

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
)
_____)	

**APPENDIX OF ELECTRONIC CASES IN SUPPORT OF LEAD PLAINTIFFS' REPLY
IN SUPPORT OF MOTION TO COMPEL THE HOUSEHOLD DEFENDANTS TO
PRODUCE SOURCE LOGS FOR DOCUMENTS PRODUCED IN THIS LITIGATION**

CASE

TAB

Amon ex rel. Amon v. Harrison,
No. 91 C 980, 1993 U.S. Dist. LEXIS 9565 (N.D. Ill. July 14, 1993)1

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Tab 1

LEXSEE 1993 US DIST LEXIS 9565

**GEORGE AND BEVERLY AMON, on behalf of DEBRA AMON, Plaintiffs, v.
ANITA HARRISON d/b/a GOLF-A-RAMA HOT SPOT, et al., Defendants.**

Case No. 91 C 980

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION**

1993 U.S. Dist. LEXIS 9565

**July 14, 1993, Decided
July 15, 1993, Docketed**

LexisNexis(R) Headnotes

JUDGES: [*1] Williams

OPINIONBY: ANN CLAIRE WILLIAMS

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiffs George and Beverly Amon ("the Amons") brought this action against Michael Schiessle ("Schiessle") and other defendants, alleging negligence in the operation of Golf-A-Rama Hot Spot ("Hot Spot"), a go-cart track on which the Amon's minor daughter was injured. The Amons claimed that Schiessle and other defendants have an ownership interest in Hot Spot or the underlying real estate. Subsequently, the court granted plaintiffs' motion to compel Schiessle's deposition testimony and denied Schiessle's motion for summary judgment on the grounds that it was premature. This matter is before the court on Schiessle's motion to dismiss plaintiffs' amended complaint pursuant to *Federal Rule of Civil Procedure 37(d)* ("Rule 37(d)") for plaintiffs' alleged failure to comply with discovery requests. For the reasons stated below, the motion is denied.

Background

Schiessle was informed that plaintiffs had served subpoenas to produce documents and depose witnesses without providing notice to his attorney. On November 25, 1992, defendant wrote plaintiffs a letter informing them of the failure to provide notice, and requested [*2]

production of certain documents. Specifically, defendant requested discovery of all subpoenas issued by plaintiffs and documents produced pursuant to subpoenas; an exhibit marked during defendant's deposition; all documents reflecting ownership of Hot Spot by Schiessle or defendants Anita Harrison and Troy Heavner; any supplemental documents; and an affidavit swearing that the production was complete. (Memorandum in Support of Defendant Schiessle's Motion to Dismiss Amended Complaint ("Def. Memo"), Defendant's Request for Production of Documents, p. 3).

On November 30, 1992, plaintiffs sent defendant a response with a copy of one document which had been turned over pursuant to the subpoena. Plaintiffs also apologized for the alleged lack of notice. (Response, Ex. B). This insurance document lists Anita Harrison ("Harrison") as a named insured of Hot Spot. (Exhibit to Def. Memo). The parties dispute whether plaintiffs produced all of the documents which were subject to the production request. (Cf. Plaintiffs' Response to Defendant Schiessle's Motion to Dismiss ("Response"), pp. 1-2; Defendant Schiessle's Reply to Plaintiffs' Response to Motion to Dismiss ("Reply"), p. 1).

Plaintiffs [*3] did not send an affidavit verifying completion of discovery. On December 7, 1992, defendant sent another letter reiterating the request for an affidavit verifying completion. Plaintiffs' attorney did not respond to this second letter.

Schiessle contends that plaintiffs wilfully failed to comply with discovery procedures and that their actions manifest flagrant bad faith. Defendant requests that plaintiffs' amended complaint be dismissed under Rule 37(d). Alternatively, defendant requests that the

1993 U.S. Dist. LEXIS 9565, *

produced document be deemed prima facie proof that Harrison, rather than Schiessle, is the owner of Hot Spot. (Memorandum in Support of Defendant Schiessle's Motion to Dismiss Amended Complaint ("Def. Memo"), pp. 4-5)

Motion to Dismiss Pursuant to Rule 37(d)

Rule 37(d) permits an immediate sanction against a party for a complete failure to respond to a notice of deposition, interrogatories, or a production request. n1 It is well settled that the decision whether to impose sanctions under Rule 37(d) is soundly within the discretion of the trial court. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1975). See generally [*4] 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2284 (1970 & Supp. 1993) (discussing the flexibility of the rule and the wide discretion entrusted to the court). Moreover, the Seventh Circuit has recommended that courts apply less drastic sanctions before imposing a severe sanction such as dismissal or default. See e.g., *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 75 (7th Cir. 1992); but see 8 Wright & Miller, § 2284 at 362 (Supp. 1993) (noting that several courts are increasingly imposing more severe sanctions).

n1 Rule 37(d) provides in pertinent part:

If a party . . . fails (1) to appear before the officer who is to take the deposition, . . . or (2) to serve answers or objections to interrogatories submitted under Rule 33, . . . or (3) to serve a written response to a request for inspection submitted under Rule 34, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed. R. Civ. P. 37(d).

[*5]

The court denies the motion to dismiss this complaint for several reasons. First, it is not clear that plaintiffs have failed to comply with the production

request because plaintiffs claim that they produced all of the documents in their possession. (Response, p. 2). Second, the court does not view the failure to provide an affidavit as a violation of Rule 37(d) -- despite the fact that plaintiffs could have easily provided such an affidavit to verify their compliance with the production request. n2 Moreover, the dismissal of a complaint is a severe sanction which is usually imposed upon a finding that the party's failure to comply with discovery procedures was wilful or in bad faith. See *National Hockey League*, 427 U.S. at 643. In the instant case, there is no indication that plaintiffs' failure to provide notice of subpoena was due to anything more than inadvertence.

n2 The Federal Rules of Civil Procedure do not require the filing of an affidavit with a response to a production request. See *Fed. R. Civ. P. 34(b)*.

[*6]

Nor do the facts suggest that this failure, or any other, prejudiced the defendant's position in his motion for summary judgment. Despite Schiessle's allegations to the contrary, the motion for summary judgment was denied as premature because no meaningful discovery had taken place in the case. (Reply, p. 3). Furthermore, the produced document only states that Harrison is a named insured of Hot Spot, it does not conclusively show that Schiessle had no ownership interest in the go-cart track or underlying real estate. For that same reason, the court denies defendant's invitation to deem that this document is prima facie proof that Schiessle lacks an ownership interest in Hot Spot. In sum, defendant has presented no basis for the imposition of Rule 37(d) discovery sanctions.

Conclusion

For the foregoing reasons, defendant's motion to dismiss the amended complaint is denied. However, plaintiffs are directed to tender an affidavit verifying their compliance with Schiessle's production request by July 26, 1993.

ENTER:

Ann Claire Williams, Judge

United States District Court

Dated: JUL 14 1993

DECLARATION OF SERVICE BY UPS OVERNIGHT DELIVERY

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on July 21, 2005, declarant served by UPS, next day delivery, the **APPENDIX OF ELECTRONIC CASES IN SUPPORT OF LEAD PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL THE HOUSEHOLD DEFENDANTS TO PRODUCE SOURCE LOGS FOR DOCUMENTS PRODUCED IN THIS LITIGATION** to the parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of July, 2005, at San Francisco, California.

/s/

MARCY MEDEIROS

HOUSEHOLD INTERNATIONAL (LEAD)

Service List - 7/21/2005 (02-0377)

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