

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60785-CIV-ZLOCH

CARL HANKERSON,

Plaintiff,

vs.

O R D E R

FORT LAUDERDALE SCARP, INC.,
A&B IMPORT EXPORT, INC., and
AMIR SATTAR,

Defendants.

THIS MATTER is before the Court upon Plaintiff Carl Hankerson's Motion To Compel Inspection Of Electronically Stored Information (DE 55). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

By the instant Motion (DE 55), Plaintiff Carl Hankerson (hereinafter "Plaintiff") asks the Court to compel Defendant A&B Import Export, Inc. (hereinafter "Defendant"), to comply with its Production Request Numbers 1 and 2, by permitting an inspection of the computer or other electronic device used to create the pay stubs and time records Defendant has provided, as well as electronic and digital files related to the pay stubs and time records. Plaintiff has produced along with its Motion (DE 55), a version of a pay stub that Plaintiff had retained (DE 55, Exh. E), and a version of the pay stub that Defendant produced (DE 55, Exh. F). The Court has reviewed these exhibits and notes that while much of the information on the documents is the same, such as particular amounts, the formatting is different and some different

information is included. For example, the version produced by Defendant lists a number of hours and hourly rate that are not present on the version Plaintiff retained. In its Response (DE 59), Defendant appears at one point to object to a privacy invasion of "Defendant(s) lifeblood business I.T. equipment," DE 59, ¶ 5, and states at another point that records have not been kept in a computerized form, or at least not by Defendant itself, DE 59, ¶ 7. The Court is certainly in no position to comment on what records Defendant stored on computers, or how Defendant stored said records. The Court notes that DE 55, Exh. F, certainly appears to have been created on a computer; of course, the Court does not know by whom or by whose computer. Defendant seems to argue that it has computers, or a computer, as to which it objects to electronic inspection, but that it does not use said computer(s) to produce payroll stubs, which are instead produced by a third party payroll company. Federal Rule of Civil Procedure 34 states in pertinent part:

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody or control:

(A) any designated documents or electronically stored information . . . stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form . . .

Fed. R. Civ. P. 34(a)(1)(A). In In re: Ford Motor Company, the Eleventh Circuit said of this rule that it "does not grant unrestricted, direct access to a respondent's database

compilations." 345 F.3d 1315, 1316 (11th Cir. 2003). Further, the court said, "Like the other discovery rules, Rule 34(a) allows the responding party to search his records to produce the required, relevant data." Id. at 1317. Even in cases where there is suspected improper conduct, the Court is required to guard the responding party's information storage. Id. The court noted that "some kind of direct access might be permissible in certain cases," but looked for "a factual finding of some non-compliance with discovery rules." Id.

Here, while the documents produced in the exhibits are clearly visibly not identical, the Court believes that what has been produced up to this point falls short of providing the Court with the necessary documentation from which it could make a factual finding of non-compliance and thus permit Plaintiff as the requesting party to perform the desired inspection. The Court will deny the instant Motion (DE 55) in its present form, to the extent Plaintiff seeks an inspection of Defendant's computer or electronic devices. Said denial shall be without prejudice, should Plaintiff believe that it can proffer more evidence of non-compliance by which the Court could make such a finding.

The Court will grant Plaintiff's Motion (DE 55) with respect to Production Request Number 2, which seeks all electronic/digital files relating to the pay stubs and time records, to the extent that Defendant has any of the types of electronic files Plaintiff seeks and Defendant can produce copies of said files. The Court is not granting this request to the extent that it also seeks an inspection, but only to the extent that Defendant can produce such

files by its own inspection of its records.

Pursuant to Fed. R. Civ. P. 37(a)(5)(C), if a motion to compel is granted in part and denied in part, the Court is not required to apportion reasonable expenses for the motion. The Court also finds that reasonable people could differ as to the appropriateness of the discovery requests resolved in this Order. See Pierce v. Underwood, 487 U.S. 552, 565 (1988). Accordingly, no attorney's fees shall be awarded. Fed. R. Civ. P. 37(a)(5)(A)(iii).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Plaintiff Carl Hankerson's Motion To Compel Inspection Of Electronically Stored Information (DE 55) be and the same is hereby **GRANTED** in part and **DENIED** in part, without prejudice:

1. Defendant shall have up to and including noon on Wednesday, February 17, 2016, to serve upon Plaintiff's counsel copies of electronic files as described in Plaintiff's Production Request 2, consistent with the terms set forth in this Order; and

2. Defendant shall not be required to permit Plaintiff's inspection of its computer(s) or electronic device(s) or electronic file(s) at this time.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 1st day of February, 2016.



WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
All Counsel of Record