UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal Corporation,

Defendant,

And

PROTECT THE PENINSULA,

Intervenor-Defendant.
_____/

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO SHOW CAUSE

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DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO SHOW CAUSE (ECF 421)

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- *Osborn v. Griffin*, 2014 WL 12647954, at *2 (E.D. Ky. July 7, 201)
- *Palacino v. Beech Mountain Resort, Inc.*, 2015 WL 8731779, at *2 (W.D.N.C. Dec. 11, 2015)

I. INTRODUCTION

This motion stems from a dispute regarding the production of insurance policies pursuant to Rule 26. Peninsula Township previously produced a policy of insurance issued by Argonaut that may cover a damages judgment in this matter. Plaintiffs, however, believe there are other policies that may be responsible, and therefore, required to be disclosed pursuant to Rule 26. This is not the case. Ultimately, motions such as this pending motion to show cause against Peninsula Township represent the precise reason why good-faith meet and confer requirements exist under the Federal Rule of Civil Procedure and the local rules.

Plaintiffs' motion should be denied because: (1) Plaintiffs failed to meet and confer as required by Rule 37 in advance of filing the pending motion and (2) the insurance policy Plaintiffs seek was not subject to disclosure under Rule 26.

First, Plaintiffs failed to meet and confer in good faith. During a brief telephone call to discuss an entirely different motion (Plaintiffs' pending Motion to Compel filed against Intervening Defendant Protect the Peninsula (ECF No. 417)), Plaintiffs' counsel inquired regarding the production of an additional insurance policy that does not cover the loss period in this matter. In response, while Defense counsel questioned the need for the entire policy language, Defense counsel did not reject Plaintiffs' counsel's request. To the contrary, Defense counsel asked for a couple of days to confer with lead counsel, who was unavailable, regarding the issue. Plaintiffs' counsel raised no objection to allowing a few days for further action by Defense counsel.

Before those days could pass, and without even a simple telephone call, Plaintiffs filed the present motion, demanding that Peninsula Township be sanctioned, that its counsel be sanctioned, that Peninsula Township be required to reimburse Plaintiffs every dollar spent on mediation and settlement conferences for the entire case, and that Peninsula Township be ordered to produce

every privileged communication between its attorneys and insurance representatives – documents that are considered work product under Fed. R .Civ. P. 26(b)(3).

Consistent with Defense counsel's representations on the phone, counsel for Peninsula Township conferred, and the full policy was produced on August 8, 2023. (ECF No. 425; Exhibit A). After producing the policy, on August 10, 2023, Defense counsel reached out to Plaintiffs' counsel by phone to determine whether the motion would be withdrawn. The request was denied.

Second, the disputed policy was not required for production under Rule 26. As such, Peninsula Township's actions were substantially justified due to the irrelevance of the U.S. Specialty Insurance policy in question to this litigation. The U.S. Specialty Insurance policy is not applicable to this litigation, and, therefore, is not subject to production under Rule 26(a)(1)(A)(iv). The U.S. Specialty Insurance policy does not cover the loss period relevant to this case. As Plaintiffs conceded at a previous hearing on the Michigan Township Participating Plan's Motion to Intervene, Plaintiffs do not seek damages from before October 21, 2017. (ECF No. 392, PageID.14633-14634). The U.S. Specialty Insurance policy was in effect from July 21, 2013 to July 21, 2014: more than three years before the earliest date of Plaintiffs' damages period. (ECF No. 341, PageID.12536). Plaintiffs have been aware of this since April 25, 2023, when the declaration pages for the policy were filed with this Court. (*Id.*).

Plaintiffs knew the policy did not cover the loss period, yet filed this motion anyways, and even upon receipt of the entire policy language, still refused to withdraw the motion. Because Peninsula Township's actions were substantially justified by the irrelevance of this policy to Plaintiffs' claims to this case, Plaintiffs are not entitled to sanctions and the motion should be denied.

