

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PATRICK R. DALKA and)
JASON SZYDLEK,)
)
Plaintiffs,)
)
vs.)
)
MAURICE C. SUBLETT, individually)
and as an employee or agent of)
TransCor America, Inc., and/or)
Correctional Corporation of)
America; TRANSCOR AMERICA, INC.,)
and CORRECTIONAL CORPORATION)
OF AMERICA d/b/a/ CCA)
)
Defendants.)

No. 01-2485V

ORDER DENYING PLAINTIFF DALKA'S MOTION TO COMPEL DISCOVERY
AND FOR SANCTIONS AGAINST DEFENDANT TRANSCOR

Before the court is the April 3, 2000 motion of the plaintiff Patrick R. Dalka to compel the defendant Transcor America, Inc. to provide more full and complete responses to Interrogatories Nos. 1, 2, 4, and 7 through 19 and Requests Nos. 2, 4, 5, 17, 19, and 20 of the Plaintiff's First Set of Interrogatories and Requests for Production of Documents. Dalka also seeks sanctions against Transcor, in the nature of fees and expenses, for failure to serve complete responses to his discovery. Dalka maintains that Transcor's responses to Interrogatories Nos. 1, 2, and 4 and to all the document requests at issue were incomplete. With respect to

Interrogatories Nos. 7 through 19, Transcor objected to answering them on the grounds that they exceeded the twenty-five interrogatory limit imposed by Rule 33.

As stated in this court's order of April 30, 2002, this lawsuit arises out of a traffic accident on July 13, 2001. On that day, the defendant Transcor, a private company engaged in the business of transporting prisoners, was transporting the plaintiffs, both of whom were state prisoners, to state correctional facilities. The Transcor van, which was driven by defendant Sublett, rear-ended another vehicle. Both plaintiffs allege that they were seriously injured as a result of the accident. Both have asserted claims for auto negligence as well as a violation of their constitutional rights under 42 U.S.C. § 1983.

In his motion to compel, Dalka first argues that any objections by Transcor to the written discovery were waived by Transcor's failure to timely interpose objections. Objections to interrogatories and requests for production of documents must be served within thirty days after service of the interrogatories or request for production of documents. Fed. R. Civ. P. 33(b)(3) and 34(b). Whenever a party is required to do some act within a prescribed time period after receiving service by mail, three additional days is added to the period. Fed. R. Civ. P. 6(e).

Dalka submits that he "served [his] discovery requests on the

Defendant [Transcor] on February 13, 2002." (Pl.'s Reply to Def. Transcor's Resp. to Pl.'s Mot. to Compel and for Sanctions at 2.) The court assumes service was made by mail. (Dalka failed to attach a copy of the discovery requests that included a certificate of service so the court has no way of verifying Dalka's service.) Service by mail is complete upon mailing. Fed. R. Civ. P. 5(b)(2)(B). Thus, Transcor's responses were due thirty-three days after service. Transcor received the interrogatories and document production requests on February 14, 2002. (Def. Transcor America Inc. Resp. to Pl.'s Mot. to Compel at 3.) Thirty-three days from February 13, 2002, would be March 18, 2002. Transcor did not serve its responses and objections until March 19, 2002, one day late.

"Generally, in the absence of an extension of time or good cause, the failure to object to interrogatories within the time fixed by Rule 33, F.R.Civ.P., constitutes a waiver of any objection." *Scott v. Arex, Inc.*, 124 F.R.D. 39, 41 (D. Conn. 1989) (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981)); Fed. R. Civ. P. 33(b)(4). There has been no request for an extension of time in this case, nor has Transcor given any specific reason for its untimeliness. Rather, Transcor insists that its responses were timely because they were due thirty-three days from February 14, 2002, the date Transcor received the discovery

requests, instead of the date Dalka mailed the requests. Clearly, according to Fed. R. Civ. P. 59b)(2)(B), Transcor has erred in calculating its deadline. Because the delay was only one day, however, the court will excuse for good cause Transcor's untimeliness due to its miscalculation. Accordingly, Dalka's request to treat Transcor's objections as waived is denied.

Interrogatory No. 1 seeks the identity of all persons involved in the arrest, confinement, and/or transportation of Patrick Dalka. Transcor objected to the interrogatory as overbroad because it seeks information relating to Dalka's arrest and confinement while the complaint and the incident giving rise to the complaint deal only with Dalka's transportation. Transcor has already provided the names of persons within its knowledge who were involved with the transportation of Dalka. To the extent that Interrogatory No. 1 seeks information about the arrest and confinement, it is overbroad, and Dalka's motion to compel is denied. Transcor is not required to ascertain the identity of employees of other jails and correctional facilities. This information is equally accessible to Dalka by way of subpoena.

As to Interrogatory No. 2, Transcor objected to Subpart (4) as irrelevant and overbroad to the extent it sought information dealing with the transportation of Dalka from Portland, Oregon, to Canton, Texas, and to Subpart (6) as being vague. The court finds

the objections to be proper. There are no allegations in the complaint concerning Dalka's transportation from Portland, Oregon, to Canton, Texas, and Subpart (6) is too general to enable a coherent response.

Dalka also contends that Transcor's responses to Interrogatories No. 2 and 4 were incomplete and insufficient. After careful review of the interrogatories and Transcor's answers, the court finds Transcor's answers to be sufficient and complete. Accordingly, Dalka's motion to compel based on the insufficiency of Transcor's answer to Interrogatories Nos. 2 and 4 is denied.

Transcor refused to answer Interrogatories Nos. 7 through 19, claiming that these interrogatories exceeded the permissible number under the Rules. Without leave of court, each party may serve up to 25 interrogatories which includes all discreet subparts. Fed. R. Civ. P. 33(a). Dalka has not obtained leave of court to serve in excess of twenty-five interrogatories, and the number of questions asked in Interrogatories 1 through 6, counting the subparts, equals twenty-five. Therefore, Dalka's motion to compel responses to Interrogatories Nos. 7 through 19 is denied at this time.

The first disputed document request, Request No. 2, seeks all documents relating to the incident which is the subject of the complaint. Transcor claims to have produced all documents with the

exception of the manifest and receipts. According to Transcor, after diligent search, it has been unable to locate these records. It appears from the record in this matter that Transcor does not have the requested documents in its possession. The court cannot compel a party to produce that which does not exist. Accordingly, Dalka's motion to compel is denied as to Request No. 2.

Request No. 4 asks Transcor to produce all documents relating to any claim against Transcor. In his motion, Dalka explains that this request is limited to claims asserted against Transcor as a result of the July 13, 2000 accident. Transcor objected to the request as overly broad, unduly burdensome, and irrelevant. As previously stated in the April 30, 2002 order on the motion to compel Sublett, the court fails to see how the medical records of the other occupants are relevant to prove the injuries to the plaintiffs and how information concerning any settlement between the other occupants of the van and the defendants herein would be relevant to the liability of the defendants and the injuries suffered by the plaintiffs in this case. As with Sublett, however, if Transcor has acquired the names, addresses, and phone numbers of the other occupants of the van and has not yet provided them, he is instructed to do so. Otherwise, Dalka's motion to compel is denied as to this request.

Request No. 5 seeks all training records for all employees,

agents, servant, contractors and entities identified in response to Interrogatory Nos. 1, 3, and 4. Transcor supplied the training records for the two individuals who were engaged in the actual transport of Dalka but objected to providing training records for any other employee on grounds of relevancy. Dalka has failed to carry his burden of showing that the training records of other employees are relevant, and his motion to compel further response to this request is denied.

Request No. 17 asks Transcor to produce Sublett's entire worker's compensation file, including all medical records, all documents filed with the Department of Labor, and all statements, plus the worker's compensation file of any other employee in the van. Transcor, like Sublett, objected to production of Sublett's file on relevancy grounds. For the reasons set forth in the Sublett order of April 30, 2002, Dalka's motion to compel Transcor to respond to this request is denied. Moreover, the court notes that Sublett's medical records are privileged under Tennessee's physician/patient privilege.

Requests Nos. 19 and 20 seek copies of all documents reflecting any injuries, damages or settlement with regard to other passengers in the van. Again, the court fails to see the relevance

of the requested information. See discussion *supra* at p. 6.

Based on the foregoing, Dalka's motion to compel Transcor is denied in its entirety, and Dalka is not entitled to an award of sanctions.

IT IS SO ORDERED May 2, 2002.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE