UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELLORA'S CAVE PUBLISHING, INC., and JASMINE-JADE ENTERPRISES, LLC,

Plaintiffs,

v.

DEAR AUTHOR MEDIA NETWORK, LLC, and JENNIFER GERRISH-LAMPE,

Defendants.
_____/

Case No: 5:14-cv-02331-JRA

DEFENDANTS' MOTION FOR FURTHER DISCOVERY PURSUANT TO FED. R. CIV. P. 56(d)

Defendant Dear Author Media Network, LLC ("Dear Author") hereby moves for an Order from this Court, pursuant to Fed. R. Civ. P. 56(d), permitting it to conduct further discovery necessary to oppose Plaintiffs Ellora's Cave Publishing, Inc. and Jasmine-Jade Enterprises, LLC's Motion for Summary Judgment (Doc. 45). This motion is consistent with Defendants' Request for Clarification Regarding Preliminary Discovery (Doc. 43), incorporated herein by reference. Although preliminary, limited discovery ended on July 15, 2015, there has been no final discovery cutoff. (See Doc. 29.) During the initial Case Management Conference January 26, 2015, the Court approved the

agreement for preliminary, limited discovery, in which Plaintiffs would primarily take discovery prior to the filing of summary judgment motions. Further discovery by Dear Author is now warranted.

MEMORANDUM OF POINTS AND AUTHORITIES

1.0 INTRODUCTION AND FACTUAL BACKGROUND

In its counterclaim, Dear Author asserted a claim for abuse of process, in that Plaintiffs brought this action for the bad-faith purpose of stifling criticism of Plaintiffs and their principal, Tina Engler. (See Doc. 11.) They hope to use Defendants as an example to show other authors who have worked and currently work with Plaintiffs what happens when they speak poorly of Plaintiffs, regardless of how accurate their statements may be. Using the legal process to hang an innocent person in the town square as a message to others is as rank an abuse of this nation's courts as possible.

Because the parties and the Court agreed to limited discovery, in order to limit the amount of burden on both parties and the court, Dear Author has not compelled responses from Plaintiffs to request for production of documents. (See **Exhibit 1**, Defendants' Requests for Production of Documents.) However, with the filing of Plaintiffs' motion for summary judgment, including the declaration of Patricia Marks in support thereof, further discovery is warranted and necessary in order to oppose summary judgment.

Marks' declaration placed the state of mind of Ms. Marks and Ms. Engler directly at issue. (See Doc. 45-1, ¶¶ 8-9.) Defendants previously attempted to schedule depositions, but Plaintiffs did not assent to the scheduling effort. (See **Composite Exhibit 2**, email correspondence between Marc Randazza, counsel for Defendants, and Steve Mastrantonio, counsel for Plaintiffs, attempting to schedule depositions.) Again, due to the limited discovery agreement, Defendants did not move to compel, as they remained permitted to take such

depositions under the agreement. Without documents responsive to these requests, as well as the opportunity to conduct depositions, Dear Author will not be able to effectively oppose Plaintiffs' motion for summary judgment.

2.0 LEGAL STANDARD

Courts may grant summary judgment before the end of the discovery period, provided that sufficient time for discovery has passed. (See *Bowling v. Wal-Mart Stores, Inc.*, 233 F. App'x 460, 464-67 (6th Cir. 2007).) The nonmoving party may seek additional discovery to oppose summary judgment when it informs the Court of its need for discovery. (See *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002).) Rule 56(d) of the Federal Rules of Civil Procedure provides:

> If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or take discovery; or (3) issue any other appropriate order.

Before a summary judgment motion is decided, the nonmoving party may specify the discovery needed for its opposition. (See *Collins v. Dan Cummins Chevrolet-Buick, Inc.*, 2015 U.S. Dist. LEXIS 98805, *9-11 (E.D. Ky. July 29, 2015).) Mere "vague assertions of the need for discovery are not enough" to meet the requirements of Rule 56(d). *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004). Rather, the nonmoving party "must state with some precision the material [she] hopes to obtain with further discovery, and how exactly [she] expects those materials would help [her] in opposing summary judgment." *Id*.

If the non-movant makes a sufficient showing under Rule 56(d), the court should defer consideration of the motion or permit additional time to obtain affidavits or declarations, or take discovery. Fed. R. Civ. P. 56(d).

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3.0 ARGUMENT

Patricia Marks is a principal of both Plaintiffs. (See Doc. 45-1 at ¶2.) She states in her declaration supporting Plaintiffs' motion for summary judgment that she has personal knowledge that Plaintiffs filed this suit due to alleged "damage resulting from the statements contained in that [Defendants'] article," and that "[t]his suit was not brought for the purpose of silencing legitimate speech or for some other improper purpose." (*Id*. at ¶¶8-9.) To testify to such statements with personal knowledge, Ms. Marks has put at issue her first-hand knowledge of why Plaintiffs initiated this suit. This is at odds with Plaintiffs' Fed. R. Civ. P. 26 disclosures, which provide only that "Patty Marks is the CEO of Ellora's Case [sic] and has knowledge regarding the statements made in the blog published by Defendants. She also has knowledge of the payment schedule of authors, editors, and cover artists affiliated with Ellora's Cave." (Doc. 25 at ¶1.)

This disclosure made no mention of Ms. Marks having any affiliation at all with Plaintiff Jasmine-Jade Enterprises, LLC, nor did it disclose that she had any knowledge of or involvement in Plaintiffs' decision to initiate this action. Accordingly, Dear Author did not move to compel depositions during the limited discovery period. (See **Exhibit 3**, Declaration of Marc J. Randazza ["Randazza Decl."], at ¶¶6-7.) Had the Plaintiffs disclosed this in their initial disclosures, this would have advanced the importance of deposing her on these facts.

By asserting personal knowledge of why Plaintiffs initiated this suit, however, Ms. Marks has placed Plaintiffs' state of mind at issue, and her personal knowledge of that state of mind at issue. To oppose summary judgment, Dear Author is entitled to depose Ms. Marks and Ms. Engler, (about whom Ms. Marks testifies), as to the question of why Plaintiffs brought this action against Defendants. Dear Author may particularly inquire as to whether this suit was initiated for the improper purpose of intimidating other current and former

authors for Plaintiffs from publishing criticism of them. (See Randazza Decl. at ¶8.) Ms. Marks, by her own admission, possesses information directly relevant to this issue. Plaintiffs have maintained the case and sought discovery on issues solely about Ms. Engler, who is not a party. Certainly, if this case were simply about obtaining recompense for lost revenue due to statements about authors and employees going unpaid, Plaintiffs would have had no occasion to pursue the personal interest of Ms. Engler, who took personal offense to statements about her personal life. Thus, further discovery into their state of mind is now warranted in a way that it previously was not.

Further, Defendants are still waiting for responses from Plaintiffs to written discovery requests served on June 10, 2015. (See **Exhibit 1**.) This information bears directly on the question of Plaintiffs' motivation in filing this suit and their attempts to intimidate other authors by making an example of Defendants. (See Randazza Decl. at ¶9.) Without documents responsive to these requests, it will be significantly more difficult, if not impossible, for Dear Author to oppose Plaintiffs' motion for summary judgment. (See *id*. at ¶10.)

Plaintiffs have recently asserted that the deadline for discovery has passed and that no further discovery should be allowed. (See Doc. # 48, Plaintiffs' Response to Defendants' Request for Clarification; see also Doc. # 49, Plaintiff's Brief in Opposition to Motion to Intervene, at p. 3.) Defendants disagree, and this is at odds with the agreement reached at the case management conference, and reaffirmed thereafter. It is untrue that "Defendants had the same opportunity as Plaintiffs to depose witnesses for trial or to support their dispositive motions." (Doc. # 48 at p. 1.) As explained above, Defendants repeatedly attempted to schedule the depositions of Patricia Marks and Tina Engler, but Plaintiffs refused to schedule such depositions. It is disingenuous to claim that Defendants had ample opportunity to depose Plaintiffs' witnesses

when Plaintiffs made every effort possible to keep such depositions from occurring. And also as previously explained, it is incorrect for Plaintiffs to assert that "[t]he discovery cut-off has passed." (Doc. # 49 at p. 3.) The parties only agreed on a **preliminary**[1] discovery cutoff date to be used primarily for any dispositive motions **Plaintiffs** wished to file. Neither the parties nor the Court have determined a specific date for the end of general discovery.

Additionally, Defendants have continued to identify sources of corroborating evidence that support the truthful statements at issue in this suit. On September 9, 2015, the Romantic Writers Association ("RWA"), a trade group for authors and publishers of romantic fiction, sent a public notice in it's latest newsletter to its members in which it quotes Ellora's Cave's CEO Patty Marks as saying "currently we are not as up to date with royalties as we want to be and will be," and warns RWA members against doing business with the company. (See **Exhibit 4**, RWA eNotes.) This evidence, and the quotes therein, were not available until September 10, 2015. No amount of foresight prior to the preliminary discovery cutoff date could have allowed Defendant to predict that these conversations or statements or actions would take place.

Accordingly, Defendants request that they be given the opportunity to take discovery from RWA regarding all communications with between the RWA and Ms. Marks, the RWA and Ms. Engler, and communications between Ms. Engler and Ms. Marks regarding the RWA and issues raised in the newsletter.

Finally, Defendants have just come into possession of a news article in which Tina Engler states that she did, indeed, purchase a home in West Hollywood, CA. (See **Exhibit 5**, Quartz article on the Huffington Post, *This Mother's Day, I'm Grateful My Mom Helped Me Build My Erotica Business*.) If Engler indeed

[1] The court appears to have endorsed this by noting this was a **preliminary** cut off date, where the court's normal orders omit "preliminary."

gave this information to Quartz but then the Plaintiffs sued the Defendants for making such a statement, their motives are further called into question. Accordingly, Defendants request that they be permitted to take discovery pertaining to Engler's and Marks' statements to Quartz and to each other on that publication's statements.

4.0 CONCLUSION

For the foregoing reasons, this Court should grant Dear Author's motion for further discovery pursuant to Fed. R. Civ. P. 56(d). The Court should stay all deadlines related to Plaintiffs' motion for summary judgment until after Dear Author has had a reasonable opportunity to conduct the aforesaid discovery, namely:

1) The receipt of the written discovery requested previously;
2) Deposition of Patty Marks with respect to the issues raised in her declaration and the issues raised in the RWA newsletter;
3) Deposition of non-party Tina Engler, regarding the issues raised in Marks' declaration and the issues raised in the RWA newsletter; and
4) Written and deposition testimony from Quartz and Patty Marks and Tina Engler on issues raised in *This Mother's Day, I'm Grateful My Mom Helped Me Build My Erotica Business*.

Dated September 15, 2015.

Respectfully Submitted,

/s/ Marc J. Randazza

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ATTORNEYS FOR DEFENDANTS

CASE NO.: 5:14-cv-02331-JRA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served upon counsel for Plaintiff, via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully Submitted,

Employee,
Randazza Legal Group