

## VIRGINIA:

**IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX**

WORLD MISSION SOCIETY, CHURCH  
OF GOD A NJ NONPROFIT  
CORPORATION,

Plaintiff,

CASE NO.: 2011-17163

**VS.**

MICHELE COLON and  
TYLER J. NEWTON

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT NEWTON'S MOTION FOR SANCTIONS**

COMES NOW Plaintiff World Mission Society, Church of God, a NJ Nonprofit Corporation, by counsel, and responds to Defendant Newton's ("Defendant") Motion for Sanctions pursuant to Rule 4:12 of the Rules of the Supreme Court of Virginia. Plaintiff respectfully requests that Defendant's Motion for Sanctions be DENIED.<sup>1</sup>

## Facts

On July 23, 2012, the Court faxed an Order requiring Plaintiff to respond to Defendant's discovery requests (Exhibit A). The Order was faxed to counsel of record for Plaintiff, John W. Dozier, Jr., on July 23, 2012, was postmarked to Mr. Dozier on July 25, 2012, and was not received, by mail, until July 28, 2012. (*See* Exhibit B). The Order required that Plaintiff respond to Defendant's discovery within fourteen (14) days. (*See* Exhibits A, B).

<sup>1</sup> Judge Maxfield has Ordered the parties to schedule all motions regarding discovery for hearing before him. This Motion for Sanctions involves a discovery dispute and has not been noted for Judge Maxfield's docket.

On August 6, 2012, Laura Marston (“associate counsel”) was notified that John W. Dozier, Jr., the sole partner of the law firm for which associate counsel works and Plaintiff’s counsel of record in this case, was dead. Within the hour, associate counsel contacted Jay McDannell, counsel for Defendant Newton, by phone and informed him of the death of Plaintiff’s counsel of record. Associate counsel also informed McDannell that the late Mr. Dozier had, prior to his death, informed associate counsel that Plaintiff, World Mission Society Church of God, intended to non-suit this matter.<sup>2</sup> McDannell informed associate counsel that Defendant Newton would consent to the nonsuit. McDannell did not, at this time, mention anything to associate counsel about alleged late discovery responses or threaten sanctions. In an August 6, 2012 email time-stamped 12:53 p.m., McDannell urged associate counsel to forward a copy of the non-suit “as soon as possible” and gave associate counsel a “deadline” of August 7, 2012 (Exhibit C). At 3:45 p.m. that day, McDannell emailed associate counsel and again agreed to consent to the nonsuit (Exhibit D). Associate counsel drafted an agreed nonsuit motion and forwarded it to counsel for Defendant Newton at 5:25 p.m. that same day (Exhibit E). Mr. Berlik responded to associate counsel’s email with a threat of sanctions if associate counsel would not affirmatively represent to Berlik that Plaintiff would not attempt to re-file the case after filing the nonsuit with the Court (Exhibit F). Associate counsel responded that if Defendant’s counsel would not agree to the nonsuit, associate counsel would proceed with filing the nonsuit motion with the Court (Exhibit G) (*See* Exhibit H (filed Nonsuit and Notice of Appearance)). At no time did associate counsel ever address or acknowledge Mr. Berlik’s and Mr. McDannell’s threats for sanctions, because up until that point, the nonsuit had been agreed to.

---

<sup>2</sup> There are privileged emails between Mr. Dozier and Plaintiff that demonstrate these facts. These emails will be available at the August 24, 2012 hearing and produced to the Court, under seal and *in camera*, at the Court’s request.

On Tuesday morning, August 7, 2012, associate counsel sent an employee to Fairfax County Circuit Court (from Glen Allen, Virginia) to file the nonsuit and to enter a notice of appearance on behalf of Laura Marston, in place of the late John W. Dozier, Jr..<sup>3</sup> On that date, Counsel for Defendants filed this Motion for Sanctions against Plaintiff.

**The Motion for Sanctions is Rendered Moot by the Nonsuit**

The Motion for Sanctions is rendered moot by Plaintiff's filing of the nonsuit. Defendant is not in any way prejudiced by the filing of the nonsuit or by the fact that Defendant did not receive discovery responses on August 7, 2012, due to the nonsuit. In fact, counsel for Defendant has not even alleged that Defendant will suffer prejudice. Discovery responses are unnecessary, as this matter will not proceed as filed.

**Plaintiff's Discovery Responses Were Not Due Until August 7, 2012**

On July 23, 2012, the Court entered an Order dated July 20, 2012, requiring Plaintiff to respond to Defendant's discovery requests (Exhibit A). Prior to receiving the Order, faxed by the Court on July 23, 2012 and addressed to John W. Dozier, Jr., counsel for Plaintiff had no notice that the Order had been entered. In fact, the Court did not mail a copy of the Order to Mr. Dozier until July 25, 2012, and that mailed copy was not received by Mr. Dozier's office until July 28, 2012 (Exhibit B). Thus, fourteen days after notice of the July 23, 2012 Order is August 7, 2012. Rule 1:7, Rules of Sup. Ct. of Va. On August 7, 2012, Plaintiff did not respond to discovery because Plaintiff nonsuited the case. The nonsuit preceded the discovery due date.

**Counsel for Defendant Did Not Meet and Confer Prior to Filing the Motion for Sanctions**

---

<sup>3</sup> Laura Marston joined Mr. Dozier's law firm on June 19, 2012, over six and a half months after this case was filed (and only six weeks prior to Mr. Dozier's death). Associate counsel had minimum involvement in the case prior to Mr. Dozier's death, and any and all involvement in the case was at the explicit direction of Mr. Dozier. Any indication in Defendant's Motion for Sanctions that associate counsel has been Plaintiff's counsel throughout the case is patently false, demonstrated by the fact that associate counsel had not even noted an appearance in the case when the Motion for Sanctions was filed.

In the praecipe for the Motion for Sanctions, Lee Berlik certifies to the Court that he did, in good faith, confer with counsel for Plaintiff prior to filing this Motion for Sanctions (Exhibit I). At the time the Motion for Sanctions was filed, Mr. Berlik knew that counsel of record for Plaintiff was deceased, knew that Plaintiff intended to nonsuit the case, and had agreed to that nonsuit. Mr. Berlik's only mention of the present motion to associate counsel was after he had knowledge of the nonsuit, and was in the form of a threat to prevent Plaintiff from re-filing this case (Exhibit F). Mr. Berlik never had a conversation or correspondence with anyone at Mr. Dozier's office regarding the motion for sanctions and certainly not with counsel of record.

#### **Plaintiff Did Not File the Nonsuit To Avoid Sanctions**

Counsel for Defendant asserts, in the Motion for Sanctions, that Plaintiff filed its nonsuit in an attempt to avoid the present Motion for Sanctions. This assertion is patently false. Counsel for Defendant was notified of Plaintiff's intent to nonsuit prior to making the threat of a Motion for Sanctions. Furthermore, the nonsuit was hand-filed by an employee of Mr. Dozier's, who drove from Glen Allen, Virginia, to Fairfax County, Virginia to file the nonsuit. The nonsuit was drafted, signed, in the employee's hands, and on the road prior to Mr. Berlik filing the Motion for Sanctions. In the Motion for Sanctions itself, Mr. Berlik admits that he knew of the nonsuit at the time he filed the Motion for Sanctions. Def.'s Mot. for Sanctions at 3. Thus, Mr. Berlik's assertion that the nonsuit was filed to avoid the filing of a sanctions motion is without merit.

#### **Defendant Comes to the Court with Unclean Hands**

Defendant has repeatedly failed to respond to Plaintiff's discovery requests. In fact, on July 17, 2012, associate counsel contacted counsel for Defendant and requested a phone call to meet and confer regarding Defendant's significant discovery deficiencies (i.e. unsupported and inapplicable objections in place of discovery responses) (Exhibit J). Counsel for Defendant

refused to meet and confer until associate counsel put in writing the discovery deficiencies (Exhibit K). On July 20, 2012, associate counsel sent to counsel for Defendants a detailed meet and confer letter describing every deficiency in Defendant's discovery responses (Exhibit L). By email dated July 24, 2012, Jay McDannell, counsel for Defendant, explicitly "promised" to deliver a response to the meet and confer letter on or before August 6, 2012 (Exhibit M). Counsel for Defendant did not provide the response on August 6, nor have they provided a response to date, because it was known that Plaintiff would file the nonsuit.

**Defendant's Requested Relief Should Be Denied**

Defendant's requested relief is demonstrative of the fact that counsel for Defendant is attempting to use this Motion for Sanctions, and threats thereof, to win an advantage in the case or to dispose of it outright. Defendant argues that Plaintiff's case is "frivolous," however, Plaintiff's case survived Defendant's Demurrer on the remaining counts (Exhibit N). Plaintiff has one voluntary nonsuit as a matter of right, Va. Code. § 8.01-380, and should not be sanctioned for choosing to enter a nonsuit. Plaintiff respectfully requests the Court to DENY Defendant's Motion for Sanctions in its entirety, and to award to Plaintiff attorneys' fees accrued in responding to this motion.

Dated: 8/17/2012

WORLD MISSION SOCIETY, CHURCH  
OF GOD A NJ NONPROFIT CORPORATION

By: Laura K. Marston

Laura K. Marston, Esq.

Virginia Bar # 73182

Dozier Internet Law, P.C.

11520 Nuckols Road, Suite 101

Glen Allen, VA 23059

Tel: (804) 346-9770

Fax: (804) 346-0800

email: [laura@cybertriallawyer.com](mailto:laura@cybertriallawyer.com)

*Attorneys for Plaintiff World Mission  
Society, Church of God*