IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Redhawk Global, LLC,	:	
Plaintiff	:	Civil Action 2:11-cv-666
v.	:	Judge Sargus
World Projects Int'l, *et al.*,	:	Magistrate Judge Abel
Defendants	:	

OPINION AND ORDER

This matter is before the Court pursuant to the request of Plaintiff Redhawk Global, LLC ("Redhawk") for an extension of time under Fed. R. Civ. P. 56(d) to respond to the motion for summary judgment of defendants Interactive Logistics, Inc. ("Interactive") and World Warehouse & Distribution, Inc. ("WWDI").

I. Procedural Background

Redhawk brought suit in the Court of Common Pleas of Franklin County, Ohio against defendants World Projects International, Inc. ("WPI"), World Projects Services International, Inc. ("WPSI"), JRO Holding, Inc. ("JRO"), WWDI, Interactive, John Rouse, Nicholas Jacomides, and Kevin O'Shea. Redhawk alleged that WPI and WPSI engaged it to provide freight services for a construction project owned by nonparty Foster-Wheeler North America. WPI and WPSI allegedly failed to pay Redhawk all of the money it was due from Foster-Wheeler, due to a scheme amongst the defendants to divert or otherwise withhold the payments. JRO is the

parent company of WPI and WPSI, and was the parent company of WWDI, until its purchase by Interactive. Rouse, Jacomides, and O'Shea are the owners and principals of JRO. WPI and WPSI have filed bankruptcy in the Southern District of Texas.

Defendants Interactive and WWDI moved for summary judgment on May 5, 2012, arguing that (1) there is no genuine issue of material fact as to whether Interactive or WWDI are liable for unjust enrichment (the sole claim pled against them), and (2) Redhawk lacks standing to assert claims against Interactive and WWDI, as any such claims would be derivative of those possessed by WPI against them and can be brought only by the trustee of WPI's bankruptcy estate.

On May 21, 2012, Plaintiff filed a motion to compel. It requested that the Court enforce "Plaintiff Redhawk Global, LLC's First Set of Interrogatories and Request for Production of Documents Propounded upon Certain Defendants". (Doc. 37-1.) The defendants to whom these discovery requests were promulgated comprised all non-bankrupt defendants. (*Id.*) To its motion to compel, Plaintiff attached a copy of certain discovery responses made by Defendants Rouse, O'Shea, Jacomides, and JRO. (Doc. 37-2.) It also attached correspondence to (Doc. 37-3) and from (Doc. 37-4) counsel for these four responding defendants concerning their discovery responses.

On April 27, 2012, before the motion to compel was adjudicated, Plaintiff filed the instant request for additional time to respond to the motion of Interactive

and WWDI for summary judgment. In it, Plaintiff stated that there were material facts unavailable to it concerning its claim for unjust enrichment against Interactive and WWDI, as it had not yet received satisfactory responses to its discovery requests. These, it stated, would permit it to demonstrate the overall scheme amongst the defendants to improperly withhold funds from Redhawk and the benefits unjustly conferred upon Interactive and WWDI. Discovery would also, Plaintiff argued, permit it to respond to their arguments that it lacked standing to bring claims, as it could show that Redhawk had claims not common to all creditors of WPI.

On May 22, 2012, the Magistrate Judge issued an order granting in part and denying in part Plaintiff's motion to compel. On May 29, 2012, Plaintiff filed a reply brief in support of its extension request. In it, Plaintiff stated that the Court's discovery order had validated its claims "that it is without critical and necessary information to adequately respond to Defendants' summary judgment motion." (Doc. 58 at 2.) Plaintiff stated further that the discovery order compelled "all Defendants, including Defendants WWDI and Interactive to provide various answers to interrogatories and responses to numerous requests for production of documents." (*Id.*)

II. Discovery Order

In its motion to compel, Plaintiff put forth a set of discovery requests it had promulgated upon all defendants (Doc. 37-1), certain unsatisfactory responses from Defendants Rouse, O'Shea, Jacomides, and JRO (Doc. 37-2), and correspondence

relating to those responses. The Magistrate Judge identified Rouse, O'Shea, Jacomides, and JRO as the "responding defendants," stated explicitly that "[t]he Court will evaluate those responses [to] which Plaintiff objected in its letter of February 1, 2012", and issued specific rulings relating to these responses. (Doc. 56 at 2, 4-5.) This order therefore pertained only to the actual controversy Plaintiff put before the Court – the unsatisfactory responses and objections by these four defendants. The Magistrate Judge did not issue a blanket ruling applicable to responses by other defendants not before the Court, and the discovery order compelled no action other than that Defendants Rouse, O'Shea, Jacomides, and JRO supplement the discovery responses about which Plaintiff had complained. This distinction is material to Plantiff's request for an extension, because the motion for summary judgment was brought solely by parties not addressed in the discovery order – Defendants Interactive and WWDI.

III. Rule 56(d)

A party may move for summary judgment at any time. The party opposing the motion may do so by requesting an opportunity to conduct additional discovery. Fed. R. Civ. P. 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
> (2) allow time to take affidavits or declarations or to take discovery;
> (3) issue any other appropriate order.

The party opposing the motion has the burden of showing that additional discovery

would likely demonstrate the existence of controverted material facts. *See Chilingirian v. Boris,* 882 F.2d 200, 205 (6th Cir. 1989). There is no absolute right to complete all discovery. *Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989). The scope of discovery is within the sound discretion of the court. *Id.* It would normally limit any such additional discovery to that relevant to the summary judgment motion. *Directory v. Ohio Bell Telephone,* 833 F.2d 606, 609 (6th Cir. 1987). Further, if the facts needed to oppose summary judgment are within the control of the party opposing the motion, then it should submit an affidavit(s) rather than seek additional discovery. *Emmons*, 874 F.2d at 356.

A party seeking discovery under Rule 56(d) must support that request with an affidavit demonstrating the need for the discovery. *Plott v. General Motors Corporation,* 71 F.3d 1190, 1196 (6th Cir. 1995). The party opposing summary judgment must present valid reasons justifying its failure of proof: "A party invoking [Rule 56(d)] protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits . . . and how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact." *Id.*, quoting *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975). The affidavit should detail the discovery sought. *Good v. Ohio Edison Co.,* 149 F.3d 413, 422 (6th Cir. 1998). The party moving for the right to conduct discovery under Rule 56(d) has the burden of demonstrating how the discovery will enable it to demonstrate

that there are controverted material facts. *Id.* Courts of appeals consider the following factors in determining whether the trial court abused its discretion in refusing to permit the requested discovery:

> (1) when the appellant learned of the issue that is the subject of the desired discovery, *see Woods* [*v. McGuire*], 954 F.2d [388] at 391 [(6th Cir. 1991)]; (2) whether the desired discovery would have changed the ruling below, *see Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 138 (6th Cir. 1993); *Elvis* [*Presley Ents., Inc. v. Elvisly Yours, Inc.*], 936 F.2d [889] at 894 [(6th Cir. 1991)]; *Rhodes v. McDannel,* 945 F.2d 117, 119 (6th Cir. 1991), *certiorari. denied,* 502 U.S. 1032 (1992); *Shavrnoch* [*v. Clark Oil and Refining Corp.*], 726 F.2d [291] at 294 [(6th Cir. 1983)]; (3) how long the discovery period had lasted, *see Woods*, 954 F.2d at 391; *Emmons,* 874 F.2d at 359 n.8; (4) whether the appellant was dilatory in its discovery efforts, *see Frank v. D'Ambrosi,* 4 F.3d 1378, 1384 (6th Cir. 1993); *McTighe v. Mechanics Education. Soc'y of Am., Local 19,* 772 F.2d 210, 213 (6th Cir. 1985); and (5) whether the appellee was responsive to discovery requests, *see Tarleton* [*v. Meharry Medical Coll.*], 717 F.2d [1523] at 1534-35 [(6th Cir. 1983)]; *Glen Eden* [*Hospital v. Blue Cross and Blue Shield of Michigan, Inc.*], 740 F.2d [423] at 428 [(6th Cir. 1984)].

Plott, 71 F.3d at 1196-97.

The district court should examine the sufficiency of the Rule 56(d) affidavit. The affidavit must detail the discovery sought. *Good, supra.* The party must show what specific facts it hopes to discover that will raise an issue of material fact. *See Hall v. Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986). "Denial of a [Rule 56(d)] application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation." *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991). Bare allegations or vague assertions of need without

supporting proof are insufficient. *See Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 409 (6th Cir. 1998); *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996).

