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Maryland District Court
Case No. 1:00-cv-02937-MJG
Sanders v. USA, et al

Document 47



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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

STEPHEN P. SANDERS

*

Plaintiff

*

vs.

*

CIVIL ACTION NO. MJG-00-2937

RICHARD V. HAYDEN,
Director of National Security Agency

*

*

Defendant

* * * * *

**Motion For Reconsideration Of Pretrial Order
Of Magistrate Judge, James K. Bredar
(28 U.S.C. §636 and Local Rule 301)**

Pursuant to Title 28 § 636 (b)(1)(A), a judge of the court may reconsider any pretrial matter where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law. A Magistrate Judge is required to diligently discharge responsibilities without bias or prejudice, maintain professional competence in judicial conduct, observe standards of fidelity and diligence, and refrain from manifesting bias or prejudice in the performance of official duties. Magistrate Judge Bredar is clearly erroneous in his Order, which is also contrary to law, because it manifests bias or prejudice and failure to diligently discharge responsibilities of fidelity and diligence in discovery management.

The District Court is requested to make *de novo* determinations as to those portions of the Order of Magistrate Judge, James K. Bredar, denying Plaintiff’s Motion To Compel, signed by Magistrate Judge Bredar on April 8, 2003 and entered by the Clerk on

April 10, 2003, including the discovery issues Magistrate Judge Bredar did not address in the Order, but which are relevant to this Civil Action MGB-00-2937. Plaintiff further requests that Honorable Marvin J. Garbis, District Court Judge, reject or modify the Order of Magistrate Judge Bredar, and recommit the issue of discovery for a dispositive hearing on the merits.

Within ten days after being served with a copy, any party may serve and file written objections to the proposed findings and recommendations of the magistrate judge. A judge of the Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the Court may modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

On January 17, 2003, United States District Judge, Marvin J. Garbis, authorized an Order Of Reference To United States Magistrate Judge For Discovery Disputes, pursuant to 28 U.S.C. §636 and Local Rule 301 of the U. S. District Court, referring Civil Action No. MJG-00-2937 to the Honorable James K. Bredar, United States Magistrate Judge for the District of Maryland, to hear as appropriate and determine all discovery disputes in Civil Action No. MJG-00-2937.

On February 4, 2003 the Honorable Judge Garbis in Memorandum and Order granted Plaintiff's Motion for Enlargement of Time, with deadline for Plaintiff to obtain through additional discovery any "new" evidence he may obtain. The Motion was extended to March 14, 2003, but the action did not indicate any view as to the merits of

the pending discovery dispute. The District Court noted that: “Nevertheless, the Court is not, by any means extending the October 2, 2002 discovery deadline or taking action to usurp the delegated discovery authority of the Magistrate Judge. The Magistrate Judge shall make such rulings as he deems appropriate, which may, or may not, include an adjustment of the discovery deadline. Thus, the defense remains free to present any available arguments in opposition to Plaintiff’s requests for discovery including, but not limited to, any contention based upon the October 2, 2002 discovery deadline.”

On April 8, 2003, U. S. Magistrate Judge, James K. Bredar corresponded with Counsel, Jennifer Lilore Huesman, AUSA, and Emile J. Henault, Jr., Henault & Sysko, Chartered, indicating MJG-OO-2937 had been referred to him for disposition of all discovery disputes. Magistrate Judge Bredar said that there was a present motion to compel filed by the plaintiff which was before him (Paper No. 42), but he deemed that no hearing would be necessary, citing L. R. 105.6. He denied the motion. (Paper No. 42).

Magistrate Judge Bredar stated that the crux of the dispute is a proposed protective order presented to plaintiff by the defendant in June 2002 seeking stipulation. He further stated he “...reviewed the proposed order, and, notwithstanding the vague but colorful complaints of the plaintiff, the order appears reasonable, innocuous and not particularly burdensome.” He said the plaintiff declined to stipulate to the order and the “...defendant, while providing discovery responses to the plaintiff, declined to provide to the plaintiff such information as might be within the protective order.”

Magistrate Judge Bredar further elaborated that:

“All of this took place in summer of 2002, and the plaintiff waited until January 2003 to file a motion to compel or otherwise seek the assistance of the Court in regard to the protective order, aside from filing requests for extensions of dispositive motions deadlines. Moreover, it appears that the plaintiff may actually be seeking to expand discovery at this late date. Local Rule 104.8a. provides that motions to compel discovery regarding responses received from an opponent are to be served within 30 days of the receipt of those responses, not five months later after dispositive motions have been filed. Accordingly, the motion to compel is denied as untimely.”

“Judge Garbis earlier issued an Order providing the latitude prior to closure of the dispositive motions practice in the case. That dispute now is resolved, and no further delay is required.”

The U. S. District Court Civil Docket for Case #: 1:00-cv-02937-MJG shows at Paper 42, filing date 01/24/2003 as being MOTION with memorandum in support by Steven P. Sanders for Order to Compel Disclosure with Defendant’s Responses; Plaintiff’s Objections; Local Rule 104.7 and Exhibits 1 - 6 and Attachments (c/s) (mms, Deputy Clerk) (Entered 01/27/2003). Magistrate Judge Bredar describes his version of Paper 42 as being the “proposed protective order presented to plaintiff by the defendant in June 2002 seeking stipulation” and that he “reviewed the proposed order, and notwithstanding the vague but colorful complaints of the plaintiff, the order appears to be reasonable, innocuous and not particularly burdensome.” Magistrate Judge Bredar also added that this (defendant’s proposed protective order) took place in the summer of 2002 and plaintiff waited until January 2003 to file a motion to compel or otherwise seek assistance of the Court in regard to the protective order, aside from filing requests for extensions of dispositive motions deadlines. Magistrate Judge Bredar further added that it appears that plaintiff may actually be seeking to expand discovery at this late date, which requires

service on an opponent within thirty days. He denied the motion to compel as untimely.

Magistrate Judge Bredar did not consider the discovery issues raised by the plaintiff on January 24, 2003 in Paper 42 which included Plaintiff's Memorandum in Support Of Motion For Order Compelling Disclosure Or Discovery. The Memorandum specified that the Defendant would not cooperate in good faith to attempt to resolve the discovery dispute, including the dispute about the Defendant's proposed "Stipulated Protective Order." Magistrate Judge Bredar was informed that the Plaintiff's Motion To Compel was deemed necessary because a proposed "Stipulated Protective Order" prepared by the Defendant was so vague and ambiguous that Plaintiff was unable to accommodate it in good faith and without prejudice to his rights and defense.

Memorandum ¶2. The history about the initial filing of Plaintiff's Motion To Compel Disclosure and Discovery on September 23, 2002 was provided to Magistrate Judge Bredar. **Memorandum ¶¶2-7.** Magistrate Judge Bredar was also informed that on October 30, 2002, in an effort to correct the problems concerning discovery, plaintiff made extraordinary attempts to resolve the discovery problem by preparing and submitting to defendant's attorneys documents entitled "Discovery Conference" which contained details concerning the production of documents, interrogatories, a proposed stipulated protective order prepared by plaintiff and his attorney, Declaration of Louis F. Giles, Director of Policy, NSA, and Declaration of Steven P. Sanders. Magistrate Judge Bredar was also informed that the plaintiff also provided the defendant an explanation of U.S. District Court Local Rule 104.8 regarding motions to compel; LR 104.7 that conference of counsel is required; LR 104.2 that timely written discovery requests are required; LR

104.3 that discovery is to proceed despite existence of disputes; and LR104.6 concerning format of responses to interrogatories and requests for production of documents.

Magistrate Judge Bredar would or should have also learned that defendant was advised by plaintiff of F.R.C.P. 26 (b) (5) concerning claims of privilege or protection of trial preparation materials, F.R.C.P. 33 concerning interrogatories, and F.R.C.P. 34 concerning production of documents, and that plaintiff also explained to defendant the concept of prepublication review used by the National Security Agency, the National Security Agency Security Agreement between NSA and the Plaintiff and that plaintiff and his counsel prepared a proposed stipulated protective order for te defendant to review, and that the Defendant's stipulated protective order prepared in June 2002 is beyond the concepts of NSA prepublication review. **Memorandum ¶7 and Enclosure ("EN 6") 6 attached to Memorandum, with 5 sub enclosures attached and made a part thereof.**

Magistrate Judge Bredar was also made aware by plaintiff's **Memorandum, ¶11 and Enclosure ("EN 9") 9 made a part thereof** that plaintiff continued to seek positive discovery from the defendant on December 20, 2002 and asked the defendant to engage in good faith discovery because the defendant continued to ignore encouragement by the plaintiff and his counsel for cooperation and demonstration of accountability and responsibility. However, the defendant did not respond.

Magistrate Judge Bredar was also informed that defendant's conduct toward the plaintiff was unreasonable and strident, despite plaintiff's total cooperation toward the defendant. **Memorandum, ¶12.** He was also informed that Plaintiff's Response To Defendant's Opposition To Plaintiff's Motion For Enlargement of Time To File

demonstrates Defendant's impairment of the discovery process by using an unreasonable ploy with Defendant's phantom protective order and agreement, both of which defy most principles of the First Amendment to our United States Constitution. **Memorandum, ¶13. See also, Memorandum, ¶¶14. & 15.** Magistrate Judge Bredar was also placed on notice that an order compelling disclosure or discovery was needed to order the defendant to fully reply substantively and immediately to enable plaintiff to schedule and take defendant's deposition, and that defendant's stipulated protective order and accompanying agreement be dismissed in favor of plaintiff's stipulated protective order which was prepared by plaintiff and his counsel and to order the defendant to cooperate with the plaintiff to consult together to prepare a protective order which is compatible with the requirements of presentation of relevant information required in Case No. MJG-00-2037. **Memorandum, ¶15.**

The Magistrate Judge Bredar made it known by the tenor and language of his Order that he did not understand the defendant's proposed stipulation and agreement were worthless documents prepared by the defendant for the benefit of the defendant and to deny the plaintiff with reasonable discovery, although the defendant was notified by the plaintiff several times that the defendant's proposed stipulation and agreement were not satisfactory. Magistrate Judge Bredar did not distinguish between the proposed stipulation and agreement prepared by the defendant and the proposed stipulation order prepared by the plaintiff and his attorney, which are legally sufficient for NSA prepublication review. However, for some reason unexplained by Magistrate Judge Bredar, concerning plaintiff's proposed protective order, he makes personal accusations

demeaning the plaintiff by reciting in his Opinion, “notwithstanding the vague but colorful complaints of the plaintiff, the order appears reasonable, innocuous and not particularly burdensome.” The further irony of this statement by Magistrate Judge Bredar is that he leaves the plaintiff with the guesswork of what he means by vague but colorful complaints of the plaintiff, because he has not explained it to the Court or anyone else in this Case. Magistrate Judge Bredar also is disappointing in his estimation that the order appears reasonable, innocuous and not particularly burdensome, but he does not explain what he means. The plaintiff also prepared a stipulated protective order superior to that of the defendant. Magistrate Judge Bredar is silent in this regard, which is detrimental the representation and fair trial being sought by the plaintiff, because the defendant’s order is not reasonable, is not innocuous and is burdensome to the plaintiff because it represent prior restraint and has colorful constitutional implications. In addition, Magistrate Judge Bredar made the negative statement about the plaintiff by stating that plaintiff declined to stipulate to the order and the “...defendant, while providing discovery responses to the plaintiff, declined to provide to the plaintiff such information as might be within the protective order.” Magistrate Judge Bredar had the information at his disposal as recited above to properly ascertain that the defendant’s protective order was not satisfactory, it was unconstitutional, it exercised prior restraint of the plaintiff’s discovery, and it impaired discovery responses to the plaintiff. The reasons for the impairment of discovery responses to the plaintiff by the defendant was because the defendant was misusing the protective order to deliberately deny discovery to the plaintiff despite his entitlement to such discovery. Magistrate Judge Bredar also criticized plaintiff by stating that all of this

took place in the summer in 2002 and the plaintiff waited until January 2003 to file a motion to compel, but he did not give much credit to the plaintiff about the first time he filed a motion to compel or discuss the premise of discovery associated with the history of this Case. Magistrate Judge Bredar then decided that it appears that the plaintiff may be actually seeking to expand discovery at this late date. He is erroneous in this regard, because the plaintiff is seeking proper discovery which has been denied to him by the deliberate acts of the defendant from the beginning of this Case. The final conclusion drawn by Magistrate Judge Bredar is that plaintiff did not comply with Local Rule 104.8a within thirty days so the motion to compel is denied as untimely. However, this premise by Magistrate Judge Bredar should carry little credence in view of the total events which have occurred in this Case, including the bad faith conduct of the defendant and defendant's failure to engage in reasonable and prudent discovery, holding out evidence under the defendant's stipulated order and agreement which is unconstitutional and depriving plaintiff with due process in this Case.

The plaintiff in his response to Defendant's Opposition To Plaintiff's Motion For Enlargement of Time To File and Proposed Order, of January 24,2003, consisting of 15 pages and 4 enclosures also provides the legal and moral reasons for all of the issues concerning good faith discovery by the plaintiff while bad faith discovery has been the emblem of the defendant. The plaintiff has provided relevant information and documentation to further demonstrate that the Order of the Magistrate Judge Bredar needs major revision and attention by all of the parties in this Case, because this Order does not reasonable relate to the facts presented. (Paper 42).

In addition to the above information, the plaintiff is unable to meet with the provisions of the Order and Memorandum of the Honorable, District Court Judge Garbis under the March 14, 2003 deadline for additionally discovered information, because the plaintiff will need the defendant to respond with discovery of this information as already requested in his interrogatory and production of documents and planned depositions which the defendant will not cooperate in providing because of defendant's bad faith in discovery and denial of due process to the plaintiff.

WHEREFORE, Plaintiff respectfully has set forth causes of action upon which relief may be granted. There are many timely material facts which are the subject of this discovery dispute. For the foregoing reasons, in addition to the relief requested above, Plaintiff requests this Court to deny the Order of the Magistrate Judge Bredar denying the motion to compel as untimely, and to Order that argument on the dispositive motions in this case be continued and taken, and Order that the Plaintiff's Motion For Enlargement of Time to File and supplement his Response to the pending dispositive motion is extended from March 14, 2003 until such time as the merits of the pending discovery dispute is Ordered by the Court to be satisfied.

Dated: April 22, 2003

Respectfully submitted

S
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2003, copies of the foregoing Motion For Reconsideration Of Pretrial Order Of Magistrate Judge, James K. Bredar, (28 U.S.C. §636 and Local Rule 301) and proposed Order, were mailed, first class mail, postage prepaid to:

U. S. Department of Justice
United States Attorney
Jennifer Lorlie Huseman
District of Maryland
Norther Division
6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692

s
Emile Joseph Henault, Jr.
Attorney for Plaintiff
Steven P. Sanders

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