

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UMG RECORDINGS, INC., *et al.*,

Plaintiffs,

-against-

MARIE LINDOR,

Defendant.
-----X

ORDER AND
REPORT AND
RECOMMENDATION

05 CV 1095 (DGT)(RML)

LEVY, United States Magistrate Judge:

By order dated December 24, 2008, the Honorable David G. Trager, United States District Judge, referred this matter to me for a Report and Recommendation on plaintiffs' motion for sanctions and to dismiss this case without prejudice. For the reasons stated below, plaintiffs' motion for sanctions is denied,¹ and I respectfully recommend that this case be dismissed without prejudice and without fees or costs to any party.

BACKGROUND AND FACTS

Plaintiffs UMG Recordings, Inc., Warner Bros. Records Inc., Arista Records LLC, Interscope Records, Motown Record Company, L.P., and Sony B.M.G. Music Entertainment ("plaintiffs") commenced this copyright infringement suit against defendant Marie Lindor ("defendant") on February 22, 2005. (See Complaint, dated Feb. 22, 2005 ("Compl.")). Plaintiffs are companies that own copyrights in sound recordings. The complaint asserts that defendant unlawfully used a peer-to-peer ("P2P") network to distribute plaintiffs' copyrighted

¹ Plaintiffs' motion for monetary sanctions is not dispositive and is therefore within my jurisdiction under 28 U.S.C. § 636(b).

songs to other Internet users. (Compl. ¶¶ 12-14.) Plaintiffs allege that defendant's actions "violated Plaintiffs' exclusive rights of reproduction and distribution" and infringed their copyrights. (Compl. ¶ 14.)

Plaintiffs initiated this action after MediaSentry – a company that plaintiffs employ to investigate file-sharing on the Internet – detected an individual using a file-sharing program to distribute music files, including plaintiffs' copyrighted songs, to other P2P users through defendant's Internet account under the username "jrlindor@KaZaA." MediaSentry determined that the individual used Internet Protocol ("IP") address 141.155.57.198 to connect to the Internet. Plaintiffs then brought a "Doe" action against this anonymous individual and obtained a court order allowing them to serve a subpoena on the individual's Internet service provider, Verizon Internet Services, Inc. ("Verizon"). In response to plaintiffs' subpoena, Verizon identified defendant Marie Lindor as the person responsible for IP address 141.155.57.198 at the time of the file sharing. (See Plaintiffs' Memorandum of Law in Support of Their Motion for Sanctions and to Dismiss Without Prejudice, filed Dec. 4, 2008 ("Pls.' Mem."), at 3.)

Once plaintiffs learned Marie Lindor's identity and named her as a defendant, the parties embarked on a long and contentious discovery process, bringing numerous disputes before the court. According to plaintiffs, defendant and her family members and counsel "intentionally provided false information, attempted to misdirect Plaintiffs as to relevant facts and events, and concealed critical information and evidence regarding the infringement at issue,"

unreasonably and vexatiously multiplying this litigation and severely prejudicing plaintiffs' ability to learn the critical facts. (Pls.' Mem. at 3.) They cite eight examples of alleged actions by defendant and her relatives that they consider obstructive: (1) falsely claiming at the outset that defendant, then appearing pro se, did not have Internet service in August 2004, compelling plaintiffs to confirm with Verizon that she did have Verizon Internet service at that time (see Pls.' Mem. at 4); (2) falsely claiming that the infringement occurred over a wireless router, and that someone must have pirated her wireless connection to download music, when in fact plaintiffs were able to prove that the infringement took place via a physical or hardwired connection to defendant's Internet account (see Pls.' Mem. at 4-5); (3) falsely claiming that there was no computer in defendant's residence at the time of the infringement, when plaintiffs uncovered evidence to the contrary (see Pls.' Mem. at 5); (4) deliberately providing false information regarding the whereabouts of defendant's nephew, Gustave Lindor, Jr., who goes by the nickname "Junior" (see Pls.' Mem. at 6); (5) unreasonably seeking to prevent, and interfering with, plaintiff's ability to depose defendant's son, Woody Raymond, and her nephew, Gustave Lindor, Jr. (see Pls.' Mem. at 6-8); (6) unreasonably refusing to produce defendant's computer for a forensic inspection until ordered to do so (see Pls.' Mem. at 8); (7) concealing evidence that an additional hard drive had been connected to the computer (see Pls.' Mem. at 8-10); and (8) intentionally providing false and misleading information regarding the whereabouts of defendant's daughter, Yanick Raymond-Wright, and falsely claiming that Ms. Raymond-Wright had not stayed in her home during the summer of 2004, when Ms. Raymond-Wright herself

testified that she had brought a desktop computer and a laptop computer into defendant's home in August 2004 and had temporarily connected them to defendant's Internet account (see Pls.' Mem. at 10-13). Plaintiffs also ask the court to disregard Ms. Raymond-Wright's belated attempts to change her deposition testimony. (Pls.' Mem. at 12-14.) They seek monetary sanctions against defendant and her counsel and, because the desktop computer that was connected to defendant's Internet account at the time of the infringement was discarded in March 2008, likely resulting in the loss of critical evidence, they move for dismissal without prejudice. (See Pls.' Mem. at 18-28.)

Defendant opposes plaintiffs' motion for sanctions and seeks dismissal with prejudice, arguing that plaintiffs' counsel has made "numerous material misrepresentations to the Court" and that plaintiffs' request for sanctions is "frivolous in the extreme." (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Voluntary Dismissal Without Prejudice and Discovery Sanctions, filed Dec. 4, 2008 ("Def.'s Mem."), at 1.) She also requests an award of attorney's fees and costs. (Id. at 6-8.)

DISCUSSION

A. Plaintiffs' Motion for Monetary Sanctions

Federal Rule of Civil Procedure 37(c) provides, in pertinent part:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), . . . the court, on motion and after giving an opportunity to be heard . . . may order payment of the reasonable expenses, including attorney's fees, caused by the failure [or] may impose other appropriate sanctions. . . .

Rule 37(b)(2)(C) permits the court to impose sanctions on “the disobedient party, the attorney advising that party, or both[.]” The court supervising discovery has broad discretion in deciding whether to impose sanctions. See Corp. of Lloyd’s v. Lloyd’s U.S., 831 F.2d 33, 36 (2d Cir. 1987); see also John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988) (the “imposition of sanctions under Rule 37 is within the discretion of the district court”). Courts in this circuit routinely impose monetary sanctions under Rule 37 against parties who deliberately disregard their discovery obligations. See, e.g., Interscope Records v. Barbosa, No. 05 CV 5864, 2007 WL 14332, at *2-3 (E.D.N.Y. Jan. 3, 2007) (imposing monetary sanctions for providing false and misleading discovery responses); LeGrande v. Adecco, 233 F.R.D. 253, 258 (N.D.N.Y. 2005) (awarding deposition costs after concluding there was no justification for pro se plaintiff’s “laissez-faire compliance with discovery”); Nike, Inc. v. Top Brand Co., 216 F.R.D. 259, 261 (S.D.N.Y. 2003) (awarding attorney’s fees as a sanction for Rule 37(c) violations); Monaghan v. SZS 33 Assocs., L.P., 154 F.R.D. 78, 83-84 (S.D.N.Y. 1994) (awarding plaintiff attorney’s fees under Rule 37(c) for defendant’s discovery abuses).

As plaintiffs also point out, federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them; thus, when a party acts “in bad faith, vexatiously, wantonly, or for oppressive reasons,” the court may exercise its discretion in fashioning a remedy. Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991). Even in the absence of a discovery order, a court may impose sanctions for misconduct during discovery through this inherent power to manage its affairs. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106-07 (2d Cir. 2002); see also Brick v. HSBC Bank USA, No. 04 CV 0129E, 2004 WL 1811430, at *6 (W.D.N.Y. Aug.11, 2004) (awarding attorney’s fees

and expenses of \$147,635.74 under the court's inherent powers for evasive and incomplete disclosure). However, the court should exercise this power with restraint and only upon a finding of bad faith. DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 136 (2d Cir. 1998).

