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CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN, XS CAPITAL MANAGEMENT, L.P., AND ASPIRE COMMODITIES, L.P.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	HARRIS COUNTY, TEXAS
CRAIG TAYLOR AND ATLAS COMMODITIES, L.L.C.,	§	
Defendants.	§	157TH JUDICIAL DISTRICT

DEFENDANTS' MOTION FOR CONTINUANCE OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Defendants Atlas Commodities, LLC and Craig Taylor move to continue Plaintiffs Eric Torres, Adam Sinn, XS Capital Management, LP, and Aspire Commodities, LP's Motions for Summary Judgment as follows:

I. SUMMARY OF THE ARGUMENT

From the moment the Plaintiffs filed this suit, they have not only resisted discovery, but argued that they should not be required to participate in it at all. Even after being compelled to respond, the Plaintiffs have still not produced their text messages - the ones which prompted this suit. They have refused to be deposed. They have withheld material based on the attorney-client privilege, but refuse to disclose information necessary to establish the privilege's existence. They have, for weeks at a time, failed to verify interrogatory responses and refused to supplement discovery responses.

Knowing that Defendants intended to move to compel on these and other issues, counsel for Plaintiffs complained that he had a busy work and travel schedule and requested that Defendants hold off until after the holidays. Out of courtesy, Defendants did. Having apparently found the

time to draft them during the same holidays, on January 2, Plaintiffs filed motions for summary judgment predicated on the claim that they did not disparage Defendants. Though this is a fact-intensive inquiry, Plaintiff's continue to claim Defendants my conduct no discovery.

Solely because the Plaintiffs have obstructed or outright refused to participate, discovery is far from complete. The Defendants served written discovery with their answers and counterclaims in September, but because of the Plaintiffs' obstruction, discovery has not yet started in any meaningful way.

The Plaintiffs now ask that they be awarded summary judgment based on their claim that they did not do what the Defendants accuse them of. It is this claim that the Plaintiffs have refused to permit Defendants to discover. The motion for continuance should be granted.

II. BACKGROUND

A. THE PLAINTIFFS FILE SUIT, REFUSE TO PARTICIPATE IN DISCOVERY.

Plaintiffs filed this suit on July 17, 2014, seeking declarations that Defendants were in breach of a settlement agreement. Defendants answered, counterclaimed and served discovery on August 18, 2014. In response to the discovery served by Defendants, Plaintiffs claimed that no discovery was warranted because the only issue before the Court was whether their sending of a vulgar picture to Craig Taylor was a breach of the underlying agreement. Because that is plainly not the only issue before the Court, discovery was compelled.

B. THE COURT COMPELS DISCOVERY, THE PLAINTIFFS REFUSE TO COMPLY.

Since the Court compelled discovery, the Plaintiffs have purposefully delayed these proceedings, asked counsel for Defendants to hold off filing another motion to compel because of supposed conflicts (including a family vacation), and continued to refuse to participate in discovery in any meaningful way. On December 2, 2014, counsel for Defendants wrote to counsel

for Plaintiffs pointing out the ways in which Plaintiffs' discovery responses were deficient and noting that Defendants would have no choice but to file another motion to compel if Plaintiffs did not respond appropriately. Exhibit 1. Counsel for Plaintiffs responded, in part, by saying that he had a very busy trial and vacation schedule, and asking that Defendants not set anything for hearing during this busy period. Exhibit 2. Counsel for Defendants complied with that request.

Defendants have nevertheless diligently pursued discovery. On December 11, 2014, they served notices of requests for production on and issuing subpoenas to third parties David Schmidli, Paul Sarver, and Evan Caron, all of whom appeared in the photo with Plaintiffs. After receiving those notices of third-party discovery, counsel for Plaintiffs emailed counsel for Defendants complaining that they were served notwithstanding counsel for Plaintiffs' busy holiday schedule. Exhibit 3. Defendants have served depositions on written questions on mobile phone carriers AT&T and Verizon. Exhibit 4. Defendants have also moved for the issuance of letters rogatory so that subpoenas may be served on Joonsup Park and Sean Kelly, who the Plaintiffs admit having sent the photo.

Plaintiffs have still not produced the actual text messages which prompted this suit. Instead, they have produced reproductions of some kind, most of which have been redacted based on what the Plaintiffs claim are attorney-client communications. Despite request, Plaintiffs have not identified the parties involved in the supposed attorney-client communications. Defendants believe that some or all of them include third parties (waiving the privilege) or are about subject matter for which no privilege would apply. Plaintiffs filed their motion for summary judgment knowing that Defendants intended to move to compel on these and other discovery-related issues.

C. CONTINUING TO EVADE DISCOVERY, THE PLAINTIFFS MOVE FOR SUMMARY JUDGMENT, INSISTING THAT THE COURT TAKE THEIR WORD FOR IT.

The motions for summary judgment themselves are predicated on the conclusory assertion – made in both Sinn and Torres' affidavits – that they did not make disparaging statements about Atlas or Taylor. This is the claim about which Defendants have been attempting to conduct (and Plaintiffs have been resisting) discovery. In fact, after receiving the motions for summary judgment, counsel for Defendants asked that Torres be made available for deposition on January 7 or 9. Exhibit 5. Counsel for Plaintiffs first ignored the request, then tersely said that he (counsel) was not available on either of those days. Exhibit 6. No alternative dates were offered. In other words, though the Plaintiffs rely exclusively on the affidavits of Torres and Sinn in requesting that they be granted summary judgment, Defendants should have no opportunity to cross examine them.

