

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 4:09-CV-10095 MOORE/SIMONTON

JOHN DOLAN-HEITLINGER

Plaintiff,

v.

NATIONAL CREDIT UNION
ADMINISTRATION as Conservator for
Keys Federal Credit Union,

Defendant.

_____ /

**PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO PROVIDE A BETTER
ANSWER TO INTERROGATORY NO. 8 OF PLAINTIFF'S FIRST SET OF
INTERROGATORIES AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, JOHN DOLAN-HEITLINGER, by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 26 and 33, S.D.Fla.L.R.26.1, and this Court's Orders of October 29, 2009 [D.E. 7] and December 14, 2009 [D.E. 9], moves this Court for an Order to Compel Defendant to Provide a Better Answer to Interrogatory Nos. 8 of Plaintiff's First Set of Interrogatories,¹ and in support thereof states:

¹] Plaintiff filed a motion seeking substantially the same relief as this motion in Circuit Court for the 16th Judicial Circuit of Florida on or about June 30, 2008. The motion is being re-filed pursuant to this Court's Orders of October 29, 2009 [D.E. 7] and December 14, 2009 [D.E. 9]. A copy of Plaintiff's state court motion, without exhibits, is attached hereto as Appendix "A."

In the state motion, Plaintiff also sought a better answer to Interrogatory 5 of Plaintiff's First Set of Interrogatories. Interrogatory 5 asked Defendant to

Identify each and every person present at any meeting or conference held by Defendant at which Plaintiff's termination was discussed or considered and indicate the dates of the meeting(s) or conference(s).

On June 12, 2008, Defendant answered Interrogatory 5 by providing the dates of Keys Federal Credit Union's board meetings, and identifying the persons present as "members of the Board and Supervisory Committee" and Msrs. Michael D. Lozoff and Bruce M. Boiko.

On June 27, 2008, Defendant added the following:

With regard to Interrogatory No. 5, the answer properly sets forth the dates of all meetings and conferences at which plaintiff's termination was discussed as well as the persons present. Confirmation of which Members of the Board were present at the meetings can be ascertained by reviewing the minutes, which will be produced upon payment of the costs of production. *See Fla. R. Civ. P. 1.340(c).*

--Letter of Natalie J. Carlos, Esq., Defendant's counsel to Jose F. Torres, June 27, 2008.

However, Defendant did not make the referenced minutes of the Board meetings available to Plaintiff as required by Rule 33(d). Based on Defendant's recent offer to provide Plaintiff with the Board Minutes referenced in its original Answer to Interrogatory 5, Plaintiff does not include a request for a better answer to Interrogatory 5 in the present motion. [Letter of Natalie J. Carlos, Esq., Defendant's counsel to Plaintiff's counsel, January 6, 2010.]

1. This is an action for breach of contract. Plaintiff JOHN DOLAN-HEITLINGER alleges that KEYS FEDERAL CREDIT UNION ("KFCU"),² after renewing Plaintiff's employment contract on or about September 1, 2007 terminated his employment without cause on or about November 9, 2007. Plaintiff does not challenge KFCU's authority to terminate his employment without cause but claims that, pursuant to the "no cause" termination provision of the employment contract between the parties, he is entitled to six months' earnings and accrued benefits. DOLAN-HEITLINGER also seeks compensation owed and payable to him in the event of a "no cause" termination under his Deferred Compensation Plan with KFCU. Defendant asserts that it terminated DOLAN-HEITLINGER's employment for cause and does not owe him any monies.

2. Plaintiff filed and served the Complaint in this action for breach of contract on or about February 12, 2008.

²] On October 5, 2009, the NATIONAL CREDIT UNION ADMINISTRATION as Conservator for Keys Federal Credit Union was substituted in the state court as the proper defendant in this action. Defendant then removed the action to Federal Court on October 6, 2009. The action was stayed. [D.E. 6.] On October 29, 2009, the Court entered an order pursuant to Local Rule 7.2 providing that Plaintiff may re-file his discovery motions pending from state court 10 days after the lifting of the stay and after consulting with opposing counsel regarding the issues raised in the motions. [D.E. 7.] Subsequently, following a Joint Motion for Extension [D.E. 8.], the Court extended the time for Plaintiff to file the pending motions until January 11, 2010. [D.E. 9.]

3. On March 3, 2008, Defendant served its Answer and Affirmative Defenses on Plaintiff on March 3, 2008.

4. In its Answer and Affirmative Defenses, KFCU asserted seven affirmative defenses. Defendant's First Affirmative Defense purportedly sets forth the reasons asserted by Defendant for terminating Plaintiff's employment.

5. Plaintiff served his First Set of Interrogatories on Defendant on February 29, 2008. Defendant served its Answers and Objections to Plaintiff's First Set of Interrogatories on June 12, 2008.