Plaintiffs also seek monetary sanctions against defendant's counsel. 28 U.S.C. § 1927 states that

[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

To impose sanctions under 28 U.S.C. § 1927, a court must find clear evidence of bad faith, which may be inferred from actions that are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose. See Vishipco Line v. Charles Schwab & Co., Nos. 02 Civ. 7823, 02 Civ. 7846, 02 Civ. 7877, 02 Civ. 7915, 02 Civ. 7928, 02 Civ. 7929, 2003 WL 1345229, at *10 (S.D.N.Y. Mar. 19, 2003) (citing Solovaara v. Eckert, 222 F.3d 19, 35 (2d. Cir. 2000)); see also Keller v. Mobil Corp., 55 F.3d 94, 100 (2d Cir. 2005) (holding that bad faith or improper purpose is required to support a request for fees under 28 U.S.C. § 1927).

This court is intimately familiar with the length and tenor of this litigation and with the combative tone that has predominated since its inception. Although I am concerned that defendant and her counsel were less than forthcoming at times, both sides bear some responsibility for escalating the hostilities and turning what should have been a routine file sharing case into an unnecessarily protracted dispute.

Plaintiffs' claims concerning defendant's conduct are largely overstated. For

example, plaintiffs point to defendant's deposition testimony in which she identified her nephew, Gustave Lindor, Jr., as having the nickname "Junior," but stated that she did not know where he lived. (See Deposition of Marie Lindor, dated July 7, 2006, annexed as Ex. K to Pls.' Mem. ("M. Lindor Dep."), at 10:16 – 12:24.) According to plaintiffs, Gustave Lindor, Jr. later testified in his deposition that "Defendant and her family were aware that he lived in Brooklyn, New York and were in regular contact with him." (Pls.' Mem. at 6.) They also point to evidence that Gustave Lindor, Jr.'s resume was found on the hard drive of defendant's computer. (Id.) Plaintiffs cite this as a prime example of defendant and her family "stonewall[ing], conceal[ing], and provid[ing] false information." (Id.) In fact, Gustave Lindor, Jr. testified that he had last seen defendant in 2001, although he had visited her home once in 2005 when she was not there. (See Deposition of Gustave Lindor, Jr., dated Oct. 22, 2007, annexed as Ex. N to Pls.' Mem., at 25, 39.) He also said that although defendant and her son, Woody Raymond, knew he lived in Brooklyn, they did not know his address. (See id. at 24–26.) This is hardly strong evidence that defendant was "in regular contact" with her nephew and was lying when she said she did not know where he lived.

Plaintiffs also complain that defendant's relatives evaded service of deposition subpoenas, failed to appear for scheduled depositions, or gave misleading or incomplete deposition testimony. (See, e.g., Pls.' Mem. at 6–7.) They place great emphasis on what they view as Woody Raymond's "obstructionist and unresponsive" conduct with respect to their efforts to uncover evidence of an additional hard drive, and his allegedly false testimony in response to questions about the occupants of defendant's home in the summer of 2004. (See Pls.' Mem. at 8–10.) Setting aside the veracity of these complaints, this court declines to impose

monetary sanctions against defendant for the acts of her non-party family members.

Finally, although plaintiffs are understandably frustrated that they were unable to discover information about Yanick Raymond-Wright's computer until her deposition in May 2008, at which point the computer had been discarded, this court is not convinced that defendant deliberately sought to deceive plaintiffs about her daughter's visit or the presence of a computer in her home in August 2004. Even assuming that defendant's statements were inaccurate, memories fade² and this court is loath to sanction a person who, by all accounts, has never used a computer and is not accused of downloading or distributing plaintiffs' copyrighted recordings herself.

Plaintiffs also accuse defendant's counsel of misconduct, stressing statements he made on his personal blog that now appear to have been inaccurate. (See Pls.' Mem. at 1, 5.) Throughout their submissions, they fault defense counsel for taking actions that, in their view, were intended "to thwart Plaintiffs' search for the truth," such as objecting to plaintiffs' discovery demands and moving to compel discovery, to preclude evidence, or to quash or narrow plaintiffs' subpoenas. (Pls.' Mem. at 2, 8, 19–20.) Although defendant's counsel took an unusually aggressive stance and, at times, veered into hyperbole and gratuitous attacks on the recording industry as a whole, I do not find clear evidence of bad faith on counsel's part.

In sum, plaintiffs' motion for monetary sanctions is denied. In light of this ruling,

² According to Ms. Raymond-Wright's deposition testimony, her husband is in the military, and she and her children have visited her mother's home "on and off" since 2003, sometimes for extended periods, while otherwise living in Virginia, Illinois, or overseas. (Deposition of Yanick Raymond-Wright, dated May 21, 2008 ("Raymond-Wright Dep."), annexed as Ex. S to Pls.' Mem., at 5–14.) Under those circumstances, it is not implausible that defendant did not recall the exact dates of her daughter's visits in 2004 or whether she brought a computer with her.

it is unnecessary to address plaintiffs' request that this court disregard Ms. Raymond-Wright's changes to her deposition testimony. In reaching this decision, I have assumed the accuracy of Ms. Raymond-Wright's original testimony.

B. Plaintiffs' Motion to Dismiss This Action Without Prejudice

Plaintiffs move for voluntary dismissal under Fed. R. Civ. P. 41(a)(2), which states that "[a]n action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Defendant opposes the motion and asks that the case be dismissed with prejudice. Rule 41(a)(2) dismissals are at the district court's discretion.

United States v. Cathcart, 291 F. App'x 360, 361 (2d Cir. 2008).

In Zagano v. Fordham Univ., 900 F.2d 12 (2d Cir. 1990), the Second Circuit delineated a number of factors that are relevant in determining whether a case should be dismissed with or without prejudice: "[1] the plaintiff's diligence in bringing the motion; [2] any 'undue vexatiousness' on plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss." Id. at 14.

I will address each factor in turn:

1. Plaintiffs' Diligence in Bringing this Motion

By letter to the court dated June 17, 2008, plaintiffs' counsel requested leave to file this motion, having learned less than one month earlier, at the deposition of Yanick Raymond-Wright, that defendant's daughter had brought a desktop computer into her mother's home and had connected it to the Internet in the summer of 2004. (See Letter of Eve G. Burton, Esq., dated June 17, 2008.) Because that computer is no longer available for inspection, having

been discarded at some point prior to May 2008 (see Raymond-Wright Dep. at 83-88), plaintiffs decided to terminate this litigation. Defendant does not suggest that plaintiffs could have discovered this information sooner, as neither defendant nor the other deponents in this case recalled Ms. Raymond-Wright's 2004 visit or the presence of her computer in her mother's home. I therefore find that plaintiffs were suitably diligent in bringing this motion.

2. Vexatiousness on Plaintiffs' Part

In determining whether a party was unduly vexatious in pursuing its claim, courts consider whether there is concrete evidence that the party had "ill motive." Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939, 2008 WL 4127549, at *6 (S.D.N.Y. Sept. 2, 2008) (citing Jewelers Vigilance Comm., Inc. v. Vitale, Inc., No. 90 Civ. 1476, 1997 WL 582823 (S.D.N.Y. Sept. 19, 1997)). The question is not whether the court approves of the plaintiff's litigation tactics, but whether the plaintiff acted for the purpose of harassing or annoying the defendant. See In re Solv-Ex Corp. Secs. Litig., 62 F. App'x 396, 398 (2d Cir. 2003); Fox Indus., Inc. v. Gurovich, No. 03 CV 5166, 2009 WL 393949, at *5 (E.D.N.Y. Feb. 17, 2009). Plaintiffs have doggedly pursued their copyright infringement claim, but I find no evidence of undue vexatiousness or ill motive on their part.

3. Extent to Which the Suit Has Progressed

For the third Zagano element, the focus is on the "prejudice to the defendant." Shaw Family Archives, 2008 WL 4127549, at *7 (citation omitted). Courts tend to find such prejudice where the case has progressed significantly and the defendant has expended substantial resources on the litigation. See, e.g., Deere & Co. v. MTD Holdings, Inc., No. 00 Civ. 5936, 2004 WL 1432554, at *2 (S.D.N.Y. June 23, 2004) (finding prejudice where the case had been

pending for nearly four years, sixty-two depositions had been taken, thousands of documents had been produced by both parties, numerous motions had been filed and disposed of, the defendant had incurred six million dollars in legal fees, and discovery had been completed). Here, the case has been pending for more than four years, numerous depositions have taken place, and both sides have expended significant resources on this litigation. At the same time, plaintiffs brought the instant motion before the close of discovery and the parties have not engaged in trial preparation. Since both sides played a role in amplifying the tensions and prolonging discovery in this case, the third factor does not weigh heavily in either direction.

