

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELLORA’S CAVE PUBLISHING, INC., et al)	CASE NO.: 5:14-CV-02331
)	
Plaintiffs,)	JUDGE JOHN R. ADAMS
)	
vs.)	
)	
DEAR AUTHOR MEDIA NETWORK, LLC et al.)	PLAINTIFFS’ RESPONSE TO
)	DEFENDANTS’ MOTION FOR
Defendants.)	FURTHER DISCOVERY
)	PURSUANT TO F.R.C P.56(d)

NOW COME Plaintiffs Ellora’s Cave Publishing, Inc. and Jasmine Jade Enterprises, LLC (hereinafter collectively “Plaintiff”) and file their response to Defendants’ Motion for Further Discovery Pursuant to Fed. R. Civ. P 56(d). For the reasons described below, Defendants’ motion should be denied.

Defendants’ motion requests the following: (1) the receipt of written discovery requested previously; (2) the deposition of Patty Marks with respect to issues raised in her declaration and the issues raised in the RWA newsletter; (3) the deposition of Tina Engler regarding issues raised in Marks’ declaration and the issues raised in the RWA newsletter; and (4) written and deposition testimony raised in the Quartz article. Doc#55, pg. 7. Defendants’ request is premised upon two rationales: first, that Plaintiff has not complied with Defendants’ discovery requests; and second, that new evidence requires additional discovery.

1. Defendants motion should be stricken as it was not made in compliance with Local Rule 37.1,

Plaintiff's request for receipt of written discovery is couched in the form as a request for further discovery, but substantively it a request to compel discovery previously propounded to Plaintiff - it is not a request for new discovery. Because this is a request to compel and was not made in compliance with Local Rule 37.1, it should be stricken as improperly filed. Local Rule 37.1 (a) describes the procedure a party must follow in the event there is a discovery dispute. It provides that discovery disputes shall be first brought to the attention of a Judicial Officer only after counsel for the party seeking discovery has made, and certified to the Court the making of, sincere, good faith efforts to resolve such disputes. If the dispute cannot be resolved at that stage, the aggrieved party may file a motion to compel. Local R. 37.1(b) further provides that no motion to compel may be filed more than 10 days after the discovery cut-off.

In this case, Defendants have not followed any of the steps provided in Local Rule 37.1 to compel discovery. Defendants have presented no evidence of a dispute. Defendants have not certified a sincere effort to resolve such dispute. Defendants have not sought the assistance of a Judicial Officer. Nor have Defendants filed a motion to compel to obtain the documents. None of these steps have been taken, and certainly not in the time frame required by Local Rule 37.1(b) or the Court's Case Management Plan. Doc#29, p.3. Defendants' requests for documents were propounded in June of 2015 and they had ample under Local Rule 37.1 to compel the requested documents.

Moreover, the premise of Defendants' argument, that the Plaintiff refused to provide discovery and "refused to schedule depositions" is simply untrue. Doc#55 p.5. Plaintiff's

counsel has never refused to make witnesses available for deposition. Nor has Plaintiff's counsel sought to avoid scheduling depositions. The emails produced to the Court thus far, if they indicate anything, indicate that Plaintiff's counsel was willing to schedule depositions. Indeed, had Plaintiff refused to schedule depositions, Defendants could have and likely would have pursued the remedy under Local Rule 37.1. They did not because there was no reason to.

Nor has Plaintiff's counsel refused to produce document to Defendants. In fact, just prior to the recent spat of discovery filings Plaintiff's counsel agreed to provide document responses to opposing counsel. See Mastrantonio emails of September 3 and 7, attached hereto as Exhibit 1. Thus, the motion is moot as to this issue.

2. The "new evidence" does not support Defendants' request for expanded discovery.

Defendants argue that further discovery is necessary pursuant to Fed. R. Civ. P. 56(d) due to new evidence in the form of (a) a declaration by Patty Marks; (b) statements made in the RWA newsletter; and (c) information from a *Quartz* article, all of which may impact Defendants' abuse of process claim.¹

Granting a Rule 56(d) motion may be appropriate where the non-movant "cannot present *facts essential* to justify its opposition" to a motion for summary judgment. (Emphasis added.) In this case, Defendants have to respond to Plaintiff's motion for summary judgment relative to the abuse of process counterclaim. However, none of the "new" facts in (a) through (c) above are *facts essential* to Plaintiff's opposition. Defendants claim that the Marks' declaration calls into question Marks' state of mind and "why Plaintiffs brought this action." Doc#55, p. 4.

¹ Defendants' abuse of process claim is based upon the notion that Plaintiff filed suit to "silence" other authors who "speak poorly of Plaintiff." Doc#55, p.2. The author declarations filed by Defendants disprove their claim. See, Lambert Declaration, Doc#7-2, and Scheffler Declaration, Doc#7-3, both of whom speak unfavorably of Ellora's Cave- neither of which have been sued or otherwise silenced by Ellora's Cave.

However, the “why” of the filing of the defamation action is not an element in an abuse of process claim and bears no relevance to it. Indeed a party “cannot claim an abuse of process claim upon the assertion that an action was improperly initiated.” *Gilman v. Schlagetter*, 777 F.Supp.2d 1084, 1099 (S.D. Ohio 2010).

Assuming arguendo that “state of mind” was an element of an abuse of process claim, Defendants would have known that it was an element to be proven when they filed the claim nearly one year ago. Marks’ declaration would not have changed that. Therefore, knowing the summary judgment cut off dates Defendants would have been obliged to request the deposition of Marks or a corporate representative prior the September 1, 2015 summary judgment filing date.

The statements made in the RWA declaration and the *Quartz* article likewise have no bearing on Defendants’ ability to present its opposition brief and therefore the request to extend discovery on the basis of Rule 56(d) is inappropriate. Nothing in the RWA declaration touches upon abuse of process claim. Doc#54-1. Rather, the RWA declaration relates to the payment of author royalties,² an issue which is not part of the abuse of process claim. The declaration is irrelevant in any case as it speaks vaguely to “not up-to-date” payments in September 2015, one year after the allegations were made and which resulted from the defamation by Defendants.

The Quartz article (Doc#55-5) has no connection to Defendants abuse of process claim. It too relates to the allegation made in the defamation claim. Presumably Defendants want to use it to show that Tina Engler purchased a home in California. However, the article was originally published in May of 2013, well before Ms. Engler moved to West Hollywood. At the time the article was written Engler was living in Venice Beach. Thus, this article has no bearing on Ms.

² It states that “Ellora’s Cave has been suspended from certain privileges”² because “Ms. Marks recently admitted...that Ellora’s Cave is not up to date with paying royalties.” Doc#54-1, p.2.

Engler's West Hollywood move. More importantly, for purposes of Defendants' motion under Rule 56(d), it has absolutely no bearing on Defendants' ability to present their opposition brief on the abuse of process claim.

CONCLUSION

Defendants' Motion for Further Discovery Pursuant to Fed. R. Civ. P. 56(d) should be denied on the basis that discovery sought by Defendants is not essential or even relevant to the presentation of their opposition brief to Plaintiff's Motion for Summary Judgment on Defendants' abuse of process claim. In so far as Defendants' claim that they were denied or refused discovery, their motion should be denied as not properly complying with Local Rule 37.1.

Respectfully submitted,

**NIEKAMP, WEISENSELL,
MUTERSBAUGH & MASTRANTONIO, LLP**

/s/ Steven W. Mastrantonio

Steven W. Mastrantonio (0062575)

23 South Main Street, Third Floor

Akron, OH 44308

330-434-1000 Tele

330-434-1001 Fax

mastrantonio@nwm-law.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of September, 2015 the foregoing was served upon all parties not in default and/or their counsel via filing with the Court's CM/ECF system.

/s/ Steven W. Mastrantonio

Steven W. Mastrantonio