6/20/83

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action No.
78-322 & 78-420

(Consolidated)

DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION

Having twice been ordered to answer defendant's discovery requests and having twice refused to comply with those orders, plaintiff now -- nearly two months after entry of the second order on April 13, 1983, and three weeks after defendant filed a dismissal motion under Rule 37(b)(2), F.R.Civ.P. -- moves the Court to reconsider and vacate its order of April 13, 1983, as well as its April 28, 1983 order directing plaintiff to pay the expenses incurred by the defendant in obtaining the April 13th order. In the alternative, plaintiff moves the Court to amend its order of April 13, 1983, so as to allow plaintiff to take an interloctory appeal under 28 U.S.C. § 1292(b).

In support of his request to reconsider and vacate the April 13th order, plaintiff merely restates the arguments he advanced in support of his motion for protective order and in his opposition

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to defendant's motion to compel. Since these arguments have thrice been shown by the defendant to be baseless[1/] and have twice been rejected by this Court,[2/] it would serve no useful purpose to rebut plaintiff's arguments yet again.[3/] Instead, defendant hereby incorporates by reference its memorandum filed in opposition to plaintiff's motion for protective order and its memoranda filed in support of its motion to compel.[4/]

The second part of plaintiff's motion for reconsideration requests the Court to vacate its order of April 28, 1983, which awarded the defendant its costs in obtaining the April 13th order

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1/ See Defendant's Opposition to Plaintiff's Motion for a Protective Order, filed on January 27, 1983; Defendant's Motion for an Order Compelling Discovery, filed on March 15, 1983; and, Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for an Order Compelling Discovery, filed on April 6, 1983.

2/ See the Court's orders of February 4, 1983 and April 13, 1983.

3/ It is of interest to note, however, that one of the arguments that plaintiff again advances against defendant's discovery requests is that those requests are burdensome, especially given Mr. Weisberg's age and alleged ill-health. Not only has that assertion been refuted in defendant's earlier submissions, but plaintiff's own actions over the past several months has undercut it as well. Indeed, during the period from February 4, 1983 (the date the Court denied plaintiff's motion for a protective order and first directed him to answer defendant's discovery) to June 6, 1983 (the date plaintiff filed his motion for reconsideration), Mr. Weisberg himself has put before the Court six affidavits totally more than 230 pages (including attachments). Surely, if Mr. Weisberg had spent as much time and effort in complying with this Court's orders as he has spent in defying those orders, he would have easily been able to answer the defendant's discovery requests. In short, given the mounds of paper that plaintiff has filed with the Court over the past four months, he is unable to argue that he is too old and infirmed to respond to defendant's fourteen interrogatories, all of which are merely designed to ascertain the factual bases for his own assertions that the FBI's search in these consolidated cases was inadequate.

4/ See fn. 1, supra.

compelling discovery. In plaintiff's view, such costs should not have been assessed against him because his objections to the defendants discovery requests were "not without substantial justification." What plaintiff conveniently overlooks, however, is the fact that those objections merely reiterated the arguments set forth in his motion for a protective order -- arguments which the Court had rejected when it denied that motion. Although it could be asserted that plaintiff's arguments as originally presented in the motion for protective order were substantially justified, such an assertion cannot be made with respect to those rejected arguments when subsequently incorporated by plaintiff as objections to defendant's discovery. In other words, once the Court had rejected the arguments in the motion for a protective order, plaintiff's reiteration of those arguments in the form of blanket objections was not substantially justified.[5/] Given the dictates of Rule 37(a)(4), F.R.Civ.P., the awards of expenses against the plaintiff was thus clearly warranted.

The third and final part of plaintiff's motion for reconsideration seeks an amendment to the Court's order of April 13, 1983, granting plaintiff the opportunity to take an interlocutory appeal under 28 U.S.C. § 1292(b). Notwithstanding plaintiff's assertions to the contrary, the Court's order of April 13, 1983 does not meet the two requirements of § 1292(b).

5/ This conclusion is buttressed by the fact that the Court declined to award the defendant the expenses it incurred in opposing plaintiff's motion for protective order, but then granted defendant the expenses it incurred in prosecuting its motion to compel after plaintiff had merely incorporated the grounds for his protective order motion as the bases for his blanket objections to defendant's discovery requests.

First, the Court's order does not involve a "controlling question of law as to which there is substantial grounds for difference of opinions." The mere fact that the order controls the future course of this litigation does not mean that it constitutes a controlling question of law. Indeed, such could be said of most orders entered by a court during the course of a lawsuit. Rather, § 1292(b) is

> to be used only in extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation. It [is] not intended to provide review of difficult rulings in hard cases."

United States v. Clay, 420 F. Supp. 853, 859 (D. D.C. 1976), quoting United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966).

Nor is there substantial ground for difference of opinion as to the correctness of the Court's order. As the defe pointed out before in this litigation, the order mere the plaintiff to spell out the factual bases for his assertions about the adequacy of the FBI's search. T order does not in any way reverse, as plaintiff claim of proof in FOIA cases. In fact, the very reason why defendant undertook its very limited discovery was to enable it to meet its burden of showing that its search was adequate. In short, plaintiff can not have it both ways: on the one hand, claiming that he possesses facts and documents which demonstrate the agency's search was inadequate; yet, on the other hand, refusing to comply with this Court's orders allowing the agency to discover

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those documents and facts so that it can have a meaningful opportunity to address his allegations about the adequacy of its search.

Moreover, the fact that this may be the first instance where a court has allowed discovery of a FOIA plaintiff does not compel the conclusion that the order creates substantial grounds for difference of opinion. See United States v. Clay, supra; Barrett v. Burt, 250 F. Supp. 904, 907 (S.D. Iowa 1966). To the contrary, given the limited nature and purpose of defendant's discovery, there can be no real disagreement that the Court's order of April 13, 1983, is both reasonable and well within the exercise of its discretion over the discovery process. This is especially true when considered in light of the procedural history of these consolidated cases.[6/]

Second, even if the Court decides not to grant defendant's pending Rule 37(b)(2) dismissal motion, the FBI does not understand how an interlocutory appeal of the April 13th discovery

6/ As was demonstrated at length in Defendant's Opposition to Plaintiff's Motion for a Protective Order, the procedural history of these cases has been one of the defendant attempting to get plaintiff to articulate all the bases for his complaints about the adequacy of the FBI's search, whereas plaintiff has attempted to avoid such an articulation, preferring instead to reveal his complaints in an ever-expanding piecemeal fashion. This tactic by plaintiff has kept his complaints fluid and obscure and, in turn, virtually irresolvable. A similar litigation tactic by Mr. Weisberg is his FOIA case concerning the spectrographic analyses in the FBI's Kennedy investigation was severly criticized by the Court of Appeals. Weisberg v. U.S. Department of Justice, No. 82-1072 (D.C. Cir. April 5, 1983).

order would "materially advance the ultimate termination of the litigation."[7/] The fact that the discovery issue will then, to use plaintiff's words, be left "dangling until the end of the case" hardly explains how the ultimate termination of this litigation will be materially advanced. Rather, allowing an interlocutory appeal of the Court's discovery orders would only undermine the well established federal policy against peacemeal appeals -- a policy designed to further judicial economy. United States v. Clay, supra. See also Switzerland Cheese Association v. E. Horne's Markets, 385 U.S. 23, 24-25 (1966); Baltimore Contractors v. Bodinger, 348 U.S. 176, 178 (1955).

In sum, it seems apparent that plaintiff's attempt to get the Court to amend its order of April 13, 1983 to allow an interlocutory appeal is but a smokescreen for his blatant refusal to comply with the dictates of that order. This conclusion is buttressed by the fact that plaintiff requested the Court to amend its order only after the 30-day period for compliance had lapsed and only after the defendant had sought dismissal as a sanction for plaintiff's wilfull violation of the order. Such a tactic by plaintiff should not be countenanced. Instead, these consolidated cases should be dismissed with prejudice.

7/ If the Court is going to grant defendant's dismissal motion, there clearly would be no reason to allow an interlocutory appeal under § 1292(b) since the issue on any appeal from the dismissal would be the same as that involved in the interlocutory appeal: that is, did the Court abuse its discretion when it twice ordered plaintiff to answer defendant's discovery requests.

CONCLUSION

For the reasons set forth above, plaintiff's motion for reconsideration or, in the alternative, for amendment of the Court's orders of April 13 and 28, 1983, should be denied.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

BARBARA L. GORDON

HENRY L. LaHAIE

Attorneys, Department of Justice
Civil Division, Room 3338
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: 633-4345

Attorneys for Defendant.

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ORDER

Upon consideration of defendant's motion for reconsideration filed on June 6, 1983, defendant's opposition thereto, and the entire record herein, it is

ORDERED and ADJUDGED, that plaintiff's motion be, and the same is hereby, DENIED.

Dated this ____ day of _____, 1983.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 1983, I have served the foregoing Defendant's Opposition to Plaintiff's Motion for Reconsideration, and a proposed Order, by first class mail, postage pre-paid to:

James H. Lesar, Esq.
Suite 900
1000 Wilson Boulevard
Arlington, Virginia 22209

Henry J. LaHaie
HENRY J. LaHAIE