

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

**LAWRENCE TROY TOMLINSON, ET AL**

**CIVIL ACTION**

**VERSUS**

**NO: 06-0617**

**ALLSTATE INDEMNITY COMPANY**

**SECTION: "F" (4)**

**ORDER**

Before the Court is **Plaintiffs' Motion for Contempt Regarding Discovery Responses (doc. # 48)** filed by the plaintiffs, seeking an order from this Court holding the defendant, Allstate Indemnity Company, in contempt. Allstate filed an opposition memorandum.

**I. Factual and Procedural Background**

On January 17, 2006, Lawrence Tomlinson and Elizabeth Bowman Tomlinson, individually and on behalf of their two minor children, brought an action against Allstate Indemnity Company in the Twenty Fourth Judicial District, Jefferson Parish, alleging that Allstate acted in bad faith pursuant to Louisiana state law by not tendering their claim. The plaintiffs allege that their house located at 17 Madewood Drive, Marrero Louisiana, suffered extensive wind damage from Hurricane Katrina. On February 9, 2006, Allstate removed the claim to this Court, alleging complete diversity among the parties and an amount in controversy in excess of \$75,000.00.

The Tomlinsons propounded a set of interrogatories and requests for production of documents on Allstate on October 26, 2006. Allstate responded to the discovery on November 22,

2006. Unsatisfied with the responses, the Tomlisons filed a motion to compel which was heard on December 13, 2006. During the hearing, the parties reached an agreement on most of the issues raised by the motion to compel and therefore a significant portion of the motion to compel was denied as moot. (*See* Rec. Doc. No. 51). Several of the remaining issues were continued so the Court could conduct an *in camera* review of certain documents and so Allstate could supplement its memorandum with further information regarding certain software used by its adjusters to determine pricing of home repairs. The Court then issued three separate written orders regarding the issues raised in the motion to compel. (*See* Rec. Doc. Nos. 51, 60, and 79).

Fourteen business days after the motion to compel was heard, the Tomlinsons filed a motion for expedited hearing for the subject motion for contempt. The Court granted the motion for expedited hearing and set the motion for hearing on the briefs. Allstate then filed an opposition memorandum.

## **II. Standard of Review**

Rule 37(b)(2) authorizes courts to appropriately respond to and deal with parties which have disobeyed discovery orders. *Chilcutt v. U.S.*, 4 F.3d 1313, 1319-1320. A “court’s discretion in fashioning appropriate sanctions for parties who disobey their orders is quite broad, though not unlimited.” *Id.* Under Rule 37, if:

a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
- (E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

FED. R. CIV. P. 37(B)(2)(A)-(C).

Courts have concluded that “sanctions are proper upon a finding of wilfulness, bad faith, or fault on the part of the noncomplying litigant.” *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir.1992). The Fifth Circuit has noted that sanctions under Rule 37 are “predicated upon the presence of such factors as willful disobedience, gross indifference to the right of the adverse party, deliberate callousness, or gross negligence.” *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970).

Further, “sanctions are not predicated upon a party’s failure to satisfy fully the requirements of a production order when the failure ‘was due to inability fostered neither by its own conduct nor by circumstances within its control’.” *Id.* However, “that the type of conduct displayed by a party ha[s] no bearing on whether sanctions should be imposed, but only on the type of sanctions imposed.” *Chilcutt*, 4 F.3d at 1323 n.4.

### **III. Analysis**

The Tomlinsons contend that this Court ruled from the bench on several issues and ordered Allstate to comply within ten days of the hearing. They contend that Allstate did not comply with this Court’s order and has not yet provided: (1) the exact number of complaints made against Allstate with the Louisiana Insurance Commissioner since Katrina; (2) a listing of all lawsuits filed

against Allstate by Jefferson Parish homeowners; (3) all photographs ever taken in this matter; (4) all claims manuals, directives, and the like used by Allstate adjusters; and (5) a copy of all manuals, CDs, and other types of documents and other type of information given to all adjusters after Katrina on how to price the claims.

They contend that because Allstate has failed to comply with this Court's order, the Court should, pursuant to Rule 37, bar Allstate from introducing certain evidence at trial. They also seek the entry of several jury instructions unfavorable to Allstate.

Allstate contends that it has not disobeyed an order of this Court because a written order had not yet been entered prior to the filing of the motion for contempt. It further contends that it has complied with any agreements it had to provide discovery to the Tomlinsons.

**A. Number of Complaints and All Photographs Taken**

The Court first notes that the exact number of complaints made against Allstate with the Louisiana Insurance Commissioner since Katrina was only mentioned in passing during the hearing, presumably because the parties had apparently reached an agreement on the matter. Second, the issue of any photographs ever taken in this matter was never mentioned at all during the hearing. Thus, Allstate could not be in violation of an order of this Court on these issues, because this Court has not issued any ruling compelling discovery on these issues.

**B. A Listing of All Lawsuits filed Against Allstate by Jefferson Parish Homeowners**

During the hearing on this matter, the Court concluded that a listing of all lawsuits filed against Allstate by Jefferson Parish Homeowners could be relevant in discovery. However, the Tomlinsons overreach by stating that this Court ordered Allstate to provide the information within ten days. This Court did not state that Allstate must answer the discovery within ten days of the

hearing. Instead, this Court issued an order on January 8, 2007, and ordered that Allstate answer the discovery within ten days. Thus, filing a motion for contempt for failing to comply with a Court order on January 3, 2007, would be premature.

**C. Claims Manuals**

During the hearing on this matter, Allstate agreed to provide the claims manual used by its adjusters after Hurricane Katrina within ten days. According to both the Tomlinsons and Allstate, Allstate provided a claims manual used by its adjusters after Hurricane Katrina to the Tomlinsons. In this case, the Tomlinsons contend that this is not the only claims manual. Allstate, in contrast, contends that this is the claims manual.

Thus, the Tomlinsons contest the sufficiency of Allstate's responses to a request for production. If in fact the Tomlinsons contend that Allstate did not produce all the responsive manuals pursuant to an agreement, they should have filed a motion to compel instead of the subject motion for contempt. Further, because there is no ruling compelling discovery on this matter, Allstate could not have violated a Court order.

**D. A Copy of all Manuals, CDs, and Other Types of Documents Given to All Adjusters after Katrina**

Presumably this refers to the Tomlinsons' Request for Production Number 9 which seeks "a copy of all operating manuals, use manuals, protocol manuals which are used with all computer programs used by the adjusters to adjust, assign value, or to indicate the value of all property damage claims." During the hearing on this matter, this Court specifically continued this request so that Allstate could supplement its memorandum.

This Court did not rule on this issue until after it received Allstate's supplemental memorandum on January 11, 2007. Thus, Allstate could not have been in violation of any order

when the Tomlinsons filed their motion on January 3, 2007.

Federal Rule 37 plainly requires that before a Court issues the sanctions requested by the Tomlinsons, the disobedient party must be in violation of a Court order. Here, the Tomlinsons failed to show that Allstate disobeyed this Court's order. The request for sanctions is denied.

The Court also concludes that an award for Allstate is warranted pursuant to Rule 37(a)(4)(B). This Rule provides that:

[i]f the motion is denied, the court may . . . after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party . . . who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Here, the Tomlinsons filed a motion for contempt on two issues, photographs and complaints with the Commissioner, that they never addressed at the hearing on their motion to compel. They also seek a contempt ruling on Request for Production Number 9 which the Court specifically continued, and also for a claims manual which was subject to an agreement not before the Court.

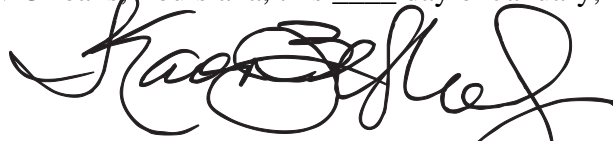
Finally, the Tomlinsons contend that this Court ordered Allstate to produce documents within ten days from the hearing, which the Court did not order. Thus, based on the foregoing, this Court concludes that the filing of this motion was not substantially justified and Allstate is awarded the costs it incurred in the filing of this motion. *See Larkin v. U.S. Dep't of Navy*, CIV.A.01-0527, 2002 WL 31427319, at \* 3 (E.D. La. Oct. 25, 2002) (awarding costs to non-moving party after concluding that movant did not have substantial basis for filing the motion).

Accordingly,

**IT IS ORDERED** that the continued portion of **Plaintiffs' Motion for Contempt Regarding Discovery Responses (doc. # 48)** is **DENIED**.

**IT IS FURTHER ORDERED** that to the extent that Allstate seeks to recover fees incurred in opposing the motion, it must file a motion by January 26, 2007, setting forth (1) an affidavit attesting to their attorney's education, background, skills and experience; (2) sufficient evidence of rates charged in similar cases by other local attorneys with similar experience, skill and reputation and; (3) the documentation required by Local Rule 54.2. Any opposition shall be filed no later than **January 30, 2007**.

New Orleans, Louisiana, this 23rd day of January, 2007

A handwritten signature in black ink, appearing to read 'Karen Wells Roby', written in a cursive style. The signature is positioned above a horizontal line.

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**KAREN WELLS ROBY**  
**UNITED STATES MAGISTRATE JUDGE**