

SUPERIOR COURT
of the
State of Delaware

William L. Witham, Jr.
Resident Judge

Kent County Courthouse
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Dover, Delaware 19901
Telephone (302) 739-5332

December 22, 2010

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Re: ***Halpern Family Property Investment LP v. Anderson, et al.***
Civil Action No. K09C-11-008 WLW
Letter Decision on Third Party Plaintiff's Motion to Compel
and Impose Sanctions

Dear Counsel:

Tolano and Cathy Anderson ("The Andersons" or "Third Party Plaintiffs") served John O'Brien ("Mr. O'Brien" or "Third Party Defendant") with a document production subpoena on December 22, 2009. At the time of service, Mr. O'Brien was not yet a party and was therefore served under Rule 45.¹ The discovery request was

¹ Mr. O'Brien became a party on January 7, 2010. He is now a third party defendant.

drafted by the Andersons' lawyer.² In relevant part, the subpoena required Mr. O'Brien to produce:

- (3) Copies of any and all documents in your possession for title insurance claims made within the last five (5) years for properties for which you were the closing attorney and/or settlement agent.

Mr. O'Brien filed a motion to quash in which he represented to the Court that compliance with the subpoena would require him to produce a burdensome 1,000 pages of documents.³ He also objected that the request was meant to embarrass him rather than to uncover relevant evidence (i.e., it would require Mr. O'Brien to produce evidence about unrelated incidents in which he may have failed to identify all interests while conducting a title search). Mr. O'Brien's motion asked the Court to quash the entire subpoena, rather than merely objecting to its over-broad elements. The Court denied the motion to quash on March 30, 2010. Mr. O'Brien then moved to reargue. That motion was denied on May 26, 2010, and the Court ordered Mr. O'Brien to comply with the subpoena within ten working days.

Mr. O'Brien responded to the Subpoena on June 10, 2010 by producing 55 pages (rather than the 1000 pages he had previously estimated). Mr. O'Brien sent a letter along with the discovery response, alluding to additional matters that could not

² The Court is aware that there is some degree of personal animosity between Mr. O'Brien and the Anderson's lawyer, Gary Dodge. The conflict apparently originates from the time when the two practiced law together.

³ See Mr. O'Brien's motion to quash, dated February 10, 2010.

be disclosed because they were subject to confidentiality. The letter states, in relevant part: “The FCS claim and the Wilgus claim were settled and involve other third parties and such settlement is bound by a confidentiality agreement.”

The Andersons inferred that Mr. O’Brien was withholding 945 pages of documents on an improperly raised claim of privilege.⁴ They filed motions to compel and find contempt.

PROCEDURAL HISTORY

On July 22, 2010, Commissioner Freud held a hearing on the motions. She found that the discovery process had become confused and unproductive, and she directed the parties to brief two issues: first, whether Mr. O’Brien should be compelled to produce documents that he had impliedly withheld; and second, whether Mr. O’Brien should be sanctioned for failure to comply with the subpoena.

Standard of Review

When information subject to a subpoena is withheld on a claim that it is privileged or otherwise protected, the claim shall be made expressly and supported by a description of the nature of the documents.⁵ Unjustified failure to comply with a

⁴ Del. Super. Ct. Civ. R. 45(d)(2) provides a mechanism for objecting to requests for the production of privileged documents. Mr. O’Brien never made such an objection.

⁵ Del. Super. Ct. Civ. R. 25(b)(5); Del. Super. Ct. Civ. R. 45(d)(2).

subpoena is grounds for a finding of contempt.⁶ An “evasive or incomplete response” to a discovery response is grounds for the imposition of sanctions.⁷

DISCUSSION

Mr. O’Brien’s September response to the motions to compel and find sanctions made it clear that he is not withholding documents under a claim of privilege. The Court finds it troubling that Mr. O’Brien’s uncooperative and perhaps obfuscating conduct has caused unnecessary confusion and delay. The Court will assume that Mr. O’Brien’s February estimate of 1000 pages was an honest, if grossly inaccurate, representation. At some point, Mr. O’Brien must have realized that compliance with the subpoena would require the submission of less than one-tenth of his earlier estimate. Yet, he failed to call the mistake to the attention of the Court and opposing counsel. Instead, he created further confusion by cryptically alluding to undisclosed, privileged matters.

Mr. O’Brien’s conduct is at least partially at fault for the confusing unproductive state of discovery in this case. He may be in violation of his ethical duty to avoid unnecessary cost and delay.⁸ However, Mr. O’Brien’s conduct does not quite arise to an “evasive or incomplete response,” which would justify sanctions under the

⁶ Del. Super. Ct. Civ. R. 45(e).

⁷ Del. Super. Ct. Civ. R. 37(a)(3).

⁸ Rules of Prof.Conduct, Rule 3.2.

rules governing discovery.⁹ He has, apparently, given a complete response, even if he has done so in a very uncooperative manner.

Counsel for the Andersons is also partially to blame for this unnecessary litigation. The initial discovery request was grossly over-broad. Literal compliance with the request, as written, would have been unnecessarily burdensome and embarrassing to Mr. O'Brien. There is no reason that the Andersons would require information about all of the title insurance claims made against Mr. O'Brien. It appears as if counsel for the Andersons was seeking information to show that Mr. O'Brien has a reputation for being incompetent. Of course, such a theory would be inadmissible. The Court is aware of the personal animosity between third party plaintiff's lawyer, Mr. Dodge, and Mr. O'Brien. A lawyer of Mr. Dodge's experience and ability is unlikely to have accidentally crafted such a clumsily over-broad and embarrassing request.¹⁰ It is also remarkable that Mr. Dodge has filed a voluminous

⁹ Del. Super. Ct. Civ. R. 37(a)(3). Similarly, Rule 45(e) provides sanctions for failure to comply with a subpoena. Del. Super. Ct. Civ. R. 45(e).

¹⁰ Commissioner Freud denied Mr. O'Brien's motion to quash. The motion to quash was largely based on the fact that evidence of unrelated title insurance claims would be irrelevant to this case. However, the standard for obtaining information through discovery is more liberal than the standard for relevance at trial. Information is discoverable if it is "reasonably calculated to lead to the discovery of admissible evidence." Del. Super. Ct. Crim. R. 26(b). Consequently, it is very difficult to exclude information from discovery on relevance grounds. Mr. O'Brien also couched his motion for reargument in terms of relevance, and that motion was denied. The most appropriate procedure for resisting the over-broad subpoena in this case would have been to move for a protective order. The Court has discretion to issue protective orders to limit discovery requests that would result in unnecessary annoyance, embarrassment, and oppression. Del. Super. Ct. Civ. R. 26(c).

amount of paper in support of this simple discovery motion, including an appendix and supplemental appendix of cases. He no doubt ran up large expenses in the effort, which would be assessed against Mr. O'Brien if the motion were granted. The Court is not so naive as to believe that to be a coincidence. In conclusion, the Court finds that Mr. Dodge has also acted in an uncooperative manner that has frustrated the discovery process.

Both lawyers have engaged in uncooperative conduct and obfuscating tactics in contravention of the spirit of the rules, which is "to secure the just, speedy and inexpensive determination of every proceeding."¹¹ As officers of the Court, attorneys have an ethical duty to avoid unnecessary cost and delay.¹² Further unnecessary litigation, expense, and delay will not be tolerated.

CONCLUSION

The Court declines to grant the motion to compel because Mr. O'Brien has apparently already complied with the subpoena. The Court declines to issue sanctions, as it appears both sides are at least partially at fault for the unnecessary confusion and delay of the discovery process.

Any further motions concerning discovery disputes must include a recitation of the efforts the movant has made to resolve that specific dispute in an amicable manner. As counsel is no doubt aware, "The Delaware Way" holds lawyers to high standards

¹¹ Del. Super. Ct. Civ. R. 1.

¹² Rules of Prof. Conduct, Rule 3.2.

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of professional courtesy and civility. The Court reserves the right to sanction either party (or their lawyers) for further uncooperative conduct that frustrates the discovery process.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Counsel