

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**E. A. RENFROE & COMPANY,)
INC.,)**

Plaintiff,)

v.)

CV-06-WMA-1752-S

**CORI RIGSBY MORAN and)
KERRI RIGSBY,)**

Defendants.)

**DEFENDANTS’ WRITTEN RESPONSE TO THIS COURT’S
JANUARY 19, 2007 ORDER TO SHOW CAUSE**

Defendants Cori Rigsby and Kerri Rigsby (hereinafter the “Rigsbys”) hereby respond to this Court’s January 19, 2007 order to show cause (hereinafter the “January 19th order”).¹ In accordance with the January 19th order, the Rigsbys respectfully represent and show unto this Court as follows:

FACTS

1. From the late 1990s until 2006, the Rigsbys worked for Renfroe and

¹ Defendants reserve the right to supplement and respond to E.A. Renfroe & Company, Inc.’s (hereinafter “Renfroe”) second supplement to its show cause motion filed in this Court on January 31, 2007 (hereinafter “Renfroe’s second supplement”). However, counsel for the Rigsbys, who were present for the telephone call that gives rise to Renfroe’s second supplement, strenuously assert in this filing that Renfroe’s second supplement seriously mischaracterizes the

adjusted insurance claims following numerous catastrophes across the country. Renfroe v. Rigsby, CV-06-1752, Doc. 1 at 4-5. After Hurricane Katrina struck the Gulf Coast on August 29, 2005, Renfroe assigned the Rigsbys to work on State Farm insurance claims in coastal Mississippi. Id. at 6. Through this work, the Rigsbys became aware of documents that they believed demonstrated fraudulent and potentially criminal activities by State Farm. Renfroe v. Rigsby, CV-06-1752, Doc. 14 at 6.

2. During the weekend of June 3, 2006, the Rigsbys made copies of numerous documents that they “felt showed evidence that State Farm had committed criminal and fraudulent acts.” (Cori Rigsby Depo. at 105-107 (hereinafter referred to as “Cori Depo.”) attached hereto). The Rigsbys selected the documents that were to be copied, focusing on those claims that contained multiple engineering reports. (Cori Depo. at 106, 114; Kerri Rigsby Depo. at 87-89 (hereinafter referred to as “Kerri Depo.”) attached hereto). The Rigsbys made three copies of those documents. (Cori Depo. at 92; Kerri Depo. at 92-93).

3. On Monday, June 5, 2006, the Rigsbys called the Mississippi Attorney General’s Office and the United States Attorney’s Office and asked each to come to Cori Rigsby’s home and pick up a set of the documents. (Cori Depo. at 92, 94; Kerri Depo. at 97). The Rigsbys stored the third set in the attic of a friend

for a period of time. (Cori Depo. at 93; Kerri Depo. at 97-98).

4. The Rigsbys gave the third and last set of documents to Richard Scruggs later in the summer of 2006. (Cori Depo. at 94, 136-137; Kerri Depo. at 98). Kerri Rigsby testified by deposition that Cori Rigsby took the documents “to Richard Scruggs’ office in Moss Point.” (Kerri Depo. at 98). Cori Rigsby testified by deposition that at that time she “released the documents, and [she has] **not had any in [her] possession since.**” (Cori Depo. at 145) (emphasis added).²

5. In July of 2006, the Rigsbys became paid consultants for the “Scruggs Katrina Group.” (Cori Depo. at 7-8; Kerri Depo. at 103).

6. The instant lawsuit was filed in this Court on September 1, 2006. Renfroe v. Rigsby, CV-06-1752, Doc. 1.

7. On Friday, December 8, 2006, this Court entered the preliminary injunction that is the basis for its show cause order (hereinafter the “December 8th Injunction”). Renfroe v. Rigsby, CV-06-1752, Doc. 60.

8. On Monday, December 11, 2006, undersigned counsel for the Rigsbys each left a message on Kerri Rigsby’s cell phone to discuss the injunction. (Kerri Depo. at 125-126).³ At approximately 10:00 a.m. on December 11, 2006, counsel

² As reflected in their deposition testimony, the Rigsbys had different reasons for giving the documents to Richard Scruggs. (Cori Depo. at 102-105; Kerri Depo. at 99-100).

³ During the depositions of Cori Rigsby on Thursday, January 25, 2007, and Kerri Rigsby on Friday, January 26, 2007, Barbara Stanley, counsel for Renfroe, agreed that testimony related to

received notice that Renfroe had posted the required bond (Exhibit “A”); thus, the December 8th Injunction became effective on December 11, 2006.

9. On Tuesday, December 12, 2006, Rigsbys’ Counsel left another message on Kerri Rigsby’s cell phone, and sent a letter to the Rigsbys via certified mail attaching the injunction. (Kerri Depo. at 125-126). On the same day, Mississippi Special Assistant Attorney General Courtney Schloemer sent a letter to Richard Scruggs requesting that he turn over to the Mississippi Attorney General the set of the documents that the Rigsbys provided to Scruggs in the summer of 2006 (hereinafter the “December 12th Request”). (Exhibit “B”).

10. After the Rigsbys learned about the injunction and discussed it (Cori Depo. at 187; Kerri Depo. at 125), they understood that they “were required to tell Dick to give us back the documents” (Kerri Depo. at 126-127). Around or shortly after December 12, 2006, Cori Rigsby telephoned Richard Scruggs and requested the return of the documents. (Cori Depo. at 167, 169-170). Scruggs told Cori Rigsby that he had sent the documents to the Mississippi Attorney General’s Office in compliance with the December 12th Request. Id. As Cori Rigsby testified by deposition:

the December 8th Injunction and to the steps that the Rigsbys took to comply with the injunction would not be used to assert that the Rigsbys had waived their attorney-client privilege. (Cori Depo. at 166-167; Kerri Depo. at 125).

A. I called Dick. I requested that he have the documents for the Court. He told me that the attorney general had requested that he send them the copy of the documents and that he no longer had them.

Id. at 167.⁴

11. On Thursday, December 14, 2006, the Rigsbys filed their notice of appeal of the December 8th Injunction. Renfroe v. Rigsby, CV-06-1752, Doc. 62. Renfroe's Counsel also sent a letter to Rigsbys' Counsel requesting a list of locations where the documents could be picked up. (Exhibit "C"). Rigsbys' Counsel informed Renfroe's Counsel of the filing of the notice of appeal, and stated, "[w]e do not plan to produce documents until the motion to stay is heard by Judge Acker." (Exhibit "D"). Rigsbys' Counsel then telephoned the Scruggs Law Firm to determine the location of the documents. It was during this telephone call that Rigsbys' Counsel first became aware of the December 12th Request from the Mississippi Attorney General's office.

12. On Friday, December 15, 2006, the Rigsbys filed a motion to stay the

⁴ A "snapshot" taken shortly after December 12, 2006 reveals two things clearly: (1) neither Kerri nor Cori Rigsby had had copies of the documents since they transferred them to the Scruggs Law Firm in the summer of 2006, which was before this lawsuit was filed; and (2) they had contacted the Scruggs Law Firm and heard that Scruggs no longer had the documents. Based on these two points, there is no doubt that the Rigsbys had taken all reasonable steps to comply with the December 8th Injunction. Whether Scruggs' transfer of the documents to the Mississippi Attorney General on December 12, 2006 was reasonable under the injunction, as discussed more fully in Scruggs' submission on this date, is not relevant to this Court's analysis of whether Kerri and Cori Rigsby should be held in contempt. There is no question that the Rigsbys took all reasonable efforts to comply with the injunction including this telephone call. See Byrne v. Nezhat, 261 F.3d 1075, 1123 (11th Cir. 2001).

enforcement of injunction in this Court, and disclosed to this Court that: “Upon information and belief, the Mississippi Attorney General recently requested that The Scruggs Law Firm produce to the Attorney General’s office all documents previously provided to the firm by the Rigsbys.” Renfroe v. Rigsby, CV-06-1752, Doc. 63.

13. On Monday, December 18, 2006, at approximately 9:20 a.m., this Court denied the Rigsbys’ motion to stay. Rigsbys’ Counsel had additional conversations confirming the understanding that neither Cori nor Kerri Rigsby had documents in their possession and that they had not had documents in their possession since before this lawsuit was filed.

14. On Thursday, December 21, 2006, Rigsbys’ Counsel emailed Renfroe’s Counsel and stated, “Here is our response to the injunction. It is as we discussed several times this week, but that I am now confirming: the Rigsbys do not have documents. They gave them to the Scruggs firm.” (Exhibit “E”)

15. On Wednesday, January 3, 2007, Rigsbys’ Counsel wrote to Renfroe’s Counsel and informed her in writing that the Rigsbys had requested the return of the documents from the Scruggs Law Firm. (Exhibit “F”).

16. On Friday, January 5, 2007, Renfroe filed a motion for an order to show cause for contempt of court against the Rigsbys, Richard Scruggs, and the

Scruggs Law Firm. Renfroe v. Rigsby, CV-06-1752, Doc. 68.

17. On Tuesday, January 9, 2007, the Rigsbys filed a “time-sensitive” motion to stay the enforcement of the injunction in the United States Court of Appeals for the Eleventh Circuit. Rigsbys’ Counsel forwarded the same to opposing counsel. (Exhibit “G”).

18. On Thursday, January 18, 2007, the day after the Rigsbys had appeared before a grand jury, Rigsbys’ Counsel sent via U.S. Mail and via email a letter to Ms. Schloemer, on behalf of the Rigsbys, demanding the return of the documents that the Scruggs Law Firm had sent to her office in response to the December 12th Request. (Exhibit “H”). Cori Rigsby and Kerri Rigsby telephoned Ms. Schloemer the same day and made similar demands. (Cori Depo. at 167; Kerri Depo. at 134-135).

19. Following a hearing on pending motions, on Friday, January 19, 2007, this Court granted Renfroe’s show cause motion and ordered the Rigsbys, Richard Scruggs and the Scruggs Law Firm to show cause by February 2, 2007. Renfroe v. Rigsby, CV-06-1752, Doc. 88.

20. On Tuesday, January 23, 2007, Rigsbys’ Counsel called Ms. Schloemer to reiterate the Rigsbys’ demands for the return of the documents. Ms. Schloemer said that she would speak with her superiors but that she was certain she

would not be able to get the documents to Gulfport, Mississippi before the Rigsbys' depositions that were set for Thursday, January 25, 2007, and Friday, January 26, 2007. (Cori Depo. at 15-16).

21. In light of the January 19, 2007 show cause order, the Rigsbys filed a motion to reconsider the denial of their "time-sensitive" motion to stay in the Eleventh Circuit on Wednesday, January 24, 2007.

22. On January 24, 2007, there was publicity surrounding a proposed settlement of the Mississippi Attorney General's claims against State Farm. Rigsbys' Counsel telephoned Ms. Schloemer and left a voicemail message on her cell phone regarding the status of the Rigsbys' document demand in light of the proposed settlement. Cori Rigsby also telephoned Ms. Schloemer about the documents that same day. (Kerri Depo. at 137).

23. On Tuesday, January 30, 2007, Rigsbys' Counsel left another voicemail message on Ms. Schloemer's cell phone requesting that Ms. Schloemer return the call so that they could discuss the status of the Rigsbys' document demand in light of Judge Senter's rejection of the proposed settlement.

24. On Wednesday, January 31, 2007, Rigsbys' Counsel sent another email requesting an update on the status of the document demand. (Exhibit "I"). Ms. Schloemer responded that the documents could be returned. (Exhibit "J").

Rigsbys' Counsel worked with Ms. Schloemer to facilitate the shipment of the documents to the office of Rigsbys' Counsel the next day.

25. On February 2, 2007, Rigsbys' Counsel received the documents from the Mississippi Attorney General's Office via FedEx and immediately delivered the documents to counsel for Renfroe exactly as Rigsbys' Counsel had received the packaged and boxed documents. (Exhibit "K").

ARGUMENT

The basic standards that govern the analysis of contempt are clear.⁵ First, the petitioner must establish by clear and convincing evidence that the alleged contemnor violated the court's earlier order. Northside Realty Assocs. v. United States, 605 F.2d 1348, 1352 (5th Cir. 1979). Based on this Court's order arising out of the January 19, 2007 hearing, it appears that Renfroe has made this prima facie showing. Once this prima facie showing of a violation is made by the petitioner, the burden then shifts to the alleged contemnor "to produce evidence explaining his noncompliance" at a show cause hearing. Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991). At the show cause hearing, the contemnor is "allowed to show either that he did not violate the court order or that he was excused from complying." Mercer v. Mitchell, 908 F.2d 763, 768 (11th Cir. 1990). Absolute compliance is not the standard. Mobile

County Jail Inmates v. Purvis, 551 F. Supp. 92, 97 (S.D. Ala. 1982).

This Court should find that the Rigsbys have sufficiently shown cause why they should not be found to be in contempt. The Rigsbys have made “in good faith all reasonable efforts to comply.” United States v. Ryan, 402 U.S. 530, 534 (1971). The Roberts case cited and relied upon heavily by Renfroe is factually distinguishable and should not be followed by this Court.

I. The Rigsbys have made reasonable efforts in good faith to comply with the December 8th injunction.

The Eleventh Circuit has consistently applied the rule that an inability to comply is a complete defense to contempt. Watkins, 943 F.2d at 1301; Paraplastic, C.A. v. Cincinnati Milicron Co., 799 F.2d 1510 (11th Cir. 1986); Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984); United States v. Hayes, 722 F.2d 723 (11th Cir. 1984). To demonstrate “inability,” a contemnor must “offer proof beyond ‘a mere assertion of an inability.’” Watkins, 943 F.2d at 1301 (quoting Hayes, 722 F.2d at 725). Instead, “[p]arties subject to a court’s order demonstrate an inability to comply only by showing that they have made ‘in good faith all reasonable efforts to comply.’” Id. (quoting Ryan, 402 U.S. at 534); see also Chairs v. Burgess, 143 F.3d 1432, 1436 (11th Cir. 1998); Hayes, 722 F.2d at 725 (“[e]ven if the efforts he did make were ‘substantial,’ ‘diligent’ or ‘in good

⁵ See Chairs v. Burgess, 143 F.3d 1432 (11th Cir. 1998).

faith,’ . . . the fact that he did not make ‘all reasonable efforts’ establishes that [respondent] did not sufficiently rebut the . . . prima facie showing of contempt.” (citation omitted). Intent and willfulness are not elements of civil contempt. Mobile County Jail Inmates, 551 F. Supp. at 97. Therefore, “[c]onduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a **good faith effort at compliance**.” Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990) (citing Graddick, 740 F.2d at 1524) (emphasis added). “[A] person who attempts with **reasonable diligence** to comply with a court order should not be held in contempt.” Graddick, 740 F.2d at 1525 (emphasis added).

The key is “all **reasonable** efforts:” Renfroe’s legal principles are quoted out of context and tend to imply that only Herculean efforts constitute “all reasonable efforts to comply.” Applying the rules set out above to the facts of this case, it is clear that the Rigsbys made reasonable efforts in good faith to comply with the injunction. This Court must note that the injunction became effective at approximately 10:00 a.m. on December 11, 2006. Around or shortly after December 12, 2006, Cori Rigsby contacted Richard Scruggs and requested the return of the documents only to learn that the documents had already been delivered to the Mississippi Attorney General. (Cori Depo. at 167, 169-170). This

Court is left with two undeniable facts: (1) Cori and Kerri Rigsby have had no documents in their possession since this lawsuit was filed; and (2) within 24 hours of this injunction becoming effective, Cori and Kerri Rigsby had no ability to retrieve the documents.

The Rigsbys and their counsel made multiple requests to the Mississippi Attorney General demanding the return of the documents (Cori Depo. at 15-16, 167; Kerri Depo. at 134-135, 137; Exhibit H; Exhibit I; supra at 7-9), but were successful in securing the return of the documents only on the date of this filing. Upon receiving the documents from the Mississippi Attorney General, the Rigsbys, through their counsel, immediately tendered the documents to Renfroe's counsel. (Exhibit "K"). It is clear that the Rigsbys made the requisite "in good faith all reasonable efforts to comply" with the December 8th Injunction. For this reason, the Rigsbys should not be held in contempt of this Court.

II. The Roberts case is distinguishable.

Renfroe alleges in its brief:

In addition to various telephone conferences, Renfroe wrote to Defendants' counsel on December 14, December 18, and December 28, 2006 requesting the documents. Defendants responded on December 14, December 21, 2006, and January 3, 2007 saying that they do not have the documents because they had given them to Scruggs.

* * *

“[A] party subject to a court’s order demonstrates inability to comply only by showing that he has made ‘in good faith all reasonable efforts to comply.’” United States v. Roberts, 858 F.2d 698 (11th Cir. 1988). “Substantial,” “diligent” or “in good faith” efforts are not sufficient . . . Id. at 702.

As set out above, the key is “all **reasonable** efforts.” The standard is not absolute compliance.

In Roberts, the contemnor failed to produce business records in response to an administrative summons issued by the Internal Revenue Service. A magistrate found that the contemnor neither denied possession of the records nor raised the lack of possession as a defense and recommended that the summons be enforced. Neither party objected, and the trial court adopted the recommendation. The contemnor still did not produce the records and the IRS moved for a contempt order to coerce compliance. The contemnor then claimed that the records were not in his possession at the time the summons had been served. The trial court found the contemnor in contempt. The appellate court affirmed and held that the contemnor’s argument that he did not possess the records when the summons was served was precluded by the trial court’s enforcement order, which was *res judicata* on the issue of possession at that time. The court also held that there was ample evidence to support the trial court’s determination that the contemnor failed

to produce sufficient evidence to overcome the burden of continuing possession.

Roberts revolved around a failure to object. The appellate court found that the magistrate's finding on a factual issue, adopted by the district court without objection by either party, is not subject to attack on appeal except on grounds of plain error or manifest injustice. 858 F.2d at 701. Only after the appellate court had made that finding did it go on to conclude that even had objection been made, the contemnor's reasons for non-production were insufficient.

In the instant case, when this Court ordered the Rigsbys to produce the documents, the Rigsbys no longer had physical possession or control of the documents. In fact, the Rigsbys had given physical possession of the documents to their attorney in Mississippi before this lawsuit was filed. (Cori Depo. at 94, 136-137; Kerri Depo. at 98). The Rigsbys requested their Mississippi attorney produce the documents as directed, and were then informed that the documents were no longer in his possession. (Cori Depo. at 167, 169-170). The factual situation in this case was not presented or addressed in Roberts. This Court should follow the line of Eleventh Circuit cases that finds that "all reasonable efforts" and "reasonable diligence" protect a party from being held in contempt.

CONCLUSION

Because the Rigsbys have made "all reasonable efforts" and have used

“reasonable diligence” to comply with the December 8th Injunction, this Court should find that the Rigsbys have sufficiently shown good cause and should find that the Rigsbys are not in contempt.

Respectfully submitted,

/s/ Gregory H. Hawley
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CERTIFICATE OF SERVICE

I hereby certify that on the **2nd** day of **February, 2007**, I served a copy of the foregoing pleading upon the following counsel of record utilizing the CM/ECF system:

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