

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FOR THE 1st JUDICIAL CIRCUIT
CASE NO: 2018-CP-18-01960

CARL MICHAEL FUNNY,

Plaintiff,

v.

ORDER GRANTING PLAINTIFF'S
MOTION TO COMPEL DISCOVERY.

**WAFFLE HOUSE, INC. AND
CHRISTOPHER HEITHAUS**

Defendants.

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DEC 23 2019

SC Court of Appeals

This matter came before the Court for a hearing on April 11, 2019, on Plaintiff's Motion to Compel discovery responses filed on February 16, 2019. After reviewing the parties' submissions and hearing argument of counsel, the Court grants Plaintiff's Motion based on the following:

FACTS

1. This case involves a Waffle House restaurant located at 8505 Dorchester Road in North Charleston, South Carolina that Plaintiff alleges was the site of ongoing dangerous criminal activity, which culminated in the shooting of Plaintiff on August 18, 2017. Plaintiff alleges that Defendants were negligent in failing to take actions to stop this criminal activity and protect himself and other customers. Plaintiff filed a lawsuit commencing this action on November 6, 2018.
2. On December 5, 2019, Plaintiff served Defendants' counsel with Plaintiff's initial discovery requests. Defendants' responses to Plaintiff's initial discovery requests were due January 4, 2019.
3. On January 9, 2019, counsel for Defendants asked for a 30-day extension to respond to discovery, which would make Defendants' responses due on February 8, 2019. Plaintiff's counsel agreed to the requested 30-day extension.

4. On February 5, 2019, Plaintiff's counsel reminded Defendants' counsel that discovery was due in 3 days.
5. Counsel for Defendants did not produce discovery responses on February 8, 2019 as promised.
6. On February 12, 2019, Plaintiff's counsel reminded counsel for Defendants that discovery was now four days past due and informed that if discovery was not produced by Friday, February 15, 2019, a motion to compel seeking costs and fees would be filed.
7. On February 16, 2019, Plaintiff's counsel filed the current Motion to Compel.
8. A hearing on Plaintiff's Motion to Compel and an unrelated motion from Defendants was scheduled for April 11, 2019.
9. In the afternoon of April 10, 2019, Defendants produced answers to Plaintiff's initial discovery requests.
10. At the motion hearing on April 11, 2019, Plaintiff's counsel asserted that the responses by Defendants' were incomplete, in addition to being more than two months late.

ANALYSIS

11. South Carolina Rules of Civil Procedure 33 and 34 generally require that responses to interrogatories and requests for production, including objections, be served within 30 days of service.
12. South Carolina Rule of Civil Procedure 37(d) provides that if a party fails "(2) to serve answers or objections to interrogatories submitted under Rule 33 ... or (3) to serve a written response to a request for inspection submitted under Rule 34 ... the

court in which the action is pending on motion may make such orders in regard to the failure as are just.”

13. South Carolina Rule of Civil Procedure 37(a) requires that costs and fees be awarded against a party whose conduct necessitated the filing of a motion to compel unless the Court finds that opposition to the motion was substantially justified.
14. It has been held in federal court that a failure to timely object to a discovery request constitutes a waiver of the objection. *Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005) (citing *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D.Ala. 1976)); *See also*, *Phillips v. Dallas Carriers Corp.*, 133 F.R.D. 475, 477 (M.D.N.C. 1990). In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive. *See*, *Unisun v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).
15. “Our judges must use their authority to make sure that ... forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.” *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10 (2001).
16. The Court find that the Defendants missed a discovery deadline, requested an extension, and then missed that extension.
17. Defendants ignored efforts by Plaintiff’s counsel to remind of the approaching extended deadline and then accommodate Defendants’ failure to meet that deadline.
18. Defendants then waited until the day before the hearing on Plaintiff’s Motion to Compel Defendants to Produce Discovery to serve their responses.

19. Defendants conduct require Plaintiff to incur costs and fees in pursuing his Motion to Compel.
20. The Court finds that Defendants waived any objections to Plaintiff's discovery requests by twice missing discovery deadlines.
21. The Court finds that Defendants failure to timely serve discovery responses and opposition to Plaintiff's Motion to Compel was not justified, thereby requiring the award of costs and fees pursuant to SCRCP 37.

ORDER

22. Defendants must provide complete responses to Plaintiff's discovery requests within fifteen days of this Order.
23. Defendants have waived any objections to Plaintiff's discovery requests that were served on December 5, 2019.
24. Defendants are to pay attorney's fees and costs as follows:
 - a. For Plaintiff's costs in filing the Motion to Compel, \$34.74, which includes the costs of electronic filing of motions;
 - b. The Court has reviewed the affidavit of Plaintiff's counsel concerning his qualifications and experience. The Court finds that Plaintiff's counsel's hourly rate of \$250.00 is reasonable.
 - c. For Plaintiff's counsel's time in filing the Motion to Compel, attend the hearing on it, and draft and file a proposed order, \$750.00 representing 3 hours at Plaintiff's counsel's hourly rate of \$250.00. (Time spend in travel and preparation for the hearing on the Motion to Compel is neither requested nor awarded.)

AND IT IS SO ORDERED

Judge George McFaddin, Jr.



Dorchester Common Pleas

Case Caption: Carl Michael Funny VS Waffle House Inc. , defendant, et al
Case Number: 2018CP1801960
Type: Order/Compel

So Ordered

S/George M. McFaddin, Jr., #2759