United States Bankruptcy Court
District of New Mexico

Document Verification

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Case Number: **99-01125**
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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable James Starzynski

James Burke, Law Clerk
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters
(505) 242-2809
Joe Jameson XXX

Date:
TUESDAY, JANUARY 16, 2001

In Re:
BRIAN DUDNEY
HEATHER HALL-DUDNEY
No. 98-17570 S

WILDERNESS EXCHANGE, INC.
No. 99-1125 S
v.
BRIAN K. DUDNEY

Oral Ruling on Motion for Sanctions

Attorney for Plaintiff: James Jurgens
Attorney for Defendant: Thomas Rice

Summary of Proceedings:

Exhibits _____

Testimony _____

Sanctions awarded in the amount of $2,781.41. Jim Jurgens to do order.

WEI v. DUDNEY AP 99-1125 January 16, 2001

ORAL RULING ON AMOUNT OF SANCTIONS AGAINST DEBTORS AND FORMER COUNSEL

Extensive recitation of background and basis for ruling in oral findings and conclusions rendered orally on the record on July 13, 2000, as permitted by Rule 7052 FRBP. Won't repeat, but a copy of Court notes for that hearing is attached to these notes, which will be attached to the minutes of this hearing.

Conflicting policy demands:

1. Parties need to comply with discovery demands, and do so within the rules, which includes being reasonably timely and complete. This policy will not be very effective if a respondent does not face the threat of sanctions for failure to comply.

2. The threat of sanctions must be a real one: the Court must be willing to impose the sanctions, and the sanctions must be sufficient to accomplish the purpose of compelling (or threatening) the respondent into provide the discovery requested.

3. Of course, the sanctions should only apply when the requested discovery is within the realm of what is appropriately sought – that is, if the information sought is discoverable as defined by Rule 26, it is not privileged, etc. But that is not an issue here.

4. On the other hand, the practice of awarding sanctions should not be such as to encourage sanctions litigation per se. The proponent of the discovery should always have an incentive to work out the problem rather than to initiate or continue sanctions litigation. In part, this is addressed by part of Rule 37(a)(2)(B): "The motion [for sanctions] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." Effectuating this policy means that any award of sanctions which ends up going to the proponent of the discovery must not be calculated generously.

5. At the same time, any award of sanctions which ends up going to the proponent of the discovery must be sufficient not to discourage the proponent from seeking to obtain the discovery to which the proponent is genuinely entitled and needs for the trial or hearing.

6. The overall goal, of course, is to make sure that each side has full disclosure and access to all the relevant and non-privileged information which the parties and the Court need to fully probe for the truth of the matter at issue. Full discovery not only aids each party in presenting its case, it also helps the Court make the best

decision possible, and thereby benefits the entire system of justice that we have.

Affidavit from JJ (Doc. 46):

Asks for $7,078.83 ($6,362.50 [50.9 hours at $125], $288.19 costs, $428.14 GRT).

WEI is being billed at a reduced rate of $125/hour (down from $165). This is the appropriate rate, even though JJ is only getting paid at the rate of $85/hour currently – ultimately WEI will be liable to JJ for the extra $40/hour.

Not clear how much of the fees incurred were for production rather than interrogs, which I ruled were sufficiently (barely) answered, but given JJ's statement that 1/2 the motion was directed at the interrogs, I will treat 1/2 the fees incurred as spent for each, and therefore only allow 1/2 the fees plus applicable GRT.

I will allow all the costs: $288.19 + GRT.

I am concerned about statements (in argument, which essentially constitute admissions) of both counsel to the combined effect that TR offered to make the documents available after February 1, but that JJ was concerned that they were not being offered to be brought to his office. It seems to me that small gap could have been bridged with some flexibility, but at the same time that probably would not have resolved the issue of payment of expenses incurred by JJ for the prior failure to produce documents for which the Court has already found the Ds and Arslanian liable. In short, I think that JJ should have consulted TR about getting the documents to him (JJ), and at the same time should have asked TR about payment of fees for the failure to produce beforehand. Of course, given what I have been presented with so far by the Ds completely resisting any payment of any expenses for the failure to comply with discovery demands, I think that such a request would probably have been futile. Nevertheless, JJ should have broached both issues. I will therefore allow 1/2 the fees for preparing for and trying the request for sanctions in connection with the failure to produce documents. This may be an incentive in the future for non-responding respondents to consider fully the consequences of not responding to discovery requests.

With this in mind, note that a total of 50.9 hours are in the affidavit. Note that nothing was charged for filing the affidavit and the work that went into its preparation. 23.4 hours were expended up to and including Feb. 1, date of TR letter. After that was 27.5. 23.4 divided by 2 = 11.7; 27.5 divided by 4 = 6.9. 11.7 + 6.9 = 18.6 x $125 = $2,325 + $288.19 = 2,613.19 x 1.064375 [GRT in Santa Fe for CY 2000 – compensates slightly for no charge for preparing affidavit] = $2,781.41.

Debtors' Response (doc. 47):

Repeats many of the arguments made in opposition to the award of sanctions to begin with.

Re para 2 and 4: Ds' counsel (TR) did request that the Court continue the hearing that it had scheduled on this motion for sanctions on February 10, 2000, so that TR could sit down and go over with JJ the production contained in the boxes (eight?) of documents brought by TR/Ds to that hearing. The Court turned down that offer because the matter was scheduled for a final hearing, and the parties should not use the final hearing as the time for finally sitting down to resolve the dispute – it should be resolved before that. This is particularly the case because the Court had already commenced the final hearing on this issue once, on 23 Nov 1999, but had continued the hearing so that the parties could present evidence. True that TR had just gotten into the case on Jan 26, and then underwent knee surgery the next day on Jan 27, but the fault in part lies with the Ds for not employing counsel sooner, and for not requesting a continuance sooner than the day of the hearing in effect.

JJ should prepare order for TR approval.

WEI v Dudney AP 99-1125

RULING on M/Compel and for Sanctions July 13, 2000 (at hrg in main case)

Motion filed 1 Oct 99. "Preliminary" trial conducted November 23, 1999, and then continued for a full fledged evidentiary hearing on February 10, 2000, on which day Court heard evidence and admitted exhibits.

This is the ruling on that motion, although what is scheduled this morning is M/Compel and for Sanctions in main case (98-17570). Court has subj matter and personal jurisd by 1334 and 157(b)(2) (J) and (O); this is a core matter, and these are FOF and COL delivered orally on the record as permitted by FRBP 7052, based on what is in the file, the admissions of the parties through their counsel about what transpired, and the testimony and exhibits presented at trial. Applicable discovery rule is 37(a)(2)(B) and (a)(4)(A).

WEI complaint objecting to discharge filed June 24, 1999.
29 July 99: answer filed by Arslanian.
17 Aug 99: order arising from Aug. 16, 1999 IPTC set discovery DL for December 6, 1999.
23 Aug 99: plaintiff served interrogs and production requests.
27 Sep 99: answers and responses due – none.
28 Sep 99: JJ sends letter to Arslanian asking where is stuff and saying will file motion if no response; gets no response.
30 Sep 99: fax letter from Arslanian to JJ (not attached to response), explaining the situation.
1 Oct 99: M/Compel and for Sanctions filed.
15 Oct 99: response by defendants conceding there were problems but opposing relief requested.
17 Nov 99: WEI supplement to M/Compel – addresses issue of negotiations among state court counsel for use of BR-obtained discovery in state court action between WEI as plaintiff and Hydro, Inc. and Ms. Dudney's grandmother (Helen Hall). I find and conclude and rule that those negotiations, while a good idea in theory and something that ought to be encouraged generally, provide no excuse for any noncompliance with discovery in this adversary proceeding.
22 Nov 99: Ds answer interrogs and respond to discovery requests (23 Nov certif of service)
23 Nov 99: FH commences. Continued to Feb 10, 2000, to present evidence.
6 Dec 99: scheduling order entered from 23 Nov hearing, setting out DL for trial prep for Feb 10 hearing.
26 Jan 00: Tom Rice "substitutes" in as counsel (his stmt on Feb 10 – day before his knee surgery on 27 Jan) for Ds (order letting Arslanian out of case entered 14 Feb 00) .
10 Feb 00: Heather Hall Dudney files verification of interrog answers.
10 Feb 00: FH resumes, with evidence.
In effect, interrog and requests for production filed 23 aug, unverified answers and responses three months later and almost two months after Arslanian said that he had faxed

a response back to JJ, with verification of interrog answers about 5 1/2 months after interrogs originally served and more than four months after Arslanian said that he had faxed a response back to JJ. But no further m/compel or for sanctions filed for the lack of verification or for inadequate answers or production. (Not saying there should have been, or encouraging such further filing, but only specifying that fact for purposes of the section of rule 37 that I am relying on.) so only section of rule I go under is 37(a)(4)(a): "...if the disclosure or requested discovery is provided after the motion is filed...."
Rule requires good faith effort to obtain the discovery without court action. JJ started that with Sept 28 letter. Problem arose when it took Ds almost two months to respond after that – had they responded more promptly even after the motion was filed on Oct 1, probably no basis for sanctions. But in those circumstances, even with Arslanian moving, they just took too long – should have been much more urgency in dealing with this discovery, especially when realized how late it was due to Arslanian moving. (Said last thing at conclusion of Nov 23 hearing.)
In short, I find:

(1) that Ds should have responded more quickly to the interrogs and requests for production,

(2) that they did so in response to the motion that was filed,

(3) that there finally were answers and production and no request for further production based on inadequate answers or production and what was tried was only the relief requested in the October 1 motion as supplemented by the Nov 17 supplement, – note that the boxes were produced but not clear what the contents were, but claim made that they were produced in same condition as kept in the business, and I have already commented that it may be that the business was as disorganized as the records were. So will order some relief on this issue, which is that Ds must produce all the documents, in toto, that they have, for both WEI and Hydro, at JJ's office, on a given date that counsel work out, before the depos of the Dudneys. Don't need to reorganize them. Mr. Freeman and JJ can go through them and copy what they want, but will be duty of Freeman and JJ to do that homework, regardless of how distasteful they may find the state of the documents and their lack of organization. Answers to Interrogs are barely satisfactory – can be fleshed out on depositions. Ds need to make sure that JJ does not successfully file a motion for further production of documents in this case, because the sanctions will be much more severe, including possible grant of relief requested on the merits of the adv proc complaint, but

(4) sanctions are appropriate.

At end of Feb 10 hearing, I said that if I ordered sanctions, I would have Mr. Jurgens file an affidavit (with time sheets and costs bills attached) for atty fees and costs incurred in obtaining this relief. He needs to file that affidavit within 2 weeks, and Ds can have 2 weeks to look at it and object. If objection, will schedule that for a hearing at Mr. Jurgens request.
Issue of who pays sanctions. Appears Ds tried to lay all the blame on Arslanian, and to be sure Arslanian has taken some blame on himself. However, evidence is that Arslanian learned of the problem NLT sept 29 and moved to remedy it – after that, is not clear whose fault it was, but problem could have been cleared up shortly after Sept 29, as I have indicated above. Therefore sanctions will be joint and several, as allowed by rule, on both

Ds and Arslanian – they can sort out who is ultimately to blame, without involving JJ.

What emerges is picture of company not well organized, in trouble. This is emerging as the background that led to the complaint.

JJ to prepare order, reciting court made oral f and c on record today, and then reciting decretal portions of ruling in summary form.