

2015 WL 457853

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Superior Court of the Virgin Islands,
Division of St. Thomas and St. John.
UNITED CORPORATION, d/b/a Plaza Extra, Plaintiff,
v.
TUTU PARK LIMITED and P.I.D., Inc., Defendants.

CASE NO. ST-2001-CV-361

Signed January 28, 2015

**ACTION FOR BREACH OF CONTRACT
JURY TRIAL DEMANDED**

MEMORANDUM OPINION

DENISE M. FRANCOIS, Judge of the Superior Court of the Virgin Islands

*1 **THIS MATTER** is before the Court on two motions for sanctions, which were both filed by Plaintiff.^{FN1} The first, Plaintiff's Renewed Motion for Sanctions against Defendants for Violation of the Court's Order Dated March 22, 2013, was filed on March 19, 2014. Defendants filed a response on April 11, 2014, and Plaintiff filed a reply on April 22, 2014. The second, Plaintiff's Renewed Motion for Sanctions Against Kmart Corporation and for Kmart Corporation to be Held in Contempt for Violation of the Court's Order Dated March 22, 2013 for Failure to Comply with Subpoena; Request that a Contempt Hearing Be Held, was filed on March 19, 2014. Kmart Corporation ("Kmart"), a nonparty to this suit, filed an Opposition on April 14, 2014, and a Motion to Amend its opposition on May 5, 2014. Plaintiff did not file a reply, or an opposition to the motion to amend. Having considered the premises of each of Plaintiff's Motions, the Court will deny both.

I. PLAINTIFF'S RENEWED MOTION FOR SANCTIONS AGAINST DEFENDANTS FOR VIOLATION OF THE COURT'S ORDER DATED MARCH 22, 2013

Plaintiff filed this Motion pursuant to [Federal Rule of Civil Procedure 37\(b\)\(2\)](#).^{FN2} Before a party may move for sanctions under [Federal Rules of Civil Procedure 26-37](#), Local Rule of Civil Procedure 37.1 obligates counsel for the parties to confer in a good faith effort to either eliminate the necessity of a motion or eliminate as many disputes as possible.^{FN3} "It shall be the responsibility of counsel for the moving party to arrange for this conference."^{FN4} If counsel cannot resolve their differences at the conference mandated by Local Rule 37.1, counsel "shall formulate and sign a written stipulation to that effect, expressly certifying their compliance with LRCi 37.1."^{FN5} The Court will not consider any discovery motion in the absence of this stipulation unless the moving party provides a declaration that opposing counsel: (1) failed to confer in a timely manner after receiving the notice required under Local Rule 37.1; or (2) that opposing counsel refused to sign the stipulation and certification required by Local Rule 37.2(a).^{FN6}

FN1. Attorney [John K. Dema](#), of the Law Offices of John K. Dema, P.C., represents Plaintiff. Attorney [Treston E. Moore](#), of Moore, Dodson & Russell, P.C., represents Defendants. Attorneys [Richard P. Farrelly](#) and [Carl R. Williams](#), of Birch, de Jongh & Hindels, PLLC, represent Kmart Corporation, a nonparty to this suit.

FN2. [Federal Rule of Civil Procedure 37](#) applies to this proceeding through the operation of Superior Court Rule 7.

FN3. LRCi 37.1. Local Rule of Civil Pro-

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cedure 37.1 applies to this proceeding through the operation of Superior Court Rule 7.

FN4. *Id.*

FN5. LRCi 37.2(a). Local Rule of Civil Procedure 37.2 also applies to this proceeding through the operation of Superior Court Rule 7.

FN6. LRCi 37.2(c).

Plaintiff has not complied with these rules. Plaintiff's moving papers contain no indication that its counsel attempted to arrange a conference pursuant to Local Rule 37.1. Additionally, Plaintiff's moving papers do not contain the stipulation and certification required by Local Rule 37.2(a), or the declaration required by Local Rule 37.2(c). Consequently, Plaintiff's Renewed Motion for Sanctions Against Defendants for Violation of the Court's Order Dated March 22, 2013 must be denied.

II. PLAINTIFF'S RENEWED MOTION FOR SANCTIONS AGAINST KMART CORPORATION AND FOR KMART CORPORATION TO BE HELD IN CONTEMPT FOR VIOLATION OF THE COURT'S ORDER DATED MARCH 22, 2013 FOR FAILURE TO COMPLY WITH SUBPOENA; REQUEST THAT A CONTEMPT HEARING BE HELD

*2 In this Motion (Plaintiff's "Renewed Motion"), Plaintiff requests three things from the Court: (i) an award of sanctions pursuant to [Federal Rule of Civil Procedure 37\(b\)](#); ^{FN7} (ii) an order of contempt pursuant to [Federal Rule of Civil Procedure 45\(g\)](#) and [4 V.I.C. §§ 243–44, 281–82](#); ^{FN8} and (iii) oral argument on the Renewed Motion. ^{FN9}

FN7. Pl.'s Renewed Mot. for Sanctions Against Kmart Corp. and for Kmart Corp. to

be Held in Contempt for Violation for the Ct.'s Order Dated March 22, 2013 for Failure to Comply with Subpoena; Req. that a Contempt Hrg. be Held 1 [hereinafter "Pl's Renewed Mot. for Sanctions and Req. for Contempt Hrg."].

FN8. *Id.*

FN9. *Id.*

i. An award of sanctions is improper pursuant to Local Rules of Civil Procedure 37.1 and 37.2.

As discussed in Section I above, Local Rules of Civil Procedure 37.1 and 37.2 impose obligations on a party that wishes to sanction another a party under [Federal Rule of Civil Procedure 37\(b\)](#). Plaintiff has failed to comply with these rules because its moving papers do not contain the stipulation and certification required by Local Rule 37.2(a), or the declaration required by Local Rule 37.2(c). Additionally, Plaintiff has provided no indication that it attempted to comply with the meet-and-confer requirements found in Local Rule 37.1. Consequently, Local Rule 37.2(c) mandates that this Court deny Plaintiff's request for sanctions.

ii. The Court will not hold Kmart in contempt of court.

a. Background

On December 12, 2012, this Court issued a Subpoena that directed Kmart to produce twenty-one categories of documents. Kmart filed a motion to quash the subpoena with the Superior Court on January 18, 2013, and on January 28, 2013, Plaintiff filed a motion to compel Kmart to produce the documents requested in the subpoena. By Order dated March 22, 2013, the Court granted Plaintiff's Motion to Compel and instructed Kmart to "produce the documents as requested by the Plaintiff in its Motion to Compel." Plaintiff admits that Kmart produced responsive documentation, ^{FN10} but requests an order of contempt

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because Kmart did not produce documentation to Plaintiff's satisfaction.

FN10. *Id.* at 1 n.1 (admitting that “Kmart produced some documents subsequent to the March 22, 2013 Order”).

b. *The alleged deficiencies in Kmart's production*

Plaintiff has identified three groups of requests where it believes Kmart's production was deficient: 1.) Requests 2 and 3; 2.) Requests 9 through 12; and 3.) Requests 13 and 14.

1. *Requests 2 and 3*

Request 2 asks that Kmart produce “any documents ... that reflect discussions, conversations, negotiations, or agreements in which the use restriction clause contained in Article 22 of the Tutu–Kmart Lease is considered, evaluated or mentioned.” FN11 Request 3 asks Kmart to produce “any documents ... in which he [sic] use restriction contained in Paragraph 2 of the Second Amendment to the Tutu–Kmart lease [amending Article 22 of the Tutu–Kmart Lease] is considered, evaluated or mentioned.” FN12

FN11. Subpoena, Ex. A, at 1 (Dec. 12, 2012).

FN12. *Id.*

In response to these requests, Kmart asserted that any responsive documentation was privileged, and that Kmart would be producing a privilege log for the Plaintiff. FN13 Kmart produced a privilege log on April 14, 2014. FN14 Plaintiff has moved to compel production of documents identified in Kmart's privilege log on the basis that the work-product doctrine does not apply to non-parties. FN15 This Motion to Compel is still outstanding.

FN13. Kmart Corp.'s Opp. to Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 5.

FN14. Pl.'s Mot. to Compel Kmart Corp. to Produce Certain Docs. Identified on Kmart's Privilege Log Because the WorkProduct Doctrine Does not Apply to Non-parties 2.

FN15. *Id.* at 1–3.

2. *Requests 9 through 12*

*3 Request 9 asks Kmart to produce “the dollar amounts of Merchandise Sales and amounts of Pretax Income for Food Edibles and Consumables, including beverages, at the Kmart store located at Tutu Park Mall, St. Thomas, Virgin Islands, for each year from January 1, 1991 through present date.” FN16 Request 10 asks for “documents showing the amount of gross revenue, total sales, gross profit, expense percent and net profit, for Food Edibles and Consumables (including beverages) at the Kmart store at Tutu Park Mall, St. Thomas, Virgin Islands, for each year from January 1, 1991 through present date.” FN17 Request 11 seeks “documents showing the total dollar amounts of Merchandise Sales and Pre Tax Income for the total Kmart store located at Tutu Park Mall, St. Thomas, Virgin Islands, for each year from January 1, 1991 through the present date.” FN18 Finally, Request 12 seeks “[p]roduce summaries of the annual total sales of the Kmart store located at Tutu Park Mall, St. Thomas, Virgin Islands, for each year from January 1, 1991 through the present date.” FN19

FN16. Subpoena, Ex. A, at 2 (Dec. 12, 2012).

FN17. *Id.*

FN18. *Id.*

FN19. *Id.*

Kmart responded to these requests by producing responsive documents, with some exceptions. Kmart has produced documents pertaining to merchandise

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sales by year for years 2000 through 2012, claiming that it does not maintain records prior to 2000.^{FN20} Kmart also claims that internal changes in sales reporting prohibited it from estimating pre-tax income for Consumables for years 2010 onward.^{FN21} Kmart has also produced a summary of its gross sales, gross profit, net sales, and net profit for the years 2006 through 2013.^{FN22} Kmart alleges that, due to software and program changes, file layout changes, and conversions to new databases, any additional data that may be responsive is now unreadable, and cannot be recreated with any certainty.^{FN23}

FN20. Kmart Corp.'s Opp. to Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 6.

FN21. *Id.*

FN22. Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 7.

FN23. *Id.*

3. Requests 13 and 14

Plaintiff's Request 13 asks for "documents or summaries to identify *each* type of Food Edible and Consumable, including beverages, sold at the Kmart store located at Tutu Park Mall, St. Thomas, Virgin Islands, for each year from January 1, 1991 through the present date including the following: a) the name of the food item; b) description of the food item, including whether it is frozen, c) whether the food item was sold in more than one package size and, if so, the package sizes sold; and d) the quantity of each food item sold."^{FN24} Kmart produced responsive documents for years 2006 through 2013,^{FN25} but maintains that no such documents exist for any period of time prior to 2006.^{FN26}

FN24. Subpoena, Ex. A, at 2–3 (Dec. 12, 2012) (emphasis in original).

FN25. Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 8.

FN26. Kmart Corp.'s Opp. to Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 8.

Request 14 seeks "documents or summary, with respect to *each* Food Edible and Consumable (including beverages) and packages or bottle size identified in No. 13 above, showing for each year from January 1, 1991 to the present date [seven categories of information]."^{FN27} Kmart claims that it has produced responsive data for 2013, and will supplement its production.^{FN28} Kmart also claims that the level of detail requested by the Plaintiff does not exist in any one location, and that readable sales data going back to 2006 was not located at Kmart's data warehouse.^{FN29}

FN27. Subpoena, Ex. A, at 3 (Dec. 12, 2012).

FN28. Kmart Corp.'s Opp. to Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 8–10.

FN29. *Id.* at 9.

c. Legal standard

An order of civil contempt is an order designed "to coerce someone to do something."^{FN30} In contrast, an order of criminal contempt "seeks to vindicate [the Court's] own authority through punishment."^{FN31} Here, Plaintiff seeks an order of contempt that imposes a \$500/day fine until Kmart produces the additional documents sought by the Plaintiff.^{FN32} Because Plaintiffs proposed order seeks to coerce Kmart to produce additional documents, it is a request for an order of civil contempt.

*4 Plaintiff has cited several provisions of the

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Virgin Islands Code as authority that an order of contempt is appropriate.^{FN33} These provisions pertain to the Court's general power to impose sanctions,^{FN34} but do not provide specific guidance as to how this Court should evaluate Plaintiff's request for an order of contempt in this case.

FN30. *In re. Rogers*, 56 V.I. 325, 335 (V.I. 2012).

FN31. *Id.*

FN32. Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 14.

FN33. *Id.* at 1 (citing 4 V.I.C. §§ 243–44, 281–82).

FN34. *See* 4 V.I.C. § 243(4) (acknowledging that every court has the power to “compel obedience to its ... orders”); *id.* § 244 (observing that one found guilty of being in contempt of court “may be punished as provided by law”); *id.* § 281(2) (acknowledging that every judicial officer shall have the power to “compel obedience to his lawful orders”); *id.* § 283 (permitting a judicial officer to “punish for contempt”).

The appropriate standard is found in the Rules of the Superior Court and precedent from the Supreme Court of the Virgin Islands. Superior Court Rule 11 states that “[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.”^{FN35} “A party may be held in civil contempt for failure to comply with a court order if ‘(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.’ ”^{FN36} The court retains discretion to issue

such an order.^{FN37}

FN35. SUPER. CT. R.. 11.

FN36. *In the Matter of the Suspension of Mcintosh*, S. Ct. Civ. No. 2012–0013, S. Ct. Civ. No.2012–0025, 2013 WL 991250. at *3 (V.I. Mar. 14, 2013).

FN37. *See id.* (stating that a party “may be held” in contempt).

d. *Kmart shall not be sanctioned because it diligently attempted to comply in a reasonable manner with the Court's March 22, 2013 Order.*

Here, the Court's March 22, 2013 Order was clear and unambiguous: Kmart was directed to produce the documents requested by Plaintiff's subpoena.^{FN38} There is also clear and convincing evidence that Kmart did not produce documents for all of the dates requested in Plaintiff's subpoena. However, the scope of Kmart's production is the product of Kmart's diligent attempt to comply with the Court's March 22, 2013 Order, not an attempt to withhold otherwise-discoverable documents. Consequently, the Court will not hold Kmart in contempt.

FN38. *See* Order 2 (Mar. 23, 2013) (ordering that “the Defendants shall respond to the Plaintiffs interrogatories and produce the documents as requested by the Plaintiff, to the extent that the Defendants have not already done so”).

Kmart has identified a number of reasonable explanations for the scope of its production under the subpoena. Most notably, Kmart claims that its record retention policy does not provide for the retention of records before the year 2005. The year 2005 was over nine years ago, and as a practical matter, a corporation may be justified if it chooses not to retain records that are over nine years old. Kmart has also alleged that

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internal changes in sales reporting prohibited it from estimating pre-tax income for certain items. Moreover, Kmart emerged from Chapter 11 bankruptcy protection in May of 2003, and merged with Sears, Roebuck and Co. in 2005. It is reasonable to believe that the disruption caused by bankruptcy and the integration of two companies impacted Kmart's ability to access records. Finally, Kmart has explained that certain data cannot be recreated due to software and database conversions, among other changes in recordkeeping. Having considered these reasons, the Court believes that Kmart has made a diligent attempt to comply in a reasonable manner with the Court's March 22, 2013 Order.

*5 Plaintiff's arguments to the contrary are not persuasive. Plaintiff directs the Court to the cases of *Sunshine Shopping Center, Inc. v. Kmart Corp.*^{FN39} and *Sunny Isle Shopping Center, Inc. v. Xtra Super Food Centers, Inc.*^{FN40} for the proposition that Kmart is "capable of producing [various sales figures] easily and quickly."^{FN41} Plaintiff has attached two deposition transcripts to its Renewed Motion, in which Kmart personnel testified to the availability of certain records. These depositions were taken in connection with the *Sunshine Shopping Center* and *Sunny Isle Shopping Center* cases. However, these depositions were taken in February and March of 2000. The sales figures at issue in *Sunshine Shopping Center* and *Sunny Isle Shopping Center* were thus produced in close proximity to the date of the depositions. By contrast, Plaintiff now asks that Kmart produce the same information over fourteen years later. Given the changes in Kmart's business since 2000—Kmart's bankruptcy and merger, among other things—it is unlikely that those transcripts describe the availability of Kmart's records as accurately today as they did in the year 2000.

FN39. Civ. Nos. 1998–0096, 1999–0099, 2000 WL 1679499 (D.V.I. Aug. 1, 2000).

FN40. 237 F. Supp. 2d. 606 (D.V.I. 2002).

FN41. Pl.'s Renewed Mot. for Sanctions and Req. for Contempt Hrg. 12.

Plaintiff claims that "Kmart's position that it has no records of what items of food it sold during the years 1993 through 2006 is not credible" because Kmart is "a multi-national corporation" and its records are "necessarily computerized".^{FN42} However, it does not follow that all multinational corporations that store electronic data retain records for such a length of time. Corporations typically employ data retention policies and dispose of records after a period of time. The Court does not find that Kmart's use of such a method justifies an order of contempt, especially considering the age of the records requested by the Plaintiff.

FN42. *Id.* at 9 (emphasis in original).

Plaintiff also claims that Kmart provided no electronically stored information ("ESI"), despite contrary language in the subpoena. Kmart responds that it has consulted with its Information Technology division, and determined that changes in technology over time preclude Kmart from recreating responsive ESI with any degree of integrity. Given the fact that, in some cases, Plaintiff seeks records dating back to 1991, in combination with the fact that Kmart has undergone internal reorganizations, Kmart's internal review constitutes sufficient diligence to avoid an order of contempt from this Court.

Standing alone, the reasons discussed in the preceding paragraphs justify this Court's decision to deny Plaintiff's request for an order of contempt. On a more fundamental level, however, Plaintiff's request for an order of contempt is functionally equivalent to its request for sanctions for failure to provide documents. Since Plaintiff failed to follow the rules for seeking sanctions, Plaintiff will not be allowed to accomplish with an order of contempt what it could not accomplish with an order for sanctions.

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iii. The Court will not hear oral argument on Plaintiff's motion.

END OF DOCUMENT

Although Superior Court Rule 36 permits a party to request oral argument on any motion, the Court retains discretion to decide the motion on the parties' submissions without oral argument.^{FN43} Given that Plaintiff did not comply with the Local Rules pertaining to discovery sanctions, and given that an order of contempt is inappropriate in this case, this Court declines exercise its discretion under Superior Court Rule 36 and will not entertain oral argument on Plaintiff's Renewed Motion.

FN43. SUPER. CT. R.. 36(a).

CONCLUSION

Both of Plaintiff's requests for sanctions must be denied due to Plaintiff's failure to comply with the applicable Local Rules of Civil Procedure. Plaintiff's request for an order of contempt will also be denied because Kmart diligently attempted to comply with the Court's March 22, 2013 Order. Although its production of documents was not fully responsive to Plaintiff's subpoena, Kmart nonetheless made a reasonable attempt to produce responsive documentation, despite certain limitations. Since sanctions and an order of contempt are both inappropriate, this Court will not hear oral argument on Plaintiff's Renewed Motion. Consequently, the Court will deny both Plaintiff's Renewed Motion for Sanctions against Defendants for Violation of the Court's Order Dated March 22, 2013 and Plaintiff's Renewed Motion for Sanctions against Kmart Corporation and for Kmart Corporation to be Held in Contempt for Violation of the Court's Order Dated March 22, 2013 for Failure to Comply with Subpoena; Request that a Contempt Hearing Be Held. An appropriate Order will follow.

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