IV. Plaintiff's Request

In their motion for summary judgment, Defendants Interactive and WWDI asserted that WWDI never received any payments from Foster-Wheeler regarding the construction project, and that it was later sold in an arms-length transaction to Interactive, an unrelated entity with no involvement in the project. (Doc. 33 at 3-4.) Accordingly, they argued, no relevant benefit was ever conferred on either party, and Plaintiff cannot maintain a claim for unjust enrichment against them. To support this argument, Defendants attached an affidavit from Defendant Kevin O'Shea, stating that WWDI had nothing to do with the construction project and had no contact with Plaintiff, and an affidavit from nonparty Daniel Deitch, associate general counsel of Interactive, stating that Interactive had nothing to do with the construction project, that its purchase of WWDI was an arms-length transaction, and that no other defendant had owned any interest in Interactive or vice versa. (Docs. 33-1, 33-2.)

In response to this, Plaintiff argued that delays in obtaining discovery have prevented it from presenting evidence concerning the parties' ownership and financial relationship. Plaintiff's counsel, in an affidavit accompanying the 56(d) motion, stated:

> 4. Concerning Redhawk's unjust enrichment claim against Defendants WWDI and Interactive, Redhawk must still ascertain the common ownership and control that the individual Defendants have in the corporate Defendants. Likewise, Redhawk must obtain information relating to any agreements among the corporate Defendants, information relating to the corporate formation of the corporate Defendants, information relating to the contracts between the individual Defendants, and information relating to agreements between the principals and corporate Defendants subject to Redhawk's Motion to Compel. [...]
>
> 10. Redhawk seeks to obtain information in discovery that Interactive and WWDI committed specific harms against Redhawk that are not common to all of WPI's creditors. This information would rebut Defendants' argument that Redhawk's claim would "affect all creditors" and "rest with the bankruptcy trustee alone." There is no way to know this for sure until Redhawk has the opportunity to conduct adequate discovery.

(Doc. 49-1.)

Absent from Plaintiff's affidavit is an explanation of what, exactly, it anticipates finding in discovery to refute Defendants' arguments. The "specified reasons" standard demanded by Rule 56(d) is more stringent than a vague fishing expedition into the general nature of Defendants' businesses. Plaintiff does not state here that it has some particular reason for believing that funds unjustly ended up in the hands of WWDI or Interactive, and that if it obtained certain records or information it would be able to prove that this belief is true.[1] Plaintiff has not

[1] Defendants also argue, as noted above, that Plaintiff lacks standing to bring claims that can only be asserted by the WPI/WPSI bankruptcy trustee. Plaintiff has similarly failed to explain with specificity what facts essential to its assertion of individualized claims it lacks. However, in light of counsels' recent representations (Doc. 57) that the bankruptcy trustee has sought leave to retain Redhawk's counsel to assert these claims, it is unnecessary for the Court to address the standing question in further detail at present.

attached copies of the discovery requests which, if satisfied, would provide the missing evidence. *Good, supra.* As noted above, if these are the same as the set of interrogatories and requests for production of documents accompanying Plaintiff's motion to compel, Plaintiff has neither sought nor received any relief relating to Defendants Interactive and WWDI.

Plaintiff has the burden of showing how the discovery sought will enable it to demonstrate that there are controverted material facts. *Id.* However, Plaintiff has, in its briefs and affidavit, merely stated again and again that if it had all the facts it could properly understand the defendants' scheme. In its motion, it also asserted:

> Even assuming the truth of Defendants' statement that they received no moneys from Foster-Wheeler, Defendants could have received an inequitable benefit as a result of the actions and/or benefits received by the individual defendants who are principals in Interactive and WWDI due to their fraudulent behavior. What's more, Redhawk should be afforded the opportunity to discovery into any benefits Defendants may have incurred unjustly from failing to pay Redhawk for services provided.

(Doc. 49 at 6.) Rule 56(d) requires more than speculation that, if it could obtain more discovery, a party might find some way to support a claim. It requires a specific explanation of what a facts the movant would assert are true and why it cannot yet prove them.

As Plaintiff Redhawk has failed to show that, "for specified reasons, it cannot present facts essential to justify its opposition," its motion under Fed. R. Civ. P. 56(d) to deny or to delay the Court's consideration of Defendants' motion for summary judgment is **DENIED**. Any memorandum contra Defendants' motion for

summary judgment shall be filed within ten (10) days of the date of entry of this Opinion and Order.

IT IS SO ORDERED.

6-5-2012
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE