

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

GOODBYS CREEK, LLC,
a Florida limited liability corporation,

Plaintiff,

v.

Case No.: 3:07-cv-947-J-34HTS

ARCH INSURANCE COMPANY,
a Missouri corporation,

Defendant.

_____/

ARCH INSURANCE COMPANY,

Counter-Plaintiff

v.

GOODBYS CREEK, LLC,
a Florida limited liability corporation,
and FAIRFIELD FINANCIAL SERVICES, INC. ,
a Georgia Corporation,

Counter-Defendants

_____/

**DEFENDANT, ARCH INSURANCE COMPANY'S, RESPONSE IN OPPOSITION
TO PLAINTIFF, GOODBYS CREEK, LLC's, MOTION TO COMPEL**

Defendant, Arch Insurance Company, LLC ("Arch"), hereby responds in opposition to the Motion to Compel and for Sanctions filed by Plaintiff, Goodbys Creek, LLC ("Goodbys"), and states:

INTRODUCTION

1. Goodbys claims in this case are for breach of a construction contract and performance bond and breach of good faith and fair dealing related to the same

construction contract.

2. Nevertheless, on July 28, 2008, Goodbys filed a Motion to Compel and For Sanctions And Incorporated Memorandum of Law (“Motion to Compel”), seeking any documents related to (i) correspondence between Arch and Auchter on other projects not at issue in this litigation, or (ii) the financial viability of Auchter during the course of the Project, and Arch’s knowledge of same. The Motion to Compel also seeks production of electronic documents in “native format” rather than in TIFF format offered by Arch, which is in compliance with the Federal Rules of Civil Procedure.

3. As stated in detail below, the information Goodbys seeks to compel from Arch is irrelevant and beyond the scope of discovery. The two categories of information described above do not bare a reasonable relationship to the issues framed by the pleadings, and therefore is not discoverable. Moreover, Arch has complied with the Federal Rules of Civil Procedure in producing electronic information in TIFF format, and the purpose for Goodbys’ demand for native format documents does not outweigh the burden and risk associated with producing documents in their native form.

4. Consequently, this Court should deny Goodbys’ Motion to Compel.

BACKGROUND

Issues Framed by the Pleadings

5. The dispute in this case centers around a performance bond and payment bond issued by Arch pursuant to a construction contract to build a condominium project (the “Project”). On October 4, 2005, Goodbys, as owner, entered into an A101-1997 Construction Contract (the “Contract”) whereby The Auchter Company (“Auchter”)

would act as general contractor for the Project. In accordance with the terms of the Contract, Arch issued Performance Bond No. SU1014173 (“Performance Bond”) and Labor and Material Payment Bond No. SU1014173 (“Payment Bond”), each naming Auchter as principal and Goodbys and Fairfield Financial Services, Inc. as co-obligees.

6. At its bare essentials, this case is a simple dispute of who failed to perform under the terms of the Performance Bond first, thereby relieving the other party of a duty to perform. Arch asserts that it was Goodbys who breached the Performance Bond by failing to appropriately respond to Arch’s demand, under the terms of the incorporated Contract, for reasonable evidence that Goodbys had made financial arrangements necessary to fulfill its obligations under the Contract. In turn, Goodbys asserts that it provided reasonable evidence, so that Arch’s subsequent refusal to perform under the Performance Bond was a breach of the Performance Bond.

7. Initially, Goodbys filed a five-count complaint for Breach of Performance Bond, Breach of Payment Bond, Breach of Good Faith and Fair Dealing with regard to both Bonds, and for violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”).

8. On July 31, 2008, this Court entered an Order granting, in part, Arch’s Motion for Judgment on the Pleadings (“Judgment Order”). In the Judgment Order, the Court dismissed all claims against Arch related to the Payment Bond, and dismissed Goodbys’ FDUTPA claim.

9. Thus, as currently framed by the pleadings, Goodbys has asserted only two causes of action. Count I of the Complaint alleges a Breach of the Performance

Bond as follows:

Despite having been provided with notice of the defaults of Contractor, Surety has failed to remedy the defaults; or failed to complete work required by the Contract in accordance with the terms and conditions of the Performance Bond; failed to secure a replacement Contractor to complete the work; Surety has otherwise breached and failed to perform any of its obligations required by the Performance Bond.

See Complaint, ¶ 16.

10. Additionally, the Court ruled that Goodbys asserted a claim for Breach of Good Faith and Fair Dealing with Owner with Respect to the Performance Bond, alleged under Count IV of the Complaint as follows:

Surety wrongfully made unreasonable and non-contractually required demands upon the Owner to provide reasonable evidence of the Owners ability to pay for the “Project.”... Surety’s bad faith insistence that the owner provide more than what the Contract required was made solely for the purpose of avoiding its obligations under the Contract and Performance Bond.

See Complaint, ¶¶ 40, 41. In the Judgment Order, this Court ruled that “Goodbys has raised sufficient factual allegations regarding Arch’s failure to perform in good faith under Section 2.2.1 [of the Contract] to proceed on its Count IV claim.” (emphasis added).

Goodbys’ Requests for Production

11. On December 31, 2007, Goodbys served a Request for Production upon Arch, a copy of which is attached to Goodbys’ Motion to Compel as Exhibit A. On February 29, 2008, Arch timely served its Response to Request for Production, which is

attached to Goodbys' Motion to Compel as Exhibit B ("Response").¹ In addition, on June 12, 2008, Arch served an Amended Response to Request for Production, which is attached to Goodbys' Motion to Compel as Exhibit C ("Amended Response").

12. Request No. 2 seeks:

All Documents and Electronic Documents that evidence, reflect, substantiate and/or relate to all communication between Arch and Auchter from January 1, 2006 to the present.

13. Request No. 11 seeks:

All Documents and Electronic Documents that evidence, reflect, substantiate, and/or relate to your knowledge of the lack of solvency and/or lack of economic viability and/or lack of ability to perform of Auchter at any time during the Project, including but not limited to Documents and Electronic Documents demonstrating your relationship with Auchter at any time, when you first learned of he problems with Auchter, and what actions you took upon learning this information about Auchter.

14. Request No. 12 seeks:

All Documents and Electronic Documents that evidence, reflect, substantiate and/or relate to your underwriting file for Auchter relating to the Project, including but not limited to any investigation of the creditworthiness and solvency of Auchter.

15. In its Response, Arch objected to Request Nos. 11 and 12 to the extent each sought documents irrelevant to this matter and which are unlikely to lead to admissible evidence. In its Amended Response, Arch objected to Request No. 2 to the

¹ In paragraphs 6 and 8 of the Motion to Compel, Goodbys implies that Arch's Response was untimely. Arch objects to such implication. Indeed, Arch requested an extension of time from Goodbys to respond, which was refused despite Arch's prior courtesies of allowing enlargements of time to Goodbys to respond to Arch's Counterclaim, Motion for Judgment on the Pleadings, and Arch's discovery requests. As such, Arch filed a Motion for Enlargement of Time to Respond to Discovery (Dkt. 26), which was granted on March 10, 2008 (Dkt. No. 32) after the responses were already provided.

extent it sought documents irrelevant to this matter (i.e. correspondence regarding other projects), but agreed to produce correspondences related to the Project at issue.²

16. Pursuant to Rule 26 of the Federal Rules of Civil Procedure, any discovery served by Goodbys must be relevant to either (1) Arch's refusal to perform under the Performance Bond; (2) Arch's demands—and Goodbys' response— under Section 2.2.1 of the Contract; or (3) Arch's Counterclaim for Breach of Contract, Impairment of Surety, and Foreclosure of Construction Lien. As discussed in detail below, Goodbys' requests bare no reasonable relationship to any of these currently pled claims and defenses, and are not calculated to lead to the discovery of admissible evidence. Thus, Goodbys' requests are beyond the scope of discovery.

LEGAL ARGUMENT

Request Nos. 2, 11 and 12 in Goodbys' Request for Production Are Not Relevant

17. Rule 26 of the Federal Rules of Civil Procedure prohibits discovery of information not relevant to any party's claim or defense, or any information not reasonably calculated to lead to the discovery of admissible evidence.

18. It is well-established law that "relevance serves as the gate through which

² Arch served a Revised Response to Request for Production on June 30, 2008. This "revised" response was an inadvertent duplication of the Amended Response served on June 12, 2008. Both these supplemental discovery responses were in response to Goodbys' correspondence of June 9, 2008 (Exhibit F to the Motion to Compel), and made to clarify Arch's response to Request No. 2.

As shown Exhibit F, Arch reaffirmed its objections to Request Nos. 11 and 12. The Revised Response was not intended to change Arch's objections to Request Nos. 11 and 12. However, it appears a scrivener's error may have done just that. There are 33 responses in the Revised Response, but only 32 requests in Goodbys' Request for Production. A review of the original Response and the Revised Response shows that an additional response was mistakenly added between Request Nos. 2 and 5. To the extent necessary, Arch hereby withdraws its Revised Response and regrets the error.

all discovery requests must pass.” *Christ Covenant Church v. Town of Southwest Ranches*, 2008 WL 2686860 (S.D. Fla. 2008). Arch has objected to Request Nos. 2, 11, and 12 as irrelevant because the continuing financial viability of Auchter has no bearing on this case. There was a fully solvent surety standing behind Auchter, should Auchter have defaulted on its contractual obligations (which it did not). Similarly irrelevant to the pending contractual claims is correspondence between Arch and Auchter not related to the Project at issue. These bases were specifically communicated to Goodbys. *See* Exhibit F to the Motion to Compel.

19. Goodbys’ purported basis for seeking the above documents is its efforts to establish (i) “potential exposure of \$100,000,000.00;” (ii) a failure to disclose information to Goodbys; (iii) Arch somehow encouraged Auchter to wrongfully terminate the Contract; and (iv) a pattern of bad faith. *See* Motion to Compel, ¶¶19-26.

20. None of these stated bases is relevant to the issues pending before this Court, as framed by the pleadings. As stated above, pending before this court are issues relating to (1) Arch’s refusal to perform under the Performance Bond; (2) Arch’s demands—and Goodbys’ response—under Section 2.2.1 of the Contract; or (3) Arch’s Counterclaim for Breach of Contract, Impairment of Surety, and Foreclosure of Construction Lien.

21. Auchter’s financial viability and Arch’s purported knowledge of same is irrelevant to the specific contractual issues before this Court. Indeed, Goodbys’ allegations of a broad pattern of bad faith (which Arch vehemently denies) are objectionable, and merely designed to cast Arch in a bad light. Despite its assertions to

the contrary, Goodbys' allegations are not related to its contractual claim for Breach of Good Faith and Fair Dealing.

22. In its Judgment Order, this Court noted that Goodbys could maintain its cause of action for Breach of Good Faith and Fair Dealing because such claim "contemplates whether a *contractual* term was breached and whether the parties' *contractual* expectations have been met" (emphasis added). All the allegations contained in the Motion to Compel are extra-contractual in nature, and do not relate to whether Arch acted in good faith in requesting adequate financial assurances under section 2.2.1 of the Contract.

23. Instead, Goodbys' allegations clearly relate to a statutory bad faith action, which is not permitted under Florida law. The allegations in the Motion to Compel further show Goodbys' attempts to circumvent Florida law by bringing a contractual claim, but alleging extra-contractual bad faith. As Goodbys is well aware, bad faith actions against sureties are prohibited under section 624.155(9), Florida Statutes, and Goodbys' cannot evade applicable law by identifying its claim otherwise.

24. Consequently, Arch's objections to Request Nos. 2, 11, and 12 of Goodbys' Request for Production must stand.

Burden and risk of producing electronic documents in "native format" far outweigh the limited benefits, if any, to be gained by Goodbys

25. Rule 34 of the Federal Rules of Civil Procedure, with regard to discovery of electronically stored information, permits a party responding to a request for production to produce documents in a "reasonably usable form" if the party seeking discovery does not specify the form in which the information is to be produced. Federal

law is clear that TIFF images are a reasonably usable form of electronic production. *See In re Seroquel Product Liability Litigation*, 244 F.R.D. 650, 655 (M.D. Fla. 2007) (“The relatively inexpensive production of computer-readable images may suffice for the vast majority of requested data.”); *see also Williams v. Sprint/United Management Company*, 230 F.R.D. 640, 643 n.8 (D. Kan. 2005) (“TIFF (Tagged Image File Format) is one of the most widely used and supported graphic file formats for storing bit-mapped images.”)

26. Goodbys’ Request for Production, while specifically defining “electronic documents,” does not specify the format for the requested electronic documents. As such, on April 23, 2008, Arch, through its attorneys, notified Goodbys that it would produce its electronically stored information (“ESI”) via TIFF images. That same day, counsel for Goodbys responded that he “will take copies of the tiffs.” *See* Exhibit G (page 3) to the Motion to Compel. Arch has therefore complied with the Federal Rules of Evidence and Goodbys’ Motion to Compel should be denied for this reason alone. *See, e.g., Ponca Tribe of Indians v. Continental Carbon Co.*, 2006 WL 2927878, at *6 (W.D.Okla. 2006) (“The original document requests issued by Plaintiffs failed to specify the manner in which electronic or computer information should be produced. [Defendant] elected to use a commonly accepted means of complying with the request. Nothing in the materials provided by Plaintiffs supports requiring [Defendant] to reproduce the information in a different format. Accordingly, Plaintiffs’ request for reproduction of documents in their native electronic format will be denied.”); *Wyeth v. Impax Labs., Inc.*, 2006 WL 3091331, at *1-2 (D.Del. 2006) (“Since the parties have never agreed that electronic documents would be produced in any particular format, [Plaintiff] complied

with its discovery obligation by producing image files”); *compare Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y.2006) (requiring production in native format where requesting party asked for it and producing party did not object).

27. Goodbys, however, now demands it receive all ESI in its “native format,”³ without any reasonable explanation for its demand. Contrary to the conclusory assertions of Goodbys, the native format of a document is *not* the most reasonable form of disclosure, as such disclosure implicates complicated issues related to metadata, which need not become an issue in this case when metadata would reveal no relevant information. Indeed, Goodbys’ Motion to Compel clearly seeks native format documents simply to make it easier for Goodbys to search the documents—not to obtain metadata.

28. Production of such metadata could reveal the privileged process of gathering the requested documents, whether for this case or another, as opposed to the status of the document as it existed during the relevant time period. Similarly, metadata in the form of hidden comments to a Word document could reveal privileged attorney communications.

29. Likewise, it is difficult and time-consuming to devise a manner of production of native format documents that will ensure the information exists now in the state it existed at the time the document may have originally been utilized, or to ensure information is not changed post-production.

30. Further, production in “native” format, without any way to identify such

³ Production in “native” format typically means production of ESI in the format in which it was originally created and maintained. For example, production of a file created by Microsoft Word typically would be produced in that format, wherein the file ends with the .DOC extension.

documents (by “bates” label or otherwise), where thousands of electronic documents may become key to the parties’ respective cases, will create unimaginable practical difficulties when it comes to identifying such documents for trial.⁴ TIFF images, in contrast, may easily be Bates labeled for ease of identification.

31. The burden and risks associated with production of native format ESI far surpass the minimal benefits, if any. *See Seroquel*, 244 F.R.D. at 654; *CP Solutions PTE, Ltd. v. General Elec. Co.*, 2006 WL 1272615 (D. Conn. 2006); *Bolton v. Sprint/United Management Company*, 2007 WL 756644 (D. Kan 2007); *see also Michigan First Credit Union v. CUMIS Ins. Soc., Inc.*, 2008 WL 2915077 (E.D.Mich. 2008) (Confirming Magistrate ruling that the limited evidentiary value of producing “native format” documents with accompanying metadata is outweighed by the overly burdensome task of generating such documents.)

32. Indeed, as noted in the Manual for Complex Litigation cited by Goodbys, production of files in their native format—a more expensive and time-consuming form of production—“should be conditioned upon a showing of need.” *See Manual for Complex Litigation* (4th ed.) §11.446.

33. Goodbys has presented no actual benefit it would obtain from obtaining ESI in native format rather than in TIFF format. TIFF images are essentially a “picture” of a document, and are “reasonably usable” as contemplated by the Federal Rules of Civil Procedure because, with the use of litigation support software, each party has the same

⁴ Goodbys inaccurately states that Arch has identified “hundreds of thousands” of electronic documents to be disclosed (Motion to Compel, ¶ 32), but a cursory review of the correspondence to which Goodbys refers indicates there may exist only hundreds *or* thousands of documents. *See Exhibit G* (page 1) to the Motion to Compel.

ability to access, search, and display the information contained in the TIFF file. Goodbys simply states that it needs the benefit of “easy-to-use search tools present in Word or email programs.” (Motion to Compel, ¶ 33). When litigation support programs exist to easily search TIFF images, this excuse does not outweigh the burden and risk associated with production of native format ESI.

34. Consequently, Goodbys’ Motion to Compel production of ESI in native format must be denied.

CONCLUSION

35. As stated above, the information Goodbys seeks to compel from Arch is irrelevant and beyond the scope of discovery. Any information related to (i) correspondence between Arch and Auchter on other projects not at issue in this litigation or (ii) the financial viability of Auchter during the course of the Project, and Arch’s knowledge of same, is completely irrelevant to the issues as framed by the pleadings. Specifically, any discovery must relate to (1) Arch’s refusal to perform under the Performance Bond; (2) Arch’s demands—and Goodbys’ response—under Section 2.2.1 of the Contract; (3) Arch’s Counterclaim for Breach of Contract, Impairment of Surety, and Foreclosure of Construction Lien. The documents sought in Request No. 2, 11, and 12 bare no reasonable relationship to these issues, and therefore are not discoverable.

36. Additionally, Goodbys’ request for electronic documents in “native format” implicates complicated and sensitive issues related to disclosure of metadata. Metadata is not an issue in this case—it would reveal no relevant information related to the parties’ respective claims, and Goodbys has not sought such metadata. Indeed,

Goodbys seeks documents in their native format simply to take advantage of “easy to use” search tools in the native programs. When litigation support programs exist to easily search TIFF images, this excuse does not outweigh the burden and risk associated with production of native format ESI.

37. Consequently, this Court should deny Goodbys’ Motion to Compel.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 11, 2008, I electronically filed the foregoing in CM/ECF.

/s/ Seth P. Traub