

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BANK OF THE OZARKS,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	
	:	1:12-CV-3147-MHS
SAPPHIRE POINTE, LLC, et al.,	:	
	:	
Defendants.	:	

ORDER

This case is before the Court on plaintiff's motions for contempt and summary judgment. For the reasons set forth below, the Court grants plaintiff's motion for contempt and denies as moot plaintiff's motion for summary judgment.

Background

Plaintiff Bank of the Ozarks filed a complaint against defendants Sapphire Pointe, LLC, J. Cary Bullard, Kimberly H. Bullard, Sean Jerguson, and Kathleen Jerguson for breach of a promissory note and guaranties thereon. On January 3, 2013, plaintiff moved to compel responses to plaintiff's first interrogatories and first request for production of documents

to defendants. Pursuant to Fed. R. Civ. P. 26, 33, 34, and 37, as well as LR 37.1, ND Ga., plaintiff sought to compel defendants to make full responses to plaintiff's discovery requests and award plaintiff its reasonable attorneys' fees incurred in having to file the motion to compel.

Specifically, plaintiff argued that defendants' responses to Plaintiff's First Interrogatories were defective because they were not made under oath as required by Fed. R. Civ. P. 33(b)(3). Additionally, plaintiff explained that in defendants' response to Plaintiff's First Requests for Production, defendants stated that they would make the documents available to plaintiff at a mutually agreed upon time and place. Plaintiff's counsel then sent defendants' counsel a letter dated December 7, 2012, requesting full responses by December 17. Plaintiff's counsel received no response. Plaintiff's counsel wrote to defendants' counsel again on December 20, 2012, requesting the discovery responses. On January 2, 2013, defendants' counsel promised to provide a response and a supplement to discovery responses to plaintiff's counsel later that day. As of January 3, 2013, defendants had not provided any discovery responses to Plaintiff's First Request for Production, and therefore, plaintiff filed its motion to compel.

Defendants did not respond to plaintiff's motion to compel, and therefore, the Court deemed the motion to be unopposed. LR 7.1B, NDGa. In an Order dated February 7, 2013 ("Discovery Order"), the Court explained that it had reviewed plaintiff's motion and found good cause for granting the discovery and attorneys' fees plaintiff requested. Accordingly, the Court granted plaintiff's motion to compel and ordered defendants to provide new responses to plaintiff's First Interrogatories with defendants' answers being made separately and fully in writing under oath in accordance with Fed. R. Civ. P. 33(b)(3) within ten (10) days from February 8, 2012. Additionally, the Court ordered defendants to produce all responsive documents to plaintiff's First Requests for Production and, if necessary, a privilege log of any protected documents, within ten (10) days from February 8, 2012. Finally, the Court ordered defendants to pay plaintiff's costs incurred in bringing the motion to compel, including its reasonable attorneys' fees. The Court directed plaintiff to file an affidavit and allowed defendants ten (10) days to respond to plaintiff's affidavit. The Court noted that defendants' failure to file a response to plaintiff's affidavit would indicate no opposition to the costs and fees requested by plaintiff.

Subsequently, on February 8, 2012, plaintiff's counsel filed an affidavit requesting \$875.00 in attorneys' fees and expenses associated with the filing of plaintiff's motion to compel. To date, defendants have not responded to plaintiff's counsel's affidavit.

Plaintiff now moves for contempt for defendants' failure to comply with the Court's Discovery Order and also moves for summary judgment.

Discussion

In its motion for contempt, plaintiff explains that defendants have failed to comply with the Court's Discovery Order. Plaintiff states that defendants never met the Court's ten-day deadline from the Discovery Order to supplement its responses and provide documents.

Plaintiff explains that on February 20, 2013, plaintiff filed a notice with the Court explaining that it had not received from defendants new sworn interrogatory responses on behalf of each defendant and documents in response to Plaintiff's First Requests for Production as required by the Court's Discovery Order. Plaintiff stated that it had received no

communication of any kind from defendants since the Court's Discovery Order.

Later that same day, defendants filed a notice in response to plaintiff's notice stating that the new discovery responses required by the Court's Discovery Order would be provided to plaintiff's counsel the following day on February 21. Defendants explained that the delay was due to an erroneous calculation of the due date for this discovery.

Plaintiff states in its motion for contempt that defendants did not provide any discovery on February 21. Instead, on February 25 defendants' counsel emailed plaintiff's counsel with supplemental responses. However, these supplemental interrogatory responses were not made under oath. Defendants also failed to produce any documents but instead stated that they only had financial records of payments, which defendants would make available to plaintiff at a mutually agreed upon time and place. As a result, plaintiff filed its second notice notifying the Court of defendants' discovery deficiencies.

Plaintiff explains further that on March 1, defendants emailed to plaintiff a verification of defendants' interrogatory responses, but this verification only provided verifications for defendants Sapphire Pointe, LLC, J. Cary Bullard, and Kimberly H. Bullard. There was no verification for Sean Jerguson or Kathleen Jerguson. Additionally, plaintiff states that defendants have never produced any documents to plaintiff or stated when such documents would be available.

Finally, plaintiff asserts that defendants have not paid plaintiff's costs and fees incurred in bringing the motion to compel.

As a result, plaintiff moves pursuant to Fed. R. Civ. P. 37 for the Court to enter sanctions against defendants in the form of striking defendants' answers and entering default judgment in favor of plaintiff. Defendants have not responded to plaintiff's motion, and therefore, it is deemed unopposed. LR 7.1B, NDGa.

Pursuant to Fed. R. Civ. P. 37(b)(2)(A), if a party fails to obey an order to provide or permit discovery, the Court may issues further just orders,

including striking pleadings in whole or in part and rendering a default judgment against the disobedient party. Rule 37 sanctions, such as dismissal or entry of default judgment, are appropriate only where the disobedient “party’s conduct amounts to flagrant disregard and willful disobedience of discovery orders.” United States v. Certain Real Prop. Located at Route 1, Bryant, Ala., 126 F.3d 1314, 1317 (11th Cir. 1997) (quotation omitted). Additionally, a district court may dismiss the claims with prejudice only where the party’s noncompliance is willful or in bad faith. OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1366 (11th Cir. 2008).

The Court concludes that defendants’ noncompliance with the Court’s Discovery Order requiring defendants to produce discovery and verify responses was a flagrant disregard and a willful disobedience of the Court’s Order and was taken in bad faith. Despite repeated notices and communication from plaintiff’s counsel that defendants had not complied with the Discovery Order, defendants still failed to comply. Furthermore, defendants’ lack of any response to plaintiff’s motion for contempt or any justification for their behavior convinces the Court that defendants’ actions were taken in bad faith. Accordingly, the Court finds defendants are in

contempt, strikes defendants' answers, and enters default judgment against them. See id. at 1367 (no abuse of discretion by district court in dismissing claim where the party produced no discovery despite repeated requests).

In addition, Fed. R. Civ. P. 37(b)(2)(C) requires that instead of, or in addition to, the sanctions above, the Court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses including attorneys' fees caused by the disobedient party's failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. As explained above, defendants have failed to provide any justification for failing to comply with the Court's discovery Order or respond at all to plaintiff's motion for contempt. Accordingly, in addition to the sanctions above, the Court orders defendants and their attorneys to pay the reasonable expenses including attorneys' fees incurred by plaintiff and its counsel in bringing the motion for contempt.

Furthermore, the Court finds the \$875 in fees sought by plaintiff, as shown by plaintiff's counsel's affidavit incurred for filing plaintiff's motion to

compel, to be reasonable. Accordingly, the Court orders defendants to pay plaintiff \$875 in fees.

Finally, plaintiff filed a motion for summary judgment in order to comply with the Court's scheduling deadline. Plaintiff states that the relief sought in its motion for summary judgment is in the alternative in the event that the Court does not grant plaintiff's motion for contempt.¹ Because the Court grants plaintiff's motion for contempt, the Court denies as moot plaintiff's motion for summary judgment.

Conclusion

For the foregoing reasons, the Court GRANTS plaintiff's motion for contempt [#20] and DENIES AS MOOT plaintiff's motion for summary judgment [#21]. The Court STRIKES defendants' answer [#9] and DIRECTS the Clerk to enter final judgment in favor of plaintiff against defendants, jointly and severally, in the principal amount of \$611,670.95 plus accrued and unpaid interest in the amount of \$28,956.52 as of September 6, 2012, plus


¹ Defendants have not responded to plaintiff's motion for summary judgment.

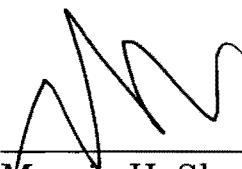
default interest at the rate of \$271.85 per diem from September 7, 2012, until the date of judgment, plus late fees of \$450.00, plus contractual and statutory attorneys' fees of 15% of the principal and interest amount due on the date of judgment, with post-judgment interest to run in accordance with applicable law.

The Court further ORDERS defendants to pay plaintiff costs and attorneys' fees in the amount of \$875.00 incurred in filing plaintiff's motion to compel and ORDERS defendants and their attorneys to pay the reasonable expenses, including attorneys' fees, incurred by plaintiff in filing its motion for contempt.

The Court DIRECTS plaintiff to file an affidavit setting out the amount of such costs and fees within ten (10) days of the date of entry of this order, and defendants shall have ten (10) days after service of the affidavit to file a response. Defendants' failure to file a response to plaintiff's affidavit will indicate no opposition to the costs and fees requested by plaintiff. The Court

DIRECTS the Clerk to resubmit this action to the undersigned following the expiration of the ten-day period after plaintiff files its affidavit.

IT IS SO ORDERED, this  day of May, 2013.



Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia