

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

MICHAEL E. MANN, Ph.D.,)	
)	
Plaintiff,)	Case No. 2012 CA 008263 B
)	
v.)	Judge Jennifer M. Anderson
)	Status Hearing: June 22, 2020
)	
NATIONAL REVIEW, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	

**PLAINTIFF MICHAEL E. MANN’S OPPOSITION
TO COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG’S
MOTION FOR PAYMENTS OF EXPENSES PURSUANT TO RULE 37(a)(5)**

I. PRELIMINARY STATEMENT

Under the American legal systems, parties to a dispute are normally expected to bear their own attorneys’ fees. This is no different when those fees relate to a legitimate discovery dispute. To be sure, requiring the party on the losing end of a discovery dispute to pay the victor’s fees would chill legitimate advocacy. As a result, a party can recover its costs and attorneys’ fees on a successful discovery motion, if at all, only where the opposition was not substantially justified and an award of fees and costs is not otherwise inequitable under the circumstances. *See* Super. Ct. Civ. R. 37.

Here, Defendants Competitive Enterprise Institutes (“CEI”) and Rand Simberg (collectively, the “CEI Defendants”) make no real attempt to explain why an award of costs is warranted in this situation. They substitute platitudes and labels for legal argument. They appear to believe that any opposition to a motion to compel is not substantially justified if the court ultimately finds it unpersuasive. That is not the law. If it were, the courts would spend incalculable hours adjudicating motions for fees.

Moreover, the CEI Defendants' claim of complete victory on their motion is mistaken. The court only granted the motion *in part*. While the CEI Defendants focus on the number of requests the court granted, they ignore the breadth and content of the requests the court did not grant. The court did not grant the CEI Defendants' motion with respect to the following requests for production:

- Request for Production 9: All Documents relating to Plaintiff's personal and/or professional finances without limitation, including but not limited to your personal tax returns, personal bank statements, the value of your personal investments, the value of your personal real estate holdings, your personal and/or professional credit card statements, and any other matter bearing on your personal or professional finances up to and including July 12, 2012.
- Request for Production 10: All Documents relating to Plaintiff's personal and/or professional finances without limitation, including but not limited to your personal tax returns, personal bank statements, the value of your personal investments, the value of your personal real estate holdings, your personal and/or professional credit card statements, and any other matter bearing on your personal or professional finances from July 13, 2012, to the present.

The court's denial of the motion with respect to these incredibly broad requests shows that Dr. Mann's opposition was substantially justified.

Equally as important, Dr. Mann offered to produce certain documents and information with respect to his professional finances and activities, such as book royalties, speaking engagements, etc. Yet he maintained that his personal finances, such as his tax returns and investments, were not relevant. The CEI Defendants insisted that they were entitled to everything, including the multitude of documents encompassed by the above requests. The court's order denying the motion on these requests shows that it is the CEI Defendants who were "dead wrong" and that Dr. Mann was right. The CEI Defendants' costs were brought about by their own refusal to budge.

The fact of the matter is that Plaintiff and the CEI Defendants had a legitimate discovery dispute that they were unable to resolve, despite a good faith effort to do so. That dispute was

limited to a particular set of requests that centered on a particular issue. The CEI Defendants' motion to compel was not brought about by broad recalcitrance or failure to participate in the discovery process. It was brought about because of a legitimate legal dispute. The parties must bear their own expenses in such a situation. The court should deny the CEI Defendants' motion for costs and fees accordingly.

II. FACTS

On May 5, 2010, this court granted in part a motion to compel filed by the CEI Defendants. The CEI Defendants' motion to compel concerned a number of discovery requests focused on the CEI Defendants' desire to discover information about Dr. Mann's personal finances and professional compensation going back to 2005.

Although the parties had negotiated in good faith to resolve the discovery issues without court involvement, they were unable to do so with respect to those requests involving Dr. Mann's personal and professional finances. The CEI Defendants contended that this information was required for Dr. Mann to prove damages. Dr. Mann argued that he was entitled to presumed damages, based on the Court of Appeals' assessment that the CEI Defendants' statements were "levelled against [Dr. Mann's] professional character," therefore making them defamatory *per se*. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1249 n.46 (2016).

The court granted the CEI Defendants' motion with respect to discovery requests regarding Dr. Mann's professional compensation and activities, but limited to 2007 to the present. It did not grant the CEI Defendants' motion with respect to their requests for information on Dr. Mann's personal finances.

The CEI Defendants now move for an award of costs and fees associated with filing their motion to compel. However, an award of costs in this situation is not proper because Dr. Mann's objections to the CEI Defendants' discovery requests were substantially justified, and in any

event, an award of costs and fees is unjustified given the circumstances.

III. ARGUMENT

Even where a motion to compel discovery is granted, the court must not require the opposing party to pay costs or attorneys' fees if the opposing party's response or objection was substantially justified. Super. Ct. Civ. R. 37(a)(5)(A). An opposition is substantially justified "if issues are raised 'about which reasonable persons could genuinely differ on whether a party was bound to comply with a discovery rule.'" *Spellman v. Am. Sec. Bank, N.A.*, 579 A.2d 151, 155 (D.C. 1990) (quoting *Habib v. Thurston*, 517 A.2d 1, 9 (D.C. 1985)). See also *Coleman v. Dydula*, 175 F.R.D. 177, 180 (W.D.N.Y. 1997) ("Substantially justified' does not mean justified to a high degree, but rather has been said to be satisfied if there is a genuine dispute over a legal issue or if reasonable people could differ as to whether the party from whom discovery is requested must comply.") (cleaned up).¹

Here, Plaintiff's opposition to the CEI Defendants' discovery requests was substantially justified. The relevant discovery requests primarily demanded a wide variety of documents and information pertaining to Dr. Mann's personal finances and professional compensation, which the CEI Defendants contended went to the issue of damages. Plaintiff objected to these requests, taking the position that because the statements at issue are defamatory *per se*, damages are conclusively presumed. Indeed, Plaintiff's opposition cited a number of cases that said exactly that. Given the supporting case law, reasonable minds could disagree over this genuine legal dispute. Sanctions are therefore unwarranted.

Notably, the court granted the CEI Defendants' motion to compel only in part, denying the CEI Defendants access to Dr. Mann's personal finances with respect to its requests for Plaintiffs' tax returns and other personal financial information. This fact alone belies the CEI

¹ The Superior Court rules are to be construed consistently with the Federal Rules. *Floyd v. Leftwich*, 456 A.2d 1241, 1245 n.4 (D.C. 1983).

Defendants' argument that Plaintiff's opposition was "dead wrong." And "[w]here parties have taken legitimate positions, and the Court grants in part and denies in part a motion to compel discovery responses, courts generally conclude that justice requires that each party be responsible for their own fees and costs." *Howard v. City of Albuquerque*, 349 F.Supp.3d 1137, 1147 (D.N.M. 2018). That is what the court should do here and deny the CEI Defendants' motion for costs.

The CEI Defendants' argument that Dr. Mann's opposition "ignored" the CEI Defendants' argument misses the mark and shows just how badly the CEI Defendants apparently misunderstood Dr. Mann's argument. Dr. Mann's argument was not that he had not pled causation and an entitlement to damages. He certainly has. Rather, Dr. Mann's argument was that the Court of Appeals' finding that the CEI Defendants' statement was libelous *per se* conclusive proves causation and entitlement to damages. Dr. Mann cited case law that said just that. *E.g. Sowder v. Nolan*, 125 A.2d 52, 55 (D.C. 1956); *Farnum v. Colbert*, 293 A.2d 279, 281 (D.C. 1972). Dr. Mann did not ignore the CEI Defendants' position, he legitimately opposed it. The CEI Defendants are therefore not entitled to costs and fees.

But the court should deny the CEI Defendants' request for another reason – requiring Plaintiff to pay costs and fees would be unjust under the circumstances. *See* Super. Ct. Civ. R. 37(a)(5)(A)(iii). Plaintiff has provided prompt responses to all of the CEI Defendants' written discovery requests. Plaintiff has produced over 1,000,000 pages of documents in response to the Defendants' requests for production of documents. Tellingly, the CEI Defendants' motion to compel encompassed only 19 of the CEI Defendants 123 interrogatories and requests for production.

