

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

<b>KEVIN McHALE, et al.</b>	)	<b>CASE NO. CV 09 709099</b>
	)	
<b>Plaintiffs</b>	)	<b>JUDGE JOHN P. O'DONNELL</b>
	)	
<b>vs.</b>	)	<b><u>JOURNAL ENTRY</u></b>
	)	
<b>ROTO-ROOTER SERVICES COMPANY, et al.</b>	)	
	)	
<b>Defendants</b>	)	

*John P. O'Donnell, J.:*

**STATEMENT OF THE CASE**

Plaintiff Kevin McHale alleges in this lawsuit that defendant Roto-Rooter Services Company, two of its officers, and one of its independent contractors all conspired to destroy his business. Discovery is ongoing and the plaintiff has now filed a motion to compel Roto-Rooter to respond to various requests for production of documents. The motion to compel has been fully briefed and this entry follows.

**STATEMENT OF FACTS**<sup>1</sup>

Kevin McHale is the owner of plaintiff Avon Plumbing, Inc., a plumbing contractor. On February 26, 2008, Avon Plumbing entered into two contracts with Roto-Rooter Services Company: an independent contractor agreement and an equipment rental agreement.

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<sup>1</sup> The alleged facts are taken from the pleadings, including the exhibits to the complaint, and briefs and exhibits on the motion to compel.

The independent contractor agreement permits Avon Plumbing to use the Roto-Rooter system and service marks as a plumbing contractor in Lorain County and part of Erie County and obligates Roto-Rooter to provide a business telephone and some advertising. In exchange, Avon Plumbing agrees to pay Roto-Rooter 40% of its labor sales, equipment rental charges, and other fees.

Other relevant terms of the contract include:

Contractor shall . . . use the Roto-Rooter system and service marks to sell and solicit sales of services.

Contractor shall perform each and every job . . . as an independent contractor . . .

Company shall in no event have any control or supervision over Contractor other than to enforce the terms of this contract, and Contractor at all times is an independent contractor.

The contract allows either party to terminate the agreement by giving a three-month notice to that effect at any time during the contract. By a letter dated August 26, 2008, Roto-Rooter terminated the contract effective December 2, 2008.

The caption of the plaintiffs' complaint describes it as for "fraud; conspiracy; for deceptive acts and practices; for breach of contract; for breach of good faith and fair dealing; for tortious interference with business relationships; for interference with contractual relations; and to intentionally cause a business failure."

The factual allegations in the complaint supporting these causes of action are generalized and disjointed, making the plaintiffs' claims difficult to penetrate. It appears that the plaintiffs claim that Avon Plumbing had a three-year independent contractor agreement beginning around early 2005 that was renewed and replaced by the two-year agreement here. Either before or after

the new contract, Roto-Rooter, despite its contractual lack of control over the plaintiffs, demanded that Avon Plumbing violate the Ohio Consumers Sales Practices Act by engaging in the deceptive practice of selling unnecessary “dig jobs.” Avon Plumbing refused. At that point, Roto-Rooter breached its obligation under the contract to support the plaintiffs’ business and installed defendant GSR Industries, LLC, as an independent contractor in the plaintiffs’ territory. According to the plaintiffs, Roto-Rooter then directed all of Avon Plumbing’s customers’ calls to GSR, sabotaged the plaintiffs’ equipment, and forced the plaintiffs’ workers to quit Avon Plumbing and work for GSR.

In discovery, the plaintiffs directed thirty-one requests for production of documents to the defendant Roto-Rooter Services Company.<sup>2</sup> The plaintiffs contend that Roto-Rooter has adequately responded to only five of the requests and has now moved to compel production of complete responses to the remainder.<sup>3</sup> The majority of the disputed requests relate to sales made by other contractors, Roto-Rooter’s dealings with other contractors, and complaints about Roto-Rooter and their contractors. The plaintiffs argue that discovery of these documents is necessary to “show the comparison of how plaintiff was treated differently than independent contractors in other locations”<sup>4</sup> and to show how other “contractors were treated after either refusing to participate in illegal activities or participating in such activities.”<sup>5</sup>

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<sup>2</sup> The plaintiffs did not include the requests for production as part of their motion to compel as required by Local Rule 8(E). However, Exhibit A to the defendant Roto-Rooter’s April 20 brief in opposition appears to reproduce the requests.

<sup>3</sup> The plaintiffs seek to compel responses to requests for production 1-11, 13-17, 20-26, and 29-31. The requests need not be reproduced here but are of record as Exhibit A to Roto-Rooter’s brief in opposition.

<sup>4</sup> Plaintiffs’ motion to compel, Page 2.

<sup>5</sup> Plaintiffs’ reply brief, Page 2.

Rule 26 of the Ohio Rules of Civil Procedure provides that “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter” of the lawsuit. Rule 401 of the Ohio Rules of Evidence defines relevant evidence as that evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evidence Rule 406 includes evidence of the habit or routine practice of a party as a category of relevant evidence, but only if the habit has “become semi-automatic”<sup>6</sup> or the routine practice is a “customary response to a regularly recurring situation.”<sup>7</sup> However, evidence of other acts that does not rise to the level of routine practice will ordinarily be excluded under Evidence Rule 404(B), which prohibits evidence of other acts to show that a party acted in conformity with past conduct on an occasion in question.

The plaintiffs’ claims of Roto-Rooter’s misconduct toward them may well have merit. It is also possible that Roto-Rooter has coerced other independent contractors to engage in deceptive practices and then destroyed those contractors’ businesses when they refused. However, it seems unlikely to have happened so often as to become semi-automatic or the defendant’s customary response to a regularly recurring situation. Moreover, even if squashing its honest contractors is the defendant’s routine practice, the plaintiffs cannot use only “other acts” evidence to prove their causes of action: they must produce direct evidence on the elements of their claims before the circumstantial evidence of the defendant’s routine practice becomes probative.

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<sup>6</sup> See *Bolan v. Adams* (1984), 19 Ohio App. 3d, 206.

<sup>7</sup> See *Cannell v. Rhodes* (1986), 31 Ohio App. 3d, 183, 185.

Because of the lack so far of that evidence, discovery of the disputed items is premature and the motion to compel is denied as to all the requests, except numbers 7, 8, 11 and 13, which are moot by virtue of having been answered. Once other discovery produces some separate evidence that Roto-Rooter terminated Avon Plumbing as an independent contractor because it would not defraud customers the plaintiffs' may again ask the court to compel production. In that event, production is likely to be ordered and the defendants' witnesses may be subject to second depositions for questions related to any information then produced.

**IT IS SO ORDERED:**

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JUDGE JOHN P. O'DONNELL

Date: \_\_\_\_\_

**SERVICE**

A copy of this Journal Entry was sent by e-mail, this 29th day of July, 2010, to the following:

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JUDGE JOHN P. O'DONNELL