DOCKET NUMBER: CV-05-4009403-S	:	SUPERIOR COURT
KONOVER CONSTRUCTION CORPORATION	:	J.D. OF HARTFORD
VS.	:	AT HARTFORD
MCLAIN ELECTRIC COMPANY, INC., JEFFREY MCLAIN, and SHARON MCLAIN	:	March 13, 2007

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DETERMINE SUFFICIENCY OF ANSWERS TO REQUESTS TO ADMIT

I. INTRODUCTION

Plaintiff Konover Construction Corporation ("Konover") filed this action to recover damages caused by defendants (collectively "McLain") breach of contract, misrepresentations, and unfair practices in connection with McLain's provision of electrical services pursuant to a subcontract with Konover. Defendants have answered the complaint with various denials, and special defenses, and have filed a counterclaim alleging *inter alia* that Konover breached various duties to McLain, has been unjustly enriched, and engaged in unfair practices.

On November 15, 2006, plaintiff served two sets of requests to admit. The first request sought admission of facts related to the complaint, special defenses and counterclaim. The second request sought admission of the authenticity of various documents. After obtaining a number of extensions of time to respond, McLain served the attached responses to the requests to admit on February 28, 2007, which are insufficient and do not comply with Practice Book Section 13-23. McLain has not responded to plaintiff's attempt to obtain to meet and confer regarding the responses.

Accordingly, plaintiff respectfully requests that the Court determine that the responses are insufficient and order McLain to serve sufficient responses forthwith.

II. FACTUAL BACKGROUND

The Town of Deep River hired Konover as the general contractor on a very complicated phased retrofit of an existing and occupied school building in Deep River Connecticut known as the John Winthrop Jr. High School (the "Project"). In July 2003, Konover entered a subcontract with McLain to perform the electrical work for the Project. Pursuant to the subcontract, McLain agreed to provide all necessary electrical work for the price of $1,924,687.41.

The subcontract required McLain to submit requisitions for payment to Konover no later than the 20th of each month, covering all work performed through the 20th of that month. The subcontract also provided that, to the extent it was McLain's position, at any time, that it was entitled to additional compensation as a result of a change in the scope of the work it had agreed to perform, McLain was required *prior to proceeding with the work associated with the change* to submit written notice of the claim to Konover. The subcontract specifically barred any claims for additional payment for work for which McLain had failed to provide prior written notice. The subcontract further required McLain to submit in writing to Konover all claims for adjustment of the contract time or price, including an itemization of the damages and time within ten days after the start of the occurrence giving rise to the claim. McLain agreed in the subcontract that any claim for adjustment of the contract price not submitted within 10 days of the start of the occurrence giving rise to the claim would be barred. Finally, McLain agreed that the contract price accounted for the possibility of delays in the work, and that it would not

bring any claim for money damages as a result of delay or hindrances and that Konover would not, under any circumstances, be liable to McLain for damages resulting from delays or hindrances. McLain agreed that, to the extent it claimed delays or hindrances, its sole remedy was an extension of time for performance, which it was required to request within ten days of the start of the occurrence giving rise to the claim for additional time.

During the course of the Project, McLain submitted requisitions for payments to Konover purportedly for work performed pursuant to the plans and specifications of the project and sought payment for supplies from vendors McLain made up to and through the respective payment period of each requisition. McLain also submitted releases to Konover covering the period up through the requisition requests.

In December 2004, however, McLain sought an additional $615,340 in compensation to perform the remaining electrical work to complete the project – claiming that the remaining balance due under the contract was not sufficient to cover McLain's expenses. Konover denied the request for additional sums. Konover also subsequently learned that Mclean failed to perform its work consistent with the plans and specifications of the Project .

In February 2005, McLain resubmitted a request for additional funds in a document entitled "claim," which sought compensation for additional expenses allegedly incurred by McLain during its prior performance of the contract, that McLain had not included in its prior requisitions and for which McLain had not given Konover written notice as provided in the contract. The "claim" contained 14 items, each of which sought payment for expenses McLain claimed to have incurred as a result of delays or

hindrances in its work allegedly caused primarily by Konovoer's failure to properly supervise and schedule the work.

On or about February 28, 2005, McLain abandoned its work on the Project, and failed and refused to return to work, despite written notice and demand by Konover. As a result, Konover was forced to retain other contractors to complete McLain's work at considerable additional costs and expense to Konover.

Konover has filed action for damages caused by McLain's failure to fulfill its contractual obligations and related misrepresentations. McLain has denied most of the allegations of Konover's complaint, and asserted special defenses and a counterclaim in which it claims it is entitled to the damages it sought in the February 2005 claim submitted to Konover, as well as additional damages allegedly caused by Konover's improper termination of the contract.

