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**IN THE
INDIANA TAX COURT**



NICK POPOVICH,)
)
Petitioner,)
)
v.)
)
INDIANA DEPARTMENT OF STATE)
REVENUE,)
)
Respondent.)

Cause No. 49T10-1010-TA-53

ORDER ON PETITIONER'S MOTION TO RECONSIDER DENIAL OF
PETITIONER'S SECOND MOTION TO COMPEL

NOT FOR PUBLICATION
June 4, 2014

WENTWORTH, J.

On April 24, 2014, this Court denied Nick Popovich's second motion to compel because he had not complied with the requirements of Indiana Trial Rule 26(F). See generally Popovich v. Indiana Dep't of State Revenue (Popovich II), 7 N.E.3d 419 (Ind. Tax Ct. 2014).¹ Popovich now asks the Court to reconsider its holding in Popovich II,

¹ Popovich's second motion to compel requested that the Court order the Indiana Department of State Revenue to produce certain original documents for use at a deposition. Because the facts and procedural history leading up to the filing of that motion are provided in the Court's opinion in Popovich II, the Court will not restate them here.

but the Court reaffirms its decision.

ANALYSIS

Popovich asks the Court to reconsider its denial of his second motion to compel for two reasons. First, Popovich claims that the Court erred in concluding that he needed to comply with Trial Rule 26(F). (See Pet'r Mot. Reconsider Denial Pet'r Sec. Mot. Compel ("Pet'r Mot. Reconsider") at 4-8.) In the alternative, Popovich claims that even if he was required to do so, the Court should excuse his failure to comply. (See Pet'r Mot. Reconsider at 8-9.)

Popovich initially explains that he issued a subpoena pursuant to Indiana Trial Rule 45 that required the Indiana Department of State Revenue's designated 30(B)(6) witness to appear for the deposition with certain original documentation. (See Pet'r Mot. Reconsider at 4-5.) Popovich therefore maintains that because his second motion to compel concerned the witness's compliance with Trial Rule 45, he had no obligation to comply with Trial Rule 26(F). (See Pet'r Mot. Reconsider at 8.)

Popovich's own language in his second motion to compel, however, brings him within the ambit of Trial Rule 37:

COMES NOW, Petitioner, Nick Popovich, by counsel, and moves the Court for an order under Indiana Rules of Trial Procedure ("TR") 37 compelling Respondent, Indiana Department of State Revenue ("the Department"), to fully comply with Petitioner's request for production of original documents in his Subpoena and Notice of Deposition[.]

(Pet'r Sec. Mot. Compel at 1 (emphasis added).) In addition, the sentence before his prayer for relief states

This Motion is brought because the Department failed to produce documents as duly requested at a deposition and refused to allow inspection as requested under TR 9.3(E) [sic] at a deposition, all in

violation of TR 37(A)(2).

(Pet'r Sec. Mot. Compel at 5 (emphasis added).) Accordingly, Popovich cannot now walk away from the requirements of the remedy he sought in his second motion to compel.² Moreover, Popovich could have filed a motion for contempt, the remedy for a violation of Trial Rule 45, thereby making compliance with Trial Rule 26(F) unnecessary, but he did not. See Ind. Trial Rule 45(F). Thus, after a second look, the Court reaffirms its finding that Popovich was required to comply with Trial Rule 26(F). See Popovich II, 7 N.E.3d at 422 (stating that "Trial Rule 26(F) requires a party seeking to compel discovery to attempt to resolve the discovery dispute before seeking Court intervention and to document its attempts in the motion"). See also Ind. Trial Rule 26(F).

Alternatively, Popovich claims that the Court should have excused his failure to comply with Trial Rule 26(F) because any effort to comply would have been futile. (See Pet'r Mot. Reconsider at 8-9.) Popovich points out that the Department acted repeatedly in a non-cooperative manner. (See Pet'r Mot. Reconsider at 5-9.) For example, Popovich explains that the Department waited until the eleventh hour to convey for the first time that its designated witness would not bring the original documentation to the deposition. (See Pet'r Mot. Reconsider at 5-6.) Popovich further explains that the Department did not respond to his prompt offer to accommodate its last minute communication, but instead sent its witness to the deposition without the

² Popovich has also claimed that his second motion to compel was not merely a motion to compel discovery, but was also a petition for sanctions and provisional relief under Trial Rule 37(B)(1). (See Pet'r Reply Supp. Pet'r Mot. Reconsider at 5-6.) Nonetheless, Popovich's claim muddies his own water because any action filed pursuant to any portion of Trial Rule 37 makes compliance with Trial Rule 26(F) a prerequisite. See Ind. Trial Rule 26(F). Moreover, the Court will hear argument on Popovich's Motion for Trial Rule 37 Sanctions, Including Judgment and Fees, filed about one month after his second motion to compel, as specified in the separate order issued on this date.

requested original documentation. (See Pet'r Mot. Reconsider at 6.) Moreover, Popovich states that the Department could have filed a defensive motion under Trial Rules 26 or 45 to protect itself from violating the terms of the subpoena, but instead it blatantly ignored and violated the trial rules altogether. (See Pet'r Mot. Reconsider at 5.) Popovich therefore maintains that any failure to comply with Trial Rule 26(F) on his part was "completely appropriate[] in the face of the Department's antics[.]" (Pet'r Mot. Reconsider at 7.) This argument, however, misses the point of the Court's holding in Popovich II.

The purpose of Trial Rule 26(F) is to limit the amount of time that courts must devote to resolving discovery disputes by encouraging the parties to make reasonable attempts to resolve the disputes themselves. See Howard v. Dravet, 813 N.E.2d 1217, 1223 (Ind. Ct. App. 2004) (stating that "[t]he vital resource of the trial court's time should be spent on discovery issues rarely and sparingly"). The requirements of Trial Rule 26(F) are neither discretionary nor onerous; indeed, in cases where one party improperly impedes an attempt at informal resolution, its opponent need only to advise the court of that fact when it files its discovery enforcement motion. See T.R. 26(F)(2); Whitaker v. Becker, 960 N.E.2d 111, 113 n.2 (Ind. 2012) (indicating that compliance with Trial Rule 26(F) is mandatory). Consequently, litigants are expected to comply with each of the specific requirements of Trial Rule 26(F) before moving to enforce, modify, or limit discovery, "even in instances where, like here, the entire discovery process has been imbued with acrimony." Popovich II, 7 N.E.3d at 423 (emphasis added). Popovich's failure to comply with Trial Rule 26(F) is not cancelled out by the purported bad behavior of its opponent and is not excusable.

For all of the reasons discussed above, Popovich's Motion to Reconsider Denial of Petitioner's Second Motion to Compel is DENIED. The Court EXPECTS the parties to obey its order to work cooperatively to resolve their discovery disputes without further Court intervention. See Popovich v. Indiana Dep't of State Revenue (Popovich I), 7 N.E.3d 406, 419 (Ind. Tax Ct. 2014).

SO ORDERED this ____ day of June 2014.

Martha Blood Wentworth, Judge
Indiana Tax Court

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