

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

DECLARATION

v.

FREDERICK DIMOND, ROBERT DIMOND,
and MOST HOLY FAMILY MONASTERY,

Civil Action No. 08-CV-347C

Defendants.

Charles C. Ritter, Jr., hereby declares, under penalty of perjury:

1. I am an attorney admitted to practice before this Court and am a partner with Duke, Holzman, Photiadis & Gresens LLP, attorneys for the Defendants in this action. Duke, Holzman, Photiadis & Gresens LLP was substituted as counsel for Defendants in this action on or about May 12, 2010, in the place of the law firm of Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC.

2. I submit this declaration in support of Defendants' motion for an Order compelling Plaintiff to:

(i) provide meaningful responses to Interrogatories 1, 2, 5, 6 and 7 of Defendants' First Set of Interrogatories dated September 10, 2009,

(ii) provide certain documents requested in Defendants' Notice to Produce, dated September 10, 2009,

(iii) produce sound recordings of telephone conversations made by Plaintiff in the weeks following his departure from Most Holy Family Monastery ("MHFM"), between and among Plaintiff, Defendants, Joseph Myers and other unknown persons regarding Plaintiff's allegations against Defendants,

(iv) produce Plaintiff's writings, apparently intended to serve as transcriptions of the conversations between Plaintiff, Joseph Myers and Michael Lipscomb during their hotel stay immediately following their departure from MHFM, and

(v) produce a privilege log for the documents Plaintiff has withheld from production claiming privilege.

3. Plaintiff commenced this action by filing a summons and complaint in or about May 2008, alleging, inter alia, that Defendants had engaged in wrongful conduct relating to Plaintiff's entering MHFM in 2005 and Plaintiff's donations of approximately \$1.6 million to MHFM in connection therewith.

4. Defendants bring this motion to compel Plaintiff to produce certain documents and things and to provide a meaningful response to certain interrogatories propounded in this action pursuant to FRCP 37(a), which allows a party to apply to the Court for an Order compelling discovery.

5. Defendants hereby certify pursuant to FRCP 37(a)(2)(A) that they in good faith conferred or attempted to confer with Plaintiff to secure the discovery sought to be compelled without this Court's intervention.

6. Attached hereto as **Exhibit A** is a true copy of Defendants' Notice to Produce, dated September 10, 2009.

7. Attached hereto as **Exhibit B** is a true copy of Plaintiff's Response to Defendants' First Notice to Produce, dated January 25, 2010.

8. Attached hereto as **Exhibit C** is a true copy of Defendants' First Set of Interrogatories to Plaintiff dated September 10, 2009.

9. Attached hereto as **Exhibit D** is a true copy of Defendants' Second Set of Interrogatories to Plaintiff dated September 18, 2009.

10. Attached hereto as **Exhibit E** is a true copy of Plaintiff's Response Defendants' First and Second Sets of Interrogatories to Plaintiff, dated December 30, 2009.

11. Defendants' prior counsel sent several letters to Plaintiff's counsel in attempts to resolve these discovery disputes. Attached hereto as **Exhibit F** are true copies of several letters in chronological order between defense counsel (past and present) and Plaintiff's counsel relative to resolving the instant discovery dispute ranging from January to July 2010.

I. Plaintiff's Insufficient Interrogatory Responses.

12. Defendants seek a meaningful response from Plaintiff to Interrogatories 1, 2 , 5 6 and 7 of the First Set of Interrogatories to Plaintiff, dated September 10, 2009.

13. "[A]n evasive or incomplete disclosure, answer, or response [to an interrogatory] must be treated as a failure to disclose, answer, or respond." FRCP 37(a)(4).

14. FRCP 33(b)(3) requires that each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

A. Response to Interrogatory 1 is Incomplete.

15. Interrogatory 1: "Identify every religious organization of which you have been a member, a supporter, or with which you have been otherwise affiliated since 2000, and the reason, if any, why you decided to disaffiliate from that organization." See Exhibit C.

16. In response to Interrogatory 1, Plaintiff identified thirty organizations, but failed to state the reason, if any, why Plaintiff decided to disaffiliate from any of those organizations. See Exhibit E.

17. To date Plaintiff has failed and refused to supplement his response to this interrogatory and the incomplete response thereto must be treated as a failure to disclose, answer or respond. FRCP 37 (a)(4).

B. Response to Interrogatory 2 is Incomplete

18. Interrogatory 2: "When did you first decide that you wanted to become a Benedictine monk, and which teachings of the Order of St. Benedict influenced your decision to try to become a Benedictine monk?" See Exhibit C.

19. In response to Interrogatory 2, Plaintiff stated "I began to consider becoming a Benedictine monk in approximately April 2005." See Exhibit E. This response is incomplete as it fails to address "**which teachings**" influenced Plaintiff's decision to become a Benedictine monk.

20. To date Plaintiff has failed and refused to supplement his response to this interrogatory and the incomplete response thereto must be treated as a failure to disclose, answer or respond. FRCP 37 (a)(4).

C. Response to Interrogatory 5 is Unresponsive

21. Interrogatory 5: "Identify the monasteries that you consider to be legitimate members of the Order of St. Benedict." See Exhibit C.

22. Plaintiff responded "Upon information and belief, all monasteries of the Order of St. Benedict, i.e., those monasteries founded in accordance with the Order's applicable rules and procedures, are listed in two annual publications: *The Official Catholic Directory* and *The Catalogus of the Benedictine Federation*." See Exhibit E.

23. As Interrogatory 5 asks Plaintiff to identify the monasteries that **he considers** to be legitimate, the response provided by Plaintiff is not responsive to the interrogatory.

24. To date Plaintiff has failed and refused to supplement his response to this interrogatory and as such his response must be treated as a failure to disclose, answer or respond. FRCP 37 (a)(4).

D. Response to Interrogatory 6 is Unresponsive

25. Interrogatory: "Is St. Vincent's Archabbey in Latrobe, PA a legitimate Benedictine monastery at present, and was it a legitimate Benedictine monastery in 2005, at the time you entered Most Holy Family Monastery?" See Exhibit C.

26. Plaintiff responded that "Upon information and belief, St. Vincent's Archabbey in Latrobe, Pennsylvania is listed in the aforementioned works as a monastery of the Order of St. Benedict." See Exhibit E.

27. Interrogatory 6 is a simple "yes" or "no" question which Plaintiff attempts to dodge with a non-responsive statement.

28. To date Plaintiff has failed and refused to supplement his response to this interrogatory and as such his response must be treated as a failure to disclose, answer or respond. FRCP 37 (a)(4)..

E. Objection to Interrogatory 7 is Unfounded

29. Interrogatory No. 7 requests: "Identify experiences, research, and conversations, as alleged in paragraph 27 of the amended complaint, that let you to set aside your pursuit of priestly training." See Exhibit C.

30. Plaintiff responded that he "objects to this interrogatory as the information sought is neither relevant to the subject matter of this action, nor reasonably calculated to lead to the discovery of admissible evidence." See Exhibit E.

31. Interrogatory 7 asks Plaintiff to particularize the allegations of paragraph 27 of his amended complaint and is entirely relevant to the subject matter of this action. Plaintiff's objection thereto is wholly without merit.

32. To date Plaintiff has failed and refused to supplement his response to this interrogatory and his objection on grounds of relevance is not warranted nor is it sufficiently specific to be sustained. FRCP 33 (b)(4).

II. Outstanding Requests For Documents and Things.

A. Documents Concerning Donations

33. Defendants' Notice to Produce dated September 10, 2009, demanded, among other things:

5. Documents concerning donations made by you to any religious organization from December 31, 2003 to present; and
6. Documents concerning the donations made my you to MHFM, including but not limited to, cancelled checks, title transfers, annual statements from your brokerage accounts(s), and bank account statements.

