

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

REX ALAN BARKER,)	
)	
Plaintiff,)	
)	
vs.)	No: 02-2835-BV
)	
AM-RAIL CONSTRUCTION INC.,)	
)	
Defendant.)	

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL RESPONSES TO
PLAINTIFF'S FIRST SET OF INTERROGATORIES AND FIRST SET OF
DOCUMENT REQUESTS
AND
ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO PROPOUND ADDITIONAL
INTERROGATORIES

Before the court are two motions filed on January 28, 2004 by the plaintiff, Rex Barker, pursuant to Rules 37, 30, and 33(a) of the Federal Rules of Civil Procedure seeking two things: (1) to compel the defendant, Am-Rail Construction, Inc. ("Am-Rail") to respond to Barker's First Set of Interrogatories and First Set of Document Requests and (2) leave to propound additional interrogatories and to depose Am-Rail's corporate designee.¹ The motions were referred to the United States Magistrate for a determination. The defendant timely responded to both motions on

¹ The caption of Barker's motion to propound additional interrogatories and to depose Am-Rail's corporate designee requests only to propound additional interrogatories; however, the body of the motion requests leave to take a Rule 30(b) (6) deposition of the defendant.

February 17, 2004. For the following reasons, Barker's motions are denied.

This is an employment discrimination and breach of contract case in which Barker claims that his employment was wrongfully terminated. Barker filed his complaint in October of 2002. He was initially represented by Kathleen Caldwell. The defendant answered in December of 2002. A scheduling order, entered in January of 2003, set a discovery deadline of December 1, 2003, and a dispositive motion deadline of November 15, 2003. The dispositive motion deadline was later extended to December 12, 2003.

On October 16, 2003, Caldwell withdrew as counsel of record. The order granting Caldwell leave to withdraw allowed Barker forty-five days to obtain new counsel. On November 21, 2003, within the time permitted by the court, Jonathan Hancock and Venita Martin entered an appearance as counsel for Barker. Shortly thereafter, on December 12, 2003, the defendant filed a motion for summary judgment. Barker's counsel then filed a motion to stay the proceedings for ninety days. The motion was granted in part for good cause shown, giving Barker until February 20, 2004 to respond to the defendant's motion for summary judgment. Barker's response to Am-Rail's motion for summary judgment was untimely filed on February 23, 2004.

The two motions presently before the court address complications that arose out of Barker's change in representation

and Am-Rail's objections to the disclosure of information sought in Interrogatory Nos. 15, 16, 17, 18, and 22 of Barker's first set of interrogatories and Request for Production Nos. 19, 20, 21, and 22 of Barker's first set of document requests. Prior to the withdrawal of Caldwell, on June 11, 2003, Am-Rail served its responses to Barker's first set of interrogatories and requests for production. In its response, Am-Rail objected to certain interrogatories and categories of documents sought on the basis of confidentiality and relevance.² Additionally, Am-Rail asserted that it would "move for a protective order if an agreement cannot be reached with the Plaintiff concerning the extent of this disclosure and manner in which the requesting information will be used in this litigation." (Def.'s Brief in Opp'n to Pl.'s Mot. to Compel Resps. to Pl.'s First Set of Interrogs. and First Set of Doc. Reqs. at 4-6.) According to Am-Rail, it never sought a protective order because it assumed that the issue was resolved

² Interrogatory Nos. 15, 16, 17, 18, and 22 request information regarding project and customer lists from 2001 to the present, lists of pending matters and projects not yet bid, lists of all bids from 2001 to present, lists of all promotional material used by defendant from 2001 to present, and lists of all contracts from potential customers seeking proposals or bids from the defendant. (Def.'s Brief in Opp'n to Pl.'s Mot. to Compel Resps. to Pl.'s First Set of Interrogs. and First Set of Doc. Reqs. at 5-6.)

Document Requests Nos. 19, 20, 21, and 22 seek copies of all annual accountings from 2000 to present, copies of all customer files from 2001 to present, and financial statements issued on behalf of Am-Rail from 2000 to present. (*Id.* at 6-7.)

when the parties had a telephonic conference with United States District Judge Hardy Mays, the original district court judge assigned to this case, about the extent to which Caldwell could depose Am-Rail President Alfonso Medrano about customer, client, or project information. (*Id.* at 4.) During that conference, Judge Mays limited the scope of Caldwell's deposition inquiry to the business Barker contends he generated, and the parties agreed that Caldwell would not disseminate any information acquired to others. (*Id.*)

After the close of discovery on December 1, 2003, the court conducted a status conference with Am-Rail and Barker's new counsel on January 15, 2004. During that conference, Barker's new counsel requested permission to file the present motion to compel responses to the interrogatories and requests for production of documents. In addition to that motion, Barker requested permission to file a motion for leave to propound additional interrogatories and to take the deposition of Am-Rail's corporate representative. The court granted the plaintiff ten (10) days to file both of the motions and extended the discovery and dispositive motion deadlines to June 1, 2004. Barker then filed the motions presently before the court on January 28, 2004.

