

STATE OF MINNESOTA
COUNTY OF RAMSEY

Judge Joanne Smith
DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Contract

DR. BA LAM,

)
)
) Plaintiff,

v.

COUNTY OF RAMSEY, MINNESOTA,)
DANIEL SCHACHT, OFFICE OF THE)
RAMSEY COUNTY ATTORNEY, and)
DAVID MACMILLAN,)

)
) Defendants.)

) **PLAINTIFF’S MEMORANDUM OF LAW**
) **IN OPPOSITION TO DEFENDANT**
) **RAMSEY COUNTY’S MOTION TO**
) **COMPEL DISCOVERY**

) Case No. 62-C8-05-012545
)
)

TO: HON. JOANNE SMITH, RAMSEY COUNTY DISTRICT COURT, 1530
COURTHOUSE, 15 W. KELLOGG BOULEVARD, ST. PAUL, MN 55102.

Plaintiff Dr. Ba Lam, through the undersigned attorney, submits this memorandum of law in opposition to defendants’ frivolous motion to compel responses to the third of thrice-served requests for production of documents.

Nota Bene

Defendant’s motion fails procedurally and on the merits. As he has done on all previous motions, defendants’ attorney goes out of his way to demonstrate an unwillingness to comply with motion practice rules and motion practice generally. This time, he has served an invalid affidavit and no memorandum of law, and the motion papers served on plaintiff’s attorney by fax were never mailed to plaintiff’s attorney. As usual, any correspondence with the court was not cc’d to plaintiff’s attorney, requiring plaintiff’s attorney to demand to know whether defendant’s *albeit* invalid and slipshod motion papers were timely filed or filed at all, whether the motion filing fee was paid, and whether an affidavit of service was filed with the court and, if so, what the affiant swore was done.

FACTS

The document requests at issue, which were served on May 4, 2007, were also served on September 15, 2006, and on March 29, 2007. See Exhibits 1, 3, and 5 to Affidavit of Alfred Stanbury dated July 3, 2007 (hereinafter “Stanbury Aff. ¶ __ and/or Ex. __”). Each of the foregoing sets of discovery consisted of the following identically-worded requests (with one exception, as noted), *to wit*:

REQUEST NO. 1:

- 9/15/06 Copies of all photographs, slides, films, moving pictures, videotapes, or other type of photographic representations relating to this cause of action and the prior lawsuit against Ramsey County, Lam v. Ramsey County, et. al. (Ramsey County No. 62-C2-02-009271), including all photographs taken before, during and after the installation of the drain.
- 3/29/07 Copies of all photographs, slides, films, moving pictures, videotapes, or other type of photographic representations relating to this cause of action and the prior lawsuit against Ramsey County, Lam v. Ramsey County, et. al. (Ramsey County No. 62-C2-02-009271), including all photographs taken before, during and after the installation of the drain.
- 5/1/07 Copies of all photographs, slides, films, moving pictures, videotapes, or other type of photographic representations relating to this cause of action and the prior lawsuit against Ramsey County, Lam v. Ramsey County, et. al. (Ramsey County No. 62-C2-02-009271), including all photographs taken before, during and after the installation of the drain.

REQUEST NO. 2:

- 9/15/06 Copies of all drawings, models, charts, or other similar types of illustrative or demonstrative items in relation to this cause of action and the prior lawsuit initiated by the Plaintiff against Ramsey County, Lam v. Ramsey County, et al. (Ramsey County No. 62-C2-02-009271).
- 3/29/07 Copies of all drawings, models, charts, or other similar types of illustrative or demonstrative items in relation to this cause of action and the prior lawsuit initiated by the

Plaintiff against Ramsey County, Lam v. Ramsey County, et al. (Ramsey County No- 62-C2-02-009271).

5/1/07 Copies of all drawings, models, charts, or other similar types of illustrative or demonstrative items in relation to this cause of action and the prior lawsuit initiated by the Plaintiff against Ramsey County, Lam v. Ramsey County, et al. (Ramsey County No. 62-C2-02-009271).

REQUEST NO. 3:

9/15/06 Copies of any notes, journals, diaries and/or similar types of documentation kept by the Plaintiff in relation to this cause of action and the prior lawsuit initiated by the Plaintiff against Ramsey County, Lam v. Ramsey County, et al. (Ramsey County No. 62-C2-02-009271), including the diary or notes Plaintiff referred to in his deposition of September 14, 2006.

3/29/07 Copies of any notes, journals, diaries and/or similar types of documentation kept by the Plaintiff in relation to this cause of action and the prior lawsuit initiated by the Plaintiff against Ramsey County, Lam v. Ramsey County, et al. (Ramsey County No. 62-C2-02-009271), including the diary or notes Plaintiff referred to in his deposition of September 14, 2006.

5/1/07 Copies of any notes, journals, diaries and/or similar types of documentation kept by the Plaintiff in relation to this cause of action and the prior lawsuit initiated by the Plaintiff against Ramsey County, Lam v. Ramsey County, et al. (Ramsey County No. 62-C2-02-009271), including the diary or notes Plaintiff referred to in his deposition of September 14, 2006.

REQUEST NO. 4:

9/15/06 Copies of all tangible things or evidence known to you to exist with regard to this case and which you plan to introduce at the trial.

3/29/07 Copies of all tangible things or evidence known to you to exist with regard to this case and which you plan to introduce at the trial.

5/1/07 Copies of all tangible things or evidence known to you to exist with regard to this case and which you plan to introduce at the trial.

REQUEST NO. 5:

- 9/15/06 Copies of all statements of all parties and non-parties to this action.
- 3/29/07 Copies of all statements of all parties and non-parties to this action.
- 5/1/07 Copies of all statements of all parties and non-parties to this action.

REQUEST NO. 6:

- 9/15/06 Copies of all photographs, slides, films, moving pictures, videotapes, or other type of photographic representations of the Plaintiffs property prior to any landscaping performed.
- 3/29/07 Copies of all photographs, slides, films, moving pictures, videotapes, or other type of photographic representations of the Plaintiffs property prior to any landscaping performed.
- 5/1/07 Copies of all photographs, slides, films, moving pictures, videotapes, or other type of photographic representations of the Plaintiffs property prior to any landscaping performed.

REQUEST NO. 7:

- 9/15/06 Any or all documents that you reviewed or relied upon in preparing your compliant(*sic*).
- 3/29/07 Any or all documents that you reviewed or relied upon in preparing your compliant(*sic*).
- 5/1/07 Any or all documents that you reviewed or relied upon in preparing your compliant(*sic*).

REQUEST NO. 8:

- 9/15/06 Any other documents, as defined above, which have not been specifically requested in the foregoing paragraphs which relate to the subject matter of this litigation.
- 3/29/07 Any other documents, as defined above, which have not

been specifically requested in the foregoing paragraphs which relate to the subject matter of this litigation.

5/1/07 Any other documents, as defined above, which have not been specifically requested in the foregoing paragraphs which relate to the subject matter of this litigation.

REQUEST NO. 9:

9/15/06¹

3/29/07 Any documents, drawings, recordings or records that specify the exact location where drain system II was to be installed.

5/1/07 Any documents, drawings, recordings or records that specify the exact location where drain system II was to be installed.

[WARNING]

9/15/06 **YOUR(*sic*) SHOULD ALSO TAKE NOTICE THAT** defendant intends to object to the introduction of any evidence at trial relating to any of these requests, which have not been revealed in a timely manner by an appropriate written answer to these requests.

3/29/07 **YOUR(*sic*) SHOULD ALSO TAKE NOTICE THAT** defendant intends to object to the **introduction** of any evidence at trial relating to any of these requests, which have not been revealed in a timely manner by an appropriate written answer to these requests.

5/1/07 **YOUR(*sic*) SHOULD ALSO TAKE NOTICE THAT** defendant intends to object to the introduction of any evidence at trial relating to any of these requests, which have not been revealed in a timely manner by an appropriate written answer to these requests.

In a September 26, 2006 letter to defendants' attorney, plaintiff's attorney objected in pertinent part as follows to the timing of the document requests served on September 15, 2006:

It could only be clear from my September 15th letter to the judge

¹ The document requests served on September 15, 2006, did not have the ninth request that first appeared in the requests served on March 29, 2007.

that I knew and know exactly what the scheduling order provides and what aspects of my extension request were not and still have not been addressed by the judge. In pertinent part, the scheduling order provides that “[a]ll discovery shall be noticed *so as to be completed by September 15, 2006.*” (Emphasis added.) Consequently, the service of your Request for Production of Documents on September 15th was not timely. To have been timely, that discovery had to have been served 30 or more days before September 15th. In other words, despite knowing that September 15th was a discovery completion deadline and not a discovery notice deadline, you proceeded to serve that document production request. And even if the service on September 15th had been timely, a response would not be due pursuant to Rule 34 until mid-October.

Stanbury Aff. Ex. 2.

On May 1, 2007, plaintiff served Plaintiff’s Objections to Defendants’ Request for Production of Documents in response to the document requests served on March 29, 2007:

GENERAL OBJECTIONS

1. Plaintiff objects to these document requests in their entirety on the grounds that they are in violation of paragraph no. 2 of the court’s First Amended Scheduling Order dated January 23, 2007, which provided that “[a]ll discovery **shall** be commenced in time to be completed before April 22, 2007.” (Emphasis added.) Defendants’ document requests were served by mail on March 29, 2007, and thus the time to respond did not expire until May 1, 2007.

2. **Plaintiff further objects to these document requests as and to the extent that they call for information beyond the scope of Rules 26 and 34.**

Stanbury Aff. Ex. 3 and 4 (emphasis added).

About a month earlier, plaintiff had moved to extend certain but not all deadlines in the First Amended Scheduling Order, *i.e., e.g.*, no extension of the deadline to complete written discovery was sought. As to that, plaintiff’s proposal was worded as follows:

All discovery shall be commenced in time to be completed by April 22, 2007, except depositions may be taken through May 31, 2007.

In granting the motion in an order issued on April 30, 2007, however, the court

instructed the civil case manager to extend the jury trial date and all other deadline dates by 45 days. Defendant thereupon served the document requests at issue, which as shown above are the same, identically-worded requests which defendants served on March 29, 2007. Five days later, the court issued an Amended Scheduling Order which stated in pertinent part that “[a]ll discovery shall be noticed so as to be completed by July 10, 2007.”

ARGUMENT

I Defendant’s Motion Should Not Be Heard For Failure (Yet Again) To Comply With Minn. Gen. R. Prac. 115.04 And 115.10 And Minn. R. Civ. P. 37.01(b).

The motion papers which defendant served by fax but not by mail on June 26, 2007, consisted of the following and only the following: (1) Defendant Ramsey County’s Notice of Motion and Motion to Compel Responses to Defendant’s Request for Production of Documents; (2) Unsigned, unnotarized, and undated Affidavit of C. David Dietz; (3) copy of Defendant’s Request for Production of Documents served on May 4, 2007, and the May 4, 2007 cover letter to plaintiff’s attorney; (4) Proposed Order Compelling Discovery; and Affidavit of Service by U. S. Mail and Via Facsimile of Defendant’s Request for Production of Documents served on May 4, 2007. Stanbury Aff. Ex. 5. As defendants’ attorney has done before, those faxed motion papers did not include a cover letter to plaintiff’s attorney nor any copies of correspondence to the court or the presiding judge. Plaintiff thus has been deprived of his right to know if the originals of defendant’s motion papers were filed, if or when courtesy copies were delivered to the presiding judge, and whether defendant Ramsey County paid the onerous motion filing fee.

Defendant served no memorandum of law, which is contrary to well-settled practice even though Minn. Gen. R. Prac. 115.04(a) allows the moving party on a non-dispositive motion to serve and file “any” memorandum of law the party intends to submit. At the same time, defendant served an invalid Affidavit of C. David Dietz even though Rule 115.04(a) can only be taken to contemplate that any served and filed

affidavit will be valid. The Dietz “affidavit” appears to have been “signed” with a signature stamp but in any event is not notarized or dated and thus is invalid. If it was signed with a signature stamp, there is no way to know, of course, whether Dietz himself stamped the signature stamp on the affidavit. That affidavit, which contains the two conclusory sentences comprising defendant’s ostensible argument, must be disregarded, which in turn requires a denial of the motion for failure to serve and file any argument in support. The two *conclusory* sentences which comprise defendant’s entire “argument” are: “The information sought in Defendant’s Request for Production of Documents is clearly relevant to the ultimate resolution of facts which plaintiff, Dr. Ba Lam, has put in issue” and “[a]s a result of plaintiff’s failure to respond to defendant’s discovery request, defendant has been prejudiced in the preparation of its case.” And, as an additional reason for the court to decline to hear defendant’s motion, defendant has not certified to the court that its attorney initiated a conference with plaintiff’s attorney in an attempt to resolve the purported discovery dispute as required by Minn. Gen. R. Prac. 115.10. And the court is respectfully reminded that, consonant with Rule 115.10, the court has stated in paragraph no. 6 of the May 9, 2007 Amended Scheduling Order that “[n]o motion will be heard unless the moving party certifies in writing the attempts of the parties to resolve their differences prior to the motion hearing.”

II. Defendant’s Motion Must Be Denied Because Plaintiff *Did* Respond To Defendant’s Document Requests 1-9.

Plaintiff served a timely and proper objection to the document requests which defendants served on March 29, 2007, and thus was not obligated to object or otherwise respond again to the identically-worded document requests which defendants Ramsey County served on May 4, 2007. Minn. R. Civ. P. 34 provides in pertinent part:

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, . . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. . . . The party submitting the request may

move for an order pursuant to Rule 37 with respect to any objection

Defendant has never moved pursuant to Rule 37 with respect to plaintiff's objections nor attempted to show, *e.g.*, that the requested documents are beyond the scope. Defendant's motion only alleges a failure to respond to the May 4, 2007 document requests, which, as shown, is baseless.

III. An Award Of Costs And Attorney's Fees To Defendant Is Precluded By Minn. R. Civ. P. 37.01(d)(1).

Minn. R. Civ. P. 37.01(d)(1) provides in pertinent part:

If the motion is granted, . . . the court shall, . . . require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

In this instance, defendant filed its motion papers without first making a good faith effort to obtain the discovery without court action, and plaintiff's objection was entirely justified. Consequently, even if there were grounds to grant defendant's motion, costs and attorney's fees could not be properly awarded to defendant Ramsey County under the circumstances. Moreover, it should be noted that, in its proposed order, defendant seeks a sanction of dismissal (the harshest and rarely imposed discovery sanction) if plaintiff were to fail to comply with an order compelling document responses (Stanbury Aff. Ex. 5), whereas, as stated in the "warning" inserted at the end of each of defendant's three document requests, defendant's previously stated intention was to do nothing more than object to the introduction at trial of any documents not revealed in response to the document requests.²

² **"YOUR(sic) SHOULD ALSO TAKE NOTICE THAT** defendant intends to object to the introduction of any evidence at trial relating to any of these requests, which have not been revealed in a timely manner by an appropriate written answer to these requests."

IV. Plaintiff Should Be Awarded His Costs And Attorney's Fees Incurred In Defending Against Defendant's Frivolous Motion.

Minn. R. Civ. P. 37.01(d)(2) provides in pertinent part:

If the motion is denied, . . . the court . . . shall, . . . require the moving party or the attorney filing the motion or both of them to pay to the party who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

In this instance, defendant's motion has been shown to be unjustified and procedurally improper in the extreme. Consequently, as and for the reasonable expenses, including attorney fees, incurred in having to defend against defendant's motion, plaintiff requests \$1,455.00, consisting of 2 hours of his attorney's time @ \$350 preparing these response papers plus an estimated 1 hour preparing for the hearing of the motion plus an estimated 1 hour of his attorney's time @ \$350 appearing at the hearing of the motion plus the \$55 motion filing fee. Stanbury Aff. ¶ 8.


CONCLUSION

For the foregoing reasons, the court should deny or refuse to hear defendant's motion, and plaintiff should be awarded the costs and attorney's fees incurred in having to defend against it.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: July 3, 2007.



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