On November 15, 2006, Konover served two requests for admissions. The first request sought, among other things, admissions relating to the terms of the contract that precluded and continue to preclude McLain's claims for damages, and admissions that the releases McLain submitted to Konover in connection with its requisitions for payment during the course of construction, are valid. The second request sought admissions regarding the authenticity of the certifications for payment submitted by McLain. To avoid the preclusive effect of the contractual prerequisites and limitations to McLain's claim for damages, and to avoid admitting that McLain failed to perform the conditions precedent to its claim for damages, McLain has refused to respond to the substance of the requested admissions, and/or has simply ignored, and failed to admit and specify the

portions of the requests that it cannot, in good faith, deny, as required by Practice Book § 13-23(a).

III. ARGUMENT

A. APPLICABLE STANDARD

"Admissions are sought first to facilitate proof with respect to issues that cannot be eliminated from the case and, secondly to narrow the issues by eliminating those that can be ... [A]n admission on a matter of opinion may facilitate proof or narrow the issues or both." Olszewski v. new Britain General Hosp., 2000 WL 234718 (February 3, 2000) (Gaffney, J.) Thus, Practice Book Rule 13-23(a) requires that answers to requests to admit "shall specifically deny the matter or set forth in detail the reason why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, such party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless such party states that he or she has made a reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable an admission or denial." Practice Book § 13-23(a).

Where a party has answered or objected to a request for admission, Practice Book Rule 13-23(b) allows the requesting party to seek a judicial determination of the sufficiency of the answer or objection. Practice Book § 13-23(b); Hightower v. Walgreen Eastern Co., Inc., 2000 WL 1434054 (Conn.Super. September 15, 2000). The court may reject unjustified objections and order answers, and determine that, as to answers deemed

non-compliant, either the matter be deemed admitted or an amended answer be served. Id.

B. THE COURT SHOULD REQUIRE McLAIN TO PROVIDE AMENDED RESPONSES TO KONOVER'S FIRST REQUEST FOR ADMISSIONS

1. Failure of responses to "meet the substance of the requested admission" and to specify the portions of the requested admissions that are true.

The responses to requests to admit nos. 5, 7, 8, 10, 13, 14, 16, 17, 19, 20, 22, 23, 25, 26, 28, 29, 31, 32, 34, 35, 37, 38, 40, 41, 43, 44, 46, and 47 fail to comply with Practice Book Section 13-23(a), which requires that "A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, such party shall specify so much of it as is true and qualify or deny the remainder" as follows:

> Request No. 5: The December 7, 2005 claim did not itemize the damages sought or the time claimed.
>
> Response: Denied that the document constituted a "claim."
>
> Deficiency: McLain's denial that the document constituted a "claim" does not meet the substance of the request, which asked McLain to admit that the document did not itemize the damages sought or the time claimed. While McLain is free to deny the portion of the request which characterizes the document as a "claim," this does not relieve McLain of the obligation to specifically admit or deny the remainder of the request. As the Federal District Court of Connecticut aptly noted: AThough qualification may be required where a request contains assertions which are only partially correct, a reviewing court should not permit a responding party to undermine the efficacy of the

rule by crediting disingenuous, hair-splitting distinctions whose unarticulated goal is unfairly to burden an opposing party." Thalheim v. Eberheim, 124 F.R.D. 34, 35-36 (D.Conn. 1988).[1]

> Request Nos. 7, 10, 13,16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46: These requests ask McLain to admit that Items 1 through 14, respectively, of its Claim Summary dated February 10, 2005 "sought damages allegedly caused by delays and/or hindrances."
>
> Response: "Denied that Item 1 [through 14] sought damages caused solely by 'delays' and/or 'hindrances.' Moreover, Konover did not raise the ten day issue during the parties' discussion of this matter."
>
> Deficiency: The responses do not meet the substance of the requests to admit.

The requests did not ask McLain to admit that delays and/or hindrances were the "sole" cause of the alleged damages sought, and the request did not anywhere address, or refer to, a "ten day issue." Moreover, while McLain's response implicitly admits that Items 1 through 14 of the Claim Summary sought damages caused, at least in part, by delays and/or hindrances, the Practice Book requires that McLain either (a) specifically deny that Items 1 through 14, respectively, of its Claim Summary dated February 10, 2005 sought damages allegedly caused by delays and/or hindrances; (b) specifically admit that the items sought damages caused by delays and/or hindrances, subject to an appropriate qualification; or (c) deny only a part of the matter, and specify so much of it as is true, which, in this case, would require McLain to specify which portion of each item of damages McLain admits were caused by hindrances and/or delays.

> Request Nos. 8, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47: These requests ask McLain to admit that "McLain did not seek an adjustment of the contract price from Konover in writing within ten days after the start of the occurrence giving rise to the price adjustment sought in Item 1 [through 14] of the Claim Summary" dated February 10, 2005.

[1] Because Practice Book § 13-23 was modeled after the federal rules, the federal interpretation of those rules is instructive. See Olszewski, supra.

Response: "Denied that there was a single 'occurrence' that would provide a rational or practical starting point. Moreover, Konover did not raise the ten day issue during the parties' discussion of this matter."

Deficiency: First, McLain's assertion that "Konover did not raise the ten day issue during the parties' discussion of this matter" is not responsive to the request to admit, which does not ask McLain to admit that Konover took, or failed to take, any action whatsoever. Second, McLain's assertion that there were no "single" occurrences with a measurable start date, which gave rise to McLain's various claims, is argumentative, in bad faith, and is not responsive. The Claim Summary itself specifies the occurrences, and those occurrences clearly have start dates. For example, Item 1(A) seeks damages caused by "10 weeks no framing contractor on site." There is clearly a date on which McLain claims the framing contractor should have been on site, but was not. Even where the Items make generalized assertions that Konover's failures resulted in increased labor and material expenses to McLain, at a minimum, McLain is clearly able to identify the dates on which it was allegedly required to incur the expenses for which it sought a price adjustment.

2. Failure to make, or state that McLain has made, a reasonable inquiry and that the information known or readily obtainable is insufficient to enable admission or denial

McLain's responses to request to admit nos. 51 and 53 do not comply with Practice Book § 13-23, which requires that "An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless such party states that he or she has made a reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable and admission or denial." Specifically:

Request Nos. 51 & 53: Request McLain to admit that the "Partial Waiver and Release of Mechanic's Lien and Payment Bond Rights that McLain executed on March 1, 2005 is valid and binding."

Response: "Unable to admit or deny because it is unknown to which document this request is intended to refer."

Deficiency: As McLain is well aware, it executed to Partial Waiver and Release of Mechanic's Lien and Payment Bond Rights" on March 1, 2005. (See McLain Responses to Second Request to Admit, ¶¶ 13, 14 and Exhibits 13 and 14 thereto.) Information as to which request to admit applied to which document was easily obtainable by McLain, but McLain failed to make any inquiry and thus, not surprisingly, failed to state that it made any reasonable inquiry to enable it to admit or deny the request. Just as importantly, McLain has failed to set forth in detail why this lack of knowledge makes it unable to admit or deny the requests, as Practice Book § 13-23 requires, as for example, might be the case if McLain admitted that one of the Waivers is valid and binding, but not the other.

B. THE COURT SHOULD REQUIRE McLAIN TO SERVE AMENDED RESPONSES TO THE SECOND SET OF REQUESTS FOR ADMISSIONS

McLain's responses to second request to admit nos. 17, 18, 19, 20, 21, 22, and 23 do not comply with Practice Book § 13-23, which requires that "The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter . . . An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless such party states that he or she has made a reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable and admission or denial." Specifically:

> Request Nos. 17, 18, 19, 20, 21, 22, 23: Request that McLain admit that the documents attached as Exhibits 17 through 23 to the Second Requests to Admit are true and correct copies of the AIA Application and Certification for Payment numbers 3 through 9, respectively, that McLain submitted for work on the Project between September 2003 and March 20, 2004.
>
> Response: "Unable to admit because the document is unsigned . . ."

Deficiency: The answer does not set forth in detail why McLain is unable to admit that it submitted these unsigned documents to Konover for payment for work on the project. Moreover, McLain has failed to state that it made a reasonable inquiry and that the information known or readily obtainable by McLain is insufficient to enable it to admit or deny the request, or why the lack of a signature makes it unable to admit or deny the request, both of which Practice Book § 13-23 requires.

Finally, McLain's responses to second request to admit nos. 24-25 and 27-32 do not comply with Practice Book § 13-23, which requires that "The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter . . . when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, such party shall specify so much of it as is true and qualify or deny the remainder . . ." Specifically:

> Request Nos. 24, 25, 27, 28, 29, 30, 31, 32: Request that McLain admit that the documents attached as Exhibits 24-25, and 27-32 are true and correct copies of the AIA Application and Certification for Payment numbers 10-11 and 13-18, respectively, that McLain submitted for work on the Project through various dates.
>
> Response: "Unable to admit or deny because of handwritten notations."

Deficiency: McLain's response does not set forth in detail why McLain cannot admit that the documents are true and correct copies of the documents that McLain

submitted for work on the Project, subject to a qualification relating to the hand-written notations, as the Practice Book requires.

Moreover, to the extent that McLain's position is that the hand-written notations render it unable to provide even a qualified admission, McLain is required to state that it made a reasonable inquiry and that the information known or readily obtainable by McLain is insufficient to enable it to admit or deny the request, and to state why the existence of handwritten notations makes it unable to admit or deny the request.

IV. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court determine that McLain's answer's to the first and second set of requests for admission identified herein are insufficient, and order McLain to serve amended responses that comply with the requirements of Practice Book § 13-23(a).