

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

MJS JANITORIAL,)	
)	
Plaintiff,)	
)	
vs.)	No. 03-2102MaV
)	
KIMCO CORPORATION,)	
)	
Defendant.)	

ORDER GRANTING IN PART AND DENYING IN PART THE PLAINTIFF'S MOTION
TO COMPEL PRODUCTION OF DOCUMENTS AND FOR SANCTIONS

Before the court is the April 12, 2004 motion of the plaintiff, MJS Janitorial ("MJS"), pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, to compel the defendant, Kimco Corporation ("Kimco"), to respond to Request No. 1 and Request No. 26 of its first set of requests for production of documents. MJS also seeks fees and expenses pursuant to Rule 37(a)(4)(A) for bringing the motion to compel. The motion was referred to the United States Magistrate Judge for determination. For the reasons stated below, MJS's motion to compel and for sanctions is denied.

MJS has sued Kimco seeking to recover money for services MJS performed under a supplier agreement with Kimco, as well as a declaratory judgment regarding a purported non-competition agreement that Kimco asserts MJS entered into by way of a contract addendum. Kimco answered the complaint and filed a counterclaim

against MJS alleging a breach of a covenant not to compete and intentional interference with a contract between Kimco and Kmart. MJS now seeks an order requiring Kimco to produce documents responsive to two separate requests.

Request No. 1

MJS's first request asks Kimco to "[p]roduce all documents relating to any communication between MJS and Kimco." (MJS Janitorial's Mem. of Law in Supp. of its Mot. to Compel at 1.) Kimco responded that the requested documents have already been produced in its initial disclosures. (*Id.*) In its motion to compel, MJS insists that all requested documents have not been produced because it believes that Kimco and Kimco's former counsel, Mr. Fimhoff, have documents in their possession relating to communications between MJS and Kimco, and that Kimco did not timely invoke the attorney-client privilege. In its response to the motion to compel, Kimco acknowledges that such attorney-client communications exist but claim they are protected by the attorney-client privilege. Kimco points out that it asserted the attorney-client privilege in its general objections and that the privilege was incorporated into its response to Request No. 1. Kimco has offered to produce a privilege log detailing the communications that it claims are privileged.

The court finds that Kimco has timely asserted the attorney-client privilege as to the documents requested in Request No. 1 and

has not waived the privilege by disclosure of other communications from Fimhoff. Accordingly, MJS's motion to compel is denied as to Request No.1. Rule 26(b)(5) instructs that when information is withheld on a claim of privilege or as protected trial preparation materials, then the claim must be "made expressly and shall be supported by a description of the nature of the documents . . . sufficient to enable the demanding party to contest the claim." FED. R. CIV. P. 26(b)(5). The burden is on whoever asserts the privilege. Because Kimco has withheld documents on a claim of privilege, Kimco must provide a privilege log with sufficient detail to allow MJS to challenge Kimco's assertion of privilege.

Request No. 26

In Request No. 26, MJS asks Kimco to "produce all correspondence between Kimco and any third party referencing any contract between Kimco and Kmart Corporation providing for the provision of janitorial services at Kmart stores." (*Id.* at 2.) Kimco objected to the request as overly broad and unduly burdensome and also on the grounds that it seeks confidential information.

Because Kimco has conceded in its response to MJS's motion for summary judgment on Kimco's interference of contract claim that it, Kimco, did not have a contract with Kmart, the documents sought in Request No. 26 are no longer relevant to a disputed issue of fact. Accordingly, MJS's motion to compel is denied as to Request No. 26 as well.

Sanctions

MJS also requests reasonable expenses including attorney fees for bringing this motion to compel. Rule 37 provides that if a motion to compel is granted, the court shall require the party whose conduct necessitated the motion to pay reasonable expenses, including attorney fees, incurred in making the motion. Here, because the motion was denied in its entirety, MJS is not entitled to fees and expenses.

CONCLUSION

For the reasons stated above, MJS's motion to compel and for sanctions is denied. Kimco, however, shall provide a privilege log for Request No. 1 within eleven days of the date of this order.

IT IS SO ORDERED this 12th day of May, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE