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By: LISA COOPER
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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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR CONTINUANCE OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT

Plaintiffs Eric Torres, Adam Sinn, XS Capital Management, L.P., and Aspire Commodities, L.P. ("Plaintiffs") file this Response in Opposition to Defendants' Motion for Continuance of Plaintiffs' Motions for Summary Judgment, and would respectfully show this Court the following:

I. INTRODUCTION

At the prior hearing in this case on Plaintiffs' special exceptions and Defendants' motion to compel, Defendants sought and were granted limited discovery concerning their alleged defenses and counterclaims. In addition, the Court considered Plaintiffs' special exceptions and, in denying those exceptions, advised Plaintiffs that their next step was to file a motion for summary judgment. After allowing Defendants the discovery permitted by the Court, Plaintiffs filed traditional motions for summary judgment because there are no facts in dispute and the conduct of Adam Sinn in sending a picture to Taylor (a) does not legally justify Defendants'

refusal to pay Plaintiff Torres the funds Defendants owe him; and (b) did not breach the non-disparagement or any other clause in the Settlement Agreement.

Now Defendants ask for a continuance of those motions to seek even more discovery, despite failing to make the showing required by the Texas Rules of Civil Procedure and Texas Supreme Court precedent in order to obtain the continuance. For each piece of discovery, Defendants must explain the discovery they seek, show how it is material to their defense of the motions, and show how they were diligent in seeking the discovery. Defendants cannot meet that burden for each of the items sought. Accordingly, Defendants' motion for continuance should be denied and the Court should have the opportunity to resolve this matter.

II. BACKGROUND

This case is about Defendants' obligation to pay Eric Torres over $200,000 in settlement funds from the last time these parties litigated. Defendants have refused to pay Torres, asserting as some kind of defense that Adam Sinn sent to Craig Taylor early in the morning on December 22, 2013, after a Christmas party, a picture of several individuals around a Christmas tree holding up their middle fingers at the camera (the "Picture"). Craig Taylor admits that the Picture message had no text or tag line.[1] Nonetheless, despite the fact that nothing about this communication is disparaging to Defendants or discusses any confidential information, Taylor and Atlas Commodities, L.L.C. have used this incident to try to avoid their legal obligation to pay Torres the settlement funds.

III. ARGUMENTS AND AUTHORITIES

Defendants are using the Picture to fish for a defense to their failure to pay Torres. Despite the fact that neither this Picture, nor its being sent to Taylor, can as a matter of law constitute a breach of the Settlement Agreement, the Court allowed Defendants limited

[1] Taylor asked for an apology and to be left alone, which was given, and should have been the end of this.

discovery, which Plaintiffs more than complied with. Now Defendants want even more discovery based on those same insufficient allegations and without any basis in their pleadings or evidence to support more discovery.

Defendants assert that Plaintiffs' counsel misled them into delaying taking discovery action. This is clearly a case of "no good deed goes unpunished." As evidenced by the emails (*see e.g*. Exh. 2 to Defendants' Motion), Plaintiffs' counsel offered to resolve the issue (which Defendants did not present to the Court at the last hearing) of whether Plaintiffs Sinn and Torres' answers to interrogatories should be amended by ***agreeing*** to amend those interrogatories, which Plaintiffs Sinn and Torres did, and which tellingly are not among the litany of things Defendants now complain about in their Motion (*see* Motion, Section II.D). Plaintiffs' counsel did ask that no hearing be set during the period of December 15-23, 2014 as he was out on vacation, but that did not prevent Defendants from taking any other action, and indeed Defendants have served subpoenas on wireless carriers, served notices of deposition of third parties, and filed a motion for letters rogatory for the deposition of a third party. Nonetheless, Defendants seek to blame Plaintiffs' counsel for their lack of proof. As discussed further below, all of the discovery referenced in the Motion for Continuance has either been permitted and provided, or is so far outside of the scope of discovery permitted by this Court and/or this Court's authority, it should be denied. Further, Defendants fail to show the discovery would allow them to respond to the motions for summary judgment.

In reality, Defendants are actually themselves in the best position to determine if their customers received a communication from Plaintiffs by simply asking them. Yet Defendants have offered nothing to show that actually occurred. Presumably Defendants would have investigated that issue before they stopped paying Plaintiff Torres or filed their counterclaims.

