1st Draft

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG, Plaintiff-Appellant, JAMES LESAR, Appellant, v. WILLIAM H. WEBSTER, et al., Defendants-Appellees,	Nos. 84-5058 and 84-5201
HAROLD WEISBERG, Plaintiff-Appellant, JAMES LESAR, Appellant, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants-Appellees.	Nos. 84-5054 and 84-5202

REPLY BRIEF FOR APPELLANT WEISBERG

I. THE DISTRICT COURT ERRED IN REQUIRING PLAINTIFF TO ANSWER DEFENDANTS' DISCOVERY.

Plaintiff's primary submission is that the district court erred in directing him to answer defendants' discovery, for if these orders are in error than the sanctions imposed on plaintiff are necessarily in error. (Plt. Br. at 16-22.) Defendants' primary response is that their discovery was proper because it "simply attempted to discover the bases for plaintiff's claims that the FBI had not conducted an adequate search." (Def. Br. at 23.)

This argument however, overlooks the posture of the case at the time defendants propounded their discovery requests. I- in his decision denying defendants' motion for partial summary judgment on the search issue, the district judge had already found on the basis of Mr. Weisberg's affidavit (D.E. 28) that their search was inadequate. (D.E. 39 at 3.) The twelve questions outlined by Judge Smith, which were drawn from plaintiff's affidavit, were questions for defendants, not plaintiff, to answer. (Id. at 3-4.) Thus, the discovery defendants sought was unnecessary since the inadequacy of the search had already been established and defendants had no further need to determine the bases for plaintiff's position. Their task at that point was not to seek additional information from plaintiff but either to conduct a new search or adduce their own evidence to overcome the district court's finding that their search was inadequate.

Plaintiff also contends that discovery was unnecessary because he had already provided the basis for his claims of inadequate search through his administrative appeals to the Justice Department's Office of Privacy and Information Appeals (OPIA). Defendants assert that this "claim is illusory" and that the appeals did not identify any problems with the search. (Def. Br. at 24.) This claim is refuted by the letter to plaintiff from the Director of the Office of Privacy and Infomation Appeals in which he told Mr. Weisberg that "I am very appreciative of the assistance you provided us by citing specific examples of what you considered to be improper processing." Furthermore, review of plaintiff's affidavit, which was the basis for his

successful opposition to defendants' motion for partial summary judgment, demonstrates that it is defendants' position that is illusory. In eight of the twelve issues identified by the judge, the referenced paragraphs in plaintiff's affidavit shows that he had previously raised the issue with OPIA.*/

In the face of these numerous examples of how plaintiff had already registered his complaints with defendants, they cite one appeal, which raises the question of whether "JUNE files" have been searched, is providing insufficient evidence. (Def. Br. at 24.) In fact, plaintiff did provide OPIA with specific evidence on this point. (D.E. 95, ¶¶ 219, 230.) But in any event, this one example does not support defendant's assertion that plaintiff's administrative appeals "frequently" lacked specificity (Def. Br. at 19) or that there were "similar difficulties with the other thirteen points" plaintiff raised in opposition to defendants' motion for partial summary judgment. Here again defendants refuse to recognize that the district court found their search to be inadequate on the basis of Mr. Weisberg's affidavit.

In addition to being unnecessary, defendants' discovery requests were also exceedingly burdensome. First, the scope of the discovery was unreasonably broad -- defendants sought each and every reason for plaintiff's position that the search was inadequate and each and every document in his collection of ~~500,000~~ FBI ~~documents~~ which supported that position. Plaintiff satisfied his burden when he produced enough examples of the inadequacy of the search to persuade the court to find that the

*/These eight issues are the ones numbered 1, 2, 3, 6, 8, 9, 11, and 12 in the district court's opinion. (D.E. 39 at 3-4.)

search was inadequate. Once that finding had been made, defendants' effort to elicit further support from plaintiff was an exercise in vindictive and retaliatory overkill.

