IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

MUSLIM COMMUNITY ASSOCIATION OF ANN ARBOR AND VICINITY, a/k/a MCA, Michigan Islamic Academy, a/k/a MIA,

Plaintiff,

v.

PITTSFIELD TOWNSHIP; *et al*.,

Defendants.

No. 2:12-cv-10803-PJD-DRG

NON-PARTY ZABA DAVIS' RESPONSE TO [CORRECTED] PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE'S ORDER TO QUASH AND FOR PROTECTIVE ORDER

Hon. Patrick J. Duggan

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INTRODUCTION

Plaintiff inexplicably (and quite inappropriately) begins its objections to Magistrate Judge Grand's Order[1] with an *ad hominem* attack against Ms. Davis' Jewish counsel, Mr. David Yerushalmi, for a statement he made in a press release. (Pl.'s Objection at 5 [Doc. No. 172]). Indeed, despite making this irrelevant and impertinent personal attack its opening argument to this court, Plaintiff proceeds to state that "it is unclear what exactly opposing counsel Yerushalmi means [by his public statement]." (Pl.'s Objection at 5). We then learn, however, that this statement by a Jewish lawyer in New York who has no connection whatsoever to Pittsfield Township is apparently "the latest example of the anti-Muslim haze that has always surrounded this case." (Pl.'s Objection at 5). Thus, even in its objections to the Magistrate Judge's Order, Plaintiff could not resist playing the "anti-Muslim" card in its opening hand.

Unfortunately, these attacks on free speech are par for the course for Plaintiff (and its attorneys). Indeed, Plaintiff's abuse of the discovery process to chill the free speech of private citizens is a primary reason why we (in particular, Ms. Davis, a non-party) are before the court today—as Magistrate Judge Grand's Order makes explicit. (*See* Order at 9-11 ["The subpoenas directed to Davis

[1] Ms. Davis will refer to Magistrate Judge Grand's "Order Granting Non-Party Davis' Motion to Quash and for Protective Order" (Doc. No. 103) throughout this response as the "Order."

should also be quashed as an undue burden on her First Amendment rights."]). Thus, and apparently unwittingly, Plaintiff has hoisted itself upon its own petard at the first opportunity, unable, apparently, to resist attacking anyone who makes public statements critical of Plaintiff (and its counsel).

Plaintiff next proceeds to compliment Magistrate Judge Grand for his generosity and expertise in handling matters related to this case. (Pl.'s Objection at 5). One can only surmise from this that Plaintiff does not consider Magistrate Judge Grand to be "anti-Muslim." Presumably, Plaintiff has no basis for claiming that Magistrate Judge Grand's thorough and well supported Order granting Ms. Davis' motion to quash *and* for a protective order (and thus awarding Ms. Davis her attorney's fees and costs) was motivated by an anti-Muslim bias or that it too was somehow part of "the anti-Muslim haze that has always surrounded this case." Indeed, Plaintiff makes clear that it has *no objections whatsoever* to Magistrate Judge Grand's Order *granting* Ms. Davis' motion (Pl.'s Objection at 6 [limiting objections to the fees and cost issue])—a concession that, quite frankly, undermines Plaintiff's objections to the Magistrate Judge's award of expenses, including attorney's fees and costs.[2] So it is that Ms. Davis will proceed to address

[2] It should be noted that in her motion, Ms. Davis made it clear that she was asking the Magistrate Judge to award her attorney's fees and costs pursuant to Rules 26 and 37. (*See* Non-Party Zaba Davis' Mot. to Quash & for Protective Order at 13 ["Ms. Davis further requests that the Court award her reasonable attorney's fees and costs pursuant to Rules 26(c)(3) and 37(a)(5) of the Federal Rules of Civil

the legal merits of Plaintiff's objections to the Magistrate Judge's Order regarding the fees and costs issue and will respond no further to Plaintiff's impertinent and utterly improper claims of anti-Muslim bias, which, as Plaintiff tacitly acknowledges, have *zero* relevance to the Magistrate Judge's Order under review.[3]

SUMMARY OF DISCOVERY DEMANDS

As set forth in the Magistrate Judge's Order: "On April 1, 2014, [Plaintiff] issued two subpoenas to non-party Zaba Davis, a community member who allegedly spoke out against the site plan. . . . One subpoena commanded Davis to

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Procedure."] [Doc. No. 89] [hereinafter "Davis' Mot."]). Yet, at no time in their response (Doc. No. 95) in opposition to Ms. Davis' motion did Plaintiff—having had "an opportunity to be heard," *see* Fed. R. Civ. P. 37(a)(5)—object to Ms. Davis' request for fees and costs. And Plaintiff certainly did not demonstrate that its overbroad and abusive discovery demands were "substantially justified," having cited only *one* case in support of its position—a case which was not relevant by any measure. (*See* Davis' Reply in Supp. of Mot. at 5-6 [Doc. No. 101]). Moreover, Plaintiff did not then—and has not now—set forth any basis for concluding that "circumstances make an award of expenses unjust." *See* Fed. R. Civ. P. 37(a)(5). Indeed, quite the opposite is true, particularly in light of the fact that the discovery sought by Plaintiff was against a non-party, private citizen, whose only involvement in this matter was to engage in constitutionally protected activity. (*See* Order at 9-11).

[3] In support of its objections, Plaintiff filed with this court an exhibit under seal (Doc. No. 173). Despite repeated requests from Ms. Davis' counsel for a copy of the filing—requests which included an analysis of the extant protective order demonstrating that disclosure is required in this instance—Plaintiff's counsel has refused to serve Ms. Davis' counsel with a copy of the document. Plaintiff's counsel also employed this tactic with the Magistrate Judge, who, quite appropriately, was "perplexed and troubled" by Plaintiff's actions. (*See* Order at 1 n.1 ["The Court has reviewed the redacted documents supplied under seal and is perplexed and troubled that they were filed in that manner."]). Indeed, this type of repeated behavior itself warrants sanctions.

produce certain documents by April 16, 2014, while the other commanded her to appear for a deposition on April 17, 2014. . . . Specifically, the subpoena for production of documents required Davis to produce:

> A complete copy of any and all documents and correspondences (including the email header showing the sender, all recipients, date and time of such email), and all other communications with (1) Pittsfield Township or any representative of Pittsfield Township, including members of the Planning Department, Planning Commission and Board of Trustees, regarding the proposed Michigan Islamic Academy project (MIA); (2) Planning Commissioners Deborah Williams and Michael Yi regarding MIA; (3) neighboring residents regarding MIA. Include copies of all documents, correspondences, leaflets, petitions or other material or information on any medium created or distributed encouraging (1) neighboring residents to oppose MIA and to attend hearings before Pittsfield Township, and (2) Pittsfield Township representatives to oppose MIA.

(Order at 3).

Magistrate Judge Grand quashed the subpoenas and issued the requested protective order. (Order at 11).

ARGUMENT

I. STANDARD OF REVIEW.

On April 16, 2014, this court entered an "Order of Reference" (Doc. No. 90), referring Non-Party Zaba Davis' Motion to Quash and for Protective Order (Doc. No. 89) to Magistrate Judge Grand for determination pursuant to 28 U.S.C. § 636(b)(1)(A).

Under 28 U.S.C. § 636(b)(1)(A), the district court "may reconsider any

pretrial matter [referred to the magistrate judge] . . . where it has been shown that the magistrate's order is clearly erroneous or contrary to law." Rule 72(a) of the Federal Rules of Civil Procedure "implements" § 636, providing that the "district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see Massey v. City of Ferndale*, 7 F.3d 506, 509 (6th Cir. 1993).

As stated by the Sixth Circuit:

> A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. The question is not whether the finding is the best or only conclusion that can be drawn from the evidence, or whether it is the one which the reviewing court would draw. Rather, the test is whether there is evidence in the record to support the lower court's finding, and whether its construction of that evidence is a reasonable one.

Heights Cmty. Congress v. Hilltop Realty, Inc., 774 F.2d 135, 140 (6th Cir. 1985); *Dunlap v. TVA*, 519 F.3d 626, 629 (6th Cir. 2008) (same).

Here, Magistrate Judge Grand's Order awarding attorney's fees and costs was not clearly erroneous nor contrary to law. Indeed, it was required by Rule 37. Fed. R. Civ. P. 37(a)(5) ("If the motion is granted . . . the court must . . . require the party . . . whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.").

II. OVERVIEW OF PLAINTIFF'S TWO OBJECTIONS.

Plaintiff raises two primary objections to the Magistrate Judge's award of attorney's fees and costs. First, Plaintiff claims that the Magistrate Judge did not "determine whether Plaintiff's actions were 'substantially justified'" and therefore, according to Plaintiff, "the Magistrate Judge misapplied the law of the rule upon which his fee and cost award relied." (Pl.'s Objection at 5). And second, Plaintiff claims "that the Magistrate Judge relied upon the wrong rule altogether," asserting that under the circumstances only Rule 45 of the Federal Rules of Civil Procedure would permit an award of fees, and unlike Rule 37, Rule 45 is discretionary as to whether fees and costs should be awarded. (*See* Pl.'s Objection at 14 ["While Fed. R. Civ. P. 45 requires a court to 'impose an appropriate sanction' for violation of the rule, it does not mandate the sanction be a fee award."]).

Plaintiff's objections are without merit, and we will begin with the second objection first since it can be dispensed with quite readily.

III. RULE 37 REQUIRES THE AWARD OF ATTORNEY'S FEES AND COSTS IN THIS MATTER.

Contrary to Plaintiff's objection, Rule 37 was the proper rule to apply in this matter. Ms. Davis moved for an order to quash and for a protective order under Rules 26 and 45 of the Federal Rules of Civil Procedure. (Davis' Mot. at 2). As Ms. Davis argued in her motion, "this Court has the authority to quash the subpoenas and issue 'an order to protect a party or person from annoyance,

embarrassment, oppression, undue burden or expense, including . . . forbidding the disclosure or discovery.' Fed. R. Civ. P. 26(c)(1); *see also* Fed. R. Civ. P. 45(d)(3)." (Davis' Mot. at 11). And in her motion, Ms. Davis requested "that the Court award her reasonable attorney's fees and costs *pursuant to Rules 26(c)(3) and 37(a)(5) of the Federal Rules of Civil Procedure*." (Davis' Mot. at 13) (emphasis added).

Here, the Magistrate Judge granted Ms. Davis' motion for a protective order. And pursuant to Rule 26(c)(3), "Rule 37(a)(5) applies to the award of expenses." Fed. R. Civ. P. 26(c)(3). Thus, in his ruling, Magistrate Judge Grand stated as follows:

> Davis requests reimbursement of the fees and costs she incurred in filing her instant motion pursuant to Rule 37(a)(5)(A), which provides, in pertinent part:
>
> > If the motion [*for protective order*] is granted . . . 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 attorney's fees.
>
> Accordingly, within 30 days of the date of this Order (or if objections are filed which are overruled, within 30 days thereafter), counsel for Davis and the MCA shall meet and confer to discuss an appropriate amount of such fees and costs to be paid to her by the MCA. In the event no agreement is reached, Davis may, within that same timeframe, submit a properly-supported petition to the Court for her reasonable fees and costs. MCA may have 14 days after the filing of any such petition to file a response thereto.

(Order at 11 n.8) (emphasis added).

Moreover, as Plaintiff acknowledges, "Fed. R. Civ. P. 37 does not afford federal courts any discretion: if a Fed. R. Civ. P. 37 motion is granted then 'the court must . . . require the party or deponent . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.['] Fed. R. Civ. P. 37(a)(5)(A)."[4] (Pl.'s Objection at 14 [claiming that "Fed. R. Civ. P. 37 does not afford federal courts any discretion. . . ."]). Thus, as Plaintiff tacitly (if not explicitly) acknowledges, the Order awarding fees in this case was proper.

In sum, contrary to Plaintiff's objection, granting Ms. Davis' request for attorney's fees and costs under Rule 37(a)(5) was correct. And as discussed further below, the award of fees and costs was completely justified under the circumstances.

IV. THE MAGISTRATE JUDGE'S ORDER MAKES CLEAR THAT THE AWARD OF ATTORNEY'S FEES IN THIS CASE WAS PROPER.

As noted previously, Plaintiff's objection "is limited to the Magistrate Judge's award of fees and costs." (Pl.'s Objection at 6). Consequently, Plaintiff raises *no* objections to the Magistrate Judge's substantive ruling, which sets forth the basis for his Order quashing the subpoenas and granting the requested protective order. Instead, Plaintiff complains that the Magistrate Judge failed to

[4] Indeed, this admission undermines Plaintiff's claim that the Magistrate Judge misapplied the rule by awarding fees and costs in this matter.

demonstrate in his Order that an award of attorney's fees was proper in this case. Plaintiff apparently has failed to read the Magistrate Judge's Order, *which makes evident* that Plaintiff's irrelevant and vexatious discovery demands upon Ms. Davis, *a non-party*, were *not* "substantially justified" and that there are *no* circumstances that would "make an award of expenses" in this case "unjust."[5]

At this point, we turn to the Magistrate Judge's Order itself and quote it in detail since it provides the best explanation as to why Plaintiff's objection is without merit. As stated in the Order:

> Davis has shown that the logical nexus between herself and the alleged injury is *far too removed for the type of invasive discovery requested of her*. The Board of Trustees has the legal authority to approve or deny the zoning petition, and is merely *advised* by the Planning Commission. Williams, who is not even a defendant in this action, is but a single member of the Planning Commission. Davis has no affiliation with either the Board or the Planning Commission, and is *merely a private citizen* who, *at most* is alleged to have distributed materials which resulted in increased public opposition to MCA's application. *For this reason alone*, the subpoenas directed to Davis must be quashed.

(Order at 8-9) (emphasis added).

[5] It is feckless (if not patently frivolous) to argue that the court should not award attorney's fees because the law firm representing the aggrieved party is a non-profit organization. (*See* Pl.'s Objection at 7). Is that the official position of the Council on American-Islamic Relations (CAIR)—a non-profit law firm that is representing Plaintiff in this case? Of course not. (*See* Second Am. Compl. ¶ 14 [requesting attorney's fees and costs] [Doc. No. 61]). Nor is it the law. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (stating that "'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel").

In a footnote, the Magistrate Judge makes further findings and conclusions demonstrating that a fee award is appropriate in this case:

> MCA's proffer as to the nature and extent of [Williams'] involvement is *extremely flimsy*. *Clearly, Williams' testimony suggests she and Davis were not working closely together*, and MCA makes no allegation that Davis or Williams bribed or otherwise coerced any person into voicing opposition to MCA's application. Indeed, MCA states that it does not suspect Davis engaged in any wrongdoing.

(Order at 9 n.6) (emphasis added).

Additionally, the Magistrate Judge concluded that the subpoenas directed to Ms. Davis should also be quashed as an undue burden on her First Amendment rights. In reaching this conclusion, the Magistrate Judge stated as follows:

> Under these indelible principles [of First Amendment jurisprudence] it is clear that permitting third-party discovery *into a private citizen's lawful actions on a matter of public debate* would clearly cause her and other individuals to be hesitant about becoming involved in the political process. Indeed *protecting against such a chilling effect is one of the First Amendment's very purposes*. MCA contends that its sole interest in deposing Davis stems from a genuine belief that she has what it believes to be relevant information, and not from any personal malice against her for her public opposition to the school. . . . *This argument fails for a few reasons*. First, as discussed above, the Court finds unpersuasive MCA's relevance argument. Second, for the reasons noted in the preceding paragraphs, to the extent information possessed by Davis is relevant, that relevance *is far outweighed* by the chilling effect that allowing the subpoenas would have on speech, not only for Davis, but for all others who wish to be involved in public discourse on matters of public concern. Thus, at least on the record before the Court as to Davis' limited activities *which were at least twice removed from the ultimate decisionmakers*, the Court concludes that any interest that would be served by requiring her to produce any

> of the requested materials is outweighed by the infringement on her First Amendment rights that would result from such compulsion.[6]

(Order at 9-10) (emphasis added).

> Thus, the Magistrate Judge concluded as follows:
>
> Having *fully considered* Davis' alleged involvement in the matter (*including the fact that her communications have no bearing on whether the Board itself acted with a discriminatory intent*), the need to protect Davis' First Amendment rights, and the availability of other evidence, the Court finds that Davis has shown that the subpoenas impose an undue burden on her. Accordingly, her motion to quash the subpoenas and for a protective order . . . will be granted.

(Order at 10-11) (emphasis added).

In sum, upon these *clear* findings—findings which demonstrate without question that Plaintiff's burdensome discovery demands were not "substantially justified"[7]—the Magistrate Judge concluded that attorney's fees and costs were

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[6] In a footnote, the Magistrate Judge also stated the following: "The Court also notes that many of the questions put to Williams during her deposition focused on emails exchanged between she [sic] and Davis that the MCA already possesses. And, to the extent the subpoenas seek correspondence between Davis and other Township officials, the MCA has other avenues of obtaining those materials." (Order at 10 n.7).

[7] Plaintiff's reliance on cases in which the court did not set forth detailed and specific findings and conclusions, which are provided in this case, is misplaced. Indeed, the principal case relied upon by Plaintiff, *Metrocorps, Inc. v. Eastern Mass. Junior Drum & Bugle Corps Ass'n*, 912 F.2d 1, 2 (1st Cir. 1990) (*see* Pl.'s Objection at 8-9), was a case in which the appellate court reversed an order *denying* the defendants their attorney's fees and costs—an award which Rule 37 requires, as Plaintiff acknowledges above, *unless* an exception is shown—because the judge did not set forth any findings "that the [plaintiffs'] failure [to obey its orders] was substantially justified or that other circumstances make an award of expenses unjust." In other words, if a court were to deny attorney's fees and costs

appropriate and set forth a reasonable approach to resolving that issue. (Order at 10-11 n.8). Indeed, under the circumstances set forth above and in the Order, it would be unjust (and contrary to Rule 37) to not award attorney's fees and costs in this matter.

CONCLUSION

For the foregoing reasons, Ms. Davis respectfully requests that the court reject Plaintiff's misguided objections to the Magistrate Judge's Order and affirm the award of attorney's fees and costs in this matter.

Respectfully submitted,

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Counsel for Non-Party Zaba Davis

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under Rule 37, then it must set forth findings demonstrating that the denial was justified under the rule—not the other way around, as Plaintiff claims. (*See* Fed. R. Civ. P. 37 advisory committee's note on 1970 amendment to subdivision (a)(4) [explaining that the amendment to the provision requiring the award of expenses, including attorney's fees, reverses the burden and places the onus on the losing party to demonstrate that its actions were "substantially justified," not the other way around, as Plaintiff argues]). Nonetheless, as set forth above, the Magistrate Judge's Order plainly shows that the award of fees and costs were justified in this matter under Rule 37.

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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