

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT OF
THE TRIAL COURT

JENZABAR, INC., LING CHAI, and
ROBERT A MAGINN, JR.,

Plaintiffs,

v.

LONG BOW GROUP, INC.,

Defendant.

CIVIL ACTION NO. 07-2075-H

**DEFENDANT LONG BOW GROUP INC.'S EMERGENCY MOTION FOR RELIEF
PURSUANT TO RULE 37(D) DUE TO PLAINTIFF'S FAILURE TO ANSWER
INTERROGATORIES AND FAILURE TO APPEAR AT DEPOSITIONS**

Defendant Long Bow Group, Inc. ("Long Bow") respectfully requests, on an emergency basis, that the Court enter an Order pursuant to Mass. R. Civ. P. 37(d) imposing appropriate sanctions on plaintiff Jenzabar, Inc. ("Jenzabar") due to its failure to answer properly served interrogatories and failure to appear at a deposition properly noticed pursuant to Mass. R. Civ. P. 30(b)(6).

In support of this Motion, Long Bow offers the Affidavit of Adam B. Ziegler ("Ziegler Aff."), and exhibits thereto, and respectfully refers the Court to the legal authorities discussed in Long Bow's Opposition to Plaintiff's Emergency Motion for Protective Order.

In further support of this Motion, Long Bow states the following:

Jenzabar's Failure To Answer Interrogatories And Appear At Deposition

1. On April 7, 2009, Long Bow properly served written interrogatories on plaintiff Jenzabar. See Ziegler Aff. ¶ 2; Ziegler Exh. G. Long Bow's interrogatories sought evidence relating to the fundamental basis of the claims and allegations asserted against Long Bow by Jenzabar and the other plaintiffs. See Ziegler Exh. G. Without getting the information sought by these interrogatories, Long Bow cannot defend itself in this case. Without disclosing the information sought by these interrogatories, plaintiffs cannot prove the elements of their claims.

2. On May 26, 2009, Jenzabar served a document purporting to be its response to Long Bow's interrogatories. See Ziegler Aff. ¶¶ 11-12; Ziegler Exhs. F-G. Jenzabar refused, however, to answer every single interrogatory on the ground that the information sought was confidential, secret, and could be disclosed only pursuant to a confidentiality and impoundment order. See Ziegler Exhs. F-G.

3. On April 7, 2009, Long Bow properly served notices for depositions of the three named plaintiffs: Jenzabar (for April 29), Ling Chai (April 30), and Robert Maginn (May 1). See Ziegler Aff. ¶ 2; Ziegler Exh. A. Long Bow subsequently agreed to reschedule these depositions and amend the tracking order by six weeks at plaintiffs' request. See Ziegler ¶ 3.

4. On May 19, 2009, after plaintiffs' repeated refusals to supply dates for their rescheduled depositions, Long Bow re-noticed all three depositions to take place during the first week of June: Jenzabar (for June 1), Ling Chai (for June 5), and Robert Maginn (for June 6). See Ziegler Aff. ¶ 7; Ziegler Exh. C. On May 21, 2009, Long Bow served a second amended notice for the Jenzabar deposition, after Jenzabar failed to respond adequate to document

requests. The second amended notice added a topic addressed to Jenzabar's document retention, collection, and production efforts. See Ziegler Aff. ¶ 10; Ziegler Exh. E.

5. On May 29, 2009, plaintiffs' counsel stated that plaintiffs would not produce additional documents, would not answer the interrogatories, and would not appear for their noticed depositions. See Ziegler Aff. ¶ 15.

6. On June 1, 2009, Long Bow's counsel conducted the duly noticed Rule 30(b)(6) deposition of Jenzabar, but neither Jenzabar nor its counsel appeared. See Ziegler Aff. ¶ 17. The topics described in the deposition notice go to the heart of the claims and allegations in this case. Without the ability to discover this information, Long Bow cannot defend itself. Without disclosing this information, Jenzabar cannot prove its claims.

7. Barring an intervening order by this Court, Long Bow's counsel intends to conduct the duly noticed depositions of plaintiff Ling Chai on June 5, 2009 and plaintiff Robert Maginn on June 6, 2009. See Ziegler Aff. ¶¶ 18-19.

Rules Authorizing Sanctions For Jenzabar's Non-Compliance With Discovery

8. Mass. R. Civ. P. 37(d) authorizes specific sanctions against a party that fails to answer interrogatories and fails to appear for depositions, including the sanctions specified in Mass. R. Civ. P. 37(b)(2)(A)-(C). In addition, Mass. R. Civ. P. 37(a)(3) provides: "For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer."

9. Mass. R. Civ. P. 37(b)(2)(A) authorizes the establishment of facts adverse to the non-compliant party. Mass. R. Civ. P. 37(b)(2)(B) authorizes preclusion of evidence favorable to the non-compliant party. Mass. R. Civ. P. 37(b)(2)(C) authorizes, among other things, dismissal of a non-compliant plaintiff's action, in whole or in part.

10. Mass. R. Civ. P. 37(b) also authorizes – in addition to or in lieu of the sanctions above – that the court may order the non-compliant party to pay the reasonable expenses, including attorneys’ fees, caused by the failure to comply.

Nature Of Emergency And Need For Relief

11. An emergency exists because the discovery deadline in this case is June 19, 2009, and because three critical depositions – including the one for which Jenzabar failed to appear – are scheduled for this week of June 1 to June 6. Without this essential discovery, Long Bow cannot defend itself against the claims and allegations made by Jenzabar.

12. In addition, Jenzabar’s excuses, delays, and avoidance of discovery have imposed significant, undue financial burdens on Long Bow, a small, non-profit documentary film producer that is the defendant in this case. Long Bow cannot afford to engage in motions practice simply to get deposition testimony from the named plaintiffs and substantive answers to interrogatories seeking the basis of the claims and allegations against it.

WHEREFORE, defendant Long Bow respectfully requests the Court to enter an Order granting the following relief:

- (a) Order that this action be dismissed, in its entirety and with prejudice, pursuant to Mass. R. Civ. P. 37(d) and 37(b)(2)(C);
- (b) In the alternative, order preclusion of any and all evidence offered by plaintiffs in support of their claims, pursuant to Mass. R. Civ. P. 37(d) and 37(b)(2)(B);
- (c) In the second alternative, order plaintiffs immediately to answer interrogatories and to submit for depositions at a time convenient to Long Bow, and to pay all reasonable expenses, including attorneys’ fees, incurred by Long Bow in connection with this motion, Jenzabar’s Emergency Motion for Protective Order, and having to conduct the discovery improperly refused by Jenzabar.

Respectfully submitted,

LONG BOW GROUP, INC.



T. Christopher Donnelly (BBO # 129930)

Adam B. Ziegler (BBO # 654244)

DONNELLY, CONROY & GELHAAR LLP

One Beacon Street, 33rd Floor

Boston, MA 02108

617-720-2880 (tel)

617-720-3554 (fax)

Dated: June 1, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of
the above document was served upon the
attorney of record for each party by mail/~~by hand~~

Date: June 1, 2009 