Defendants' discovery requests were all the more burdensome in view of Mr. Weisberg's health problems. Defendants argue that since Mr. Weisberg was able to prepare a number of affidavits, he should have been able to answer their discovery requests and that answers would have taken less time than the affidavits. (Def. Br. at 29-30.) This argument rests on willful ignorance of the undisputed record. In an affidavit filed in support of his objections to defendants' discovery, Mr. Weisberg explained that his circulatory and other ailments made it extremely difficult, indeed dangerous, to climb up and down the stairs to his basement where his files are located and search his collection of some half million documents. (D.E. 56, Weisberg Aff., ¶¶ 19-22.) When defendants made the same argument in the district court that they make here, plaintiff filed an affidavit again addressing the point that his medical condition limits his ability to search through his voluminous files rather than to type affidavits based on his recollection and documents which were immediately at hand in his study. (D.E. 95, ¶¶ 7-14.) Yet the heart of defendants' discovery was the demand to identify and produce each and every document in plaintiff's possession which supports his position -- which already had been accepted by the district court -- that defendants' search was inadequate. (D.E. 41A, 41B.)

Appellate counsel seeks to minimize the magnitude of this task by saying that "all that was required of [him] was a reasonable good faith effort at providing answers without significant new research." This is a far cry from what defendants' trial counsel demanded. As noted in our opening brief, they wanted "all the factual bases" for plaintiff's assertion that the search was inadequate. (Plt. Br. at 11, 20, quoting D.E. 50 at 14.) In another pleading -- also filed after the district court had already found the search inadequate -- defendants demanded "an exhaustive list of those facts and documents which [plaintiff] contends supports his assertion that the FBI's search was inadequate." (D.E. 64 at 5, emphasis in original.)

There can be no doubt that defendants were engaging in abusive and oppressive discovery to bully plaintiff and box him into a corner where it appeared that he was stalling the litigation rather than they. The district court should not have countenanced these tactics, but unfortunately they worked. Reversal by this court is therefore in order.

As a final reason why defendants' discovery was inappropriate, plaintiff's trial counsel argued that defendants' purported need for a comprehensive statement of plaintiff's contentions that the search was inadequate (even though the court had already found it was inadequate) could be furnished when he filed his

motion for a further search. (Plt. Br. 21-22.)*/ Defendants respond that "it remains a mystery why plaintiff refused to answer defendants' discovery requests, which represented a far less burdensome means of stating the basis for his claims." (Def. Br. 29.) Trial counsel's point was that his proposed motion to compel a further search would focus on specific areas of plaintiff's request and would not seek a new search of all the files encompassed by the original request. Indeed, he told the court that "[p]laintiff does not seek in this case to raise all of those issues of which he raised in his appeals to OPIA]." (April 8, 1983 Tr. at 42.)**/ Yet defendants' discovery sought the bases for all those issues. It therefore should be

*/In their statement of the case, defendants err in stating that this proposal was not made until June 6, 1983, when plaintiff filed his opposition to defendants' motion to dismiss and motion for reconsideration of the April 13, 1983 order directing plaintiff to answer defendants' discovery (Def. Br. at 15.) In fact, trial counsel made this proposal on April 8, 1983, at the hearing on defendants' motion to compel. (April 8, 1983 Tr. at 44, 48; see Plt. Br. at 13.)

**/Plaintiff's willingness to sharply limit the scope of this suit in return for a thorough search for matters of special interest was demonstrated in the settlement proposal he filed with the district court. (D.E. 11.) Defendants, however, promptly spurned this offer and insisted on going forward with a Vaughn v. Rosen covering hundreds of documents which plaintiff was willing to forego further litigation. (D.C. 11A.)

no "mystery" why plaintiff proposed a procedure which would have been less burdensome than identifying and producing each and every document which supported his assertion that the search was inadequate. Although, as demonstrated above, there were ample independent reasons for the district court to bar defendants' discovery, this reasonable, less burdensome alternative proposed by plaintiff further demonstrates that the discovery was unnecessary.

Defendants devote four pages of their brief (Def. Br. 25-28) responding to plaintiff's "implied argument" that the government may never have discovery of a plaintiff in an FOIA case. (Id. at 26.) Plaintiff has not made such an argument -- express or implied -- because it is unnecessary to the decision of this case, and this portion of defendant's brief attacks a classic straw man. Plaintiff's position is that in the circumstances of this case, after the district court had found the search inadequate, defendants should not have been allowed to require burdensome discovery that was redundant of what already had been established. Since the court erred in ordering such discovery, the sanction imposed for plaintiff's refusal to comply should be reversed.