6. Plaintiff's Interrogatory No. 8 (First Set) reads as follows:

INTERROGATORY NO.8

State whether Defendant or any attorney or representative on Defendant's behalf has obtained statements, reports, memoranda or recordings from any person which in any way concern the facts of this case or the matters alleged in your pleadings. If your answer is in the affirmative, separately identify the author of each such statement, report, memorandum or recording; the person or persons to whom the statement, report, memorandum or recording was issued, distributed, or otherwise provided; the present location or custodian of each such statement, report, memorandum or recording; and state the date each such statement, report, memorandum or recording was prepared.

7. Defendant's Answer to Plaintiff's Interrogatory No. 8 (First Set), served on June 12, 2008, reads in its entirety as follows:

Keys Federal objects to Interrogatory No. 8 because it seeks information that is protected by the work product and attorney-client privileges.

8. Via letter to Plaintiff's counsel, dated January 6, 2010, in response to Plaintiff's counsel's attempt to resolve the present discovery dispute, Defendant added:

With respect to Interrogatory No. 8 (First Set), NCUA objects on the grounds of attorney-client and work-product privileges. NCUA will provide a privilege log pursuant to Federal Rule of Civil Procedure 33(d).³

9. This Court should compel Defendant to provide a better answer to Interrogatory 8 (First Set) for the following reasons:

a) The scope of discovery is governed by Fed. R. Civ. P. 26(b)(1)⁴ which provides that:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense -- including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the

³] Letter from Natalie J. Carlos, counsel for Defendant, to Jose F. Torres and Robert E. Weisberg, counsel for Plaintiff, January 6, 2010, attached as Appendix "B."

⁴] Fla. R. Civ. P. 1.280(b)(5) parallels Fed. R. Civ. P. 26(b)(1). The state rule requires that "[w]hen a party withholds information otherwise discoverable under [Florida's rules of civil procedure] by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

b) The information sought by Plaintiff's Interrogatory is squarely within the provisions of Rule 26(b)(1). Plaintiff seeks information relevant to claims and defenses in the case, in particular, the existence, description, nature, custody, condition, and location of documents and the identity and location of persons who know of any discoverable matter.

c) Defendant's objection is unfounded and interposed to delay and impede discovery. The work-product and attorney-client privileges protect the *information* contained in privileged material. This dispute arises over an answer to an Interrogatory. The Interrogatory does not ask Defendant to disclose the information contained in any statements, reports, memoranda, or recordings over which Defendant seeks to assert a privilege. It does not ask Defendant to produce the materials which it claims are privileged. All it does is ask Defendant to state whether responsive statements, reports, memoranda, or recordings exist, and, if they do exist, to describe their nature with sufficient specificity for Plaintiff to identify the responsive materials and for the Court to assess Defendant's claim of privilege. In short, Plaintiff only asks Defendant to do what the rules require it to do.

d) Rule 26(b)(5) requires Defendant to "describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that,

without revealing information itself privileged or protected, will enable other parties to assess the claim" if it wishes to assert a privilege instead of producing the responsive documents. Fed. R. Civ. P. 26(b)(5).⁵

e) As of the date of this motion, almost two years after service of the Interrogatory on Defendant, Defendant has not complied with the basic requirements of Rule 26(b)(5). To comply with Rule 26(b)(5), Defendant must indicate whether statements, reports, memoranda or recordings exist and, if they do exist, identify the author of each such statement, report, memorandum or recording; the person or persons to whom the statement, report, memorandum or recording was issued, distributed, or otherwise provided; the present location or custodian of each such statement, report, memorandum or recording; and state the date each such statement, report, memorandum or recording was prepared.

f) If Defendant wishes to answer the Interrogatory pursuant to Fed. R. Civ. P. 33(d), as indicated in defense counsel's letter of January 6, 2010, it must comply with that rule by specifying the records to be reviewed in sufficient detail to enable Plaintiff to locate

⁵ Florida Rule 1.280(b)(5), tracks the language of the federal rule:

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

and identify them and it must give Plaintiff a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries thereof. Fed. R. Civ. P. 33(d)(1) and (2).⁶

10. Pursuant to this Court's Orders of October 29, 2009 [D.E. 7] and December 14, 2009 [D.E. 9], Plaintiff's counsel have consulted with opposing counsel in an attempt to resolve the issues raised in this motion but the Parties have not been able to resolve the

⁶] Fed. R. Civ. P. 33(d) is reproduced in its entirety below:

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

- (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
- (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

copies, compilations, abstracts, or summaries is a sufficient answer. An answer shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party interrogated, the records from which the answer may be derived or ascertained, or shall identify a person or persons representing the interrogated party who will be available to assist the interrogating party in locating and identifying the records at the time they are produced.

issues.

WHEREFORE Plaintiff respectfully requests that this Court enter an Order overruling Defendant's objection to Plaintiff's Interrogatory No. 8 and to compel Defendant to serve a fully responsive answer to Plaintiff's Interrogatory in compliance with Fed. R. Civ. P. 26, 33, and S.D.Fla. L.R. 26.1G within seven (7) calendar days of the date of the Court's Order on this motion.

Certificate of Service

We hereby certify that a true and correct copy of the above was served on counsel of record on the attached service list via electronic filing with the United States District Court for the Southern District of Florida on this 11th day of January, 2010.

s/ Robert E. Weisberg

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