

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,)	Case No. 2016 09 3928
)	
Plaintiffs,)	Judge Patricia A. Cosgrove
)	
v.)	
)	
KISLING, NESTICO & REDICK, LLC, et al.,)	<u>DEFENDANT'S JOINT REPLY BRIEF IN</u>
)	<u>SUPPORT OF ITS MOTION TO COMPEL</u>
Defendants.)	<u>AND RESPONSE TO PLAINTIFFS' MOTION</u>
)	<u>FOR PROTECTIVE ORDER</u>
)	

Plaintiffs' request for a protective order shielding the production of all documents that were stolen from Defendant by Robert Horton and illicitly obtained by Plaintiffs belies logic on a number of fronts.

Plaintiffs have not even attempted to set forth a showing of "annoyance, embarrassment, oppression, or undue burden or expense" that could plausibly justify such an order here. Civ.R. 26(C). Putting aside the absurdity of Plaintiffs claim that the Horton Documents "will have no substantive impact on [Defendants'] ability to mount a defense in this case" (See Pltf. Motion at p. 1), Plaintiffs have used cited to these documents as evidence allegedly supporting their claims in this case. Thus, Defendant's request for production of the documents is reasonably calculated to lead to the discovery of admissible evidence on its face.

Plaintiffs' fabricated justification for withholding these documents is that "Defendants will destroy or wrongfully withhold evidence based upon their knowledge of the documents in Plaintiffs' possession." Plaintiffs will only produce the Horton documents "after the Defendants have made a good faith response to Plaintiffs' own discovery requests." (See Pltf. Motion at pp. 1-5) (emphasis in original). Putting aside the offensive suggestion that officers of the Court (both the Defendants and their counsel), would conspire to intentionally destroy evidence, this assertion simply has no factual basis in the record of this case. Nor is it a legally supportable justification to withhold discoverable documents responsive Defendant's discovery requests.

Plaintiffs have no authority to unilaterally withhold documents they agree are discoverable. Plaintiffs identified no rule, statute or case law supporting their obstructive quid pro quo strategy, nor did they respond to the controlling and persuasive authority identified by Defendants specifically condemning this improper discovery tactic. See, e.g. *Springfield Local Sch. Dist. Bd. of Ed. v. Ohio Ass'n of Pub. Sch. Employees*, 106 Ohio App.3d 855, 868, 667 N.E.2d 458 (9th Dist. 1995) (citations omitted) ("No person has a privilege to refuse to testify or produce a document upon request in a judicial proceeding unless the constitution, a statute or case law provides otherwise. This rule applies to all stages of the proceeding, including discovery"); *Massara v. Henery*, Ninth Dist. No. 19646, 2000 Ohio App. LEXIS 5425 at *5 (Nov. 22, 2000), citing *Nakoff v. Fairview General Hospital*, 75 Ohio St.3d 254, 662 N.e.2D 1 (1996) ("Whether a product of sloth or gamesmanship, repeated delays by a party in discovery create unneeded delays, waste judicial resources, and sound an unwelcoming echo to nineteenth century ambush lawyering."); *Shoreway Circle v. Gerald Skoch Co., L.P.A.*, 92 Ohio App.3d 823, 637 N.E.2d 355 (8th Dist. 1994) (approving dismissal of case by trial court as a sanction for plaintiff's quid pro quo tactics during discovery); *Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. 17, 24 (D.C.C. 2009) (stating a party "is not justified in providing insufficient answers [to discovery] just because [the other party] did."); *Blake Associates v. Omni Spectra, Inc.*, 118 F.R.D. 283, 287 (D.Mass. 1988) (finding sanctions warranted where a party refused to produce documents until the opposing party produced requested discovery).

The case law is clear. Plaintiffs are not permitted to wield the Horton documents as a sword and a shield to further their own improper discovery and fishing expedition in this case.¹ The quid pro quo strategy is not only improper as a matter of law – it is sanctionable.

¹ Plaintiffs' further attempt to rationalize their unlawful position and "spoliation concerns" by again claiming the documents somehow "evidence fraud" is belittled by Mr. Horton's own sworn affidavit testimony that there was no fraud in relation to his representation of Plaintiffs' underlying personal injury claims, which Plaintiffs conveniently ignore.

Plaintiffs' obviously faulty logic in attempting to justify their position demonstrates that their position has been taken for purposes of gamesmanship, and not for legitimate purposes related to the Rules of Civil Procedure. Specifically, Plaintiffs claim they are excused from producing these admittedly discoverable documents because Mr. Horton has already returned to Defendant the documents he stole and improperly gave to Plaintiffs. (See Pltf. Motion at pp. 2-3). If this were indeed the case, Plaintiff should thus have no issue with immediately returning the entirety of the Horton documents forthwith, as Plaintiffs' wild conspiracy theory that Defendant will withhold or otherwise destroy relevant evidence vanishes into the same thin air out of which it was created.

"Discovery is not poker where the cards are turned up one at a time." *Massachusetts Sch. Of Law v. American Bar Ass'n*, 914 F. Supp. 1172, 1178 (Dist. Pa. 1996). Plaintiffs have set forth no showing of "good cause" allowing this Court to issue a protective order under the authority of Civ.R. 26(C), nor have they set forth any legitimate, legally supportable basis to justify the continued withholding of the Horton Documents. As a result, Defendants respectfully requests that the Court overrule Plaintiffs' Motion for Protective Order and compel the immediate production of the Horton Documents.

Respectfully submitted,

/s/ James M. Popson

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CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), the undersigned certifies that a copy of the foregoing *DEFENDANT'S JOINT REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL AND RESPONSE TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER* was filed electronically with the Court on this 15th day of March, 2018. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson

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