UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

AVIVA SPORTS, INC., CIV. NO. 09-1091(JNE/JSM)

Plaintiff, **REDACTED** ORDER

v.

FINGERHUT DIRECT MARKETING, INC. et. al.

Defendants.

This matter came before the Court on plaintiff's Motion for Sanctions [Docket No. 605]. Keith Sorge, Esq. and Cary Stephenson, Esq. appeared on plaintiff's behalf. Stephen Lobbin, Esq. and Jonathan Wilson, Esq. appeared on behalf of defendant Manley Toys, Ltd.

The Court, being duly advised in the premises, upon all the files, records and proceedings herein, and for the reasons stated on the record and described in the memorandum below, now makes and enters the following Order:

IT IS HEREBY ORDERED THAT:

Aviva Sports, Inc.'s Motion for Sanctions [Docket 605] is GRANTED in part and DENIED in part as set forth in the accompanying Memorandum.

June 15, 2012

Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

MEMORANDUM

I. BACKGROUND

Manley Toys, Ltd. disregarded this Court's order of May 9, 2012, requiring it to reimburse Aviva for document production expenses Aviva incurred in connection with a production of Manley's documents in China. This is the second time Manley has disregarded an Order from this Court regarding that payment.[1] The Court now hopes to persuade Manley that it is perilously close to this Court recommending the sanction of default judgment as punishment for its behavior. If Manley violates this Order, as it violated the Court's May 9, 2012, Order, the Court will recommend to the Honorable Judge Joan Ericksen, the presiding district court judge in this action, that default judgment be entered against Manley on its liability under Aviva's Lanham Act claim.

On January 3, 2012, this Court ordered Manley and Aviva to share 50/50 in the costs Aviva incurred in connection with Manley's document production in China. Order p. 21 [Docket No. 508]. Manley objected to this portion of the Court's order and refused to pay its share of the costs while its objections were pending. Aviva's Memorandum of Law in Support of Motion for Sanctions ("Aviva's Sanctions Mem."), p. 2 [Docket No. 562]. On February 28, 2012, Judge Ericksen affirmed the Order, but Manley continued to refuse to pay Aviva. For reasons unknown, Manley felt justified in not paying

[1] Manley seems to have a propensity for disobeying this Court's orders. On January 3, 2012, this Court ordered Manley to provide to Aviva by January 17, 2012, an amended response to discovery previously propounded to Manley by Aviva. Order [Docket No. 508]. Without seeking an agreement from Aviva or permission from this Court, Manley unilaterally gave itself a three-week extension of time to comply with the Court's Order. As to what it untimely produced to Aviva, this Court determined was completely inadequate and amounted to a document dump, and granted sanctions to Aviva for Manley's complete disregard of the Court's Order. See Order dated May 11, 2012 [Docket No. 601].

because this Court had not imposed a date certain by which it was required to pay the costs, and Manley claimed it was experiencing financial difficulties. Manley Memorandum in Opposition to Aviva's Motion for Sanctions, pp. 3, fn. 2, 5 [Docket No. 580]. Aviva moved for entry of default judgment against Manley as a sanction. Aviva's Sanctions Mem., pp. 5-6. At the hearing on Aviva's sanctions motion, Manley's counsel indicated that within a week or two Manley would "nail down" a payment schedule—despite the fact that the Court's previous Order never contemplated anything other than full and immediate payment.

The Court ordered Manley to pay to Aviva, in U.S. dollars, the full amount of $238,254 on or before May 21, 2012, but denied Aviva's request for entry of default judgment, noting that "dismissal of an action is an extreme sanction to be reserved only for the most exceptional situations." Order, May 9, 2012 [Docket No. 594]. Manley did not appeal this Order and did not seek reconsideration or any further relief from this Court from the requirements of the Order. Instead, on May 21, 2012, on the day full payment was due, Manley offered to pay Aviva pursuant to a payment plan that can only be described as laughable. Manley's plan stretched payments from May 30, 2012, to February 28, 2013, with initial payments of $3,000 per month. Declaration of Raymond Choi, p. 3 ("Choi Decl.") [Docket No. 630]. Aviva's counsel reported that Manley made its first payment of $3,000 under this proposal, although Aviva never agreed to the plan. Aviva did not cash the check.

Now before the Court is Aviva's motion for entry of default judgment as a sanction for Manley's disregard of this Court's May 9, 2012, Order or, in the alternative, an order requiring Manley to pay the amount ordered within five business days or risk

entry of default judgment. Aviva's Memorandum in Support of Motion for Sanctions, pp. 4-5 [Docket No. 613].

II. ANALYSIS

Federal Rule of Civil Procedure 37 provides that if a party disobeys a discovery order, the Court may issue an order

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
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> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> (iii) striking pleadings in whole or in part;
>
> (iv) staying further proceedings until the order is obeyed;
>
> (v) dismissing the action or proceeding in whole or in part;
>
> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

The Court's discretion to issue Rule 37 sanctions "is bounded by the requirement of Rule 37(b)(2) that the sanction be 'just' and relate to the claim at issue in the order to provide discovery." Hairston v. Alert Safety Light Products, Inc., 307 F.3d 717, 719 (8th Cir. 2002) (quoting Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 558 (8th Cir. 1992)). "[T]he district court's discretion narrows as the severity of the sanction or remedy it elects increases." Wegener v. Johnson, 527 F.3d 687, 692 (8th Cir. 2008). "While the sanction of dismissal is drastic and should therefore be used only in exceptional cases, a district court is not required to impose the least onerous sanction

so long as it considers whether a lesser sanction is available or appropriate." Brennan v. Qwest Communications Intern., Inc., Civ. No. 07-2024 (ADM/JSM), 2009 WL 1586721 at *7 (D. Minn. June 4, 2009) (citations and quotations omitted).

Manley submitted the declaration of Raymond Choi as a post hoc explanation of why it disregarded this Court's May 9, 2012, Order. Choi indicated that Manley [redacted]. Choi Decl., ¶1. According to Choi, [redacted] Id., ¶5. Choi stated, with no factual support whatsoever, that Manley has [redacted] than the payment plan proposed and "the payment plan is the best alternative for both Manley and Aviva." Id., ¶9.

This Court rejects the Choi declaration as providing any reasonable explanation for Manley's actions. It is both self-serving and reflects the arrogance and defiance with which Manley has conducted itself throughout much of this litigation. The absurdity of Manley offering initial payments of $3,000 against its obligation of $238,254 was underscored by the presence at the sanctions motion hearing of two lawyers appearing on Manley's behalf. Mr. Lobbin traveled from San Diego, California for the purpose of persuading the Court that a $3,000 payment was the best Manley could do in light of its financial circumstances. The Court is firmly convinced that the legal expenses Manley incurred in connection with opposing Aviva's motion exceeded its initial payment under the plan Choi so brazenly declared was in Aviva's best interests.

Nonetheless, in light of the severity of the sanction of default judgment, the Court will give Manley one last chance to comply with the May 9, 2012 Order. The Court ordered as follows:

1. On or before the close of business on June 27, 2012, Manley must deliver a certified check in the amount of $238,254 payable to Aviva Sports, Inc. to the offices of Aviva's counsel, Mr. Keith Sorge.

2. On June 28, 2012, Aviva shall notify the Court in writing as to whether payment was or was not made. If Manley failed to make payment exactly as described above (for example, if Manley attempts to deliver a non-certified check), the Court shall then issue a Report and Recommendation to Judge Ericksen recommending that default judgment be entered on the issue of Manley's liability to Aviva on Aviva's Lanham Act claim.[2]

3. If Manley fails to make payment as ordered, Aviva shall serve and file an affidavit setting forth its reasonable attorney's fees and costs incurred in connection with the motion for sanctions (including preparation of the motion, attendance at the hearings and its communications with opposing counsel to address the nonpayment and payment plan), and including the following information: the identity of each service provider; the amount of time each service provider expended on the motion and a description of each service provided; the hourly rate, level of experience and year of graduation for each service provider; and a description and amount for all expenses incurred. Manley may not submit a response to Aviva's filing. The Court will decide the reasonableness of Aviva's attorneys' fees and costs.

J.S.M.

[2] The Court finds that Manley's conduct, which arose in connection with discovery on Aviva's Lanham Act claim, warrants this sanction, but that default judgment on damages or Aviva's patent claims was not appropriate.