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Trewin Homes, LLC, Order on Defendants' Motion to Compel

Melvin K. Westmoreland
Fulton County Superior Court Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

TREWIN HOMES, LLC,)	
)	
Plaintiff/Counterclaim Defendant,)	
)	
v.)	
)	
STACEY HODULICH AND MARC HODULICH,)	
)	
Defendants/Counterclaim Plaintiffs,)	Civil Action File No. 2016-CV-284290
)	
v.)	
)	
THE WINTER CONSTRUCTION COMPANY, INC.,)	
Counterclaim Defendant.)	
)	

ORDER ON DEFENDANTS' MOTION TO COMPEL

The above-styled matter is before this Court on Defendants/Counterclaim Plaintiffs, Marc and Stacey Hodulich's (hereinafter "Hodulichs") Motion to Compel responses to various discovery requests from Plaintiff/Counterclaim Defendants, Trewin Homes, Inc. (hereinafter "Trewin") and Counterclaim Defendant, The Winter Construction Company, Inc. (hereinafter "Winter"). With respect to the general scope of discovery, O.C.G.A. §9-11-26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to discovery of admissible evidence

See also Bowden v. The Med Ctr. Inc., 297 Ga. 285, 291 (2015) (citing Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) (“The key phrase in this definition – ‘relevant to the subject matter involved in the pending action’ – has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issues that is on may be in this case.”)). Additionally, the Georgia Court of Appeals has established that Georgia courts may properly consider federal courts’ construction of their rules. *See* Barnum v. Coastal Health Services, Inc., 288 Ga. App. 209, 215 (2007) (citing Bicknell v. CBT Factors Corp., 171 Ga. App. 897 (1984)) *distinguished on other grounds by* Hull v. WTI, Inc. 322 Ga. App. 304 (2013). (“... the Georgia Civil Practice Act was taken from the Federal Rules of Civil Procedure and with slight immaterial variations its sections are substantially identical to corresponding rules. Because of this similarity it is proper that we give consideration and great weight to constructions placed on the Federal Rules by the federal courts.”)

In the instant motion, the Hodulichs seek to compel answers to various interrogatories and requests for production of documents from both Trewin and Winter. The Hodulichs served their First Discovery Requests to Trewin on June 1, 2017, and Trewin served their responses on June 30, 2017. From July, 2017, through October, 2017, counsel for both sides engaged in a good faith discussion to resolve the Hodulichs’ concern regarding the discovery responses. These discussions were ultimately unsuccessful and the Hodulichs filed the present motion. Trewin and Winter filed a combined response to the motion, requested the Court grant them attorneys’ fees for having to respond to the motion, and attached to the Response Trewin’s second supplementary responses served shortly after the motion was filed.¹ Based on Trewin’s second supplementation, the Hodulichs’ Reply brief dismisses some of the disputed discovery

¹ First set of supplementary responses was filed on November 2, 2017.

requests initially included in the Motion.² Thus, the Hodulichs seek an order to compel Trewin to fully answer Interrogatories Nos. 1-5, 7-16, 20-22, 26-29, 36. The Hodulichs also ask the Court to compel Winter to provide additional information to Interrogatories Nos. 1, 6, 8, 13, 15, 16 and Requests for document production Nos. 5 and 7.

A. Hodulichs' Discovery Requests to Trewin

Interrogatories Nos. 1-4, 27

Interrogatory No. 1, directed at paragraph 13 of the Complaint, asks for information regarding changes in the work Trewin contends were the result of change orders, change directives, or allowance overages. Interrogatory No. 2, also directed at paragraph 13, seeks information regarding Trewin's cost changes that created additions to the Contract Estimated Amount, but were not caused by change order, change directive, or overage allowance. Interrogatory No. 3, directed at paragraph 14, asks Trewin to "identify modifications that they claim were made by the Architect that contributed to increased costs on the project." Finally, Interrogatory No. 4, directed at paragraph 15, asks for amount and description of each change to the work and work that was in addition to the original scope of work, all bases for these changes, documents related to these changes and the correspondence and conversations pertaining to each change. Each of the four interrogatories contains subparts requesting, among other things, that Trewin provides the amount and detailed description of all changes in cost from the original estimate, "all bases that support [Trewin's] claim that the change order . . . exists;" all bases that support Trewin's claim that it is entitled to the amount for the cost of the work order, all documents related to the change that show Hodulichs' agreement, plans and drawings related to the change, and "any conversations or communication regarding the change . . . including parties to the communication or conversation, the time of the conversation and the substance of the

² Interrogatories Nos. 18, 19, 23, 24, and 25 were dismissed.

communication or conversations.” (Interrogatory Nos. 1-4). Insofar as Interrogatory No. 27 asks Trewin to identify each and every document or correspondence sent by Trewin to the Hodulichs which references or explains any charge, overage, or change not contemplated or referenced in the Contract, this interrogatory appears to be requesting information duplicative of some of the information requested in Interrogatories Nos. 1 through 4.

To the extent the Hodulichs’ interrogatory requests seek “each and every fact” supporting Trewin’s allegations and “make no distinction between admitted and contested” facts, the Court finds interrogatories Nos. 1-4 and 27 are overly broad and unduly burdensome. Hilt v. SFC Inc., 170 F.R.D. 182, 186-88 (1997) (finding interrogatories are overly broad and burdensome where they ask for “each person having knowledge of each fact” and “all documents purporting to support Counts I through IV,” reasoning they did not make a distinction between admitted and contested allegations); *see also* Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 662 (D.Kan.1996). Responding fully to this type of interrogatories would “require [Trewin] to provide the equivalent of a narrative or otherwise detailed account of [its] entire case in chief, together with identification of . . . all supporting evidence for each fact.” Hilt, 170 F.R.D. at 188. In the present case, it appears not all change orders are in dispute. *See* Motion for Summary Judgment Transcript, p. 63. The Court instructs the Hodulichs to narrow the interrogatories to changes in the work that are in dispute instead of all changes which took place over a two-year period, involving multiple conversations, various communication channels, and likely involving many different people.

Trewin provided a detailed supplemental response to Interrogatory No. 1 and incorporated it to serve as a response to all five of the above interrogatories. The response to Interrogatory No. 1 includes a list of “extras and additional work” not initially included in the Stipulated Amount, a list summary of conversations regarding changes organized by topics, a list of thirteen payment applications identified by Bates ranges, fifteen change orders with

description and Bates ranges, a list of thirty-five items that were the subject of changes, thirty-four RFIs with identified Bates ranges, and a list of job cost reports identified by Bates ranges. Although Trewin contends to have provided a supplemental response by incorporating its response to Interrogatory 1, the Court finds the production inadequate insofar as Trewin has not correlated the documents listed in the response to Interrogatory No. 1 with each interrogatory request. Trewin's Production is inconsistent with its discovery obligations. *See Hull*, 322 Ga. App. at 308 (trial court held that "failure . . . to identify which documents are responsive to which . . . requests . . . is inconsistent with [a party's] obligations under the Civil Practice Act."). To the extent that Trewin contends it has already produced documents responsive to these requests, Trewin should supplement its responses and specifically identify (through Bates numbering or otherwise) which produced documents/communications are responsive to these requests.

Interrogatory No. 5

This interrogatory asks Trewin to provide each and every basis that underlies their monetary claims, including each line-item charge, along with information regarding when each line-item was submitted to the Hodulichs, the party who communicated the charge to the Hodulichs, and the documents supporting the claims. In response to Interrogatory No. 5, Trewin points to its response to Interrogatory No. 1 where it incorporates, among other things, a table of payment applications identified by Bates ranges. The Court finds payment applications are responsive to the issue of damages. To the extent Trewin has not identified which payment applications are in dispute, it is instructed to do so. The Motion is DENIED as to Interrogatory No. 5. and Trewin is ordered to comply with this Court's instructions within ten days of this Order.

Interrogatories Nos. 8 and 9

Interrogatory Request No. 8 seeks the identity of “all costs” Trewin incurred on the project, including which line-item on Exhibit A of the contract the costs relate to and whether Trewin contends the costs relate to an overage allowance or change order. As to each category listed in Exhibit A, Interrogatory No. 9 requests Trewin to identify all bids, estimates and other information used to compute the amounts listed in Exhibit A to the contract, and all entities or individuals from whom Trewin obtained the estimates or bids.

In its supplemental response to Interrogatory No. 8, Trewin asserts that it has produced and identified by Bates range its “committed cost report which shows the construction costs and to whom those amounts were paid.” Hodulichs did not address the cost report in their Reply. It appears the cost report is responsive to a portion of the information sought in Interrogatory No. 8. It is not clear whether the report is responsive to the portion of the interrogatory asking whether the cost incurred is in relation to an overage or a change order, nor does the report appear responsive to the portion of the interrogatory requesting information about bids. The Court finds this request is reasonably calculated to lead to the discovery of admissible evidence relevant to the subject matter involved in this action. To the extent the report is not fully responsive, counsel is instructed to confer with each other. To the extent Trewin contends that the remaining information has been produced, it must identify it by Bates numbers or otherwise. Insofar as the remaining information has not been produced, Trewin is instructed to produce it within thirty days of this Order.

In its supplemental response to Interrogatory No. 9, Trewin notes it “has produced in this civil action records reflecting all costs for which Trewin seeks payment in this civil action and the change orders on the Project[]” and also that it “has produced documents in this civil action

support each item of damages Trewin seeks.” The Court finds this is not responsive to the information sought and that Interrogatory No. 9 is relevant, and the request is reasonably calculated to lead to the discovery of admissible evidence. To the extent Trewin has produced information and documents responsive to Interrogatory No. 9, it must identify such production by Bates numbers within ten days of this Order. Insofar that Trewin has not produced information and documents responsive to this interrogatory, Trewin is instructed to do so within thirty days of this order.

Interrogatories Nos. 7 and 26

These interrogatories ask Trewin to identify their employees that worked on the project, the employees’ titles, dates of employment at residence, areas or categories of work done, and current contract information (*see* Interrogatory 7) and every individual who worked as a supervisor or project manager during the construction of the residence (*see* Interrogatory 26). In response to Interrogatory No. 7, Trewin has provided the names of eight employees, their job titles and that they may be contacted through counsel for Trewin. As to Interrogatory No. 26, Trewin has provided names, but has not responded to the remainder of the interrogatory. In their Reply brief, the Hodulichs ask that Trewin provide the remainder of the information sought by both interrogatories. The Court finds these requests are reasonably calculated to lead to the discovery of admissible evidence relevant to the subject matter involved in this action and the Motion is GRANTED as to Interrogatories Nos. 7 and 26. Trewin is ordered to respond fully within ten days of this Order.

Interrogatories Nos. 10 and 11

Interrogatory No. 10 asks Trewin to identify all persons who participated in the construction of the project or sale of supplies or goods for the residence, including but not

limited to employees, contractors, subcontractors, supervisors, independent contractors, laborers, vendors, materialmen, and suppliers. The request also includes nine subsections requesting additional details, including scope of work done or materials supplied, amount charged to Trewin, date of any invoices or bill, date and amount of payment by Trewin, relation of payment to overage or change order, date cost billed to the Hodulichs, and whether the Hodulichs paid for the work done or material supplied. Interrogatory No. 11 requests all documents related to Interrogatory No. 10. The Court finds the requests are reasonably calculated to lead to the discovery of admissible evidence relevant to the issues in this dispute. Trewin notes it has “produced and identified by Bates range its committed cost report which shows the construction costs and to whom those amounts were paid.” It appears the cost report addresses some of the information sought in the interrogatory. It is unclear whether and to what extent the other parts of the interrogatory are addressed in the report. Counsel for both parties are instructed to confer regarding missing information. If there is information missing from the report, Trewin is instructed to produce it within thirty days of this Order. To the extent that the information has been produced or will be produced in response to another interrogatory in dispute in this Motion, Trewin should identify the information by Bates number within ten days of this Order.

