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KING COUNTY
SUPERIOR COURT CLERK
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Hon. Redacted D. Eadie

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LANE POWELL PC, an Oregon
professional corporation,

Plaintiff,

v.

MARK DeCOURSEY and CAROL
DeCOURSEY, individually and the marital
community composed thereof,

Defendants.

No. 11-2-34596-3SEA

ORDER ON PLAINTIFF'S THIRD
MOTION FOR ORDER OF
CONTEMPT OR RULE 37
SANCTIONS

~~PROPOSED~~ RE

THIS MATTER comes before the Court on Plaintiff Lane Powell's Third Motion for Order of Contempt or Rule 37 Sanctions. In connection with that Motion, the Court reviewed the following:

- (1) Plaintiff's Third Motion for Order of Contempt or Rule 37 Sanctions;
- (2) Declaration Malaika M. Eaton in Support of Plaintiff's Third Motion for Order of Contempt or Rule 37 Sanctions and Exhibits A-N attached thereto;
- (3) DeCourseys' Response to Plaintiff's Third Motion for Order of Contempt or Rule 37 Sanctions and Subjoined Declaration and Exhibits A-CC attached thereto;
- (4) Declaration of Paul E. Fogarty and Exhibit 1 attached thereto; and
- (5) Plaintiff's Reply in Support of Third Motion for Order of Contempt or Rule 37 Sanctions.

The Court has also reviewed the records and files herein.

1 **II. FINDINGS OF FACT**

2 Being duly informed, the Court hereby makes the following FINDINGS OF FACT:

3 **A. Discovery Orders**

4 1. On October 5, 2011, Lane Powell propounded its First Set of Interrogatories
5 and Requests for Production to Defendants, which sought information on the relationship
6 between Lane Powell and the DeCourseys in the underlying lawsuit in which Lane Powell
7 represented the DeCourseys ("the Windermere Lawsuit"). The Windermere Lawsuit is the
8 subject of the DeCourseys' counterclaims against Lane Powell for, among other things,
9 malpractice. Lane Powell noted the depositions of the DeCourseys based on the anticipated
10 response time.

11 2. The DeCourseys' eventual responses were incomplete, claiming (1) attorney-
12 client privilege over documents relating to Lane Powell's representation; and (2) that they
13 should not be required to produce materials they believed Lane Powell had.

14 3. Because of the inadequate responses, Lane Powell postponed the DeCourseys'
15 depositions.

16 4. On November 3, 2011, the DeCourseys filed a Motion for Discovery
17 Protection Under CR 26(c) and Sanctions Under 26(i) and Subjoined Declaration, Dkt. 11,
18 which sought an order that their communications with Lane Powell on the Windermere
19 lawsuit were privileged.

20 ~~5. Lane Powell responded that this objection was baseless because they waived~~
21 ~~privilege by asserting far-reaching malpractice and related counterclaims against Lane~~
22 ~~Powell. Dkt. 18 at 6-7. (This paragraph is argument). (RE)~~

23 6. On November 17, 2011, the Court denied the DeCourseys' motion in its Order
24 on Defendants' Motion for Discovery Protection Pursuant to CR 26(c) and Sanctions Under
25 CR 26(i). Dkt. 23. This order rejected the DeCourseys' objections to Lane Powell's
26 discovery requests, including the DeCourseys' privilege objection.

1 7. The DeCourseys raised the same privilege arguments again on reconsideration,
2 Dkt. 26; the Court again rejected the DeCourseys' privilege arguments, Dkt. 64.

3 8. The DeCourseys moved for a discovery plan again claiming privilege and that
4 they should not have to produce documents they claimed Lane Powell had. Dkts. 16 & 24.

5 9. Lane Powell again opposed on the same grounds. Dkt. 40.

6 10. On December 12, 2011, this Court denied the DeCourseys' requests in its
7 Order on Defendants' Amended Motion for CR 26(f) and Discovery Plan, Dkt. 44, again
8 rejecting their position on privilege and other objections.

9 11. Despite these orders, the DeCourseys still withheld discovery based on the
10 same objections the Court had previously rejected.

11 12. On January 24, 2012, because of the DeCourseys' refusal to comply with the
12 Court's previous orders and their discovery objections, Lane Powell filed a Motion to
13 Compel Defendants' Discovery Responses to First Discovery Requests, asserting that the
14 DeCourseys' continued assertions of the same discovery objections were improper. Dkt. 71.

15 13. The DeCourseys' response largely repeated previously-rejected arguments.
16 Dkt. 90.

17 14. On February 3, 2012, the Court granted Lane Powell's motion, directing the
18 DeCourseys to "provide full and complete responses to Plaintiff's First Set of Interrogatories
19 and Requests for Production" **no later than February 13, 2012.** Dkt. 93.

20 15. The DeCourseys' sought reconsideration. Dkt. 97. They ~~made no effort to~~ ^{did not} ^{AE}
21 comply with the Court's orders and did not seek a stay.

22 16. On February 29, 2012, the Court entered its Order on Motion for
23 Reconsideration of Motion to Compel, ~~which disposed of the DeCourseys' motion without~~
24 ~~requesting a response from Lane Powell.~~ ^{PE} Dkt. 98. That Order required the DeCourseys to
25 "respond to discovery requests *in full* with evidence and materials in accordance with this
26 Court's order of February 3, 2012 in accordance with CR 26(b) and ER 502." *Id.* at 2

1 (emphasis added). The Court specifically struck the DeCourseys' proposed language on the
2 attorney-client privilege. *Id.*

3 17. Despite the fact that the Discovery Orders consistently rejected the
4 DeCourseys' privilege arguments, they continued to obstruct discovery. They even argued ^{RE}
5 that the Court's rejection of their reconsideration motion actually granted them the relief they
6 requested and precluded discovery of "privileged" documents. Dkt. 102, Ex. D. They
7 persisted even after Lane Powell pointed out that the order's language did not support their
8 position and that court rules would preclude the Court from granting relief on reconsideration
9 without calling for a response. *Id.* The DeCourseys' arguments in this regard are
10 unreasonable and frivolous.

11 18. Due to the DeCourseys' recalcitrance, Lane Powell's efforts to litigate this
12 case on the merits have been stymied.

13 19. The DeCourseys were aware of each of the Court's discovery orders,
14 including the February 3, 2012 Order, within the time to comply and never presented
15 evidence of inability to comply.

16 20. To date, the DeCourseys have not provided full and complete answers to
17 Plaintiff's First Set of Discovery Requests as ordered.

18 **B. Registry Order**

19 21. On December 21, 2011, the Court granted Plaintiff's Motion to Require
20 Deposit of Funds Into Court Registry, ordering the DeCourseys to deposit \$57,036.30 into
21 the Court Registry **no later than December 31, 2011**. Dkt. 63. ~~This motion was~~
22 necessitated by the DeCourseys' deliberate decision not to notify Lane Powell of their
23 attempt to undermine Lane Powell's lien. ^{RE}

24 22. The DeCourseys were aware of the Registry Order within the time to comply
25 and never presented evidence of inability to comply.

1 23. The DeCourseys' sought reconsideration. Dkt. 67. They made no effort to ^{RE}
2 comply with the Registry Order and did not seek a stay. ^{RE}

3 24. To date, the DeCourseys have not deposited the \$57,036.30 into the Court
4 Registry as ordered.

5 **C. Contempt Order**

6 25. On January 26, 2012, Lane Powell moved for contempt for the failure to
7 comply with the Registry Order. Dkt. 77. ~~Lane Powell's motion was straightforward—the~~
8 ~~Registry Order's required the DeCourseys to deposit funds into the Court Registry, they~~
9 ~~failed to comply, and they never claimed they were unable to do so.~~ ^{RE} ~~Id.~~ The DeCourseys
10 opposed. Dkt. 84.

11 26. On March 8, 2012, Lane Powell filed a second motion, this time for both
12 contempt and discovery sanctions for the DeCourseys' refusal to comply with the Court's
13 discovery orders. Dkt. 101. The DeCourseys opposed using the same arguments that this
14 Court had previously rejected on numerous occasions, and, this time, also took the position
15 that the Court's order on reconsideration had actually granted them the relief they sought. ^{RE}
16 Dkt. 103.

17 27. On April 25, 2012, the Court granted Lane Powell's motions for contempt and
18 sanctions based on the DeCourseys' failure to comply with the Registry and Discovery
19 Orders. In the Contempt Order, the Court found their continued refusal to comply to be
20 "*without reasonable cause or justification* and therefore, ^{RE} *willful and deliberate.*" Dkt.
21 106A (emphasis added). It found their conduct "has prejudiced Plaintiff's preparation of this
22 case." *Id.* It ordered them to comply with the Registry and Discovery Orders by depositing
23 \$57,036.30 into the Court Registry and fully responding to discovery **no later than 4:00 pm**
24 **on May 3, 2012.** *Id.* It further ordered monetary sanctions in the amount of Lane Powell's
25 fees and costs in securing compliance. It also cautioned them that "further and more serious
26 sanctions, including the possibility of striking claims, defenses, or pleadings, or entry of

1 default may follow from any further failure to abide by court orders or rules." *Id.*

2 28. The DeCourseys ~~refused~~ ^{failed} ~~to comply with the Contempt Order, and then~~ ~~belatedly~~ ^{RE} sought a stay from this Court, Dkt. 110, and from the Court of Appeals. Both
3 motions for stay were denied. ~~(argument deleted)~~.

