first motion to compel, and because Plaintiff's counsel did not anticipate the misconduct that would follow, Plaintiff did not seek fees under Rule 37. Before the Court could rule, Nationwide produced the evidence.

The second discovery 'dispute' emerged when Plaintiff sought invoices, correspondence, and certain other materials relating to Nationwide's hired doctor, DeFilippis. As discussed in the motion to compel that Plaintiff ultimately filed on June 8, 2017, Plaintiff had asked for this material on December 7, 2016. Plaintiff followed up on January 17, 2017. Nationwide promised that it would produce the evidence. Nationwide did not do as it had promised. Nationwide ignored Plaintiff's repeated attempts to resolve the issue without Court involvement on April 12, April 24, and May 30. Nationwide then promised, again, that it would produce the evidence. But Nationwide again failed to do as promised. Nationwide ignored Plaintiff's final attempt to get the evidence without Court involvement on June 6. On June 8, Plaintiff moved to compel. This time, Plaintiff sought fees under O.C.G.A. § 9-11-37(a)(4)(A). Before the Court could rule, Nationwide produced at least some of the requested material.

The third discovery 'dispute' emerged when Plaintiff sought the IME report to which Plaintiff was entitled under O.C.G.A. § 9-11-35(b)(1). As discussed in the supplemental brief that Plaintiff ultimately filed on July 7, 2017, Nationwide had promised to produce the report within 30 days of DeFilippis's IME. The report was therefore due on June 29, but Nationwide did not produce it as promised. Nationwide ignored Plaintiff's attempt to resolve the issue without Court involvement on June 30, 2017. On July 7, Plaintiff briefed the issue for the Court in a supplemental brief to the motion to compel that was already pending. Plaintiff again sought the statutorily mandated fees. Before the Court could rule, Nationwide produced the report.

This is a pattern.

LAW

The Georgia Civil Practice Act does not contemplate that a party should have to involve the Court to obtain evidence that is obviously discoverable. The process is designed to function with minimal judicial intervention. *Vlasz v. Schweikhardt*, 178 Ga. App. 512, 515-16 (1986) (“This system is designed to operate as efficiently as possible with minimal participation by the trial court”). Further, when lawyers agree to something, courts expect them to honor that agreement. *White v. Owens*, 172 Ga. App. 373, 374 (1984) (“Agreements made by an attorney pertaining to his client’s cause of action are binding upon the client, absent fraud, collusion, or express prohibition of such an agreement.”).

Where a party ***repeatedly*** refuses to produce evidence that is obviously discoverable, and ***repeatedly*** breaks its own promises, the discovery system cannot function. That is why the Civil Practice Act imposes ***mandatory*** fee penalties when a party must file a motion to compel to which there can be no legitimate opposition. O.C.G.A. § 9-11-37(a)(4)(A). That is where we are.

Nationwide cannot evade sanctions by belatedly producing documents. If it could, then every stonewalling litigant would do exactly what Nationwide has done three times—refuse to produce evidence, break its own promises, ignore follow-up attempts, and produce nothing until a motion to compel has been filed. Georgia law is abundantly clear: “once a motion for sanctions for failure to make discovery has been filed, the opposing party may not preclude their imposition by making a belated response.” *Exum v. Norfolk Southern Ry.*, 305 Ga. App.

781, 783 (2010); *accord American Radiosurgery, Inc. v. Rakes*, 325 Ga. App. 161, 167 (2013); *Greenbriar Homes, Inc. v. Builders Ins.*, 273 Ga. App. 344, 346 (2005); *Bryant v. Nationwide Ins. Co.*, 183 Ga. App. 577, 578 (1987); *Vlasz*, 178 Ga. App. at 515-16 (“[W]e find the trial court abused its discretion in denying plaintiff’s motion for sanctions.”).

Nationwide now wrongly asserts that “Plaintiff has not been prejudiced in any way” and that “[t]here is no justification to award Plaintiff any attorney’s fees.” Def.’s Br. at 1. That is wrong for two reasons. First, it is false. If the Court had not had to deal with these repetitive motions we would probably have completed a trial by now. That delay matters—Mr. Taylor is in his mid-sixties. He is not doing well and not getting better, and he is (justifiably) ready to be finished with this. He asked me last week if I thought Nationwide was stalling in hopes that he would die before a trial.

Second, it is irrelevant. Plaintiff has had to involve the Court on three separate occasions now, and on *none of them* was any opposition “substantially justified.” See O.C.G.A. § 9-11-37(a)(4)(A). In such circumstances, fee sanctions “shall” be imposed. *Id.* Prejudice is not a prerequisite.

This 25th day of July, 2017.

Respectfully submitted,

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SUSAN HOWSE, AND NATIONWIDE
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CERTIFICATE OF SERVICE

I hereby certify that foregoing pleading was served upon all parties by email and depositing it through the U.S. Mail with adequate postage affixed thereon and addressed as follows:

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This 25th day of July, 2017.

Respectfully submitted,

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