

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

ALFRED J. BELNIAK, D/B/A
HAMMERHEAD CONSTRUCTION,

Plaintiff,

v

Case No.8:07-CV-00032-T-24TGW

MODERN DAY CONSTRUCTION, INC., a Florida
Corporation, et al.
Defendants

**PLAINTIFF'S MOTION TO COMPEL DISCOVERY
FROM DEFENDANTS MODERN DAY CONSTRUCTION, INC. AND MARC
DELAPE AND MEMORANDUM IN SUPPORT**

Plaintiff ALFRED J. BELNIAK D/B/A HAMMERHEAD CONSTRUCTION, hereinafter Plaintiff, by the undersigned counsel moves this court pursuant to Federal Rules of Civil Procedure 37 and Local Rule 3.04(a), M.D. Florida Local Rules, for an Order Compelling Defendants, MODERN DAY CONSTRUCTION, INC. and MARC DELAPE, hereinafter Defendants, to produce all documents responsive to Plaintiff's First Request for Production of Documents and to respond to Request number 9 of Plaintiff's First Request for Admissions. The grounds upon which this Motion is based and the substantial matters are set forth hereinafter.

Nature Of The Action

This action arises under the copyright laws and specifically involves the alleged copyright infringement by Defendants of Plaintiff's architectural floor plan for Plaintiff's

copyrighted The Abbey. This action was instituted by Plaintiff on January 5, 2007. On March 13, 2007, Plaintiff mailed Plaintiff's First Request for Production of Documents and Plaintiff's First Request for Admissions. Defendants response to Plaintiff's First Request for Admissions was served on April 17, 2007. Defendants belated response to Plaintiff's Request for Production was served on April 24, 2007.

Although the requested documents and request for admissions were proper objects of discovery, Defendants have objected to multiple requests for production and one of Plaintiff's requests for admissions. Plaintiff's request for production and requests for admissions and Defendants' objections thereto are reproduced here in their entirety for this Honorable Court's consideration.

Request for Production

In Plaintiff's First Request for Production of Documents to Defendants Requests l, m, q, s, t, u, ll, pp, and qq and Defendants responses read as follows:

REQUEST LETTER I: All documents that summarize, record, audit and/or analyze the costs incurred in constructing the residence which is the subject of this litigation.

REQUEST LETTER m: All documents that summarize, record, audit and/or analyze the price that CIANCIMINO paid in purchasing the residence that is the subject of this litigation.

RESPONSE: Objection. Defendants, Modern Day

Construction, Inc., and Marc Delape, object to the extent that discovery sought pertains to monetary agreements, monetary estimates, monetary proposals or monetary information between these defendants and their suppliers, contractors or subcontractors, or others, including the other defendants in this matter and is proprietary.

REQUEST LETTER q: All contracts with any other person or persons for labor, services, and/or material on any part or all of the construction of the residence which is the subject of this litigation not covered by another or other category in this list.

REQUEST LETTER s: All written contracts entered into with the CIANCIMINO and PAR and/or ROUSH.

REQUEST LETTER t: All communications between MODERN and/or DELAPE and CIANCIMINO relating to the residence which is the subject of this litigation.

REQUEST LETTER u: All contracts with any other person or persons in connection with the preparation of the architectural prints and/or plans that are the subject of this litigation.

RESPONSE: Objection. Defendants, Modern Day Construction, Inc., and Marc Delape, object to the extent that discovery sought pertains to monetary agreements, monetary

estimates, monetary proposals or monetary information between these defendants and their suppliers, contractors or subcontractors, or others, including the other defendants in this matter and is proprietary. Without waiving this objection, all other documents failing under this request will be available for inspection at Caglione, Miller & Anthony, 703 Lamar Avenue, Brooksville, Florida 34601, at a mutually agreeable date and time to the parties.

REQUEST LETTER II: All accounts, journals, ledgers, reports, bank statements or other documents evidencing any payment received by MODERN and/or DELAPE for the sale, or other distribution of copies of technical drawings or architectural works for the residence which is the subject of this litigation.

RESPONSE: Objection. Defendants, Modern Day Construction, Inc., and Marc Delpae, object to the extent that discovery sought pertains to monetary agreements, monetary estimates, monetary proposals or monetary information between these defendants and their suppliers, contractors or subcontractors, or others, including the other defendants in this matter and is proprietary.

REQUEST LETTER pp: All financial statements, audited and/or unaudited, of MODERN and/or DELAPE reflecting all expenditures made in connection with the creation of Defendant's Work, including all

expenditures made in connection with the construction of the CIANCIMINO residence on 11044 Baywind Court, Brooksville, Florida 34613.

RESPONSE: Objection. To the extent that this Request uses the term “Defendant’s Work” which is undefined by Plaintiff and is thus vague and ambiguous. Further, Defendants, Modern Day Construction, Inc., and Marc Delpae, object to the extent that discovery sought pertains to monetary agreements, monetary estimates, monetary proposals or monetary information between these defendants and their suppliers, contractors or subcontractors, or others, including the other defendants in this matter and is proprietary.