Rule 37(a)(2)(B) of the Federal Rules of Civil Procedure requires that a motion to compel a party to produce documents include "a certification that the movant has in good faith

conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." FED. R. CIV. P. 37(a)(2)(B). Similarly, Local Rule 7.2 requires that all discovery motions be accompanied by a certificate of counsel affirming that, after consultation pursuant to the Rule, the parties were unable to reach an accord as to all issues. Local Rule 7.2(a)(1)(B). The moving party must specify the name of counsel with whom he confers and what means of communication were used to discuss the motion. The burden is also on the moving party to initiate the conference "upon giving reasonable notice of the time, place and nature of the conference." *Id.* Failure to file a Rule 7.2 certificate "may be deemed good grounds for denying the motion." *Id.*

Barker's attorney filed a certificate of consultation with both of the motions presently before the court that states:

[C]ounsel for Plaintiff[] personally attempted to contact via telephone counsel for the Defendant, Eugene Stone Forrester, Jr., to discuss the issues raised in the present Motion on January 27 and 28, 2004 and was unable to do so and was therefore cannot [sic] assert whether the Defendant will oppose the relief sought in the present Motion. . . .

(Pl.'s Mot. for Leave to Propound Additional Interrog. and Mem. in Supp. Thereof at 4.) In response to the plaintiff's motions, Am-Rail argues that Barker's counsel have not complied with Local Rule 7.2. Although Am-Rail confirms Barker's assertion that no consultation between the parties' counsel actually occurred prior

to Barker's filing, they claim that the lack of consultation was a result of Barker's counsel's delayed attempt to contact them two days before the court's deadline for filing the present motions. (Def.'s Brief in Opp'n to Pl.'s Mot. to Compel Resps. to Pl.'s First Set of Interrogs. and First Set of Doc. Reqs. at 7.) Furthermore, Am-Rail's counsel disputes that Barker's counsel made a good faith effort to contact them because one of Am-Rail's attorneys, Eugene Forrester, was in his office on January 27, 2004 and was never informed that Plaintiff's counsel was trying to reach him. (*Id.*) No one at his office took a message from Barker's counsel on either January 27 or 28 and no voice mail message was left. Additionally, Am-Rail's other attorney, James Love, was in his office on both days and was never contacted by Barker's counsel. (*Id.* at 8.)

Based on Am-Rail's counsel's representations to the court, it appears that Barker's counsel failed to confer in good faith with Am-Rail in an attempt to resolve the discovery dispute without court intervention. Barker's attorneys did not provide any notice to Am-Rail of when a conference would take place, even though the defendant was aware from the January 15 status conference that Barker intended to file the motions presently before the court. Although Barker's attorneys assert that they tried to call Am-Rail's counsel on two different dates, the record does not indicate that any messages were left with either attorney representing the

defendant in this matter. Furthermore, Barker's certificate of consultation indicates that Barker's counsel only attempted to contact Forrester although another attorney, Love, was available to discuss the motions and the necessity for court intervention. Barker's failure to consult is particularly troubling as it concerns his motion to compel responses because court intervention could have been avoided if the parties had discussed the nature and scope of the interrogatories and requests for production of documents and Judge Mays' earlier ruling on the subject matter addressed in those requests.

Even if the court found that Barker had complied with Local Rule 7.2, his motion for leave to file additional interrogatories and to depose Am-Rail's corporate designee would still have little merit. Barker seeks to propound an additional twenty-five (25) interrogatories but does not illustrate why such interrogatories are necessary. The only explanation given in support of Barker's request is that his new counsel has determined that "new discovery is needed into the policies and/or practices of Defendant." (Pl.'s Mot. for Leave to Propound Additional Interrogs. and Mem. in Supp. Thereof at 2.) Rule 26(b)(2) of the Federal Rules of Civil Procedure provides the court with the discretion to limit discovery methods "otherwise permitted under these rules . . . if it determines that . . . (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the

information sought." FED. R. CIV. P. 26(b)(2). The plaintiff has already propounded more than the twenty-five interrogatories allotted by Rule 33. In fact, as pointed out by the defendant, Barker already has served thirty-two interrogatories and has not attempted to demonstrate that propounding an additional twenty-five interrogatories is justified by the complexity or scope of the issues raised in this case. (Def.'s Brief in Opp'n to Pl.'s Mot. for Leave to Propound Additional Interrogs. and Mem. in Supp. Thereof at 2.) Accordingly, Barker has had ample opportunity in discovery to obtain the information sought, even though he was once represented by different counsel.

Likewise, Barker's request to depose Am-Rail's corporate counsel is duplicative and unreasonably cumulative because the plaintiff's counsel has already deposed Am-Rail's president, a designated corporate representative. Furthermore, Barker's new counsel has not demonstrated to the court that another deposition is necessary or that they did not have ample opportunity to obtain the information sought when Medrano was deposed the first time. Accordingly, Barker's motions to compel and for leave to file additional interrogatories and to depose Am-Rail's corporate representative are denied.

IT IS SO ORDERED this 26th day of February, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE