

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ORIGINAL
FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
MAR 26 2003
LUTHER L. WILSON, Clerk
By: [Signature] Deputy Clerk

CHEP USA,

Plaintiff,

v.

MOCK PALLET COMPANY,

Defendant.

CIVIL ACTION
NO. 1:02-CV-2053-BBM

ORDER

This action is currently before the court on the plaintiff's motion to compel discovery [Doc. No. 11-1]; the plaintiff's motion for a protective order [Doc. No. 12-1]; the defendant's motion to compel discovery [Doc. No. 15-1]; the defendant's motion for an award of attorneys' fees [Doc. No. 14-1]; and the plaintiff's unopposed motion for leave to file an affidavit under seal [Doc. No. 20-1].

Factual and Procedural Background

CHEP USA, a New York partnership (hereinafter "CHEP" or the "plaintiff"), filed this action on July 24, 2002 against Mock Pallet Company, a Georgia corporation (hereinafter "MPC" or the "defendant"), alleging conversion of property

and seeking monetary and injunctive relief. On September 19, 2002, MPC answered CHEP's complaint, asserting a counterclaim of unjust enrichment and also seeking monetary and injunctive relief. Essentially, the parties are seeking an adjudication regarding title to approximately 35,000 to 40,000 shipping pallets CHEP says it owns and MPC claims it has rightfully acquired.

Discovery in this action is currently set to close on April 21, 2003. On February 14, 2003, CHEP filed a motion to compel MPC to provide substantive responses to certain discovery requests. On the same date, CHEP also moved for a protective order regarding the exchange of confidential information between the parties. On February 18, 2003, in turn, MPC also filed a motion to compel CHEP to provide substantive responses to certain of its discovery requests, and requested an award of attorneys' fees in connection with such motion. On March 7, 2003, CHEP moved for leave to file under seal an affidavit in support of its motions and in response to MPC's motions.

The court now considers the parties' motions.

Discussion

The Federal Rules of Civil Procedure permit discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party" and permit the

court to “order discovery of any matter relevant to the subject matter involved in the action.” Fed. R. Civ. P. 26(b)(1). It has long been recognized that this, and all other discovery rules, are to be afforded “a broad and liberal treatment,” as “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” Hickman v. Taylor, 329 U.S. 495, 507 (1947); accord Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 540 n.25 (1987); National Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982); see also Dunbar v. United States, 502 F.2d 506, 509-10 (5th Cir. 1974) (“discovery should be allowed if the information sought appears reasonably calculated to lead to the discovery of admissible evidence”).¹ Indeed, “diligence by all parties in securing the facts in preparation for trial is an essential element in our adversary system of justice.” Southern Ry. Co. v. Lanham, 403 F.2d 119, 129 (5th Cir. 1968). The court’s “role in administering the discovery rules . . . is not to reward diligence or penalize laziness. A lawsuit is not a contest in concealment, and the discovery process was established so that ‘either party may compel the other to disgorge whatever facts he has in his possession.’” Southern Ry., 403 F.2d at 130 (citing Hickman, 329 U.S. at 507). Above all, discovery rules, like all the Federal

¹Decisions of the United States Court of Appeals for the Fifth Circuit which were decided prior to October 1, 1981 are binding as precedent for the Court of Appeals, district courts and bankruptcy courts in the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206, 1209-11 (11th Cir. 1981).

Rules of Civil Procedure, are to “be construed and administered to secure the just, speedy, and inexpensive determination of every action” Fed. R. Civ. P. 1, and, “[p]roperly used, they prevent prejudicial surprises and conserve precious judicial resources.” Burns v. Thiokol Chem. Corp., 483 F.2d 300, 304 (5th Cir. 1973).

A. *CHEP’s motion to compel discovery*

CHEP seeks an order from the court compelling MPC to provide substantive discovery in response to two interrogatories, three requests for production, and a request for inspection and photography of MPC’s premises.

The court notes that MPC had initially agreed, subject to a proposed protective order between the parties, to provide the information sought by CHEP’s interrogatories and requests for production. Some 29 days later, however—and more than 61 days after initial service of CHEP’s discovery requests—MPC withdrew its consent to provide the information requested, newly asserting that such information was “irrelevant” to the parties’ claims and defenses in the action, and further refusing to produce such information, even under the aegis of a protective order, due to its “extraordinary competitive value.” Also, while MPC timely objected to CHEP’s request to inspect and photograph MPC’s premises on the basis that the request “d[id] not specify a time, place or manner for the performance of any such inspection or photographing,” it has since been unwilling

to permit such inspection and photography during regular business hours or in the presence of any CHEP employees.

