

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

C-B KENWORTH, INC. a/k/a)
GMC TRUCKS OF PORTLAND,)
)
Plaintiff)
)
v.)
)
GENERAL MOTORS CORPORATION,)
)
Defendant)

Civil No. 87-0250 P

MEMORANDUM DECISION AND ORDER ON MOTION FOR SANCTIONS

Before the court is the plaintiff's motion for sanctions under Fed. R. Civ. P. 37(d). The plaintiff contends that the defendant (hereinafter sometimes referred to as "GM") improperly withheld documents it requested in August, 1987 pursuant to Fed. R. Civ. P. 34. It asserts that the defendant's failure to produce these documents in response to that request has significantly prejudiced its discovery and it now seeks issue preclusion¹ and the payment of costs. The defendant argues that the plaintiff's motion should be denied because, first, it complied with the discovery requests at issue and, second, even if its production was incomplete it nevertheless served a written response to the request which renders Rule 37(d) inapplicable.

¹ Specifically, the plaintiff seeks a determination by the court that the defendant, together with representatives of Volvo White Truck Corporation, had decided by September 10, 1986 that the plaintiff would not be appointed a dealer for heavy-duty trucks for the joint venture company between the defendant and Volvo.

The facts underlying this motion are as follows: On or about August 14, 1987 the plaintiff commenced this action and served the defendant with a complaint, summons and a limited Rule 34 request for production of documents. The defendant submitted a written response to the document request on October 13, 1987 in which it first stated a number of objections, denominated as general objections, and then proceeded to identify those documents it agreed to produce subject to the general objections. Among the documents requested were:

All notes, minutes and other documents relating or referring to any meetings or conversations of the joint venture selection committee referred to in Exhibit A to the Complaint or any other committee or group regarding the offer or possible offer of representation, or dealership rights, for heavy-duty trucks marketed or to be marketed by Volvo GM Heavy Truck Corporation to any truck dealer located in the State of Maine.

Plaintiff's Memorandum in Support of Its Motion for Sanctions Under Rule 37, Exh. A at 3. The defendant responded to this particular request as follows:

Subject to the General Objections, GM will produce such documents to the extent they (a) exist in GM's files and (b) relate to any such truck dealers located in that part of Maine which is encompassed by plaintiff's prescribed Area of Primary Responsibility. GM objects to any broader scope of production as it would involve areas other than plaintiff's and therefore is beyond the proper scope of discovery.

See General Motors Corporation's Response to Plaintiff's Request for Production of Documents (attached to letter from Wendell G. Large dated July 23, 1990). The plaintiff did not object to the limitation placed on the request by the defendant that it would only produce documents relating to the plaintiff's "area of primary responsibility." The defendant subsequently produced several documents encompassed by its response. On January 18, 1990 the court granted the plaintiff leave to amend its original complaint based upon the court's finding that the "[p]laintiff only obtained the document on which the proposed amendment is based shortly before making the motion . . . [and] justice requires

that the amendment be allowed."² *See* Order on Pending Motions at 1 (Docket No. 64). Subsequent to amending its complaint the plaintiff served the defendant with another request for production of documents. *See* Plaintiffs' Rule 34 Document Request of General Motors (found at Exh. C to Defendant General Motors Corporation's Memorandum in Opposition to Plaintiff's Motion for Sanctions). The defendant responded to this request by producing on March 6, 1990 the documents which form the basis for this motion. These documents contain references to dealerships within the plaintiff's primary area of responsibility, *i.e.*, the Portland area, and were not supplied in response to the first document request. *See* Exhs. B and G to Plaintiff's Memorandum in Support of Its Motion for Sanctions Under Rule 37.

² The amended complaint added a count alleging fraud under Maine law and a claim for punitive damages.