Interrogatories Nos. 12 and 13

These interrogatories seek to discover information regarding any payment made by or to Trewin related to an overage or a change order. The interrogatories contains seven subparts each seeking additional information, including: allowance amount related to the overage and change order, specific type, brand name, make and model of goods or product contemplated in Tab B in the Contract, description of difference between overage or change order and the products contemplated in the allowance amount, description of how items within the Hodulichs’ price

range were communicated to the Hodulichs, detailed description of any and all information presented to the Hodulichs related to overage and the date it was presented to them, “complete substance of the conversations with the Hodulichs,” and when the expense related to the overage was incurred. Trewin responded by incorporating its response to Interrogatory No. 1.

Pursuant to this Court’s earlier analysis, the Hodulichs are ordered to narrow the interrogatories to changes in the work that are in dispute. To the extent that Trewin contends its response to Interrogatory No. 1 is responsive to these requests, Trewin should specifically identify, through Bates numbering or otherwise, which produced documents/communications are responsive.

Interrogatories Nos. 14, 15, 28

These interrogatories request information regarding any and all conversations between Trewin and the Hodulichs or the architect related to change orders, overages, or delays in the construction of the residence, the substance of those conversations and the parties who were present (*see* Interrogatory Nos. 14 and 15), as well as documents and correspondence regarding a delay or change in schedule of construction sent by Trewin to the Hodulichs (*see* Interrogatory No. 28). The Court finds these interrogatories reasonably calculated to lead to the discovery of admissible evidence relevant to the issues in this dispute.

In response to Interrogatory No. 14, Trewin states it “has already provided a full record of the construction process, and the Hodulichs already know all the changes they directed.” Additionally, Trewin states it “has produced in this civil action records reflecting all costs for which Trewin seeks payment in this civil action and the change orders on the Project.” As noted above, the Court does not find this to be responsive to the information sought. Insofar as Trewin

contends it has produced information responsive to this request, it must identify it by Bates numbers within ten days of this Order.

In response to Interrogatory Nos. 15 and 28, Trewin makes the above statement and also incorporates its lengthy response to Interrogatory No. 1. As noted above, the above statement is not responsive to the information sought in the interrogatory, insofar as Trewin contends its response to Interrogatory No. 1 contains information responsive to these two interrogatories, Trewin must identify the pertinent information with Bates numbers within ten days of this Order.

Interrogatory No. 16

Interrogatory 16 requires Trewin to expressly state whether there were any defects in materials or workmanship on the residence the last time any of its agents, employees, or servants were present there. In response, Trewin notes it is “not aware of any defects in any work at the time of termination that was the fault of Trewin.” Trewin’s statement is not responsive to the information sought in the interrogatory. The Court finds this information to be relevant to the issues in dispute in this action and Trewin is instructed to respond to the question posed within ten days of this Order.

Interrogatories Nos. 20 and 21

These interrogatory requests ask Trewin to identify employees, agents, officers, directors, or other persons who have done work for or have been compensated by both Trewin and The Winter Construction Company in the last 5 years (*see* Interrogatory No. 20) and any assets, such as real estate, equipment, vehicles, computer systems, software licenses, bank accounts, credit card accounts, lines of credit, warehouse accounts, insurance policies, office space, or human resources (including clerical personnel) used by both Trewin and The Winter Construction Company, Inc. in the last 5 years (*see* Interrogatory 21). The Court finds the requests are

reasonably calculated to lead to the discovery of admissible evidence relevant to the issues in this dispute.

As to Interrogatory 20, the Hodulichs note the list produced by Trewin “does not seem to be a complete list.” To the extent Trewin purports the list of employees they have produced is the complete list, they should supplement their response to so certify within ten days of this Order.

As to Interrogatory 21, Trewin indicated that it will supplement its initial response. It appears from the Reply brief a supplemental response was instead provided by Winter. The Hodulichs request further specificity regarding certain line items reflecting payment for assets owned by Winter, but used by Trewin. The Court finds the request is reasonably calculated to lead to the discovery of admissible evidence relevant to the issues in this dispute and the assets referred to in the Hodulichs’ Reply brief shall be identified within thirty days of this Order.

Interrogatory No. 22

Interrogatory 22 seeks information regarding licenses held by Trewin during the construction of the project and whether such licenses have lapsed or expired, as well as the date of expiration of each license. Trewin has indicated that it has a business license and was a licensed contractor in the State of Georgia. In their Reply brief, the Hodulichs ask that Trewin produces the remainder of the information requested by the interrogatory. The Court finds this request is reasonably calculated to lead to the discovery of admissible evidence relevant to the subject matter involved in this action and the motion is granted as to Interrogatory No. 22. Trewin is ordered to respond fully within ten days of this Order.

Interrogatory Request No. 29

The interrogatory seeks the production of any information or documents in support of Trewin's Breach of Contract, Quantum Meruit, and Implied Contract claims. Insofar as this interrogatory seeks all information and all documents in support of all counts of Trewin's Complaint, the Court finds this interrogatory to be vague, overly broad, and burdensome.

Interrogatory No. 36

This interrogatory seeks a list of all individuals, including employer and job title, who kept accounting records, books, correspondence, instructions, drawings, receipts, subcontracts purchase orders, vouchers, memoranda, or any other documents listed in Section 4.3 of the contract and the "nature and substance of their work on such documents." In response, Trewin notes that "multiple individuals performing accounting functions participated in job cost accounting, record-keeping and management of project-related documentation." The Court find this interrogatory is reasonably calculated to lead to the discovery of admissible evidence relevant to the alter ego claims in this dispute and Trewin is ordered to provide the requested information within thirty days of this Order.

B. Hodulichs' Discovery and Document Production Requests to Winter

Interrogatory No. 1

This interrogatory seeks information regarding all charges or cost reimbursements from Trewin to Winter, including, invoices, statements showing reimbursements, and correspondence between Trewin and Winter related to reimbursements. In its response, Winter has acknowledged that its Home Depot account was used to purchase materials and other items and that those items were "reimbursed." The Hodulichs ask that Winter produce documentation "providing proof that those amounts were reimbursed." The Court finds this interrogatory request is reasonably calculated to lead to the discovery of admissible evidence related to the

alter ego claims in this dispute and Winter is instructed to produce the documents requested within thirty days.

Interrogatory No. 6

Interrogatory No. 6 asks Winter to identify bank accounts, credit accounts, and any other accounts or source of funding owned or controlled by Winter from which deposits related to the residence were made. In addition, the interrogatory seeks the name of the financial institution, the account number, the authorized signatories to the account, and specific deposits made to such account. In response, Winter points to the Home Depot account mentioned in Interrogatory No. 1. The Court finds this interrogatory is reasonably calculated to lead to the discovery of admissible information. Insofar as the Hodulichs are requesting information related to accounts where deposits related to the Hodulichs' project were made, Winter's response is non-responsive. To the extent Winter contends certain reimbursements for expenses related to the Hodulichs' project have been made by Trewin (including but not limited to the Home Depot account), Winter is ordered to respond to this Interrogatory. Insofar as Winter contends no such deposits were ever made, it should respond by stating so. Winter is ordered to comply with this Court's instructions within thirty days of this Order.

Interrogatory No. 8

Interrogatory No. 8 asks Winter to identify all bank accounts and credit cards, including account numbers, that are owned or controlled by Winter, but are used by Trewin, or owned by or controlled by Winter, but are used by any entity for the benefit of Trewin. The Hodulichs' Reply brief asserts Trewin responded to this interrogatory by directing the Hodulichs to the response to Interrogatory No. 6. As noted above, the response to Interrogatory No. 6 is non-responsive. The Court finds that Interrogatory No. 8 is reasonably calculated to lead to the

discovery of admissible information. The Motion is granted with respect to this request and Winter is instructed to respond within thirty days of this order.

Interrogatory No. 13

This interrogatory asks Winter to identify each and every promotion or piece of marketing material used by or paid for by Winter that mentions or references Trewin in any way. In its response, Winter asserted that a search by its marketing department returned no results. The Court finds that Winter has responded to the interrogatory as posed and the motion is denied in respect to this request.

Interrogatories Nos. 15 and 16

These interrogatories ask Winter to identify all of its officers and directors (*see* Interrogatory No. 15) and if any of them has been employed by or had any role or title with Trewin in the last five years, including the time of employment with Trewin, his or her title, and description of his/her work with Trewin (*see* Interrogatory No. 16). In its initial responses to the interrogatories, Winter identified two officers. According to the Hodulichs' Reply brief, Winter also indicated these officers held leadership roles with Winter. The Court finds this interrogatory is reasonably calculated to lead to the discovery of admissible information. The Motion is granted as to Interrogatories 15 and 16 and Winter is instructed to provide the rest of the information requested by the interrogatories as it relates Mr. Mumme and Mr. Reid, and to clarify whether Winter had any directors and provide the remainder of the information requested in the interrogatory as it relates to any such directors. Winter is ordered to comply with these instructions within ten days of this Order.

Request for Production No. 5

This request seeks copies of all records which reflect funds transferred into or out of any account, including credit cards, that are related to the work on the Hodulichs' residence. In its response, Winter directed the Hodulichs to look at "documents produced herewith." To the extent Winter is referring to documents produced by Trewin, Winter and Trewin were served with separate discovery requests and each party provided separate responses and supplemental responses. Insofar as Winter asserts Trewin has produced documents responsive to this interrogatory, Winter must specifically identify (through Bates numbering or otherwise) which produced documents are responsive to the request. Winter is ordered to supplement its response to this interrogatory within thirty days of this Order.

Request for Production No. 7

This request seeks corporate state and federal tax returns for the last five years. Winter objected. Hodulichs note Winter can redact the documents to only reflect activity between Winter and Trewin.

"Although tax returns are not privileged, they are not automatically discoverable upon a de minimis showing of relevancy." Snellings v. Sheppard, 229 Ga. App. 753, 757 (1997) (citing Borenstein v. Blumenfeld, 151 Ga. App. 420(1), 421, 260 S.E.2d 377 (1979)) [T]he competing interest in [the] right to privacy must be accommodated in the discovery process." Borenstein, 151 Ga. App. at 420-21. The party seeking production has the burden of showing the tax returns' production is necessary and there are no other methods of obtaining the same information. Snellings, 229 Ga. App. 757 (reasoning that the party seeking the production of the tax returns could not compel their production because he had requested other documents which could reveal the financial information.); *see also* Hilt, 170 F.R.D. at 189 (identified a two-prong test to assure a balance between the liberal scope of discovery and the policy favoring the

confidentiality of tax returns, holding “the court must find that the returns are relevant to the subject matter of the action” and “there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable” and that the party seeking production has the burden of showing relevancy, and once that burden is met, the burden shifts to the party opposing production to show that other sources exist from which the information is readily obtainable.”).

Here, the Hodulichs have not met their burden to show the production of Winter’s tax returns is necessary and there is no other method of obtaining the information. The motion is denied as it relates to this request for production.

CONCLUSION

Defendants’ Motion to Compel is GRANTED, in part, and DENIED, in part. Plaintiff’s request for attorneys’ fees is reserved.

SO ORDERED, this 3rd day of July, 2018.



HON. MELVIN K. WESTMORELAND, JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit