

DOCKET NUMBER: CV-05-4009403-S : SUPERIOR COURT
: :
KONOVER CONSTRUCTION CORPORATION : J.D. OF HARTFORD
: :
VS. : AT HARTFORD
: :
MCLAIN ELECTRIC COMPANY, INC., :
JEFFREY MCLAIN, and SHARON MCLAIN : March 13, 2007

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO COMPEL RESPONSES TO INTERROGATORIES
AND REQUEST FOR PRODUCTION**

I. INTRODUCTION

Plaintiff Konover Construction Corporation (“Konover”) filed this action to recover damages caused by defendants (collectively “McLain”) breach of contract, misrepresentations, and unfair practices in connection with McLain’s provision of electrical services pursuant to a subcontract with Konover. Defendants have answered the complaint with various denials, and special defenses, and have filed a counterclaim alleging *inter alia* that Konover breached various duties to McLain, has been unjustly enriched, and engaged in unfair practices, resulting in damages to McLain.

On November 15, 2006, plaintiff served two sets of requests to admit, as well as interrogatories and requests for production of documents. The interrogatories sought, among other things, to discover the factual basis for the allegations in McLain’s special defenses and counterclaim, and requested that McLain detail the damages it claims to have incurred as a result of each of Konover’s alleged improper acts, as well as the dates on which it claims to have incurred the damages. The interrogatories also requested that McLain identify the facts and documents that support its denial and/or qualified admission of Konover’s requests to admit. The request for production sought all

documents that supported McLain’s denials and qualified admissions, and all documents that supported its damage claims.

As set forth herein, McLain has failed to provide meaningful responses to Konover’s legitimate and reasonable requests.

III. ARGUMENT

A. APPLICABLE STANDARD

“The discovery rules are designed to facilitate trial proceedings and to make a trial less a game of blindman's [bluff] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” (Internal quotation marks omitted .) Chief of Police v. Freedom of Information Commission, 52 Conn.App. 12, 16, 724 A.2d 554 (1999), *aff'd*, 252 Conn. 377, 746 A.2d 1264 (2000). Practice Book § 13-6(b) provides, in relevant part, that “[i]nterrogatories may relate to any matters which can be inquired into under [Practice Book Section] 13-2 ...” Furthermore, § 13-2 provides, in pertinent part, that “[i]n any civil action ... a party may obtain ... discovery of information or disclosure, production and inspection of papers, books or documents material to the subject matter involved in the pending action ... whether the discovery or disclosure relates to the claim or defense ... Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action ...” Interrogatories requesting a calculation of damages and how these damages were calculated are permissible. Churchill Linen Service v. Miso Inc., 2006 WL 224038 (January 4, 2006) (Taylor, J.)

Practice Book § 13-14 authorizes the court to make such orders as the ends of justice require if any party has failed to answer interrogatories, or to answer them fairly or has failed to respond to requests for production. These orders include an order

compelling responsive answers, production of documents, as well as an award to the discovering party of the costs of the motion, including a reasonable attorney's fee.

C. THE COURT SHOULD COMPEL McLAIN TO PROVIDE RESPONSIVE ANSWERS TO KONOVER'S SECOND SET OF INTERROGATORIES

1. FAILURE TO STATE FACTS ON WHICH SPECIAL DEFENSES ARE BASED

Interrogatory numbers 1 through 4 requested that McLain state all facts that support its first through fourth special defenses, respectively. In response to these interrogatories, McLain merely repeated the conclusory allegations contained in its pleadings, without any supporting facts. For example, McLain makes the conclusory statement that "Konover "failed to fulfill its obligations as a general contract" but fails to state any facts to support this claim, such as identifying the obligations Konover allegedly failed to fulfill and the manner in which it failed to fulfill those obligations; McLain makes the conclusory statement that Konover "failed to approve and process payment for legitimate extra work performed by McLain" but fails to identify the applications for payment for extra work that McLain submitted, which it claims Konover improperly failed to approve, or to state any facts to support its conclusion that the claims were for "legitimate" extra work; McLain makes the conclusory statement that Konover was "assessing unwarranted back charges without hesitation against McLain, unjustifiably." but does not identify the alleged backcharges, or state any facts to support the claim that the backcharges were "unjustifiable."

Konover has the right to discover the factual basis for the conclusory claims in McLain's pleadings, and McLain has the corresponding obligation to disclose those facts to the fullest extent practicable. The responses fail to do so, unfairly requiring Konover

to guess at the factual basis for the special defenses. The Court should compel McLain to provide substantive responses to these interrogatories.

2. FAILURE TO SET FORTH FACTS THAT SUPPORT THE ALLEGATIONS OF THE COUNTERCLAIM

Interrogatory No. 9 required McLain to state all facts that support its allegation that Konover failed to comply with C.G.S. § 49-41a and 49-41b regarding prompt payment and the release of payment.” McLain’s response is the conclusory claim that “Konover failed to pay McLain within the statutorily-prescribed time period.” The interrogatory response plainly fails to comply with McLain’s obligation to specifically identify which, if any, of Konover’s payments were not made within the statutorily prescribed time period, and the factual basis for the claim that these payments were outside the prescribed period.

Interrogatory No. 11 required McLain to state all facts that support its allegation that Konover failed to process, approve and pay in a timely and reasonable manner change order or extra work performed by McLain. The response merely repeats this allegation. A fair response to the interrogatory required McLain to identify the specific change orders or extra work McLain claims it performed and the facts that support the allegation that Konover failed to timely process, approve and pay, these orders.

Interrogatory No. 13 required McLain to state all facts that support its allegation that Konover “assessed unwarranted back charges without hesitation enabling it to retain funds otherwise payable to McLain.” McLain’s response, that “other than damage to a fence gate for which McLain accepted responsibility, no other backcharges unilaterally assessed by Konover were justified,” improperly requires Konover to guess what McLain means when it refers to “back charges” and which “back charges” it claims Konover

“unilaterally” assessed, and fails to specify any facts to support the allegation that these alleged “back charges” were “unwarranted” or to state any facts to support that, as a result of the alleged “back charges,” McLain was able to “retain funds otherwise payable to McLain.” McLain is obligated to identify the specific “back charges” it claims Konover improperly assessed, the facts that support its claim that each particular assessment was “unwarranted” and, moreover, to state the facts that support its allegation that these assessments allowed Konover to “retain funds otherwise payable to McLain.

Interrogatory No. 15 required McLain to state all facts that support its allegations that Konover attempted to terminate the subcontract “without complying with the provisions of the subcontract governing a party’s right to terminate.” McLain’s conclusory response that “the letter did not comply with the termination provisions of the contract” merely repeats the allegation in the counterclaim, and is patently insufficient. McLain is obligated, and has failed, to state the facts that support that the alleged termination letter failed to comply with the contract.

Interrogatory No. 17 required McLain to state all facts that support its allegation that “during February 2005 and thereafter . . . Konover . . . withheld any further payments to McLain,” including all claims for payment submitted to Konover at that time. McLain’s response that “Konover made no payments directly to McLain in February 2005 or thereafter” is not responsive to the request, which requires McLain to specify the factual basis for its claim that Konover “withheld” payments to McLain, including facts to support that McLain made claims to Konover during that time, which Konover failed to pay.

Interrogatory No. 19 required McLain to describe in detail the “constriction of cashflow” that it alleges Konover knew would “impair McLain’s ability to meet its obligations for labor, taxes and vendor accounts.” McLain’s conclusory response that “Konover’s failure to issue progress payments to McLain as requisitioned, its over-withholding of retainage and refusal to pay for legitimate extra work strained McLain’s cashflow. As with any subcontractor or general contractor, payments to suppliers, vendors and others is dependent on fair and timely payment of requisitions” is insufficient. The interrogatory is not addressed to “any subcontractor” – it is addressed to McLain and requires McLain to describe in detail its constriction of cashflow (and not a generalized, conclusory claim that Konover failed to make payments) and its alleged inability to meet its obligations.

Interrogatory No. 20 required McLain to describe in detail the “commitments” it alleges in the counterclaim that Konover failed to fulfill. McLain’s response that the “commitments are those referred to in McLain’s letter dated March 9, 2005 to Konover, as well as the contractual and statutory obligations imposed on Konover as the general contractor to pay McLain in a prompt and complete manner” simply reiterates the allegations of the counterclaim and does not describe in detail, as required, the commitments McLain claims Konover failed to fulfill. Konover is entitled to know the specific commitments McLain claims Konover failed to fulfill. Konover is not required to speculate which provisions of the contract, which statute, and which of the assertions in McLain’s letter identify “commitments” that McLain claims Konover failed to fulfill, or to guess which payments McLain claims Konover failed to pay promptly. See e.g. In re Savitt/Adler Litigation, 176 F.R.D. 44, 48-49 (N.D.N.Y. 1997); (Where “each of the

interrogatories at issue directs a plaintiff to ‘state the facts’ supporting various allegations “the interrogatories seek facts, not documents or tangible objects . . . the proper form of response is a narrative answer, not a reference to documents or objects where the answers might be found.”); Shamis v. Ambassador Factors Corp., 34 F.Supp.2d 879, 895 (S.D.N.Y. 1999) (“it is unacceptable to respond to an interrogatory by directing the interrogating party to deposition transcripts and documents without identifying the specific document and indicating the page and paragraphs that are responsive.”); Nagele v. Electronic Data Systems Corp., 193 F.R.D. 94, 108 (W.D.N.Y. 2000) (“Plaintiff should not be required to guess at her peril as to the answer by perusing the file which may or may not contain the necessary information.”)

Interrogatory No. 21 required McLain to state all facts that support its allegation that “Konover failed to comply with its payment obligations under the contract.” McLain’s response that “a comparison of the amounts and timing of payments, including retainage made by the Owner to Konover . . . with the timing and amount of payments made by Konover to McLain reveals that Konover failed to make timely and full payment to McLain for its work and over-withheld retainage by 2.5% each month” is insufficient. Again, Konover is entitled to know the contract provision with which McLain claims Konover failed to comply, and the specific payments that McLain claims failed to comply with that provision. Konover is not required to search through the contract to speculate which provision McLain claims Konover violated, or to search through the payments it received and the payments it made and to speculate as to which payments McLain claims were untimely, as McLain’s response would require Konover to do. See In re Savitt/Adler Litigation, supra; Shamis, supra, Naegle, supra.

3. FAILURE TO PROVIDE RESPONSIVE ANSWERS TO INTERROGATORIES RELATED TO DAMAGES

Interrogatory Nos. 6 & 8: McLain alleges in this action that it incurred damages as a result of Konover's alleged failure to (a) staff the project with capable and experienced personnel; and (b) coordinate the operations of its subcontractors so as to meet the project schedule. Interrogatory nos. 6 and 8 required McLain to describe in detail the damages it claims to have incurred as a result of each of these alleged failures by Konover, including the date on which McLain incurred the alleged damages. McLain simply ignored the requirement that it identify the dates on which incurred the alleged damages, and responded that "it is not possible to quantify with specificity the amount of damages flowing" from each of these particular allegations. This answer is not responsive to the interrogatory. McLain is obligated to provide Konover with a breakdown of its damage claims, including the dates on which it incurred the alleged damages and the basis for its contention that each of Konover's alleged failures caused it damages. John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 845 F.2d 1172, 1176 (2d Cir.1988).

Interrogatory No. 10: required McLain to describe in detail all damages it claims to have incurred as a result of Konover's alleged failure to comply with C.G.S. §§ 49-41a and 49-41b. McLain's response, speculation as to the measure that the jury will "likely" apply to determine McLain's damages is utterly unresponsive to the demand that McLain describe the damages "it claims" to have incurred. McLain's additional statement, that "the shortages and non-prompt payments caused payments to suppliers, vendors and other account obligations to be delayed" is conclusory. A fair response to the interrogatory requires McLain to identify the specific shortages and non-prompt

payments that caused the specific payments to specific suppliers, vendors and other account obligations to be delayed, and how McLain claims it was damaged as a result of this alleged delay. Finally, to the extent that McLain's statement that "unpaid invoices and retainage amount to \$173,703.00" purports to identify damages caused by Konover's alleged statutory violations, the response is insufficient because it does not describe in detail how these alleged damages were the result of Konover's alleged failure to comply with the statutes.

Interrogatory No. 14 required McLain to describe in detail all damages its claims to have incurred as a result of Konover's alleged assessment of unwarranted "back charges", including the date on which McLain incurred those alleged damages. McLain's response that "McLain would refer to the specific backcharges assessed by Konover, which are contained in Konover's files" is, again, insufficient and unresponsive. Konover is not required to search its files and speculate to determine the damages that McLain claims. McLain is obligated to specify the damages it claims to have incurred, state the facts that support its claim that those damages bear a causal connection to Konover's alleged assessment of unwarranted back charges, and the date on which it incurred those alleged damages. John B. Hull, Inc., supra.

Interrogatory No. 16 required McLain to describe in detail the damages it claims to have incurred as a result of Konover's alleged failure to provide McLain with three business days advance notice of the alleged termination of the subcontract. McLain's response, which identifies the alleged amount of unpaid invoices and retainage, unpaid change orders, unpaid claims for compensation, unabsorbed overhead amounts, and "loss of revenue of two years from loss of bonding capacity" is not responsive to the

interrogatory. McLain is obligated, and has failed to, state the facts that support its claim that these alleged damages bear a causal connection to Konover's alleged failure to provide McLain with three business days advance notice of the alleged termination of the subcontract. John B. Hull, Inc., supra.

Interrogatory No. 18 required McLain to describe in detail the damages it claims to have incurred as a result of Konover's alleged withholding of payments to McLain during February 2005 and thereafter. McLain's response, which identifies the alleged amount of unpaid invoices and retainage, unpaid change orders, unpaid claims for compensation, unabsorbed overhead amounts, and "loss of revenue of two years from loss of bonding capacity" is not responsive to the interrogatory. McLain is obligated, and has failed to, state the facts that support its claim that these alleged damages bear a causal connection to Konover's alleged withholding of payments of McLain during February 2005 and thereafter. John B. Hull, Inc., supra.

4. FAILURE TO PROVIDE RESPONSIVE ANSWERS TO INTERROGATORIES RELATED TO RESPONSES TO REQUESTS TO ADMIT

Interrogatory Nos. 24 & 25 required McLain to identify the facts on which it based the denial or qualified admission of Konover's Requests to Admit, and to identify the documents upon which it relied to deny the request or qualify its admission. All of the requests to admit that McLain denied, or for which McLain provided a qualified admission are relevant to the matters at issue, and discovery of the factual and documentary basis for the responses to these requests is likely to lead to the discovery of relevant, admissible evidence. By way of example:

(a) In response to Request to Admit numbers 1-3, McLain denied that Section 9 of the subcontract prohibited and/or required certain conduct by McLain as a prerequisite to its right to seek the amounts it currently seeks as damages in this action, and the non-payment by Konover of which it asserts as a defense to Konover's claims in this action. This contract provision is thus critical to the action, and Konover is entitled to discover the basis for McLain's denial of the requests to admit related to that provision; and

(b) In response to Request to Admit numbers 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, and 46, McLain denied that Items 1 through 14, respectively, of its Claim Summary dated February 10, 2005 "sought damages allegedly caused by delays and/or hindrances" on the ground that they allegedly did not seek "damages caused solely by 'delays' and/or 'hindrances.'" McLain is seeking to recover these amounts in this action, and the purpose of this denial is plainly to circumvent the provision of Section 9 of the subcontract which precludes McLain from obtaining damages resulting from delays or hindrances in McLain's work. The response is thus central to both McLain's defense and claims in this action, and Konover is thus entitled to discover both the factual and documentary basis for McLain's contention.

Nevertheless, McLain has refused to answer these interrogatories on the ground that they are unduly burdensome because of the number of requests to admit to which they apply. Although "[t]he granting or denial of a discovery request rests in the sound discretion of the court ... that discretion is limited ... by the provisions of the rules pertaining to discovery ... especially the mandatory provision that discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action." (Citations omitted; emphasis in original; internal quotation marks omitted.)

Pavlo v. Slattery, 2004 WL 424263 at *2 (February 20, 2004) (Bear, J.), quoting, Standard Tallow Corp. v. Jowdy, 190 Conn. 48, 57-59, 459 A.2d 503 (1983).

“All questions, including those objected to, are to be answered ... unless the objecting party procures from the court a protective order precluding or limiting the scope or disclosure of discovery.” (Citation omitted.) Id., quoting, Pavlinko v. Yale-New Haven Hospital, 192 Conn. 138, 143, 470 A.2d 246 (1984). The purpose of a protective order is to “protect a party from annoyance, embarrassment, oppression, or undue burden or expense ...” and the court may only grant such an order “for good cause shown.” Id., quoting, Practice Book § 13-5. Good cause has been defined as “a sound basis or legitimate need to take judicial action.” (Internal quotation marks omitted.) Id., citing, DGG Properties v. Konover Construction, Superior Court, judicial district of New Britain, Docket No. CV 99 0501534 (September 19, 2000, Aurigemma, J.). A good cause showing “must involve a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” Id., quoting, Langerman v. John Morganti & Sons, Superior Court, judicial district of Danbury, Docket No. CV 03 0348185 (September 18, 2003, Bellis, J.) (35 Conn. L. Rptr. 492).

McLain’s conclusory statements that the interrogatories are overly broad and burdensome because of the number of requests to admit to which they relate, is not sufficient to justify denying the highly relevant discovery that Konover seeks. Pavlinko, supra (rejecting defendant’s argument that good cause existed for granting a motion for protective order on the ground that the 123 requests for admission in action relating to construction of 2700 square foot home, propounded by plaintiff would “unduly burden and harass” defendant because of their quantity and scope, where the requests related to

issues relevant to the action), quoting, Carlino v. Town of Seymour, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV 92 038083 (September 2, 1992, McGrath, J.) (“The fact that answering numerous interrogatories may be burdensome ... is not a bar if they are relevant.”), citing, Clark v. General Motors Corp., 20 Fed.R.Serv.2d 679, 682 (D.Mass.1975).

C. RESPONSE TO SECOND REQUEST FOR PRODUCTION

Request number 2 to Konover’s Second Request for Production, seeks all documents that support McLain’s claims for damages. The response, which refers Konover to McLain’s “project files,” is insufficient. In response to Konover’s Second Set of Interrogatories, McLain has asserted damages beyond the scope of the project – in particular, \$248,692.00 in “loss of revenue for two years from loss of bonding capacity.” McLain is obligated, and the Court should compel McLain, to produce the documents on which it is relying to calculate these damages and that support its claim of lost bonding capacity and consequent lost profits, which clearly includes documents outside of the project file such as tax returns, attempts to obtain bonding, rejection of bond applications, documentation regarding projects that McLain claims it was precluded from obtaining as a result of its alleged loss of bonding capacity, documentation to support that, but for the alleged loss of bonding capacity, McLain would have been awarded the contracts, and documentation to support the net revenue McLain claims it would have earned from those contracts had they been awarded to McLain. Compare. Westport Taxi Service, Inc. v. Westport Transit Dist., 235 Conn. 1, 28-32, 664 A.2d 719 (1995) (evidence regarding plaintiff’s revenue and expenses, other sources of income, and evidence to support that plaintiff would have been able to obtain a rate increase but for defendant’s wrongdoing,

was sufficient to meet burden to establish lost future profits.) with Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin, 247 Conn. 48, 69-71, 717 A.2d 724 (1998) (award of lost future profits improper where plaintiff failed to present evidence that it would have earned the income, or that it would have earned the income but for the defendant’s misconduct: “such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with *reasonable certainty*” *such as by* “extrapolating from past profits”).¹

In the alternative, Konover respectfully requests that the Court issue an order prohibiting McLain from introducing documents outside of the “project files” it has provided to Konover in support of its claim for damages pursuant to Practice Book § 13-14(b)(4).

IV. CONCLUSION

For the foregoing reasons, Konover respectfully requests that the Court compel McLain to provide substantive responses to Konover’s second set of interrogatories and either order McLain to produce documents responsive to Konover’s second request for

¹ At pages 72-73, the Court cited the following cases, which also support the relevance of evidence relating to McLain’s prior and subsequent profitability to its lost future profits claim: Kay Petroleum Corp. v. Piergrossi, 137 Conn. 620, 624-25, 79 A.2d 829 (1951) (profits earned by plaintiff in year prior to breach may be extrapolated to time remaining on contract breached by defendant); Tull v. Gundersons, Inc., 709 P.2d 940, 945 (Colo.1985) (trial court improperly excluded evidence of plaintiff’s “past profit experience on other projects”); White v. Southwestern Bell Telephone Co., 651 S.W.2d 260, 263 (Tex.1983) (profits earned by plaintiff’s florist shop prior to defendant’s breach of contract relevant to determination of lost profits caused by defendant’s failure to list plaintiff’s business properly in telephone directory); El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 199 Neb. 697, 698, 261 N.W.2d 358 (1978) (increased profits earned after faulty pizza oven replaced indicative of profits lost as result of defendant’s breach of warranty of merchantability); Guady v. Seaman, 188 Pa.Super. 475, 477-78, 149 A.2d 523 (1959) (plaintiff’s success at different location admissible to show lost profits from defendant’s breach of lease); Ferrell v. Elrod, 63 Tenn.App. 129, 146-47, 469 S.W.2d 678 (1971) (same); Cook Associates v. Warnick, 664 P.2d 1161 (Utah 1983) (plaintiff’s experience at unaffected plant relevant to lost profits projected for affected plant)

production of documents or prohibit McLain from introducing documents outside of the “project files” it has provided to Konover in support of its claim for damages.