The plaintiff argues that the defendant's failure to have supplied the requested documents in response to its initial request inhibited its ability to take meaningful discovery and deposition testimony and therefore seeks issue preclusion. *See* n.1, *supra*. Rule 37(d)³ provides, *inter alia*, for sanctions against a party who fails to serve a written response to a properly served discovery request. The courts are split, however, over the extent to which Rule 37(d) covers a party whose response is incomplete. Some courts will order Rule 37(d) sanctions only where there is a total failure to respond. *See Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 995 (8th Cir. 1975); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1339-40 (9th Cir. 1985); *Southard v. Pennsylvania R.R.*, 24 F.R.D. 456 (E.D. Pa. 1959). Other courts have awarded sanctions under Rule 37(d) where a response is so evasive or misleading as to amount to no response at all. *See* cases collected in *Badalamenti v. Dunham's Inc.*, 896 F.2d 1359, 1363 (Fed. Cir. 1990). I conclude that the latter formulation states the better rule. A failure to disclose requested documents which are not subject to any unchallenged objections or limitations interposed by the responding party is inherently evasive and misleading. Indeed, the production of some, but not all, requested documents implies either that unproduced documents do not exist or, if they do, that they fall within one or more stated objections or limitations. If such documents do exist and do not fall within an asserted objection or limitation, the resulting incomplete

³ Rule 37(d) states in relevant part:

If a party . . . fails . . . (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, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. 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

production is tantamount to no answer at all, and rule 37(d) is applicable." *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145, 155 (7th Cir. 1976). Any other reading of the rule invites a callous disregard for the very purpose of discovery, which is to narrow and clarify the basic issues between the parties and to facilitate the orderly and full exposure of the pertinent evidence in a case. *See* 8 C. Wright & A. Miller, *Federal Practice and Procedure* ' 2001 at 13-15 (1970). Failure to produce discoverable documents not only impedes the discovery process, but often leads to extended and piecemeal discovery.

In this case, the defendant objected generally to the production of requested documents protected as work-product or by the attorney-client or some other privilege. In addition, it specifically limited its production to those documents related to truck dealers located within the plaintiff's prescribed area of primary responsibility. Because the plaintiff failed to challenge the general objections or specific limitation interposed by the defendant, it must accept them. The defendant, however, does not argue that any of the documents at issue comes within any of its general objections. Rather, it seems to suggest that they concern matters outside of the plaintiff's primary area of responsibility and therefore come within the specific limitation which conditioned its response. A review of the documents indicates that they do, indeed, concern matters outside of the plaintiff's primary area of responsibility. Yet, with one exception, they also refer to Portland or South Portland. Accordingly, I conclude that the defendant's failure to produce those documents attached as Exhibits B and G to the plaintiff's supporting memorandum rendered its response so evasive and misleading as to amount to no response at all.

award of expenses unjust.

Having determined that the defendant's failure to produce certain documents comes within Rule 37(d), I next must determine the appropriate sanction. I conclude that the plaintiff's requested sanction of issue preclusion is an extreme remedy not warranted in the circumstances presented. Although the missing documents were produced on March 6, 1990, the plaintiff has made no showing that this late production has prevented it from adequately developing its case for trial on the issue as to which it seeks preclusion or in any other respect.⁴ The rule does provide that "[i]n lieu of any order . . . 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." Fed. R. Civ. P. 37(d). I find that the proper remedy is to allow the plaintiff to recover from the defendant its reasonable expenses.

Accordingly, the plaintiff's motion is GRANTED as follows: The defendant is ORDERED to pay the reasonable expenses, including attorney fees, caused by its failure to produce the documents at issue. Unless the parties are able to agree on the amount and manner of payment of such expenses, the plaintiff shall file affidavits as necessary to substantiate the expenses to which it claims to be entitled under this order, together with a supporting memorandum, on or before August 17, 1990 and the defendant shall file any responsive affidavits and memorandum on or before August 28, 1990. A determination will be made on the basis of the papers so filed without oral argument unless otherwise ordered by the court or, in its discretion, upon request of counsel. Any such request shall be filed by August 31, 1990 and contain a detailed specification of the basis of the claim of need for such argument.

⁴ I note that the record reflects no motion seeking an opportunity to conduct further discovery relating to the late production. I can only conclude that the plaintiff has either been able to conduct such discovery with the defendant's cooperation or has decided against such discovery.

Dated at Portland, Maine this 30th day of July, 1990.

David M. Cohen
United States Magistrate