II. EVEN IF THE ORDERS COMPELLING DISCOVERY WERE PROPER, THE SANCTION OF DISMISSAL WAS TOO SEVERE.

Defendants' contention that dismissal of the entire case was an appropriate sanction rests on a seriously distorted view of the law which has developed under Fed. R. Civ. P. 37. They mistakenly rely on National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1979), for the proposition that dismissals should be freely imposed whenever litigants fail to obey discovery orders. (Def. Br. 30-40.) They even go so far as to argue that "[d]ismissal is inappropriate only if there is a showing that the plaintiff's failure to obey the discovery order 'was due to inability fostered neither by [his] own conduct nor by circumstances within [his] control.'" (Def. Br. at 35-36, quoting Societe Internatinale v. Rogers, 357 U.S. 197, 211 (1958).) If that standard is met, then no sanction is appropriate. Moreover, in arguing that dismissal is the rule except where a party is disabled by circumstances beyond his control, defendants read the intermediate sanctions set forth in Rule 37(b) out of existence.

Finally, defendants misrepresent this court's view when they say that the opinion in The Black Panther Party v. Smith, 661 F.2d 1243 (1981), judgment vacated, 458 U.S. 1118 (1982), "suggested" the use of sanctions short of dismissal. (Def. Br. at 39.) In fact, the court in that case mandated the use of less drastic sanctions where they will be equally effective

and reserved dismissal as "a last resort" to be sued in "rare circumstances" where "a party has displayed callous disregard for its discovery obligations, or when it has exhibited extreme bad faith." Id. at 1255.

Plaintiff's conduct cannot be so characterized. In all the cases cited by defendants where the sanction of dismissal was upheld, the offending parties irresponsibly ignored their obligations, failed to make good on promises of compliance, toyed with the court, or flouted its authority. Here plaintiff adhered to a firmly held, good faith belief that discovery was inappropriate, unnecessary, and burdensome to the point of impossiblity. He did not ignore his obligations but filed a succession of motions and objections seeking to preserve his position. When the district court disagreed with him and he had exhausted all avenues for reconsideration, the only way for plaintiff to preserve his position for appeal was to continue to decline to respond and suffer an appropriate sanction. If he had answered the discovery, he would have foregone his right to attempt to vindicate his position on appeal. This principled course of conduct is plainly not the sort of irresponsible and reckless disregard for discovery orders demonstrated by ten parties in National Hockey League and similar cases.

To be sure the district judge is in charge, and having decided that the discovery was proper, he had to carry out that decision. But as we demonstrated in our opening brief, the intermediate sanctions available under Rule 37 provided a number

of alternatives for doing so in the context of the search issue without aborting the entire case or even terminating further litigation on the search issue. See Plt. Br. 24-25.

In the section of their brief arguing that dismissal was appropriate, defendants callously denigrate plaintiff's health problems and argue that he was fully capable of responding to their discovery. (Def. Br. at 36.) For example, they "acknowledge" only that "plaintiff has claimed to have serious health problems." In fact, these problems were described in detail under oath with supporting documentation, and defendants' trial counsel made no effort to challenge these submissions. It is unseemly this late in the day to acknowledge only that plaintiff "claims" to be ill and therefore to imply that his illness is feigned. Defendants develop this theme further by asserting that "the district court nevertheless believed that it was within plaintiff's ability to answer defendant's [sic] interrogatories and produce the documents requested." (Def. Br. at 36.) The truth of the matter is that the district court never made any such finding and in his orders was completely silent on the issue of plaintiffs' health. From this silence it is at least as plausible to infer that the district judge simply ignored plaintiff's health problems as it is to infer that he found plaintiff physically able to respond.*/

*/In this connection, defendants again rely on the fact that plaintiff was able to prepare affidavits as proof that he could have responded to their discovery requests. As we demonstrated at pp. _____, supra, plaintiff fully explained that his health problems prevented him from searching through his files, rather than typing affidavits.

refer to my affidavit 7/3/83

III. THE AWARD OF EXPENSES WAS NOT JUSTIFIED.

[Brief legal discussion to be added.]

IV. DEFENDANTS ARE RESPONSIBLE FOR THE DELAYS IN THIS CASE.

In footnote 17 of defendants' brief, they state that "plaintiff himself was the cause of the delay and acrimony" in this case. Moreover, throughout their brief, defendants make similar statements designed to portray plaintiff in an adverse light. These assertions, particularly the one in footnote 17, are so wholly unsupported by the record that they cannot be permitted to pass without a brief review of this FOIA request to demonstrate where responsibility for the delays rests.

Plaintiff requested documents from the FBI's Dallas and New Orleans field office on December 25, 1977. (D.E. 1.) The point of these requests was to obtain documents from those offices which were not included in the main Kennedy assassination file at FBI Headquarters, including documents concerning persons and organizations who figured in the assassination investigation that are not located in the files on the assassination.*/ Despite the clear thrust of these requests, the field offices promptly forwarded the requests to Headquarters, where field office records are not located, and the requests were processed in the main assassination file, which was precisely what plaintiff

*/At the very beginning of their brief defendants misrepresent the scope of the Dallas request when they state that it covered records pertaining to the assassination of President John F. Kennedy and that only the New Orleans request included an "addendum", quoted in the brief which covers records on parties who figured in the investigation that are not contained in the files on the assasination. (Def. Br. at 2.) In fact, both requests contained this addendum, and the only additional aspect of the New Orleans request was the third paragraph quoted at page 2 of defendants' brief which identifies certain New Orleans figures.

~~did not seek.~~ The initial ~~This unresponsive~~ processing continued for two and a half years, and at its completion, on June 5, 1979, plaintiff appealed to the Office of Privacy and Information Appeals that the search had been inadequate. (D.E. 10, Exhibit A, Attachment 1.) After a year and a half of processing the appeal, the Associate Attorney General on December 16, 1980, agreed with plaintiff and directed the FBI to conduct a new search. (Id., Attachment 3.) During the period of this administrative appeal, the Director of OPIA wrote a memo on March 27, 1980, stating: "I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed -- largely because the Bureau has 'declined' to search for them." (D.E. 45, Attachment 1.) At a status call on December 10, 1981, defendants reported that they had completed the reprocessing ordered by the Associate Attorney General's decision a year earlier. Thus, defendants took four years to process plaintiffs' request.

However, it is plaintiff's position that the Bureau still has refused to conduct a genuine search in response to his request and has failed to do ~~adequate~~ search and has failed to do what the Associate Attorney General had ordered. The district court upheld this contention when it denied defendants' motion for partial summary judgment on the search issue and found that the search had been inadequate. Defendants argue in their brief that it would have been easier for plaintiff to comply with their discovery demands than to resist them. A more

central point is that it would have been easier for the FBI to conduct the search which they were directed to do and found to have failed to do than to harrass plaintiff with needless discovery.

There is no need at this juncture to review all the deficiencies in defendants' search. For the purposes of this appeal, the district court's finding suffices. However, one example of the FBI's refusal to follow the directions of its superiors in the Department of Justice is appropriate to demonstrate that it is the Bureau rather than plaintiff who has been obdurate in this case.*/ The Associate Attorney General directed the FBI "to determine whether there are any other official or unofficial administrative files which pertain to the Kennedy case, with particular emphasis on seeking files on 'critics' or 'criticism' of the FBI's assassination investigation." (D.E. 36, Exhibit A, p. 6.) The Bureau interpreted this order to require a search for files captioned "critics" or "criticism" and refused to search files captioned under the names of critics supplied by plaintiff. (Id. at 6-7.) Since FBI files are, for the most part, organized by names of people and organizations rather than subject matters such as "criticism of Kennedy investigation," the Bureau's interpretation insured that its search would turn up nothing and nullified the Associate Attorney General's instructions. (D.E. 19, Lesar Aff. ¶ 2.) Such resolute determination

*/Plaintiffs additional affidavits filed in this case are replete with similar examples.

by the Bureau to evade not only the FOIA but also its bureaucratic superiors is at the heart of this suit. Defendants, not plaintiff, are the ones responsible for the dealys and complications that have beset this suit.

CONCLUSION

For the reasons state above, as well as in plaintiff's opening brief, the district court's judgment should be vacated and the case remanded for further proceedings consistent with the FOIA.

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Respectfully Submitted,

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