Moreover, the parties met and conferred about the CEI Defendants' discovery requests, and counsel for Dr. Mann offered to provide certain information, such as information on book

royalties and speaking engagements. The CEI Defendants rejected the offer and insisted that Dr. Mann also provide his personal tax returns, bank statements, investment information, real estate holdings, credit card statements, and salary information. The court's order on the CEI Defendants' motion to compel, however, excluded the very documents the CEI Defendants' insisted they were entitled to (i.e., tax returns, bank statements, investments, real estate holdings, and credit card statements). Had the CEI Defendants accepted the offered compromise, they would have received most, if not all, of the information and documents that the court ordered produced. Thus, the CEI Defendants' costs were brought about by their own obstinacy and overreaching, not by Dr. Mann.

This is not the first time the CEI Defendants have employed such scorched-earth litigation tactics, requesting sanctions without any legitimate basis to do so. In their reply brief regarding the denial of their Anti-SLAPP motion, the CEI Defendants told the Court of Appeals that Dr. Mann should be sanctioned for stating that certain investigation reports "exonerated" him. *CEI v. Mann*, No. 14-CV-101, Event No. 51 at p. 5 ("Mann's discussion of these materials is so misleading as to seriously call into question his and his counsel's candor to the Court. In these circumstances, it would be well within the Court's discretion to order Mann and his counsel to show cause why they should not be sanctioned for mis-representation of the record and for unreasonably imposing litigation costs on Defendants.")

The Court of Appeals, of course, did not accept the invitation. Rather, it specifically rejected the CEI Defendants' position that the reports could not be said to exonerate Dr. Mann. *CEI v. Mann*, 150 A.3d 1213, 1255-1257 (D.C. 2016). To be sure, directly contrary to the CEI Defendants' accusation that Dr. Mann misled the court by saying that these reports exonerated him, the Court of Appeals noted that one investigation was "unequivocal in its conclusion" and another "similarly concluded that there was 'no specific evidence that [Dr. Mann] falsified or fabricated any data and no

evidence that his actions amounted to research misconduct.”” *Id.* at 1256-57. The CEI Defendants’ request for sanctions was baseless.

Their request for sanctions is similarly baseless here. This is not a case where Plaintiff has been intransigent with regard to discovery. Rather, he has made a good faith effort to comply with his discovery obligations.² The CEI Defendants’ motion to compel was the result of a legitimate disagreement as to whether the CEI Defendants were entitled to the documents and information they requested and whether their discovery requests were otherwise objectionable. And the CEI Defendants filed their motion only after the parties made a good faith effort to resolve that disagreement, including an offer by Dr. Mann to produce a majority of the information that court later ruled discoverable. An award of costs and fees is not justified.

At the very least, the court should defer the motion until the end of the litigation. This is what the parties have done with requests for fees under the Anti-SLAPP Act. It would therefore serve judicial economy to defer ruling on this and the other fee motions, including whether the fees claimed by the CEI Defendants are reasonable, until the end of the litigation.

IV. CONCLUSION

For the foregoing reasons, Dr. Mann respectfully requests that the court deny the CEI Defendants’ Motion for Payment of Expenses Pursuant to Rule 37(a)(5).

² Dr. Mann also prevailed, in part, on a motion to compel discovery against the CEI Defendants and did not seek sanctions against them. See Feb. 25, 2020 Order Granting in Part Plaintiff’s Motion for Reconsideration of the Court’s order relating to Rand Simberg and the Competitive Enterprise Institute.

Dated: May 29, 2020

Respectfully submitted,

/s/ John B. Williams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May 2020, a copy of the foregoing Opposition to Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Payment of Expenses Pursuant to Rule 37(a)(5) was served via the court's electronic filing system or email on the following:

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[PROPOSED] ORDER

Upon consideration of the Motion for Payment of Expenses Pursuant to Rule 37(a)(5) filed by Defendants Competitive Enterprise Institute and Rand Simberg, and Plaintiff's opposition to that Motion, it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

This ___ day of _____, 2020

Honorable Jennifer Anderson
Associate Judge