Instead Defendants relied on the Picture being sent to them as an excuse to initially breach the Settlement Agreement, and now are trying to use that picture as a basis for a fishing expedition in the hopes of finding something to justify their breach *ex post facto.* Now is the time for this alleged "justification" to be decided by the Court.

In Section D of their Motion for Continuance, Defendants identify eight (8) items of "discovery" that they seek (Items 1-8 in their Motion, which are really more akin to topics rather than discovery). However, Defendants have failed in their requirement to provide an affidavit or verified motion which describes the evidence sought, explains its materiality, and sets forth facts showing the due diligence used to obtain the evidence. *Zepeda v. Indus. Site Servs., Inc.*, No. 13-07-00579-CV, 2008 WL 4822205, at *6 (Tex. App. Corpus Christi -- Nov. 6, 2008, no pet.) (mem.op.); *see Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 162 (Tex. 2004) (approving trial court's denial of a continuance because none of the discovery described could have raised a fact issue as to the issues in the motion for summary judgment). Furthermore,

> In order for a continuance to be granted, cause must be shown, supported by affidavit. Tex.R. Civ. P. 251. Further, if the basis for the requested continuance is "want of testimony," the affidavit must show (1) that the testimony is material, (2) that due diligence has been used to obtain the testimony, (3) that there is an explanation given for the failure to obtain the testimony, and (4) that the testimony cannot be procured from another source. Tex.R. Civ. P. 252.

Tri-Steel Structures, Inc. v. Baptist Found. of Texas, 166 S.W.3d 443, 447-48 (Tex. App. –Ft Worth 2005, no pet).

The motion for continuance here is similar to that *LaGrone Co. v. Bank One, Texas, N.A.*, No. 05-91-02092-CV, 1993 WL 25362, at *2 (Tex. App. Dallas -- Feb. 3, 1993, writ denied) (not designated for publication).

> We conclude that appellants' motion was not in substantial compliance with the Rule. First, we note that there was no allegation that the testimony or information sought through the discovery process would be material to this lawsuit; nor was there any information that demonstrated the materiality of the information.

> Further, while counsel concluded that he had been diligent in all respects, he failed to demonstrate his diligence. A mere conclusion that diligence was used is not sufficient to satisfy the requirements of Rule 252.

Id.

Like the non-movant in *Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576-77 (Tex. App. 2001, no pet.), the Court should deny Defendants' request for continuance:

> Perrotta asserted in his motion for continuance that additional time for discovery was needed to compel the production of documents Farmers had withheld based upon attorney-client privilege. Perrotta, however, did not show why the documents were material nor file a motion to compel production after being served with Farmers's responses. *See Blake v. Lewis*, 886 S.W.2d 404, 409 (Tex.App.—Houston [1st Dist.] 1994, no writ) (holding proponent of a motion for continuance should state what specific discovery is material and show why it is material). Likewise, Perrotta claimed he needed additional time to take depositions of Farmers representatives, but he failed to show how this discovery was material to his breach of contract and extra-contractual claims. *See Rhima v. White*, 829 S.W.2d 909, 912 (Tex.App.—Fort Worth 1992, writ denied). Perrotta also claimed that a request by Farmers to hold off on discovery justified a continuance. However, nothing prevented Perrotta from conducting discovery earlier in the case, and his failure to make diligent efforts to secure discovery did not authorize the granting of a continuance. *See Blake*, 886 S.W.2d at 409. Moreover, the requested discovery would not have affected our findings on either the contractual or extra-contractual claims.

Perrotta v. Farmers Ins. Exch., 47 S.W.3d 569, 576-77 (Tex. App.-Hous. [1st Dist] 2001, no pet) (footnote omitted).

Regarding the specific requests for discovery articulated in Defendants' motion, Plaintiffs respond as follows:

1. Plaintiffs have provided all communications responsive to this Court's Order that are not privileged communications. Defendants cannot compel or obtain documents which do not exist.