The court has carefully reviewed the subject discovery requests and the responses thereto, and finds each of these objections to be without merit. First, the court notes that MPC's objections to CHEP's interrogatories were untimely interposed and therefore waived absent "good cause shown." Fed. R. Civ. P. 33(b)(3) & (4). The court finds no such good cause in the present circumstances. Second, the court notes that the objections to CHEP's requests for production were likewise untimely interposed and therefore likewise invalid under the Federal Rules. Fed. R. Civ. P. 34(b).

Moreover, even considering the substantive merit of MPC's objections, the court is compelled to conclude that CHEP's discovery requests are relevant to the parties' claims and defenses in this action. As noted above, the parties are, in essence, seeking an adjudication as to the rightful title of certain shipping pallets currently in MPC's possession, which CHEP claims it owns and MPC claims it has acquired from other distributors and other merchants. Alternatively, MPC claims "unjust enrichment" of CHEP insofar as MPC separates CHEP-designated pallets from other non-CHEP-designated pallets and thereafter stores them, thereby "confer[ring] a benefit" on CHEP and the distributor from whom MPC has acquired

such pallets. The subject discovery requests are limited to inquiries regarding the source(s) from whom MPC has obtained such pallets, the other parties to whom MPC may have transferred such pallets, the terms and conditions of such transactions, and, as regards the request for inspection and photography, the circumstances under which such pallets are sorted and stored. Moreover, the inquiries are specifically limited in temporal scope to a four-year period, corresponding to the statute of limitation applicable to claims of conversion under Georgia law. Ga. Code Ann. § 9-3-32. For these reasons, the discovery requested is indisputably relevant to the parties' claims and defenses in this action.

Finally, MPC has failed to call the court's attention to any authority, binding or otherwise, which would appear to confer any discovery-related privilege on information of "extraordinary competitive value." Accordingly, since the information sought is apparently "relevant" and "not privileged," it is plainly subject to discovery under Fed. R. Civ. P. 26(b)(1), and will be hereinafter compelled by the court.

B. *CHEP's motion for a protective order*

The Federal Rules of Civil Procedure provide, in relevant part, that

[u]pon motion by a party . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a trade secret or other confidential research,

development, or commercial information not be revealed or be revealed only in a designated way . . . If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party . . . provide or permit discovery.

Fed. R. Civ. P. 26(c). The parties to this action apparently “agree that a protective order is necessary to govern the production and use of documents produced in this litigation,” but “have been unable to agree on the scope of disclosure.” Specifically, MPC is unwilling to allow CHEP’s in-house counsel to view competitive information disclosed in discovery, while CHEP asserts that access of its in-house counsel to such information is crucial to its ability to effectively present its case and defend itself from MPC’s counterclaims. As a result, the parties have been unable to agree upon the appropriate terms and conditions of a protective order relating to discovery in this action.

The court finds that “good cause” has been “shown” warranting entry of a protective order in this action, but is unable to conclude that it must be entered on the terms CHEP seeks. As a preliminary matter, the court notes that there is certainly a great potential for “oppression” inherent in the disclosure of sensitive trade secret information to the employees of competitors. CHEP has itself “recognize[d] the legitimacy of [MPC]’s concern” in this regard. Further, the court notes once again, as it has previously in this order, that this action apparently

concerns little more than the rightful ownership of approximately 35,000 to 40,000 wooden pallets currently in the possession of MPC. The issues to be developed herein are therefore neither complex nor particularly technical in nature.

Finally, the court notes that CHEP has retained sophisticated and highly competent outside counsel who have thus far demonstrated a substantial ability to prevail where their legal arguments are meritorious. Indeed, there has been no showing whatsoever that CHEP's ability to present its case has been compromised thus far by its in-house counsel's lack of access to MPC's confidential information, or that a protective order limiting disclosure of such information to outside counsel only would deprive CHEP's outside counsel of its ability to consult with such in-house counsel to the extent it sees fit, an ability which it has to date presumably already exercised. Accordingly, and in order to facilitate effective discovery in this matter, the court will hereinafter *DIRECT* the parties to enter into a protective order that will allow for the exchange of confidential information, but only among the parties' outside counsel of record.²

²The court notes that CHEP's most recent filings in this action have been signed by an individual who has not been identified as an attorney of record in this matter. In accordance with U.S. Dist. Ct. N.D. Ga. Local Rule 83.1(D), the court hereby *DIRECTS* such individual to file with the clerk of this court his notice of appearance in this action.

C. *MPC's motion to compel discovery*

MPC seeks an order from the court compelling CHEP to provide substantive discovery in response to fourteen requests for production and five interrogatories it has propounded on CHEP. In general, such discovery requests are broadly worded and seek information not limited to the pallets in dispute in this action, but extending as far as CHEP's business relations with merchants throughout Georgia, the United States and internationally; its overall business strategies and practices; its past litigation efforts against other pallet recyclers; and its costs of litigation in the instant action. Some, but not all of such requests are limited to the period since January 1, 1997; others refer only to the past four years; others contain no time limitations whatsoever.