D. DISCOVERY IS NEEDED TO RESPOND.

At a minimum, in order to respond to the motions for summary judgment, the Defendants need the following discovery[1]:

1. Full, complete, true and accurate copies of the actual text messages sent and received by the Plaintiffs containing the photo attached to Defendants' counterclaim as Exhibit A (the "Photo") and any messages mentioning either Defendant.

2. Complete searches of the Plaintiffs' electronic devices for mentions of either Defendant and production of relevant records.

3. Depositions of all Plaintiffs.

4. Third party discovery from recipients of the Photo to determine what was said to whom and when and whether the records produced by the Plaintiffs are what they purport to be. The Plaintiffs apparently insist that though they admit to having sent the Photo to a number of other people, they said nothing about Defendants. This is demonstrably false (and will be demonstrated during the Plaintiffs' depositions while they are under oath).

[1] Some of what the Defendants need has already been ordered produced by the Court, but the Plaintiffs continue to refuse to produce it.

Their current position is apparently that the Court should take their word for it and just give them summary judgment because they say it is warranted.

5. Third Party Discovery from everyone Plaintiffs admit received the photo.

6. Third party discovery from wireless carriers to establish who sent what to whom and when.

7. In light of the Plaintiffs' continued obstruction and refusal to participate in discovery, and their false representations regarding searches made of their devices and the total lack of substantive responses to discovery, possible appointment of a discovery master with the authority to compel expert inspection of all of the Plaintiffs electronic devices.

8. Rulings on the Plaintiffs' claims of privilege in withholding discoverable material.

As they have since serving written discovery with their answers, the Defendants remain committed to diligently pursuing discovery in order to bring this matter to trial in a timely manner. By contrast, since instituting this case, the Plaintiffs have done everything they could to resist discovery. Now they ask that the Court take their word for it when they say that they did not violate the settlement agreement underlying this case. As the Court is aware, that is not the law. Defendants are entitled to conduct discovery, and the Plaintiffs should be compelled to comply with their discovery obligations. Plaintiffs' motions for summary judgment are just another attempt to preempt discovery.

III. ARGUMENT AND AUTHORITIES

That a party is entitled to conduct discovery is not ordinarily a controversial proposition. In this case, however, the Plaintiffs have argued from the start that no discovery is warranted. The Court ordered the Plaintiffs to respond to discovery. Their responses were evasive, inadequate, and purposefully misleading. Their motions for summary judgment are simply their latest attempts to avoid discovery. Hearing them before discovery is conducted – much less full and fair discovery – would be error.

> Like any other breach of contract claim, a claim for breach of a settlement agreement is subject to the established procedures of pleading and proof. Parties are "entitled to full, fair discovery" and to have their cases decided on the merits. A trial court abuses its discretion when it denies discovery going to the heart of a party's case or when that denial severely compromises a party's ability to present a viable defense. ("Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery."). The validity of a settlement agreement cannot be determined without "full resolution of the surrounding facts and circumstances."

Joki v. Springer, 2014 WL 6091957, at *1 (Tex. App. – Waco, Nov. 13, 2014, no writ) (internal citations omitted) (attached as Exhibit 7). "[B]y granting the Springers' motion for summary judgment without first permitting discovery, the trial court implicitly denied Joki's continuance to permit discovery. Accordingly, because Joki had not been able to conduct any discovery on the Springers' breach of contract claim, the trial court abused its discretion in denying Joki that opportunity." *Id* at *2.

IV. CONTINUANCE NOT FOR DELAY ONLY

This motion and the request for a continuance are not sought for delay only, but so that justice may be done.

V. RELIEF REQUESTED

Defendants request that the January 30, 2015 hearing on Plaintiffs' motions for summary judgment be continued and they be ordered not to reset them until they have first complied with their discovery obligations and the Defendants have had an opportunity to conduct discovery.

VI. CONCLUSION

Plaintiffs' motions for summary judgment are only their latest attempt to avoid discovery. They should be continued until discovery has been substantially completed.

Respectfully submitted,
BERG FELDMAN JOHNSON BELL, LLP

By: /s/ Geoffrey Berg

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ATTORNEYS FOR CRAIG TAYLOR AND
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CERTIFICATE OF CONFERENCE

On January 2, I conferred with counsel for Plaintiffs, who advised that he is opposed to the relief sought in this motion.

/s/ Geoffrey Berg
Geoffrey Berg

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served by electronic filing, certified mail, return receipt requested, email, and/or facsimile on January 6, 2015 as follows:

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/s/ Geoffrey Berg
Geoffrey Berg

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HOUSTON §

BEFORE ME, the undersigned Notary Public, on this, the 6th day of January, 2015 personally appeared Geoffrey Berg, who, being by me duly sworn on his oath deposed and said that the facts stated in Defendants Atlas Commodities, LLC and Craig Taylor's Motion for Continuance are within his personal knowledge and are true and correct.

Signature

Geoffrey Berg
Printed Name

SUBSCRIBED AND SWORN TO on this the 6th day of January, 2015 to certify which witness my hand and official seal of office.

[seal]

Yalonda Nelms
Notary Public, State of Texas

YALONDA NELMS
Notary Public, State of Texas
My Commission Expires
November 11, 2017