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Defendant Ordered to Pay Attorney Fees for Discovery Violations

Jeff Mordock, Delaware Law Weekly

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The Delaware Court of Chancery has ordered a cash advance lender to pay a plaintiff's attorney fees and expenses after the loan company failed to comply with a court order to produce a spreadsheet detailing its annual percentage rates.

Vice Chancellor J. Travis Laster, who is overseeing the case, *James v. National Financial*, also criticized attorneys from Ciconte, Wasserman, Scerba & Kerrick of Wilmington and Chartwell Law Offices, a Philadelphia firm, for their role in the discovery violations. While Laster said the Ciconte Wasserman attorneys did not actively participate in the discovery violations, they should have more closely monitored the defendants' actions.

"On at least two occasions, the court cautioned Delaware counsel off the record about the need to play a more substantive role," Laster said. "Delaware counsel does not appear to have heeded those warnings. Had Delaware counsel been more involved, the current regrettable situation might have been avoided."

The vice chancellor also chastised the Chartwell attorneys, who alleged the discovery violations were the result of their lack of technological knowledge, according to court papers.

"Professed technological incompetence is not an excuse for discovery misconduct," Laster said.

Edward T. Ciconte of Ciconte Wasserman and Kenneth Dubrow, a Chartwell attorney, represented the defendants. The attorneys did not return multiple calls seeking comment.

While Laster ordered the defendants to cover the plaintiff's attorney fees and expenses, the vice chancellor did not individually sanction the attorneys.

Gloria James obtained a short-term loan from National Financial LLC, a Utah company that offers payday loans through a Delaware outlet operating as Loan Till Payday LLC. James borrowed \$200 for rent and groceries under a loan agreement that required 26 biweekly payments of \$60 with a final balloon payment of \$260, according to court documents. The total payments added up to \$1,620 with an annual percentage rate of 838.45 percent, the court said in its opinion.

James broke her hand after she took out the loan, limiting her ability to work. She made the first \$60 payment, but her injury impacted her ability to generate work and she missed the subsequent payments, according to court documents.

On Sept. 20, 2013, James filed a verified class action complaint in the Chancery Court. She alleged National's lending practices were "unconscionable" in light of the inequality between National and its customers and the company charged excessive interest rates.

Attorneys from Cross & Simon and Pires Cooley represented James. The attorneys asked the court to enjoin National from collecting on the loans made to her and other class members, issue a declaration that National's loan documents were not enforceable and that National violated the covenant of good faith.

Laster issued a discovery order requiring National to provide information for loans made between September 2010 and September 2013. National was required to provide plaintiff's counsel with 15 pieces of information, including the APR.

National produced an Excel spreadsheet, but left out certain information such as the schedule of payments, total amount of payments, and finance charges, according to court documents. Also, the APRs listed in the spreadsheet did not match loan documents used by the plaintiff's counsel.

National's principal, Timothy McFeeters, testified he created the initial spreadsheet himself and said the discrepancies between the APRs on the spreadsheet and in the loan agreements must have been an error that occurred when he exported the data.

James' counsel asked National to provide an updated spreadsheet with the correct APRs, but the new spreadsheet was never produced, according to court documents. Laster again ordered National to produce accurate loan history information with accurate APR calculations and the missing loan information.

However, instead of producing an updated spreadsheet, National produced a letter from NexVel Solutions, the information technology company hired to create a second spreadsheet. The letter alleged there was no automated way to convert paper records into an Excel database. NexVel also estimated it would take roughly 688 days to manually input the data, according to court documents.

James' counsel responded that NexVel's letter did not comply with the second discovery order. National countered by alleging its software vendor will not allow an outside company such as NexVel to access its information.

Plaintiff's counsel then asked for an affidavit detailing that the APRs were not accessible. National's attorneys produced a version of the NexVel letter with a notary stamp.

In October, James moved for default judgment against National as a sanction for the defendants' refusal to comply with the discovery orders. National's counsel informed the plaintiff's attorneys that they wanted to withdraw the NexVel letter because the executive whose signature appears on the letter had not signed it in the presence of a notary.

Laster declined to issue the default judgment, but did order National to pay James' attorney fees and expenses.

"In light of this record, the court is forced to conclude that National and its counsel willfully disregarded their discovery obligations and sought to mislead James and her counsel," Laster said. "Sadly, National's Delaware counsel bears some responsibility for the current situation."

Although Laster concluded that Delaware counsel did not appear to have participated in the discovery violations, he did criticize the firm for failing to stay "meaningfully involved in the case."

"The court expects Delaware counsel to play an active role in the discovery process, including in the collection, review and production of documents," he said. "If Delaware counsel does not directly participate in the collection, review and production of documents, then at a minimum Delaware counsel should discuss with co-counsel the court's expectations."

Laster said an entry of default judgment would be warranted, but declined to do so in light of the Delaware Supreme Court's guidance about using less punitive consequences. Instead, the vice chancellor said James is entitled to attorney fees and expenses since the second discovery order was issued.

"National's failure to comply with the second discovery order was not substantially justified," Laster said. "The excuses offered by National's counsel conflicted with positions National had taken earlier and with his professional obligations."

Richard H. Cross Jr. of Cross & Simon said the decision was good news for his client.

"I am pleased the judge granted the motion for sanctions and awarded us our fees," he said. "I hope the case continues to proceed and provide a recovery for Ms. James and the rest of the class."

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