34. Plaintiff's responses to these demands stated:

Response [to No. 5]: Plaintiff objects to this demand with respect to all religious organizations except for defendant Most Holy Family Monastery as it seeks documents that are neither relevant to the subject matter of this action, nor reasonably calculated to lead to the discovery of admissible evidence. Documents responsive to this demand with respect to defendant Most Holy Family Monastery are produced.

Response [to No. 6]: Plaintiff objects to this demand as vague, ambiguous, overly broad, or unduly burdensome. Without waiving said objections, documents are produced.

35. Of the 1,290 documents Plaintiff has produced so far in discovery, none include Plaintiff's tax filings or gift tax returns.

36. On June 18, 2010, I wrote a letter to Plaintiff's counsel addressing outstanding discovery issues, in attempts to achieve a good faith resolution of such outstanding and disputed discovery. The items requested in this letter included, among other things, Plaintiff's federal and state tax filings for 2003 through 2008, including all gift tax returns (as well as supplemental interrogatory responses as requested by prior defense counsel). See Exhibit F.

37. Plaintiff's counsel, by letter dated July 19, 2010, requested identification of where the tax return information had been requested previously and rationale for requesting such information. See Exhibit F.

38. Our firm responded by letter dated July 22, 2010, identifying applicable demands in the Notice to Produce served by prior counsel and explaining that the tax return filings are relevant to Plaintiff's donative intent of the subject funds at issue in this action. See Exhibit F.

B. Plaintiff's Failure to Produce Recordings and Writings.

39. It has been over eight months since prior defense counsel specifically requested that Plaintiff produce 1) the sound recordings of telephone conversations made by Plaintiff in the weeks following his departure from MHFM, between and among Plaintiff, Defendants, Joseph Myers and other unknown persons regarding Plaintiff's allegations against Defendants, and 2) Plaintiff's writings, apparently intended to serve as transcriptions of the conversations between Plaintiff, Joseph Myers and Michael Lipscomb during their hotel stay immediately following their departure from MHFM.

40. These writings and recordings are subject to automatic disclosure under FRCP 26(a)(1)(A)(ii) and therefore must be produced.

C. Plaintiff's Failure to Produce Privilege Log.

41. Defendants respectfully request that the Court compel Plaintiff to produce a privilege log for the documents Plaintiff has failed to produce based on privilege. In response to No. 2 of Defendants' Notice to Produce, Plaintiff objected to the production of responsive documents based on privilege, however, Plaintiff failed to provide Defendants with a privilege log to identify the documents to which it claimed the privilege applies.

42. Prior defense counsel memorialized previous requests for the privilege log by letter to Plaintiff's counsel on May 5, 2010. See Exhibit F. Plaintiff's counsel represented that the log would be forthcoming in May, 2010. However, to date Plaintiff has not produced a privilege log.

43. I certify that Defendants have pursued a good faith effort, as set out above, to obtain the subject documents and information without court action.

WHEREFORE, the Defendants respectfully request that the Court grant an Order compelling Plaintiff to: (i) provide meaningful responses to Interrogatories 1, 2, 5, 6 and 7 of Defendants' First Set of Interrogatories dated September 10, 2009, (ii) provide certain documents requested in Defendants' Notice to Produce, dated September 10, 2009, (iii) produce sound recordings of telephone conversations made by Plaintiff in the weeks following his departure from Most Holy Family Monastery, between and among Plaintiff, Defendants, Joseph Myers and other unknown persons regarding Plaintiff's allegations against Defendants, (iv) produce Plaintiff's writings, apparently intended to serve as transcriptions of the conversations between Plaintiff, Joseph Myers and Michael Lipscomb during their hotel stay immediately following their departure from Most Holy Family Monastery, and (v) produce a privilege log for the documents Plaintiff has withheld from discovery claiming privilege.

Dated: August 19, 2010

/s/ Charles C. Ritter, Jr.

Charles C. Ritter, Jr.