2. Plaintiffs have searched their electronic devices for any mention of Defendants. In fact, Plaintiffs did even better. With regard to Sinn's device in particular because it had a substantial number of texts, Plaintiffs' counsel looked through over 10,000 texts individually to see if they could possibly relate or concern Atlas or Taylor even if not mentioned by name and confirmed these with Plaintiff Sinn. All non-privileged, responsive texts that were located have been produced. "Providing access to information by ordering examination of a party's electronic storage device is

particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be." *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 317 (Tex. 2009). "Courts have been reluctant to rely on mere skepticism or bare allegations that the responding party has failed to comply with its discovery duties." *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 317-18 (Tex. 2009); *see also In re Pinnacle Eng'g, Inc.*, 405 S.W.3d 835, 842-43 (Tex. App. -Hous. [1st Dist.] 2013, no pet). Further, there are particular showings that must be made under *In re Weekly Homes* which Defendants have not even attempted to do here. Defendants have not and cannot show that they can meet the conditions of the Texas Supreme Court to obtain access to Plaintiffs' electronic devices.

3. Defendants seek depositions of Plaintiffs. This is a recent request first mentioned after Plaintiffs filed their Motions for Summary Judgment. *See Carbonara v. Texas Stadium Corp.*, 244 S.W.3d 651, 659 (Tex. App. 2008) (denying continuance because the affidavit supporting the motion described efforts to obtain the requested discovery, after the filing of the motion but not before). In fact, although Defendants noticed the depositions of three non-parties and filed a motion to take the deposition of another non-party, Defendants never requested any Plaintiffs' deposition until they requested Eric Torres' deposition on January 2, 2015, *after the motion for summary judgment was filed*. The reality is that any such deposition cannot alter the fact that the Picture was sent by Sinn (not Torres), and the Picture is not a breach of the Settlement Agreement. Defendants offer no affidavit or verified motion showing what material evidence may be available to defeat the motions for summary judgment which merely seek this Court's interpretation of unambiguous contract.

4. Defendants seek discovery from third parties who simply appear in the Picture. Plaintiff Sinn sent the picture to Taylor and the people as identified in Sinn's answers to interrogatories, already provided to Defendants on September 22, 2014 (*See* Exhibit B to Defendants' motion to compel filed September 29, 2014, No. 2). Plaintiff Sinn produced his actual communications from his telephone and, even better, the complete telephone records from his carrier for the time period set by the Court without any redaction so that Defendants could see Plaintiff Sinn was not sending the picture to their customers, an allegation one would think Defendants could easily prove by placing evidence in the record that one of its customers actually received a text from Sinn – which they have not done. Defendants have failed to show that they could obtain evidence from these third parties which would be material to the issues presented by the motions for summary judgment seeking an interpretation of a contract.

5. Item number 5 is simply a restatement of Item number 4. Defendants seek "[t]hird party discovery from everyone Plaintiffs admit received the photo." Defendants have failed to offer any affidavit or verified motion showing that such discovery would lead to evidence to create a material issue of fact on Plaintiffs' motions, as is required in order to obtain a continuance.

6. Defendants state that they seek discovery for wireless carriers to establish "who sent what to whom and when." Plaintiff Sinn already provided the actual telephone records he got from his carrier and over a month ago. At the same time, Plaintiff Torres provided Defendants with what Verizon would provide him as a former customer and advised Defendants to subpoena Verizon to get the rest because Verizon demanded a subpoena before producing anything further for a former customer. Defendants have failed to show how such discovery is material or how Defendants exercised due diligence in obtaining such discovery. Again, presumably Defendants could offer some evidence from their own customers that they actually saw the Picture or received a communication from Plaintiffs, which Defendants have still yet to do. Defendants have had adequate time to conduct their fishing expedition and have failed to find any "fish."

7. In Item 7, Defendants seek appointment of a discovery master. Although not referenced in the Motion, Texas Rule of Civil Procedure "171 is the exclusive authority for appointment of masters in our state courts." *Simpson v. Canales*, 806 S.W.2d 802, 810 (Tex. 1991) (vacating order appointing a discovery master in a toxic tort case involving 18 defendants). "Rule 171 permits appointment of a master only 'in exceptional cases, for good cause'" *Id.* at 811. Neither exists here. Defendants want a discovery master to search Plaintiffs' electronic devices. Again, Defendants have failed to make the showing required by *In re Weekly Homes* for such an invasion of privacy. Further, this case is about a picture of a couple of guys around a Christmas tree holding up their middle fingers, which Sinn sent to Taylor – hardly the kind of case warranting a discovery master! This request seeks to lead this Court into error and should be denied.

8. Defendants seek a ruling that Plaintiffs' claims of privilege are unfounded. Plaintiffs withheld privileged material that is exempt under Texas Rule of Civil Procedure 193.3(c), because such communications were

> (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and
> (2) concerning the litigation in which the discovery is requested.

