

Second Circuit Court Sanctions Both Defendants' CEO And Defendants' Counsel For Discovery Misconduct

Article By:

Sandi R. Wilson

Brett M. Anders

District Judge Katherine Polk Failla imposed significant sanctions in *Arrowhead Capital Finance, LTD v. Seven Arts Entertainment, Inc.*, 2016 U.S. Dist. LEXIS 126545 (S.D.N.Y. Sept. 16, 2016), following Defendants' repeated failure to cooperate in discovery and comply with the terms of her previously issued discovery orders.

The Backdrop. Plaintiff sued Defendants in 2014 seeking to enforce an incontestable judgment that it had no practical means of enforcing because all of the assets held by the debtor had been sold to Defendants. Defendants filed a motion to dismiss, arguing the Court lacked personal jurisdiction. The Court denied the motion pending discovery. In a letter dated September 21, 2015, Plaintiff claimed that Defendants and their attorney had engaged in various forms of misconduct during discovery. Specifically, Plaintiff alleged that Defendants had puffed up their discovery with a nonresponsive document production, while simultaneously refusing to produce responsive documents. Plaintiff also alleged that the discovery responses were incomplete and these issues were exacerbated by Defendants' failure to produce key witnesses for deposition. The Court held a conference to address Plaintiff's concerns. During the conference, Defendants' counsel acknowledged that he had not reviewed the discovery responses and merely forwarded the materials he received from his client, Defendants' CEO.

The Court's First Step. Based on information received during a conference with the parties, the Court stated it had no confidence that Defendants were meeting their discovery obligations. The Court ordered Defendants' CEO to personally appear before the Court and testify concerning the alleged discovery misconduct following Plaintiff's opportunity to depose multiple witnesses. The Court also asked Plaintiff's counsel to provide a list of the responsive documents Defendants had failed to produce and ordered Defendants to produce the documents identified by Plaintiff. Nevertheless, Defendants continued to refuse to produce witnesses for deposition or produce the required documents.

The Contempt Hearing. Because Defendants' CEO appeared to be directing Defendants' counsel not to produce responsive documents or key witnesses, Plaintiff move for sanctions. Defendants' CEO testified that his offices were "paperless" and all records were stored on a server maintained by

a third party that had destroyed the records in issue—after Defendants failed to pay their bills. The CEO also cast blame on various staff people to whom he had purportedly delegated the task of compliance with the Court's order.

The Court Was Not Amused. The Court concluded that Defendants were willfully making misrepresentations to the Court, cancelling depositions, and violating the Court's orders for the purpose of withholding information from Plaintiff. As such, the Court held that Defendants had forfeited their jurisdictional arguments through non-compliance with the Court's discovery order and stated that the jury would receive a spoliation instruction, as appropriate, on any claims submitted to the jury. Defendants' CEO also was ordered to pay Plaintiff's costs in association with bringing its motions in regard to discovery misconduct and was ordered to retain separate legal counsel to conduct a thorough review of Defendants' files and determine if any additional responsive information remained to be produced. This counsel also would represent Defendants in any future discovery hearings. Defendants' counsel, who was deemed complicit in the violations, also was ordered to pay a portion of Plaintiff's costs.

This decision reinforces that counsel may not blindly follow the instructions of their clients and have a duty to ensure that good faith efforts are taken to comply with a parties' discovery obligations.

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