Moreover, Plaintiffs' request for sanctions should be denied because Plaintiffs failed to meet and confer in good faith to resolve the dispute prior to filing this motion, as required by Rule

37(a)(5)(A)(1). Instead, Peninsula Township should be awarded fees and expenses pursuant to Rule 35(a)(5)(B).

II. BACKGROUND

This dispute boils down to whether Peninsula Township was obligated to produce a policy of insurance obtained from U.S. Specialty Insurance, with a policy period of July 21, 2013 to July 21, 2014, a time period not in the scope of Plaintiffs' claims. During the pendency of this litigation, Peninsula Township produced to Plaintiffs a policy of insurance with Argonaut, which covers a time period for which Plaintiffs seek a judgment. As recently as June 15, 2023, Plaintiffs' counsel confirmed that Plaintiffs are not seeking damages from before October 21, 2017. (ECF No. 392, PageID.14633). In the Court's consideration of Plaintiffs' concession in response to the Michigan Township Participating Plan's Motion to Intervene, the Court did raise concerns regarding Peninsula Township's production of insurance policies in its Opinion and Order Denying Motion to Intervene (ECF No. 392):

> But this is not all to the story. **If**, as the Township asserts, **MTPP would be responsible for paying some of the Wineries' damages**, the Township appears to be in violation of Judge Kent's order compelling Peninsula Township to produce "a copy of any insurance policy covering Peninsula Township's litigation expense in this Lawsuit." (ECF Nos. 94, 336-1 at PageID.12279) (emphasis added).

In the same Opinion and Order, the Court then addressed the damages period for this litigation:

> The "sole reason" MTPP seeks to intervene in this matter is to assert the alleged conflict of interest regarding Miller Canfield representing the Wineries in this case as well as representing MTPP from around 1985 to February 2023 (ECF No. 357 at PageID.13120). MTPP claims that the Wineries are seeking damages for a fifty-one year period, but it is entirely unclear where this number is derived from. If the Wineries are seeking damages to cover acts during the time period in which the Township was a member of the MTPP, from 1986 to 2014, MTPP claims there is a conflict in the Wineries receiving damages stemming from this time period if the MTPP will be responsible for paying them.

> In response, the Wineries contend that their "monetary damages claim does not extend back to 2014 (let alone 51 years)" (ECF No. 370 at PageID.13846). The Wineries assert that they are bound by Michigan's three-year statute of limitations for injuries to persons or property, which is applicable in this § 1983 civil rights/personal injury action. *See* Mich. Comp. Laws § 600.5805(2) ("Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person or for injury to a person or property."); *see also Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986) ("In all actions brought under § 1983 alleging a violation of civil rights or personal injuries, the state statute of limitations governing actions for personal injuries is to be applied."). **Therefore, because the Wineries filed this lawsuit on October 21, 2020, the Wineries claim they may only seek damages back to October 21, 2017 (ECF No. 370 at PageID.13846). Given that there appears to be no legal basis for the Wineries to receive damages stemming from the period during which the Township was allegedly covered by the MTPP policy, MTPP has no basis to intervene in this lawsuit**, and the Court can deny its motion to intervene and disqualify for this reason alone.

(ECF No. 392, PageID.14633-14634) (emphasis added). The Court continued its analysis in addressing whether the MTPP should be granted intervention on a permissive basis: "Further, MTPP's concerns about a conflict of interest appear to have been remedie[d] by the Wineries' assertion that they are bound by the three-year statute of limitations, and therefore, MTPP's 'sole reason' for moving to intervene is not an issue that requires a Court decision." (*Id.* at 14643).

After oral argument on June 15, 2023, during which Plaintiffs conceded that they are not seeking damages from before October 20, 2017 (more than three years after the coverage period for the disputed U.S. Specialty Insurance policy terminated) counsel for Peninsula Township was under the impression that the issue regarding the production of the U.S. Specialty Insurance policy was resolved since Plaintiffs' own concession made the policy irrelevant to resolution of this case.

That remained the case until the afternoon of August 1, 2023, when Plaintiffs' counsel, Steven Ragatzki, and Defense counsel, Beau Rajsic, met and conferred regarding Plaintiffs' anticipated motion to compel against PTP. During that meet and confer – which dealt with issues of privilege and a joint defense agreement – Mr. Ragatzki expressed concerns that Peninsula Township may have failed to produce an insurance policy involving Tokio Marine or Sedgwick.

Mr. Rajsic explained that neither Sedgwick nor Tokio Marine issued a policy of insurance to Peninsula Township. Further, Mr. Rajsic noted Plaintiffs were already in possession of the Argonaut policy and the declaration pages for the U.S. Specialty Insurance policy. Plaintiffs seem to recognize this based on statements in their brief in support of this motion. (ECF No. 422, PageID.15103).

Nevertheless, Mr. Ragatzki countered that Plaintiffs needed the entire policy. Mr. Rajsic did not reject the request. To the contrary, Mr. Rajsic indicated he needed to confer with his lead counsel, Mr. Thomas McGraw, who was unavailable for several days, and asked for a few days to resolve the issue. Based on Mr. Rajsic's understanding of the conversation, Mr. Ragatzki understood the request and made no objection to Mr. Rajsic's representations.

Approximately 48 hours later, on August 1, 2023, and without any further conversation, Plaintiffs filed the present motion. (ECF No. 421). At no point did counsel for Peninsula Township reject the request to produce the policy as requested. Instead, on August 8, 2023, Peninsula Township produced the subject U.S. Specialty Insurance policy via a supplementary response to requests to produce. (ECF No. 425; Exhibit A). Peninsula Township noted in its production that it does not waive whether the policy is responsive, but rather that the production was made in good faith and in the spirit of discovery.

After producing the policy, and prior to commencing work on this response, on August 10, 2023, Mr. Rajsic contacted Mr. Ragatzki to ask that the pending motion be withdrawn in light of the production of the policy. The request was rejected.

Finally, while only tangentially addressed in Plaintiffs' legal argument, in the interest of disclosure, it is important to note that Magistrate Judge Kent ordered the Township to produce a copy of any insurance policy covering the Township's litigation expenses. That Order was issued on September 28, 2021. (ECF No. 94). On October 12, 2021, the Township produced to Plaintiffs

the Argonaut policy. (*See* ECF No. 422, PageID.15102; ECF No. 422-9). Upon information and belief, on or after August 18, 2022, nearly a year after Magistrate Judge Kent's Order, the Michigan Township Participating Plan/TMHCC made its first payment of fees related to this lawsuit. However, as Peninsula Township explained in its supplemental discovery responses, it is unclear whether those payments are required to be or are being paid pursuant to the U.S. Specialty Insurance policy. Either way, Peninsula Township produced the policy – and without waiving any argument regarding whether the policy is actually responsive – in the interest of open and complete discovery.

III. ARGUMENT

A. Peninsula Township's Actions Were Substantially Justified Because Production of the U.S. Specialty Insurance Policy Was Not Required Under Fed.R.Civ.P. 26(a)(1)(A)(iv).

The U.S. Specialty Insurance policy was in effect until July 21, 2014, at the latest. Plaintiffs admit that the earliest date to which their damages claim pertains is October 21, 2017. Therefore, as this Court has already ruled, the U.S. Specialty Insurance policy would not be responsible to pay for damages in this case. As such, Peninsula Township was not obligated to produce this policy under Rule 26(a)(1)(A)(iv). Peninsula Township's actions were substantially justified.

The Sixth Circuit has concluded that under Rule 37, a party's actions are "'substantially justified' if [the party] raises an issue about which 'there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.'" *Doe v. Lexington-Fayette Urban Cty. Gov't*, 407 F.3d 755, 765 (6th Cir. 2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). "There is a genuine dispute if the resistance to discovery 'has a reasonable basis in law and fact.'" *Osborn v. Griffin*, 2014 WL 12647954, at *2 (E.D. Ky. July 7, 2014) (quoting *Pierce*, 487 U.S. at 566 n.2 (noting that "a [party's] position can be justified even though it is not

correct")). The Supreme Court further reasoned that the phrase substantially justified "has never been described as meaning justified to a high degree . . . but rather justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565 (internal quotation marks omitted).

Plaintiffs' claim of wrongdoing, which, in turn, they argue supports sanctions, is that Peninsula Township was not "substantially justified" in allegedly failing to produce "insurance information mandated by Rule 26." (ECF No. 422, PageID.15105). Rule 26(a)(1)(A)(iv) provides that as part of initial disclosures a party must provide, "for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Based on the plain language of Rule 26, Peninsula Township was obligated to produce policies that may be liable to satisfy all or part of a possible judgment. This squares with the cases cited by Plaintiffs that the Township must produce "applicable" insurance agreements. *See*, *e.g.*, *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219 (10th Cir. 2015); *Palacino v. Beech Mountain Resort, Inc.*, 2015 WL 8731779, at *2 (W.D.N.C. Dec. 11, 2015) (awarding sanctions for failing to disclose applicable insurance policies). On the flip side of the coin, denial of a motion for sanctions under Rule 37 is appropriate when a party has produced relevant policies and has indicated that no others exist. *See Miller v. Tiger Style Corp.*, 2018 WL 6566553 (W.D. Tenn. Nov. 7, 2018) (denying motion for sanctions even though statements denying the existence of additional policies were equivocal).

The U.S. Specialty Insurance policy is not applicable under Rule 26(a)(1)(A)(iv). Based on Plaintiffs' concessions and the Court's previous ruling, the U.S. Specialty Insurance policy is not a responsive policy under Rule 26(a)(1)(A)(iv), due to the timeframe in dispute in this case.

Instead, as discussed *supra*, Plaintiffs' damages (to the extent they exist) only reach back to October 21, 2017. The U.S. Specialty Insurance policy period expired on July 21, 2014.

Of course, Plaintiffs knew the U.S. Specialty Insurance policy was not applicable before filing the present motion; they were in possession of the declaration pages showing the relevant policy period, and they were aware of the Court's ruling which denied MTPP's intervention based on Plaintiffs' judicial admission that it was not seeking damages before October 21, 2017. Nevertheless, the current motion was still filed.

Because the U.S. Specialty Insurance policy is not applicable and, therefore, not subject to production under Rule 26(a)(1)(A)(iv), Peninsula Township's actions were substantially justified, and no sanctions are warranted under Rule 37. Moreover, Peninsula Township's prior actions in providing the declaration page, confirming the policy period and its lack of relevance to this case, is further evidence of substantial justification for not producing the policy previously. Even then, as a show of good faith and in the interests of open discovery, Peninsula Township still produced the entire policy, despite its lack of relevance and inapplicability.

Moreover, while only tangentially addressed in Plaintiffs' motion, it is unclear whether the U.S. Specialty Insurance policy is covered under Magistrate Judge Kent's Order regarding payment of litigation expenses. (ECF No. 94). Principally, there remains a dispute regarding whether the U.S. Specialty Insurance policy is covering litigation expenses in this matter. While payments have been made by the Michigan Township Participating Plan/TMHCC, it is unclear whether those payments are being made pursuant to the U.S. Specialty Insurance policy. Moreover, upon information and belief, the first payments made by the Michigan Township Participating Plan/TMHCC did not occur until August, 2022 at the earliest. Magistrate Judge Kent's Order regarding insurance coverage was issued in September, 2021. Because questions

remain regarding whether litigation expenses are actually being paid pursuant to the U.S. Specialty Insurance policy, Peninsula Township's actions were substantially justified.

The Western District of Tennessee in *Tiger Style Corp.* aptly summarized an analogous situation in denying a plaintiffs' motion to compel:

> Mr. Miller and Ms. Rose are correct that Rule 26 requires the disclosure of excess and umbrella insurance policies, see Fed. R. Civ. P. 26(a)(1)(A)(iv) (requiring disclosure of "any" insurance policies), but the Court finds no basis to grant the Motion. One way to interpret Mr. Miller and Ms. Rose's request here is that they effectively seek an order commanding counsel for Tiger Style and Mr. Singh to produce a policy that, according to that counsel, does not exist. Obviously, that result is not possible, as "you can't always get what you want." The Rolling Stones, You Can't Always Get What You Want, on Let It Bleed (London Records 1969). While the authorities Mr. Miller and Ms. Rose cite are accurate, they are all factually distinct from this case. Cf. Palacino, 2015 WL 8731779, at *2; Garcia, 2015 WL 1880544, at *1; Regalado, 2015 WL 10818616, at *1; Cessante, 2009 WL 973339, at *4.

2018 WL 6566553, at *4.

Here, Plaintiffs seek sanctions based on a policy that does not cover the loss period. Peninsula Township was not required to produce an additional applicable policy that does not exist, as the policy referenced by Plaintiffs is inapplicable to the time period in question. Moreover, it is unclear whether the Township is or would be required to produce the U.S. Specialty Insurance policy under Magistrate Judge Kent's Order, and even if it was, the first payments were not made until nearly a year after the ruling.

Plaintiffs' unwarranted motion should be denied as Peninsula Township's actions were substantially justified.

B. Plaintiffs' Failed to Meet and Confer in Good Faith Prior to Filing the Present Motion Which Precludes an Award of Sanctions Under Rule 37(a)(5)(A)(i).

There was simply no need to file the present motion. Plaintiffs' alleged meet and confer was not performed in good faith. During the phone conversation on August 1, 2023 (a meet and confer regarding Plaintiffs' anticipated motion to compel against PTP), Peninsula Township,

through counsel, never rejected the production of the requested policy. To the contrary, Defense counsel requested a couple of days to confer with lead counsel, Mr. McGraw, who was unavailable. As requested, the policy was produced a few days later. Instead of filing the present motion, a follow-up phone call would have sufficed.

Rule 37(a)(5)(A)(i) precludes an award of sanctions "if the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action." Further, L.Civ.R. 7.1(d) dictates that "in the case of all nondispositive motions, counsel or *pro se* parties involved in the dispute shall confer in a good-faith effort to resolve the dispute." Ultimately, Plaintiffs failed to attempt in good faith to obtain the discovery before filing the present motion. Simply speaking, there was no dispute here. Peninsula Township did not reject the discovery that Plaintiffs seek in this motion – the production of the U.S. Specialty Insurance policy. Instead, at most, there was a reasonable request for a few days for Mr. Rajsic to confer with Mr. McGraw, who was unavailable. Mr. Rajsic ultimately conferred with Mr. McGraw, as he said he would, and the policy was produced.

This entire motion could have been avoided by a simple follow-up phone call or email, which one would anticipate to be within the scope of good faith conference under L.Civ.R. 7.1(d) and common courtesy.

C. Peninsula Township Should Be Awarded Expenses Pursuant to Rule 37(a)(5)(B).

Rule 37(a)(5)(B) provides for the payment of expenses upon the denial of the motion to compel:

> *If the Motion Is Denied*. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

Plaintiffs' current motion was not substantially justified, and an award of fees is not unjust, because this entire process could have been easily avoided had Plaintiffs complied with Rule 37's good-faith meet and confer requirements. Plaintiffs knew in advance that the U.S. Specialty Insurance policy did not apply under Rule 26, well before filing this motion. There was no substantial justification to file the present motion – and to refuse to withdraw it upon receipt of the entire policy, which confirms what was already known. Instead, Peninsula Township was forced to respond to the present motion, which is unnecessary. Further, this entire process – and expenditure of the Court's time and resources – could have been avoided as discussed *supra* through some common courtesy. Instead of any intervening measures, Plaintiffs went straight to filing this motion. Peninsula Township should be awarded fees and expenses.

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons summarized above, Peninsula Township respectfully requests that this Honorable Court deny Plaintiffs' motion to show cause, and award Peninsula Township fees and expenses pursuant to Rule 35(a)(5)(B).

Respectfully Submitted,

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Dated: August 14, 2023

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