

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
5:06-CV-305-BO

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
)
v.)
)
S.G.T. CINELLI'S, INC. and CINELLI'S)
RISTORANTE, INC.,)
)
Defendants.)

DECISION AND ORDER

This case comes before the court on plaintiff's motion to compel discovery responses from defendant S.G.T. Cinelli's, Inc. ("S.G.T.") and to extend the discovery period (DE #31). S.G.T. has not filed a response to the motion. For the reasons set forth, the motion will be allowed in its entirety.

Background

Plaintiff commenced this action on 3 August 2006 alleging that S.G.T. and defendant Cinelli's Ristoriante, Inc. violated Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 by subjecting a class of similarly situated women to a hostile work environment and also constructively discharging a class of women as a result of sexual harassment. (*See* Am. Compl. (DE #4), p. 1). Plaintiff seeks a permanent injunction, damages making whole the alleged victims of defendants' misconduct, costs, and other relief. (*Id.*, pp. 3-4). Defendants deny any wrongdoing in their answers to plaintiff's amended complaint. (*See* Defs. Ans. to Am. Compl. (DE #19, 20)). A Scheduling Order was issued by the court which provided for the close of discovery by 15 January 2008. (DE #26).

On 4 October 2007, plaintiff served on S.G.T. interrogatories and requests for production of documents for inspection (DE #32-2, pp. 1-7), the responses to which were due by 7 November 2007. Then-counsel for S.G.T. made a request for additional time to serve responses, to which plaintiff agreed, resulting in a new due date of 26 November 2007. (DE #32-2, p. 8). No responses were forthcoming and plaintiff's counsel contacted opposing counsel two more times without obtaining responses. Then, on 13 December 2007, plaintiff's counsel notified defense counsel that if responses were not received by 19 December 2007 a motion to compel would be filed with the court. (DE #32-2, p. 13). On 21 December 2007, defense counsel advised plaintiff's counsel that he anticipated serving responses by 31 December 2007. (DE #32-2, p. 16). No responses were received by that date, however, and on 3 January 2008 defense counsel filed a motion to withdraw as counsel for S.G.T. (DE #27), which was allowed by the court (DE #28). Plaintiff filed the instant motion on 15 January 2008.

As part of the order allowing defense counsel to withdraw, the court directed S.G.T. to retain new counsel¹ as soon as possible, but no later than 8 February 2008. No appearance of new counsel for S.G.T. was filed by that date and none has been filed since then.

Discussion

Rule 37 of the Federal Rules of Civil Procedure provides in relevant part that on notice to other parties a party may move for an order compelling disclosure or discovery. Fed. R. Civ. P. 37(a)(1). A motion to compel under Rule 37 is appropriate when a party "fails to answer an interrogatory submitted under Rule 33," or "fails to respond that inspection will be permitted--or

¹ A corporation may not appear pro se, but must be represented by duly licensed counsel. See *Rowland v. California Men's Colony*, 506 U.S.194, 201-02 (1993) ("It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel.").

fails to permit inspection--as requested under Rule 34.” Fed R. Civ. P. 37(a)(3)(B)(iii)-(iv). Pursuant to this rule and the Local Rules of this court, a motion to compel must include a certification that the movant has in good faith conferred or attempted to confer with the party from whom it seeks discovery before seeking court intervention. Fed. R. Civ. P. 37(a)(1); Local Civil Rule 7.1(c), E.D.N.C.

Here, plaintiff timely served interrogatories and requests for production of documents on S.G.T. Although S.G.T. has now had over six months to respond, it has failed to do so. By not responding to the motion, S.G.T. has offered no explanation, or even attempted to offer an explanation, to the court for its inaction. The court finds that S.G.T. has waived its objections to the instant discovery by failing to respond timely. *Loughery v. Tompkins Indus., Inc.*, 1:07cv128, 2008 WL 922099, at *1 (N.D. W.Va. 26 March 2008) (any ground for objection to discovery requests not stated in a timely manner is waived unless the court, for good cause, excuses the failure).

S.G.T.’s failure to respond came notwithstanding plaintiff’s manifestly good faith and repeated efforts to obtain responses without court intervention. Plaintiff’s motion contains the requisite certification of its counsel’s good faith efforts to resolve the dispute. (DE #31, p. 1). *See, e.g., RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 745-46 (E.D.Va. 2007) (Rule 37 “requires that a movant in good faith confer or attempt to confer with the party not making the disclosure in an effort to secure the disclosure without court action. [Counsel’s] averments are not controverted and the record shows that [movant’s] actions qualify as a good-faith effort to attempt to resolve the discovery dispute out of court.”).

Accordingly, plaintiff’s request for an order compelling discovery responses is ALLOWED. S.G.T. shall serve responses to plaintiff’s first set of interrogatories and first request for production

of documents by 28 April 2008. No objections shall be asserted to any interrogatories or requests for production, except objections based on the work product doctrine, attorney-client privilege, or other privilege. A privilege log shall be provided for any documents withheld on the basis of the work product doctrine or privilege, in accordance with Fed. R. Civ. P. 26(b)(5)(A).

Any objections to interrogatories permitted herein and the responses to the requests for production in their entirety must be signed by counsel for S.G.T. *See* Fed. R. Civ. P. 26(g)(1), 33(b)(5). The court therefore directs S.G.T. to retain counsel in this case to enable it to respond timely to plaintiff's discovery requests as provided in this order.

Failure by S.G.T. to serve discovery responses as required by this order shall subject S.G.T. to the court's imposition of sanctions against it. Possible sanctions include but are not limited to entry of a default judgment against S.G.T. awarding plaintiff the injunction, damages, costs, and other relief it seeks. Principals of S.G.T. found to have participated in any noncompliance by S.G.T. with this order (or any other order) may face personal liability for sanctions.

The court notes that S.G.T. failed to comply with the court's prior directive to retain counsel. A pattern of noncompliance increases the likelihood that sanctions will be imposed and that such sanctions will be more severe.

Where, as here, a motion to compel is allowed, Rule 37 provides in relevant part that "the court must, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," unless circumstances would make the award of costs unjust. Fed. R. Civ. P. 37(a)(5)(A). The court defers its decision whether

to award costs against S.G.T. and any persons associated with it pending S.G.T.'s conduct in response to this order.

Further, for good cause shown, plaintiff's request for extension of discovery deadlines is also ALLOWED. The Scheduling Order (DE #26) is modified as follows:

1. All discovery shall be commenced in time to be concluded by 27 June 2008.
2. All potentially dispositive motions shall be filed by 28 July 2008.
3. All other provisions in the Scheduling Order remain in effect.

Conclusion

For the reasons set forth above, plaintiff's motion to compel is ALLOWED in its entirety on the terms set forth above.

SO ORDERED, this 18th day of April, 2008.


James E. Gates
United States Magistrate Judge