4. Duplication of Efforts if the Case is Relitigated

Plaintiffs state that they “have no intention of relitigating this case against Ms. Lindor,” but that they wish not to be precluded from doing so if additional evidence comes to light that implicates her. (Pls.’ Mem. at 25.) They contend that “even if that were to occur, all of the effort and expense incurred to date could simply be reused in any subsequent proceeding.” (Id.)

In the court’s view, it would be unwise to relitigate this action. Even in the unlikely event they were to do so, defendant has not suggested that the parties would be unable to use whatever discovery or legal work has been completed thus far. See A.V. by Versace, Inc. v. Gianni Versace S.p.A., Nos. 96 Civ. 9721, 98 Civ. 0123, 01 Civ. 9645, 2009 WL 1840811, at *3 (S.D.N.Y. June 24, 2009). Accordingly, I find the risk of duplication of efforts to be minimal.

5. Adequacy of Plaintiffs’ Explanation

Plaintiffs have explained that they moved for voluntary dismissal within weeks of learning that the computer most likely used to share music files via defendant’s IP address had

been discarded and was therefore unavailable for inspection. I find this explanation adequate. Since the balance of factors weighs in plaintiffs' favor, I respectfully recommend that their motion be granted and that this case be dismissed without prejudice.

6. Attorney's Fees and Costs

Defendant asks that the dismissal be conditioned on an award of attorney's fees and costs. As the Second Circuit has explained:

Fee awards are often made when a plaintiff dismisses a suit *without prejudice* under Rule 41(a)(2). The purpose of such awards is generally to reimburse the defendant for the litigation costs incurred, in view of the risk (often the certainty) faced by the defendant that the same suit will be refiled and will impose duplicative expenses upon him.

Colombrito v. Kelly, 764 F.2d 122, 133 (2d Cir. 1985) (citations omitted). "However, 'this does not amount to a bright-line rule' in favor of fee awards." Continental Ins. Co. v. Morrison Exp. Corp., No. 06 CV 2408, 2009 WL 1269701, at *2 (E.D.N.Y. May 7, 2009) (quoting Global One Commc'ns World Holding B.V. v. Gaul, No. 01 Civ. 254, 2008 WL 2783429, at *3 (N.D.N.Y. July 16, 2008)). Rather, fees and costs are to be awarded only "when justice so demands." BD ex rel. Jean Doe v. DeBuono, 193 F.R.D. 117, 125 (S.D.N.Y. 2000).

Courts in this circuit appear to be split on the issue of whether an award of attorney's fees and costs requires a showing of bad faith or vexatiousness on the part of the party moving for dismissal. Compare id. at 125 (requiring showing of bad faith or vexatiousness; collecting cases), with Mercer Tool Corp. v. Friedr. Dick GmbH, 179 F.R.D. 391, 396 (E.D.N.Y. 1998) (awarding fees despite not finding bad faith or vexatiousness, where plaintiff voluntarily dismissed case for the purpose of adding a non-diverse party defendant and refiling in New York State court). As explained above, plaintiffs have exhibited neither bad faith nor vexatiousness.

Moreover, the risk that defendant will incur duplicative costs due to relitigation of the claim against her is minimal. I therefore recommend that defendant's request for an award of attorney's fees and costs be denied.

CONCLUSION

For the reasons stated above, plaintiffs' motion for sanctions is denied, and I respectfully recommend that this action be dismissed without prejudice and without fees or costs to any party. Objections to this Report and Recommendation must be filed with the Clerk of the Court, with courtesy copies to Judge Trager and to my chambers, within ten (10) business days. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Respectfully submitted,

/s/
ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
October 9, 2009