



IT IS ORDERED as set forth below:

Date: August 15, 2012

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

In re:	:	Case No. 10-43028-MGD
	:	
CHRISTOPHER WARREN MATHIS	:	Chapter 7
and PAULA KAY MATHIS,	:	
	:	Judge Diehl
Debtors.	:	
	:	
RIVER CITY BANK,	:	
	:	
Plaintiff,	:	
	:	Adversary Proceeding
v.	:	
	:	No. 11-4023-MGD
	:	
CHRISTOPHER WARREN MATHIS	:	
and PAULA KAY MATHIS	:	
	:	
Defendant.	:	
	:	

**ORDER GRANTING IN PART PLAINTIFF'S
REQUEST FOR ATTORNEYS' FEES
AND DENYING DEFENDANT'S REQUEST FOR ATTORNEYS' FEES**

By Order entered on June 19, 2012, the Court granted in part and denied in part Plaintiff

River City Bank's Motion to Compel Discovery from Defendant. (Docket No. 67). Plaintiff now seeks to recover the attorneys' fees it incurred in bringing the Motion to Compel, and has filed an affidavit supporting its request. (Docket No. 71). Defendant filed a brief in opposition along with affidavits in support of his own request for attorneys' fees for having to defend against Plaintiff's Motion to Compel. (Docket No. 73). Plaintiff filed a response brief. (Docket No. 74). For the reasons stated below, the Court grants in part Plaintiff's request for attorneys' fees and denies Defendant's request for attorneys' fees.

This adversary proceeding has been pending since April 2011. A default judgment was entered against the Defendant on October 31, 2011 but was subsequently vacated by the Court on January 27, 2012. (Docket Nos. 17, 24). Plaintiff promptly undertook discovery by the service of written discovery on February 3, 2012. (Docket No. 29). Responses would have been required by early March 2012. Plaintiff filed its Motion to Compel in May 2012, proceeding under Federal Rule of Civil Procedure 37, applicable to this Court under Federal Rule of Bankruptcy Procedure 7037. 11 U.S.C. § 7037. The Court entered an order granting in part and denying in part Plaintiff's Motion to Compel.

In accordance with Rule 37(a)(5), Plaintiff now seeks to recover attorneys' fees incurred in making and resolving the Motion to Compel.

Rule 37(a)(5)(A) provides that if a

“motion [to compel] is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorneys' fees.”

Rule 37(a)(5)(C) further provides that a court may apportion reasonable expenses for the motion if

the motion is granted in part and denied in part. 11 U.S.C. § 37(a)(5)(C). Here, Plaintiff argues that it is entitled to attorneys' fees because it successfully brought a Motion to Compel. In response, Defendant argues that, under Rule 37(a)(5)(A)(i) and (ii), Plaintiff is not entitled to fees because Plaintiff failed to confer in good faith before bringing the Motion to Compel and because Defendant's opposition was substantially justified. Defendant further argues that attorneys' fees should be apportioned between the parties on the basis that Defendant is entitled to attorneys' fees.

The Court is not persuaded by Defendant's arguments. First, the Motion to Compel sets forth Plaintiff's compliance with the local rules requiring a good faith conference with opposing counsel prior to filing a motion to compel. Although Defendant disputes that Plaintiff's actions constituted a good faith effort to comply, the Court finds that the good-faith requirement was satisfied here. Second, the Court finds that the Motion to Compel was necessary for Plaintiff to obtain the relief requested. The Motion to Compel raised a number of issues, some of which were resolved prior to the hearing. The filing of the Motion to Compel contributed to Defendant's compliance with Plaintiff's requests in this respect, even before the Court ruled on the Motion to Compel.

In addition to the two reasons above, there is a third reason: Defendant's actions were not substantially justified. At the hearing on the Motion to Compel, the Court only made two rulings, as the other issues had been resolved. The Court first ruled that Defendant must provide additional discovery to Plaintiff by providing information on the identity of certain attorneys. Defendant argued the information was protected by the attorney-client privilege, but the Court overruled that objection. The other argument made – that Defendant did not see how the evidence was relevant and Plaintiff was required to first explain its relevance – does not make Defendant's action substantially justified. Next, while the Court did not order the production or disclosure of additional information concerning

the number and sale of cattle, which Defendant claimed he did not have, the Court expressly allowed Plaintiff the ability to obtain the information sought through a deposition. Plaintiff would not have been able to obtain the information sought without filing the Motion to Compel. Because the Court ruled in Plaintiff's favor in part and because Defendant's opposition to the Motion to Compel was not substantially justified, an award of attorneys' fees for Plaintiff is therefore justified.

Defendant argues, however, that Plaintiff is not entitled to all of its fees since it did not prevail on all of its arguments. The Court agrees. Defendant further argues that he should also recover attorneys' fees since the Court did not grant the Motion in full and since Rule 7037(a)(5)(c) permits the Court to apportion fees when a motion is granted in part and denied in part. The Court declines to do so because Plaintiff's Motion to Compel was substantially justified given the history and status of the case and the length of time required to obtain the responses.

As to the amount of an award of attorneys' fees for Plaintiff, the Court has reviewed the Affidavit of David M. Brearley on the attorneys' fees incurred and the itemization contained therein. Determining the amount of attorneys' fees to award a party under Rule 37 is within the sound discretion of this Court. *Gratton v. Great Am. Comm.*, 178 F.3d 1373, 1374-75 (11th Cir. 1999); *Kister v. District of Columbia*, 229 F.R.D. 326, 239-30 (D.D.C. 2005). Here, Plaintiff seeks \$4,569.50 for 24.7 hours of services. Because Plaintiff was required to bring the Motion to Compel, because Plaintiff prevailed on some of its arguments, and based on the hours and qualifications reported in the Affidavit of David M. Brearley, the Court finds that \$3000.00 is a reasonable fee. Accordingly, it is

ORDERED that Defendant **SHALL** pay the sum of \$3,000.00 to the law firm of Brinson, Askew, Berry, Seigler, Richardson, & Davis, LLP as the payment of expenses, including attorneys'

fees, pursuant to Bankruptcy Rule 7037(a)(5).

The Clerk of Court is directed to serve a copy of this Order on Plaintiff, Defendant, and their respective counsel.

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