Tex. R. Civ. P. 193.3. These were communications at the time the Picture was sent and Defendants' counsel complained about it as a breach of the settlement. Plaintiffs did not even have to tell Defendants they were withholding privileged documents exempt under Texas Rule of Civil Procedure 193 but because the text messages on the image of Plaintiff Sinn's telephone were listed in a spreadsheet by date order, Plaintiff Sinn identified the privileged text on the spreadsheet produced to Defendants and noted in the cover letter sending the documents to Defendants' counsel that this was done so as to avoid a claim that the list was misleading. Defendants have already received more than what they are entitled to under the Texas Rules of Civil Procedure. There is no basis to rule on exempt documents and further,

> Defendants have failed to show how that ruling would lead to evidence material to the issues in the motions for summary judgment.

Defendants attempt to equate themselves with the defendant in the memorandum opinion *Joki v. Springer*, No. 10-14-00154-CV, 2014 WL 6091957, at *2 (Tex. App. Nov. 13, 2014, mem. op.). In *Joki*, the court noted that "Like in *Ford,* Joki is complaining that the trial court denied Joki *any* discovery on the Springers' breach of contract action." *Id.* at *2 (emphasis in original). Here the Court has permitted some discovery and Defendants want more, which as *Joki* acknowledges requires proof. *Id.* ("The Springers contend that the trial court did not err because Joki did not file an affidavit explaining his need for discovery or a verified motion for continuance, citing *Joe v. Two Thirty Nine J .V.*, 145 S.W.3d 150 (Tex.2004). However, as the Texas Supreme Court stated in *Ford Motor Co.*, in the cases requiring a party to file an affidavit or a motion for continuance, the parties had already conducted formal discovery and were seeking time to conduct additional discovery."). Moreover Joki denied the existence of the settlement agreement; here no one has denied the existence of the Settlement Agreement, and in fact, both parties want to enforce the Settlement Agreement.

As the court in *In re Sears, Roebuck & Co.*, 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, no pet.) noted:

> Aside from the problems in the timing and format of this order, its substance was also improper. A "fishing expedition" is one aimed not at supporting existing claims but at finding new ones. *See Dillard Dept. Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex.1995). As noted above, the only Sears products that Joel Fuerstenau or any of his designated co-workers identified as potential sources of asbestos exposure were Homart water heaters and boilers. Yet the order required production of far more.

Id. The court has allowed Defendants the opportunity to conduct limited discovery and now the Court can decide if the picture sent to Mr. Taylor was a breach of the non-disparagement or confidentiality clauses of the settlement and, if so, whether that justified Defendants' refusal to

pay Torres. There is no need for further discovery on such issues, much less the abusive, harassing, and over-the-top invasive discovery proposed by Defendants. Plaintiffs have produced the allowed discovery, showing that the picture was not sent to any customers of Taylor or Atlas, and Defendants have not been able to produce a single shred of evidence available to them showing the picture was ever sent to their customers; not in the documents provided to them by plaintiffs, not in the documents produced to them by Verizon, and not in any document or testimony of a single Atlas customer. There is simply no basis to permit further discovery or delay the summary judgment motions.

WHEREFORE, Plaintiffs request that the Court deny Defendants' Motion for Continuance and grant Plaintiffs all further relief to which they are entitled.

Respectfully submitted,

RAPP & KROCK, PC

s/ Kenneth M. Krock

Kenneth M. Krock
State Bar No. 00796908
Terri S. Morgan
State Bar No. 08286500
Megan N. Brown
State Bar No. 24078269
3050 Post Oak Boulevard, Suite 1425
Houston, Texas 77056
(713) 759-9977 telephone
(713) 759-9967 facsimile
kkrock@rk-lawfirm.com
tmorgan@rk-lawfirm.com
mbrown@rk-lawfirm.com
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of January 2015, a true and correct copy of this document was served on counsel of record in accordance with the Texas Rules of Civil Procedure.

Geoffrey A. Berg
gberg@bfjblaw.com
Kathryn E. Nelson
knelson@bfjblaw.com
Berg Feldman Johnson Bell, LLP
4203 Montrose Boulevard, Suite 150
Houston, Texas 77006

Via Eserve

s/ Kenneth M. Krock
Kenneth M. Krock