Defendants’ main objections to the above requested Requests for production of documents are that each of the preceding requests the discovery of “proprietary information.” However, Defendants failed to provide a privilege log or other index reasonably describing the documents in which Defendants assert are proprietary in nature. Further, if this information is proprietary, the entry of a protective order would ensure that any documents and information would not be publicly disseminated or used to gain an unfair competitive advantage not only between the parties, but with any other competitor with access to the Court file. Counsel for Plaintiff has attempted to persuade Defendants to enter into a stipulated protective order since April 14, 2007, but Plaintiff’s counsel has been met with frustration.

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order to compel the production of all responsive documents to Plaintiff's First Request for Production and respond to Request number 9 of Plaintiff's First Request for Admissions (listed hereafter as originally submitted to Defendant's counsel) within ten (10) days of this Court's Order.

Memorandum of Law in Support of Plaintiff's Motion to Compel

a. Party Asserting a Claim of Confidentiality or Protection Has the Burden of Proving Such Confidentiality or Protection.

Federal Rule of Civil Procedure Rule 26 (b) (1) specifically states that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party...” Further, “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

The United States Supreme Court has held that the discovery rules should be afforded “broad and liberal treatment.” *Hickman v. Taylor*, 329 U.S. 495, 504 (1947). Further, the party asserting a claim of irrelevance or confidentiality has the burden of proving such irrelevance or confidentiality. *See Panola Land Buyers Assoc. v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985).

This action involves copyright infringement of residential blueprints (architectural drawings). As such, one of the main issues in this action is damages. The damages provision of the Copyright Act provides:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the

copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work. (17 U.S.C. §504(b)).

It is clear that in a copyright infringement case, the plaintiff must have access to a defendants' financial records in order to carry their burden on the issue of actual damages. *See Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir.1978) (court held that the financial records of defendants were needed to carry plaintiffs burden on the issue of pretext in an age discrimination case)

While actual damages for copyright infringement include both Plaintiff's lost profits and profits of the infringer, there may be additional recovery of defendant's profits in an amount equal to the amount by which Defendants' profits exceed Plaintiff's lost profits. *See Montgomery v. Noga*, 168 F.3d 1282, 1296 (11th Cir. 1999). Plaintiff is unable to adequately prepare for trial without being able to determine the profits reaped by the Defendants that are attributable to Defendants' infringement. Plaintiff has the burden of proving both his profits and Defendants' profits by a preponderance of the evidence. While Defendants have the burden of proving any deductions and expenditures, without the requested documents and information, Plaintiff will be unable to meet this burden in proving Defendants' profits.

In addition, the documents could contain names and other various information which could lead to additional admissible discovery which could be utilized in Plaintiff's cause of action against Defendants. In conclusion, Plaintiff would be concede to the production of these documents under the umbrella of a protective order limiting their disclosure.

b. Party Asserting a Privilege or Protection Must Describe the Nature of the Documents, Communications, or Things Not Produced or Disclosed.

While the Federal Rules of Civil Procedure do not mandate that a privilege log be produced, the party asserting the privilege must make a prima facie showing that such information or documents are privileged. F. R. C.P. Rule 26 and *See Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g*, 230 F.R.D. 688, 695 (M.D.Fla.2005) (stating that the log must state “the authors and their capacities, the recipients (including copy recipients) and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery”). Further, a requesting party does not bear the burden of showing that the information or documents requested is relevant if thither party has failed to meet its burden of demonstrating that the information or documents are confidential. *See Gober v. City of Leesburg*, 197 F.R.D. 521 (M.D. Fla. 2000)

In Federal Rule of Civil Procedure Rule 26 (b)(5) a party asserting a privilege and seeking to withhold information based on such privilege must “describe the nature of the documents, communications, or things not produced or disclosed in a manner that, . . . will enable other parties to assess the applicability of the privilege or protection.” *Id.*

Further, United States District Court Middle District of Florida’s Handbook on Discovery Practice also provides that a party asserting a privilege and withholds information otherwise discoverable “must assert the claim expressly and must describe the nature of the documents, communications, or things not

produced or disclosed, such that, without revealing the privileged or protected information itself.” *See* Middle District Discovery (2001) at V(A)(1-). This discovery handbook is considered to be highly persuasive in addressing discovery issues in the Middle District of Florida.

Defendants, in their responses to Plaintiff’s requests, Defendants do not assert that Plaintiff’s requests are irrelevant; however, Defendants assert that the above-cited requests seek proprietary information. Conversely, Defendants failed to adequately describe the documents in which Defendants seeks protection. Thus, Plaintiff would assert that such assertions or privilege be deemed waived for failing to comply with Rule 26(b) (5) and Middle District Discovery rule V(A)(-1). *See Dorf & Stanton Comm., Inc. v. Molson Breweries*, 100 F.3d 919, 923 (1996) (stating that local rules of the court should be considered in determining waiver)

While failure to provide a privilege log does not result in an automatic waiver several factors should be determined. *See Burlington N. & Santa Fe Ry. Co. v. United States Dist. Court for the Dist. of Montana*, 408 F.3d 1142, 1149 (9th Cir. 2005)). In *Burlington* the court considered several factors in determining whether an assertion of privilege was waived; a district court should make a case-by-case determination, taking into account the following factors:

“the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy.” *Id.*

This “holistic reasonableness analysis” is intended to “forestall needless waste of time and resources, as well as tactical manipulation of the rules and the discovery process.” *Id.* The court also held that these factors should be applied subject to any local rules. *Id.*

In the present case, the objections seemingly describe the type of documents which Defendants assert as privileged and/or protected; however, Defendants use the same boilerplate objection to each and every objectionable Request; thus, Plaintiff is unable to determine what documents are being withheld in relation to each Request.

In addition, Plaintiff would submit that the requests do not seek such a magnitude of document production which would prevent Defendants from timely preparing and serving a privilege log or index. To date, no such log or index has been served on Plaintiff. Moreover, Defendants served Plaintiff with its responses to production approximately ten (10) days after such responses were due, giving Defendants additional time to produce such log or index. Further, all requested documents are likely housed in Defendant Marc Delape’s place of business, which upon information and belief, has one location located in Hernando County, Florida. Furthermore, Defendants’ counsel’s office is located in Hernando County, Florida. As such, these particular circumstances make responding to Plaintiff’s discovery requests and providing a privilege log unusually easy. Based on the foregoing, Plaintiff asserts that Defendants’ have waived the asserted privileges.

c. Vague and Ambiguous Objection to Request to Produce Letter pp.

In Plaintiff's Request for Production Request Letter pp, Plaintiff utilizes the phrase or word "Defendant's Work." Defendants object and assert that this phrase is vague and ambiguous. However, Plaintiff provided a definition for such phrase in Plaintiff's Request for Admissions; as such, this objection has no merit because Defendants could have merely referenced the definition provided for in Plaintiff's Request for Admissions. Further, even if this phrase was not defined previously, the phrase has a common meaning in copyright infringement litigation which would have enabled Defendants to adequately respond to the Request. Thus it is not so lacking in specificity that it would become burdensome or oppressive for Defendants to formulate an answer to Plaintiff's Request and Defendants should be compelled to answer.

e. Plaintiff is Entitled to Sanctions Pursuant to Federal Rule of Civil Procedure Rule 37(a)(4) Sanctions and Middle District Discovery section V(A)(-1).

Plaintiff also moves, pursuant to Rule 37(a)(4), Federal Rules of Civil Procedure, that Defendant be required to pay to Plaintiff the reasonable expenses, including attorney's fees incurred by Plaintiff in bringing this Motion. Rule 37(a)(4) provides, that "[i]f the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, ... require the party or deponent whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that ... the opposing party's nondisclosure, response, or objection was substantially justified." See *Gober* at 520 (ordering sanctions because the information requested would lead to the

discovery of admissible evidence).

**CERTIFICATE OF GOOD FAITH
COMPLIANCE WITH LOCAL RULE 3.01(g)**

In accordance with Local Rule 3.01(g), counsel for Plaintiff sent an electronic message which included Plaintiff's six (6) page Stipulated Protective Order to Defendants' counsel on April 14, 2007 in an attempt to get all parties involved in the structuring of a mutually agreeable protective order. (Exhibit A) On April 20, 2007, after receiving Defendants' responses to Plaintiff's discovery requests, Plaintiff's counsel sent written correspondence to Defendants' counsel regarding his objection to Request number 9 of Plaintiff's Request for Admissions. (See Exhibit B) On April 27, 2007, Plaintiff's counsel sent written correspondence to Defendants' counsel regarding his various objections to Plaintiff's Request for Production. (See Exhibit C) On May 7, 2007, Plaintiff's counsel sent an electronic message to all named Defendants' counsel once again attempting to secure an agreeable protective order and followed up that correspondence with a telephone call. (See Exhibit D) Plaintiff's counsel also telephoned Defendants' counsel on May 10, 2007, that same day Plaintiff's counsel received an electronic message stating that Defendants' counsel "is not agreeable to the protective order." (See Exhibit E) Plaintiff has exhausted its avenues for the resolution of this matter and requests this court to consider Plaintiff's Motion to Compel as the discovery deadline in this action is October 1, 2007.

WHEREFORE, for the reasons set forth herein, Defendants have improperly answered and improperly objected to numerous Plaintiff discovery requests. As such, Defendants should be compelled to provide full and complete answers to Plaintiff's Request for Production and Request for Admissions, and for such other and further relief

as this Court deems just and proper.

Respectfully submitted,

/s/ Debra B. Tuomey
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Date: March 20, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 20, and 21 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following individuals: Frank A. Miller at fmiller@cagmil.com; Scott D. Clay at sclay@claylawgroup.com; and Shannon K. Rosser at srosser@wickersmith.com.

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