In general, CHEP has objected to such requests by asserting that they are "overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant evidence" or "argumentative, vague and ambiguous"; in addition, CHEP has objected to some of the requests as seeking information protected by attorney-client privilege or the work product doctrine. Despite such objections, CHEP has agreed, in general, subject to a proposed protective order between the parties, to provide MPC with information regarding its relations with merchants from whom MPC might have obtained the pallets at issue in this action.

The court cannot help but agree, in general, with the tenor of CHEP's responses to MPC's requests. While this action really concerns the rightful ownership of approximately 35,000 to 40,000 wooden pallets currently in the possession of MPC, MPC is apparently seeking to conduct a broad inquiry into CHEP's local, national and international business strategies and its past attempts to pursue legal action against other parties. Not only are such requests largely irrelevant to the ownership of the pallets MPC admits are in its possession, they are textbook examples of the "overly broad, unduly burdensome," and indeed, harassing, discovery abuses the court is obligated to prevent. Indeed,

discovery, like all matters of procedure, has ultimate and necessary boundaries . . . [L]imitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

Hickman, 329 U.S. at 507-08. Accordingly, to the extent that MPC's requests exceed the permissible scope of discovery as provided in Rule 26 of the Federal Rules of Civil Procedure, responses thereto cannot be compelled.

As noted above, CHEP has agreed to produce some relevant information in response to MPC's broadly-worded discovery requests. Beyond such production, however, the court will hereinafter GRANT IN PART MPC's motion to compel only

insofar as its discovery requests are relevant and reasonably calculated to lead to the discovery of admissible evidence in this action, i.e., are potentially related to the ownership of the subject pallets and are specifically limited to the limitation period applicable in this action. The court will also, however, DENY IN PART such motion to the extent it does indeed seek information that is apparently irrelevant to the parties' claims and defenses in this action, and to the extent it seeks information which CHEP asserts is protected by privilege. The specific terms of the court's disposition of this motion are set forth below.

Summary

1. CHEP's motion to compel discovery [Doc. No. 11-1] is hereby GRANTED. MPC is hereby ORDERED to comply with such discovery requests no later than twenty (20) days following entry of this order on the docket of the court. MPC's compliance with such requests may be fulfilled subject to the terms and conditions of the protective order to be approved by the court as described in the following paragraph 2. Moreover, for the avoidance of any doubt, MPC is hereby ORDERED to permit inspection and photography of its business premises by CHEP's counsel of record and a CHEP official of CHEP's choosing during normal business hours on a date and at a time

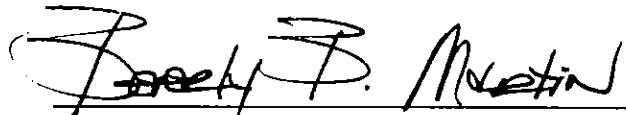
mutually agreeable to both parties prior to the expiration of such twenty (20) day period.

2. CHEP's motion for a protective order [Doc. No. 12-1] is hereby GRANTED IN PART AND DENIED IN PART, as follows. The parties are hereby DIRECTED to submit for the court's approval no later than ten (10) days following entry of this order on the docket of the court a revised form of protective order, signed by counsel for both parties, substantially similar to that proposed in connection with CHEP's motion, but specifically limiting access to "Attorney's Eyes Only Material" solely to the parties' outside counsel of record.
3. MPC's motion for an award of attorneys' fees [Doc. No. 14-1] is hereby DENIED.
4. MPC's motion to compel discovery [Doc. No. 15-1] is hereby GRANTED IN PART AND DENIED IN PART, as follows. CHEP is hereby ORDERED to provide information responsive to such requests no later than twenty (20) days after MPC's compliance with the court's directive set forth in paragraph 1 above, but only to the extent such requests relate to (a) those entities identified by MPC in response to the discovery compelled by the court as set forth in paragraph 1 above, and (b) the four-year period

preceding the filing of this action, *except that* CHEP is not hereby required to respond to MPC's Request to Produce No. 30, regarding CHEP's litigation expenses, or to provide any information that it believes is privileged. CHEP's compliance with such requests may also be fulfilled subject to the terms and conditions of the protective order to be approved by the court as described in the above paragraph 2. Any item CHEP believes to be privileged and therefore not subject to discovery must be expressly identified as such and described to MPC in accordance with Fed. R. Civ. P. 26(b)(5).

5. CHEP's motion for leave to file an affidavit under seal [Doc. No. 20-1] is hereby GRANTED as unopposed.

SO ORDERED, this 26th day of March, 2003.



BEVERLY B. MARTIN
United States District Judge

ENTERED ON DOCKET
MAR 27 2003
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