

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02802-REB- MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, in his individual capacity,

Defendant.

DEFENDANT'S MOTION FOR AN ORDER COMPELLING DISCOVERY

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, the Loveland City Attorney's Office and Wick & Trautwein, LLC, and pursuant to Fed.R.Civ.P. 37(a)(3)(B), respectfully moves that the Court enter an order compelling discovery. In support hereof, Koopman states as follows:

D.C.COLO. LCivR 7.1 CERTIFICATION

Undersigned defense counsel, Kent N. Campbell, hereby certifies that, before filing this Motion, he has conferred with opposing counsel in person, by letters and by email, and has attempted to confer with opposing counsel by telephone, to resolve the disputed issues. Plaintiff presumably opposes this Motion in view of Plaintiff's attorney's incomplete responses to defense counsel's inquiries and requests, and complete failure to provide any information concerning when Plaintiff will produce copies of requested documents despite repeated requests for such information.

REQUESTED RELIEF

A. Requested Income and Business Records

Koopman's interrogatory number 2, submitted to Plaintiff Jeremy C. Myers ("Myers") on March 21, 2012, requested the following:

"Describe by type and amount each compensatory and consequential damage you allege to have incurred, including but not limited to damages to property, past and future wage or business income losses, other past and future pecuniary and non-pecuniary losses, emotional distress, suffering, loss of reputation, humiliation, public ridicule and scorn, inconvenience, mental anguish, loss of economic opportunity and loss of enjoyment of life, and state how each such amount was calculated."

Myers' initial response was limited to the following:

"See Rule 26(a) Disclosure and Complaint. Attorney fees, hair test, lab testing, lab testing of sugar.

Loss of business – Rule 26(a). Sold all equipment to pay for defense. Emotional distress, etc., as determined by a jury.

Koopman requested Myers provide a supplemental response. See letter to Myers' attorney dated April 24, 2012, ***Exhibit A***, at 1. Myers' supplemental response states:

"The original response referred the reader to Plaintiff's Rule 26 disclosures. Page 7 fairly well sets forth the damages and the amount attributable to each item. A and B represent actual expenditures. C. is a projected figure based on 3 to 4 times the gross revenues of the business. D. is an estimated figure by the property owners. The balance of the claimed damages such as emotional distress and loss of reputation are not the type of damages to which a party can assign a definite value and, thus, cannot be calculated. Plaintiff feels the answers and their calculations are mostly obvious to any normal party to such litigation."

Myers' Fed.R.Civ.P. 26(a) Disclosures, which he has referred to in order to respond to the aforementioned interrogatory, provides in relevant part:

“Plaintiffs claim all economic losses on all claims allowed by law in an amount to be determined at trial. These losses include, but are not limited to, expenses incurred in defending dropped charges, expenses incurred as a result of ‘methamphetamine structure’ designation of 1101 North Madison Avenue, loss of excavating business—Buck Antler Excavating LLC—and business opportunities associated therewith, and damage to the property at a 1101 North Madison Avenue. While Plaintiff reserves the right to supplement this response as more detailed evaluations of the lost business are obtained, the expenses, which currently total \$148,521, include the following:

- A. Costs incurred in defending criminal charges – \$20,928.00, which includes attorneys’ fees, bond costs, expert analyses and reports, jail fees, urinalysis costs, and supplies.***
- B. Remediation costs – \$2,593.00.***
- C. Loss of business and business opportunities – \$120,000.00.***
- D. Property damage to 1101 North Madison Avenue – \$5,000.00.”***

In order to investigate and, if necessary, challenge Myers' calculations of alleged economic damages and losses, Koopman's First Request for Production of Documents to Plaintiff submitted on March 21, 2012, requested the following:

“5. Copies of your personal and business federal and state income tax returns, to include all schedules, together with W-2 and/or 1099 and/or K-1 forms, filed for the years 2004 through 2011.”

Myers responded to this request as follows:

“Release provided to obtain documents requested.”¹

¹ Myers did not indicate that he does not have possession, custody or control of the requested income tax records. Myers did, however, provide a signed records release authorization enabling Koopman to obtain such records directly from the Internal Revenue Service; however, in undersigned defense counsel's experience, the IRS often takes several months to fulfill such requests.

Koopman also requested Myers produce the following:

“6. Copies of all paycheck stubs, receipts for income, and other documents reflecting income received by you for the years 2004-2011 and during 2012.”

Myers responded as follows:

“Objection, burdensome and overbearing. This information is reflected in Plaintiff’s tax records.”

In view of Myers’ supplemental response to interrogatory number 2, defense counsel, by letter to Myers’ attorney dated May 4, 2012, **Exhibit B**, at 2, provided the following clarifying request to which Myers and his attorney have not responded:

“5. Inasmuch as plaintiff is incorporating by reference his Rule 26(a)(1) disclosure in order to describe and itemized [sic.] his claimed damages, in response to interrogatory #2, we respectfully request that plaintiff promptly disclose copies of all documents in any way referring to or supporting the alleged costs incurred in defending the criminal charges, specified in the mandatory disclosure as \$20,928, which is said to include attorneys’ fees, bond costs, expert analyses and reports, jail fees, urinalysis costs and supplies, plus copies of all documents pertaining to remediation costs, specified in the mandatory disclosure as \$2,593. Please also produce all documents that support or refer in any way to the loss of business and business opportunities that plaintiff has estimated in his mandatory disclosure to amount to \$120,000, and which he has stated in his supplemental discovery responses is a ‘projected figure based on three to four times the gross revenues of the business.’ Please also produce all documentation pertaining to allege property damage to 1101 North Madison Avenue specified in the mandatory disclosure as \$5,000. Finally, please produce all documents supporting plaintiff’s claims for attorney’s fees in this lawsuit, including but not limited to a copy of all written fee agreements between plaintiff and you, all attorney time records, and all attorney invoices and records of payment(s) received.”

In summary, Myers is seeking nearly \$300,000 in specified economic damages, and an unknown amount for attorneys’ fees and other costs. The specific dollar amounts claimed by Myers in his Fed.R.Civ.P. 26(a)(1) Disclosure demonstrates that

documents and records must exist that support these claimed dollar figures, yet Myers' discovery responses have failed to produce such documents and records and, instead, have evasively indicated that it is too burdensome and overbearing for Koopman to request Myers produce records that would support his claimed lost business income. It is also insufficient for Myers to fail to produce copies of income tax returns that are likely in his possession.

Koopman therefore respectfully requests the Court order Myers to promptly produce copies of all of his state and federal income tax returns for the years 2004 through 2011, consisting of both individual and business returns, and to promptly produce all other documents and records supporting his claimed loss of business income, as well as all documents and records supporting his claimed consequential damages and expenses for defending himself against the underlying criminal charges, remediation costs, property damage, and loss of business and business opportunities. Koopman also requests an order requiring Myers to promptly produce his attorney fee agreement and all records concerning attorneys' fees charged, billed and paid or unpaid in connection with this § 1983 lawsuit.

B. Health and Medical Information Sought

Koopman requested in interrogatory number 3:

"If you have received consultation or treatment or incurred costs for medical or mental health treatment which you attribute to acts or omissions of Koopman, provide the name of each and every such provider, the treatment provided, the dates of treatment, the diagnosis, the prognosis and the billing for each such treatment."

Myers responded:

“See results from health records request.”²

Koopman in his First Request for Production of Documents to Plaintiff requested:

“2. Copies of all health insurance, hospital, doctors’, Medicare and Medicaid lien notices, documents, letters, itemizations and every other communication pertaining to such lien(s), including records of any Medicare or Medicaid subrogation contractor.”

Myers responded:

“None. Plaintiff will provide a release to obtain.”

Koopman also requested production of the following documents:

“3. Copies of all narrative medical and/or psychological reports and records, statements, billing records, correspondence, notes or other documents from all health care providers and copies of all hospital records from each hospital relating to any of the injuries you claim in this lawsuit.”

Myers responded:

“None. Release will be given to obtain.”

When defense counsel complained to Myers' attorney that the aforementioned interrogatory and request for production responses were insufficient and evasive, inasmuch as they utterly failed to identify any of Myers' past healthcare providers, including healthcare providers who have provided any treatment for injuries alleged to have been sustained due to acts or omissions of Koopman,³ Myers, in a supplemental

² Myers' response consisting of the ambiguous statement, “[s]ee results from health records request,” presumably referred to his response to Koopman's request for production of medical records in which Myers indicated that he would provide a release to enable Koopman to obtain such records.

³ Defense counsel wrote a letter to Myers' attorney dated April 24, 2012, *Exhibit A*, requesting Myers provide detailed responses that actually respond to various interrogatories, including those requiring Myers to provide “the names of each of his health care providers from whom he received treatment for injuries allegedly sustained due to acts or omissions of Detective Koopman (Interrogatory No. 3)”

response—rather than identifying each and every healthcare provider who has provided treatment to him for injuries allegedly sustained as a result of Koopman's acts or omissions, and providing other specified information concerning the treatment provided, dates of treatment, diagnosis, prognosis and billing information—stated:

"See document attached to this response."

The document attached to the supplemental response was a one-page document from Associates in Family Medicine referring Mr. Myers to a plastic surgeon, ***Exhibit C***. This is an evasive and insufficient response.

Koopman therefore respectfully requests the Court order Myers to promptly identify each and every healthcare provider, the treatment provided, the dates of treatment, the diagnoses, the prognoses and the billing for each such treatment, in connection with medical or mental health treatment that Myers attributes to acts or omissions of Koopman.

C. Documents Requested be Copied

Koopman, in his Request for Production of Documents, requested the following:

"1. All photographs, diagrams, or other representations of the scene of the incident and photographs depicting any alleged damages sustained by you."

For his response, Myers stated:

"Available for inspection at attorney's office. Plaintiff reserves right to supplement this response."

Koopman also requested production of the following:

"15. Any and all public documents and/or documents in the public domain you intend to or may use at trial."

For his response, Myers stated:

“Available for inspection at attorney’s office (newspaper articles—see Reporter Herald). County Record of Beet Lab. County wrap of property. Anything provided by any previous Defendant.”

Koopman further requested production of the following documents in connection with Myers’ retained environmental expert, Dr. James Dennison:

“16. Any and all reports of Century Environment Hygiene, LLC, including draft reports, and the complete file of Century Environment Hygiene, LLC, including but not limited to all communications between Century Environment Hygiene, LLC, and you or your representatives, whether by email, letter, memo, or other paper or electronic communication.”

For his response, Myers stated:

“Available for inspection at attorney’s office.”

In response to Myers’ invitation for defense counsel to inspect the aforementioned documents in his attorney’s office, defense counsel wrote to Myers’ attorney on April 24, 2012, stating, in part, as follows:

“As to all answers/responses that provide that various documents are available for inspection at your office, please provide copies to us and we will promptly reimburse you for reasonable copying expense involved. You need not provide any public documents that were provided by any previous defendant with their discovery responses or Rule 26(a)(1) mandatory disclosures.”

Exhibit A at 1.

In response thereto, Myers, in his Supplemental Responses to Defendant’s April 24, 2012 Request for Discovery Clarification, stated:

“Plaintiff prefers if Defendant specifically identify those documents he wishes to have copies made of, Plaintiff will copy @ \$.25 per page.”

In response thereto, defense counsel wrote to Plaintiff’s counsel on May 4, 2012, ***Exhibit B***, providing the following clarification:

“3. The supplemental response to defendant’s request for production stating: ‘Plaintiff prefers if Defendant specifically identify those documents he wishes to have copies made of, plaintiff will copy @ 25¢ per page’ overlooks that my letter of April 24, 2012 specifically requested that your office make copies of all documents mentioned in plaintiff’s initial Response to Defendant’s First Set of Interrogatories to Plaintiff except that you need not provide any ‘public documents’ that were provided by any previous defendant with their discovery responses or Rule 26(a)(1) mandatory disclosures.’ That was our specification of which documents we want to have copies of. In other words, all of them except those ‘provided by any previous defendant with their discovery responses or Rule 26(a)(1) mandatory disclosures.’ Therefore, the documents requested to be copied to us are each of the documents as to which plaintiff has stated in his responses to Defendant’s First Request for Production of Documents to Plaintiff are ‘[a]vailable for inspection at attorney’s office.’ In the interest of clarity, this would include the following:

- All photographs, diagrams or other representations of the scene of the incident and photographs depicting any alleged damages sustained by plaintiff.
- A copy of plaintiff’s current driver’s license (both sides), and, if plaintiff does not have a driver’s license, then a photocopy (both sides) of any other identification card.
- Any and all public documents and/or documents in the public domain plaintiff intends to or may use at trial.
- Any and all reports of Century Environment Hygiene, LLC, including draft reports, and the complete file of Century Environment Hygiene, LLC, including but not limited to all communications between Century Environment Hygiene, LLC, and plaintiff or plaintiff’s representatives, whether by email, letter, memo, or other paper or electronic communication. [I should add here that we also specifically request a copy of all appendices to Dr. Dennison’s report.]”

Defense counsel has asked Myers’ counsel to specify when defense counsel may expect to receive copies of the requested documents, but no response has been forthcoming. Therefore, there has been an unnecessary delay on Myers’ part in

producing records for over two weeks since his initial discovery responses were served on April 23, 2012,⁴ thereby causing an unnecessary delay in discovery proceedings, inasmuch as the defense wishes to obtain, review and analyze the requested documents before scheduling depositions in this matter.

CONCLUSION

WHEREFORE, for good cause shown, Koopman respectfully prays that the Court enter an order compelling Myers to provide complete and non-evasive answers to interrogatories and production of documents forthwith as specified hereinabove.

DATED this 9th day of May, 2012.

WICK & TRAUTWEIN, LLC

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⁴ The requested records were due to be produced on or before April 20, 2012, 30 days after Defendant's discovery requests were propounded. See Fed. R. Civ. P. 34(b)(2)(A).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 9, 2012, I electronically filed the foregoing DEFENDANT'S MOTION FOR FOR AN ORDER COMPELLING DISCOVERY with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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s/ Jennifer E. Jones _____