4 29. On June 26, 2012, the DeCourseys returned to the Court of Appeals asking
5 again for a stay. ~~Although not the DeCourseys do not call it that, their motion to the Court of~~
6 ~~Appeals seeks reconsideration of the previously denied stay request. In connection with their~~ ^{RE}
7 ~~effort to convince the Court of Appeals to reconsider the denial of their stay motion,~~ ^{RE} ~~the~~
8 DeCourseys posted a supersedeas bond in the amount of \$57,036.30—the amount they were
9 required to deposit into the Court Registry months ago—and notified the Court of the same.
10 ~~Ex. N. The bond amount does not serve the intended purpose of a bond—to protect Lane~~
11 ~~Powell's interests pending a possible appeal—because an appeal will delay the trial date,~~
12 ~~requiring a higher amount.~~ ^{RE}

13 30. The DeCourseys were aware of the Contempt Order within the time to comply
14 and never presented evidence of inability to comply.

15 31. To date, the DeCourseys have not complied with the Contempt Order serving
16 on counsel full and complete answers to Plaintiff's First Set of Discovery Requests. They
17 also have not complied by depositing the sum of \$57,036.30 into the Court Registry or
18 seeking approval from this Court to post a bond of sufficient amount to protect Lane
19 Powell's interests in lieu of compliance.

20 **D. Intent to Comply**

21 32. On June 6, 2012, and after the Court denied the DeCourseys' motion for stay,
22 Lane Powell's counsel asked the DeCourseys whether they intended to comply with the
23 Court's orders. The DeCourseys did not respond.

24 33. Lane Powell's counsel again inquired as to the DeCourseys' intentions. The
25 DeCourseys again did not respond.
26

The discovery violations by Defendants are ~~substantial~~ substantial, and have been repeated despite this Court's orders to compel. The imposition of further deadlines would not be likely to result in meaningful compliance. The discovery sought by Plaintiff is clearly material to its case and to its defense of Defendants' counterclaims and affirmative defenses.

III. CONCLUSIONS OF LAW

Being duly informed, the Court hereby reaches the following CONCLUSIONS OF LAW: * After considerable reflection on this case, the Court is unable to conceive of any lesser sanction than striking Defendants' counterclaims and affirmative defenses that has any reasonable prospect of permitting Plaintiff to proceed to trial on the merits of its claim.

1. The DeCourseys have failed to obey the Registry Order and Contempt Order by refusing to deposit \$57,036.30 into the Court Registry, despite the fact that they were able to do so. As such, the Court has statutory and inherent authority pursuant to RCW 7.21.010 to hold the DeCourseys in contempt of Court and impose remedial sanctions. in a reasonably timely manner. (RE)

2. The DeCourseys have failed to obey numerous Discovery Orders and the Contempt Order by refusing to provide full and complete answers to Plaintiff's First Set of Discovery Requests based on objections that this Court has rejected on numerous occasions. As such, the Court has considerable authority under CR 37(b)(2) to sanction the DeCourseys.

3. The Court finds the DeCourseys' refusal to comply with this Court's Contempt Order has been without reasonable cause or justification and therefore is willful and deliberate. The Court likewise adopts by reference its earlier findings the from the Contempt Order.

4. The prejudice Lane Powell has suffered and continues to suffer as a result of the DeCourseys' willful and deliberate refusal to comply with the Court's Discovery Orders and the discovery aspects of the Contempt Order is substantial insofar as it needlessly (RE) compromises Lane Powell's ability to prepare for trial. Lane Powell has been unable to move this case forward since just after the case was filed. (RE)

5. No sanction against the DeCourseys other than striking their counterclaims and defenses would adequately punish the DeCourseys, deter them from further noncompliance, and ensure that they do not profit from their wrongdoing. Merely holding the DeCourseys in contempt (again) and imposing monetary sanctions (again) would do little more than compensate Lane Powell for the costs associated with litigating the contempt. (RE)

1 ~~proceedings, without doing anything~~ ^{RE} to alleviate the substantial prejudice to Lane Powell and
2 its ability to pursue its claims against the DeCourseys and defend against their counterclaims.

3 ^{RE} Indeed, the DeCourseys' pattern of disregard of this Court's orders makes clear that lesser
4 sanctions will not suffice.

5 6. Having considered lesser alternatives, the Court finds that such alternatives
6 are not warranted under the circumstances and rejects them. Considering the DeCourseys'
7 extended pattern of willful disregard of this Court's orders, and the fact that this Court
8 specifically warned the DeCourseys that these sanctions would result from continued non-
9 compliance, the sanctions imposed are the only appropriate sanctions here.

10 IV. ORDER

11 In light of the foregoing findings of fact and conclusions of law, the Court exercises
12 its substantial discretion and hereby ORDERS as follows:

13 1. Plaintiff's Third Motion for Order of Contempt or Rule 37 Sanctions is hereby
14 **GRANTED** in full.

15 2. Defendants' counterclaims and defenses are **STRICKEN**.

16 3. Lane Powell is **AWARDED** reasonable attorney fees and expenses pursuant
17 to RCW 7.21.030(3) and CR 37(b)(2) incurred in bringing its Third Motion for Order of
18 Contempt or Rule 37 Sanctions. Plaintiff may note a motion pursuant to CR 37(b)(2) for
19 those fees and expenses.

20 IT IS SO ORDERED.

21 DATED this 6th day of July, 2012.

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23 Honorable Redacted D. Eadie
24 King County Superior Court Judge

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