

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

ALFRED J. BELNIAK, D/B/A
HAMMERHEAD CONSTRUCTION,

Plaintiff,

v

Case No.8:07-CV-00032-T-24TGW

MODERN DAY CONSTRUCTION, INC., a Florida
Corporation, et al.
Defendants

**PLAINTIFF'S MOTION TO COMPEL DISCOVERY
FROM DEFENDANTS PAR CUSTOM DRAFTING, INC. AND PHILLIP ROUSH
AND MEMORANDUM IN SUPPORT**

Plaintiff ALFRED J. BELNIAK D/B/A HAMMERHEAD CONSTRUCTION, hereinafter Plaintiff, by the undersigned counsel moves this court pursuant to Federal Rules of Civil Procedure 37 and Local Rule 3.04(a), M.D. Florida Local Rules, for an Order Compelling Defendants, PAR CUSTOM DRAFTING, INC. and PHILLIP ROUSH, hereinafter Defendants, to produce all documents responsive to Plaintiffs Second Request for Production of Documents. The grounds upon which this Motion are based and the substantial matters are set forth hereinafter.

Nature Of The Action

This action arises under the copyright laws and specifically involves the alleged copyright infringement by Defendants of Plaintiff's architectural floor plan (house plan)

for Plaintiff's copyrighted *The Abbey*. This action was instituted by Plaintiff on January 5, 2007.

Although the requested documents are proper objects of discovery, Defendants have improperly objected to their production. Plaintiff's Second Request for Production of Documents, and Defendants' Responses thereto are reproduced here in their entirety for this Honorable Court's consideration.

Plaintiff's Second Request for Production of Documents

REQUEST:

- a. All memoranda notes, sketches, architectural drawings, technical drawings, architectural prints, architectural renderings, or other documents which were used in connection with the creation of the architectural prints and/or plans exemplified by Exhibit 3 of the Complaint.

ANSWER: Objection. This request seeks documents which are not relevant and not reasonably intended to lead to the discovery of admissible evidence. Further, this request is overbroad in scope and unduly burdensome and harassing.

Exhibit 3 of Plaintiff's Complaint is an infringing architectural drawing of Plaintiff's copyrighted *The Abbey* which was drafted by Defendants PAR and/or Roush and/or an employee of PAR and/or Roush in 2003. Thus, this request is relevant to Defendants previous and continuing access to Plaintiff's copyrighted *The Abbey*. Further,

this request is relevant as to whether Defendants had knowledge of Plaintiff's copyrights in *The Abbey* and thus could also lead to admissible evidence negating Defendants' asserted defense of innocent infringement. (Dkt. # 19, Affirmative Defenses Para. 6) Also, this evidence could lead to impeachment evidence regarding Defendants' asserted defense of independent creation. (Dkt. #19, Affirmative Defenses Para 3) Accordingly, Defendants' objections should be overruled and Defendant should be compelled to disclose the documents requested pursuant to this Request.

REQUEST:

- b. All correspondence and documents between PAR and/or ROUSH Kenneth Zarrillo and/or Heidi Flexer and/or Scott Flexer which were used to create the designs for the residence exemplified in Exhibit 3 of the Complaint.

ANSWER: Objection. This request seeks documents which are not relevant and not reasonably intended to lead to the discovery of admissible evidence. Further, this request is overbroad in scope and unduly burdensome and harassing.

This request seeks correspondence and documents relating to Defendants' interaction with the homebuilder, Kenneth Zarrillo, and the homeowner, Heidi Flexer and Scott Flexer, all of whom were involved in the infringement of Plaintiff's copyrighted *The Abbey* which is exhibited in Plaintiff's Complaint Exhibit 3. This request is relevant to Defendants' access to Plaintiff's copyrighted *The Abbey* and also to Defendants knowledge of Plaintiff's copyrighted *The Abbey*. Defendants are alleged to have copied

Plaintiff's copyrighted *The Abbey* on three separate occasions. The first known infringement was in the year 2003 and involved contractor Kenneth Zarrillo and homeowner Heidi and Scott Flexer. The second and third known infringement alleged in this action and Civil Case No. 8:07-CV-00256-JMSS which is also pending before this Honorable Court. Thus, Defendants drafted Plaintiff's *The Abbey* for (2) two separate builders and (3) three separate homeowners. Thus, the manner in which these designs were crafted and devised, the act of infringement and the circumstances and factual background of the infringement are relevant to Defendants willfulness of the infringement in this action.

It should be noted that Kenneth Zarrillo, homebuilder (contractor) involved in the infringement represented in Exhibit 3 of Plaintiff's Complaint, was listed as a defense witness in Defendants' Initial Disclosures pursuant to Federal Rule of Civil Procedure Rule 26(a) and disclosed to have "knowledge regarding prior homes designed" by Defendants. Accordingly, any documents or correspondence between Defendants and a previous infringer of the same copyrights are relevant for the above-stated reasons. Accordingly, Defendants should be compelled to produce all correspondence and documents pursuant to this Request.

REQUEST:

- c. All correspondence and documents between PAR and/or ROUSH and/or drafting firms and/or draftsmen and documents which created the designs for the residence exemplified in Exhibit 3 of the Complaint.

ANSWER: Objection. This request seeks documents which are not relevant and not reasonably intended to lead to the discovery of admissible evidence.

Further, this request is overbroad in scope and unduly burdensome and harassing.

This request is seeking the disclosure of documents and correspondence between Defendants and any other drafting firm or draftsman who worked with Defendants in the creation of the infringing drawing exemplified in Exhibit 3. It is believed, that Paul Grynewicz, an employee of Defendants drafted the infringing floor plan in this action, the infringing floor plan exemplified in Exhibit 3 of Plaintiff's Complaint and the infringing floor plan in Civil Action Case No. 8:07-CV-00256-JMSS. As such, this information is relevant as to whether Defendants had knowledge of the infringement in this action and in its previous drafting of Exhibit 3. Further, these documents are relevant to Defendants asserted defenses of innocent infringement and independent creation. (Dkt. # 19, Affirmative Defenses Para. 3 and 6)

It should be noted that Defendants have in addition to the aforementioned infringement of Plaintiff's *The Abbey* are alleged to have infringed another copyrighted architectural drawing of Plaintiffs as represented in Civil Action Case No. 8:00-CV-02500-SCB.¹ Employee, Paul Grynewicz, employee of Defendants also, upon information and belief, drafted the infringing house drawing in Civil Action Case No. 8:00-CV-02500-SCB. Thus, any correspondence and documents associated with the creation of the designs in Exhibit 3 of Plaintiff's Complaint are relevant to determine what policies and procedures, if any, have been instituted by Defendants to ensure in good faith that Defendants and its employees do not commit future copyright infringement. It also

¹ This action was filed before this Honorable Court and involved the infringement of Plaintiff's copyrights in *The Dynasty III*. This action was settled before trial.

may lead to evidence whereupon it could be proven that Defendants had knowledge of Plaintiff's copyrights but chose to disregard those copyrights and to subsequently illicitly draft Plaintiff's architectural drawing in this action. Accordingly, Defendants' objections should be overruled and Defendants should be compelled to produce the requested documents.

REQUEST:

- d. All correspondence relating in any way to either the drafting of the architectural prints or plans and/or the construction of the residence exemplified by Exhibit 3 of the Complaint.

ANSWER: Objection. This request seeks documents which are not relevant and not reasonably intended to lead to the discovery of admissible evidence. Further, this request is overbroad in scope and unduly burdensome and harassing.

This request has the same relevance as Request letter a, b and c. Further, this Request seeks any correspondence relating to the drafting of Exhibit 3 of Plaintiff's Complaint. The purpose of this Request is to ensure that Plaintiff is provided with all of the correspondence involved in the drafting of Exhibit 3. Because of the infringement exhibited in Exhibit 3 was settled prior to Plaintiff filing a complaint, Plaintiff did not get the benefit of discovery and the benefit of a thorough background information regarding the drafting of Exhibit 3. Thus, Plaintiff is unaware of the potential witnesses and potential admissible evidence which may be contained in documents held by Defendants regarding the drafting of Exhibit 3. This information could lead to further witnesses

which could disclose Defendants' access to Plaintiff's copyrighted *The Abbey* and also be relevant to various defenses asserted.

Understandably, Plaintiff is not seeking to litigate any of these previous allegations of copyright infringement; however, Plaintiff is entitled to some leeway in the gathering of information surrounding this prior infringement so as to fully prosecute the action in this matter.

REQUEST:

- f. All communications between PAR and/or ROUSH and Heidi Flexer and/or Scott Flexer and/or Kenneth Zarrillo relating to the residence exemplified in Exhibit 3 of the Complaint.

ANSWER: Objection. This request seeks documents which are not relevant and not reasonably intended to lead to the discovery of admissible evidence. Further, this request is overbroad in scope and unduly burdensome and harassing.

This request has the same or similar relevance as to Request letter a, b and c. Moreover, this Request is relevant to the factual allegations surrounding the infringement involved in the drafting of Exhibit 3. Plaintiff is unaware of the circumstances surrounding Defendants involvement in the infringement of Exhibit 3. This Request may lead to admissible discoverable evidence regarding Defendants' knowledge of Plaintiff's copyrights in *The Abbey* and ultimately aide to negate the various referenced asserted defenses of innocent infringement and independent creation. Perhaps these previous infringers documented their communications with the Defendants regarding the copying

of Plaintiff's *The Abbey*. This information is unknown to Plaintiff, and Plaintiff should be entitled to the benefit of this information for all of the various reasons previously set forth in this Motion to Compel.

For the above-stated reasons, Plaintiff respectfully requests that this Court enter an Order compelling the production of all responsive documents within ten (10) days of this Court's Order a mutually agreed upon place and to permit the inspection and copying of.

Memorandum of Law in Support of Plaintiff's Motion to Compel

a. Unduly burdensome is Not in and of Itself a Reason to Object.

The sheer fact that a request for production of documents would be unduly burdensome is not in and of itself a reason for objecting to the disclosure of documents and information. *Clark v. Mellon Bank, NA*, 1993 WL 54435 (3rd Cir. in E.D. P.A. 1993). Additionally, the party resisting discovery must demonstrate specifically how the request “is unreasonable or otherwise unduly burdensome.” *See Donahay v. Palm Beach Tours & Transp., Inc.* 2007 WL 1576143, *2 (S.D.Fla.,2007) (citing Fed.R.Civ.P. 33(b)(4) and *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir.1985). To merit consideration, ““an objection must show specifically how a discovery request is overly broad, burdensome or oppressive, by submitting evidence or offering evidence which reveals the nature of the burden.”” *Id* (Citing *Coker v. Duke & Co.*, 177 F.R.D. 682, 686 (M.D.Ala.1998).

While there is no set standard for courts to determine what is deemed to be unduly burdensome, the court must consider the needs of the case, the amount in controversy, the parties' resources, and the importance of the issues at stake and the importance of the proposed discovery. F.R.C.P. Rule 26(b)(2)(iii).

In the present case, Defendants are believed to have only one location whereupon their business is conducted. In addition this drawing (house plan) was drafted in the year of 2003. Thus, all of the requested documents are easily accessible to Defendants. Further, the requests were in part formulated to address Defendants' asserted affirmative defenses which include independent creation and innocent infringement. Thus, there is a great importance to the proposed discovery in Plaintiff being able to prosecute this action and counter Defendants' asserted affirmative defenses.

The amount in controversy for this action is up to \$150,000.00, if Defendants are found to have willfully violated Plaintiff's copyrights. While counsel for Plaintiff is unaware of Defendants' resources, Plaintiff is merely seeking the disclosure of documents that are readily available to the Defendants and thus would not cause Defendants to expend unnecessary resources in the production of those documents. As such, Defendants' objections as to the above-related requests for production are not unduly burdensome and thus Defendants should be compelled to produce the requested documents in Plaintiff's Second Request for Production of Documents.

c. The Discovery Rules Should be Liberally Construed.

The discovery rules should be afforded broad and liberal treatment and makes trial "less a game of blind man's bluff and more a fair contest." *See United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) Further, the information sought need not be

admissible in trial in order to be discoverable. *See Anton v. Proposed Café Miano, Inc.*, 233 F.R.D. 216, 218 (D.D.C. 2006) The party objecting to the discovery request has the initial burden of proving that the information is irrelevant. *See Rubin v. Islamic Republic of Iran*, 349 F. Supp 2d. 1108, 1111 (N.D. Ill. 2004)

Defendants also object that the requests will not lead to admissible evidence. Discovery under the Federal Rules of Civil Procedure are not limited to admissible evidence, but can extend to any evidence which *might* lead to discovery of admissible evidence. A party must show the court ““that the requested documents [information] either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.”” *See Gober v. City of Leesburg*, 197 F.R.D. 519, 521 (M.D. Fla. 2000) (citing *Burke v. New York City Police Dept.*, 115 F.R. D. 220, 224 (S.D.N.Y. 1987)).

The party resisting production of documents or information bears the burden of establishing lack of relevancy or undue burden in supplying the requested information. *See International Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 184-85 (M.D.Fla.1973) (holding that the party avoiding discovery has the initial burden of demonstrating a privilege). "The party must demonstrate to the court 'that the requested documents [information] either do not come within the broad scope of relevance defined pursuant to Fed.R.Civ.P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.” *Id.* (citing *Burke v. New York City Police Dept.*, 115 F.R.D. 220, 224 (S.D.N.Y.1987))

Because these Requests are calculated to lead to admissible evidence, Defendants should be compelled to produce all documents relating to Plaintiff's above-stated Requests.

In conclusion, the discovery sought from Defendants in this action are relevant for myriad of reasons, of which include Defendants' access to Plaintiff's copyrighted *The Abbey* and Defendants asserted defenses of innocent infringement and independent creation. These requests were designed to go to some of the essential elements of Plaintiff's copyright infringement action. Because this information is relevant to the issues before this court and/or may lead to the discovery of admissible evidence in this action, as outlined in the body of this Motion, Plaintiff's objections to the discovery outlined herein should be overruled and Defendants should be compelled to fully answer each Request for Production of Documents and provide the documents associated therewith within ten (10) days of this court's order.

d. Plaintiff is entitled to sanctions under Rule 37(a)(4) and Middle District Discovery (2001) at III (A)(6)

Plaintiff also moves, pursuant to Rule 37(a)(4), Federal Rules of Civil Procedure, that Defendant be required to pay to Plaintiff the reasonable expenses, including attorney's fees incurred by Plaintiff in bringing this Motion. Rule 37(a)(4) provides, that "[i]f the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, ... require the party or deponent whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that ... the

opposing party's nondisclosure, response, or objection was substantially justified.”” See *Gober v. City of Leesburg*, 197 F.R. D. 519, 520 (M.D. Fla. 2000) (ordering sanctions because there was no substantial justification in withholding the information requested). Plaintiff asserts that Defendants objections are without merit and thus Defendants have no substantial justification to withhold the requested documents.

Pursuant to Middle District Discovery at III (A) (6), “[s]pecific objections should be matched to specific requests. General or blanket objections should be used only when they apply to every request.” Defendants’ objections to each of Plaintiff’s Second Request for Production of Documents represent are general blanket objections which are not specific in relation to Plaintiff’s Requests. Further, Middle District Discovery (2001) at III (A) (3) provides that a responding attorney “shall reasonably and naturally interpret it, recognizing that the attorney serving it does not have specific knowledge of the documents sought” and further provides for sanctions under the provisions of Federal Rule of Civil Procedure Rule 37 if the responses are “evasive or incomplete.” Plaintiff would assert that because Defendants have given blanket “kitchen sink” responses to Plaintiff’s Requests and because Defendant is attempting to evade the disclosure of relevant discoverable information, Plaintiff is entitled to sanctions pursuant to Federal Rule of Civil Procedure Rule 37.

**CERTIFICATE OF GOOD FAITH
COMPLIANCE WITH LOCAL RULE 3.01(g) AND FEDERAL RULE OF
CIVIL PROCEDURE RULE 34**

In accordance with Local Rule 3.01(g), counsel for Plaintiff has conferred with Defendants’ counsel on the requests made and the objections raised and was unable to

amicably resolve the issues set forth herein.

WHEREFORE, for the reasons set forth herein, Defendants have improperly objected to Plaintiff's discovery requests that are not only relevant to the issues in this action but are also within the permissible scope of discovery pursuant to Federal Rule of Civil Procedure Rule 26, thus, Defendants should be compelled to provide full and complete answers to each of the above outlined production requests, and for such other relief as this Court deems just and proper.

Respectfully submitted,

/s/ Debra B. Tuomey

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Date: June 8, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 8, 2007 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following individuals: Frank A. Miller at fmiller@cagmil.com; Scott D. Clay at sclay@claylawgroup.com; and Shannon K. Rosser at srosser@wickersmith.com.

/s/ Debra Tuomey

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