

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

GOURMET GALLERY CROWN BAY, INC.,	)	CASE NO. ST-2014-CV-513
and ZAKARIA SUID,	)	
	)	
Plaintiffs,	)	ACTION FOR DECLARATORY
	)	JUDGMENT, INJUNCTION,
	)	REFORMATION, RESCISSION,
v.	)	ESCROW OF RENT,
	)	AND DAMAGES
CROWN BAY MARINA, L.P.,	)	
	)	JURY TRIAL DEMANDED
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Quash Subpoenas Duces Tecum (Defendant's "Motion to Quash"), which was filed with the Court on February 12, 2015. Plaintiffs filed an Opposition to Defendant's Motion to Quash Subpoena Duces Tecum (Plaintiffs' "Opposition") on February 23, 2015. Having considered the premises of these filings, the Court finds that Plaintiffs violated the applicable rules of procedure when they issued subpoenas before conducting a discovery conference pursuant to Federal Rule of Civil Procedure 26(f). Because of this violation, and because Plaintiffs have other methods to obtain the information they seek, enforcing Plaintiffs' subpoenas would be unreasonable. Consequently, Defendant's Motion to Quash will be granted.

BACKGROUND

On November 5, 2014, Plaintiffs filed this action against Defendant in relation to Defendant's lease of space at Crown Bay Marina to Sarah and Gene Brin d/b/a "Scoops & Brew."¹ At issue are three subpoenas issued by Plaintiffs (collectively, the "Subpoenas"). The first was directed to Jane Wherren as manager of Defendant, and was served upon Ms. Wherren on February 6, 2015. The second was directed to Sarah Haynes of Scoops & Brew, and was served upon Ms. Haynes on the February 6, 2015. The third was served upon the Director of the Divisions of Corporations and Trademarks on February 10, 2015. At the time the Subpoenas were served, the parties had not conducted the discovery conference required by Federal Rule of Civil Procedure 26(f).

Defendant moves to quash the Subpoenas, arguing that their issuance is premature. Defendant claims that no discovery may be had before the parties conduct a discovery conference in accordance with Federal Rule of Civil Procedure 26(f).² It also argues that, once the parties have conducted their discovery conference, the self-executing disclosures mandated by Federal Rule of Civil Procedure 26(a) will likely produce the documents requested by the Subpoenas.³ Defendant concludes by arguing that Plaintiffs' issuance of a subpoena to an opposing party is

¹ Compl. ¶ 15.

² Def.'s Mot. to Quash Subpoenas Duces Tecum 1.

³ *Id.*

improper, due to the fact that the Federal Rules of Civil Procedure set forth methods for requesting the production of documents from an opposing party.⁴

In response, Plaintiffs argue that the question of whether the Subpoenas are valid is now moot because the parties conducted their Rule 26(f) conference on February 13, 2015 and came before the Court for a status conference on February 18, 2015.⁵ Plaintiffs also argue that Federal Rule of Civil Procedure 26(f) may not apply.⁶ Plaintiffs contend that the scheduling conference referenced in Federal Rule 26(f) is contingent upon procedures stated under Federal Rule of Civil Procedure 16(b), but that the pretrial procedures referenced in Federal Rule of Civil Procedure 16(b) are not obligatory pursuant to Superior Court Rule 38.⁷ Plaintiffs conclude by asserting that accepting Defendant's argument "would mean—as a practical matter—that Plaintiffs would be unable to obtain discovery prior to a hearing on their preliminary injunction motion."⁸

ANALYSIS

Defendant's Motion to Quash presents this Court with two issues. First, the Court must determine whether Plaintiffs' issuance of the Subpoenas was proper. Second, if Plaintiffs' issuance of the Subpoenas was improper, the Court must then determine whether the Subpoenas should be quashed.

I. PLAINTIFFS' ISSUANCE OF THE SUBPOENAS WAS IMPROPER.

Discovery in the Superior Court is governed by Federal Rules of Civil Procedure 26 to 37, inclusive.⁹ Under these rules, "[a] party may not seek discovery from any source before the parties have conferred as required by [Federal] Rule [of Civil Procedure] 26(f), except in a proceeding exempted from initial disclosure under [Federal] Rule [of Civil Procedure] 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."¹⁰

Plaintiffs do not fall under any of the exceptions to the general rule prohibiting discovery prior to a Rule 26(f) conference. The Court has not issued an order permitting Plaintiffs to subpoena documents, and Defendant's Motion to Quash demonstrates that the parties have not stipulated to the use of preconference subpoenas. Because Plaintiffs—a St. Thomas corporation and resident of St. Thomas¹¹—purport to state claims for injunctive relief,¹² declaratory judgment and reformation,¹³ rescission and reformation,¹⁴ escrow of rent,¹⁵ audit of expenses,¹⁶ and

⁴ *Id.* at 1–2.

⁵ Pls.' Opp. to Def.'s Mot. to Quash Subpoena Duces Tecum 3.

⁶ *Id.* at 4–5.

⁷ *Id.*

⁸ *Id.* at 5.

⁹ SUPER. CT. R. 39(a).

¹⁰ FED. R. CIV. P. 26(d)(1).

¹¹ See Compl. ¶¶ 1a–2b (identifying the plaintiffs in this matter).

¹² *Id.* ¶¶ 23–25.

¹³ *Id.* ¶¶ 26–28.

¹⁴ *Id.* ¶¶ 29–30.

¹⁵ *Id.* ¶¶ 31–32.

¹⁶ *Id.* ¶¶ 33–34.

damages¹⁷ against a limited partnership formed in Delaware,¹⁸ this case does not constitute one of the proceedings exempt from initial disclosure under Federal Rule of Civil Procedure 26(a)(1)(B). Finally, although Federal Rule of Civil Procedure 45 governs, among other things, the issuance, content, and service of subpoenas, it contains no provision that allows a party to issue subpoenas prior to conferring pursuant to Federal Rule of Civil Procedure 26(f). Even if Federal Rule of Civil Procedure 45 contained such a provision, Superior Court Rule 11, and not Federal Rule of Civil Procedure 45, governs the issuance of subpoenas in this Court. Like Federal Rule of Civil Procedure 45, Superior Court Rule 11 contains no provision that allows a party to issue subpoenas prior to conferring pursuant to Federal Rule of Civil Procedure 26(f). Consequently, Plaintiffs are not authorized by another provision to issue subpoenas in advance of a Rule 26(f) conference.

Plaintiffs' issuance of the subpoenas was improper because the subpoenas were issued before the parties conducted a Rule 26(f) conference and Plaintiffs do not fall under an exception that permits preconference discovery. Plaintiffs' arguments to the contrary are not persuasive. It is irrelevant that the parties have subsequently conducted a Rule 26(f) conference, as Plaintiffs had consummated their violation of the applicable rules of discovery before the conference was held. Subsequent compliance with a rule does not negate a previous failure to adhere to that rule. It is also irrelevant that the status conference referenced in Federal Rule of Civil Procedure 26(f) references a pretrial procedure that this Court is not obligated to utilize. Although Plaintiffs correctly state that Superior Court Rule 38 renders the use of the pretrial procedures contained in Federal Rule of Civil Procedure 16 optional, Plaintiffs' argument ignores the fact that Superior Court Rule 39 obligates the parties to conduct discovery in accordance with Federal Rules of Civil Procedure 26 through 37. Consequently, through the operation of Superior Court Rule 39 and subject to the exceptions discussed above that do not apply here, the parties "must confer as soon as practicable"¹⁹ to establish a discovery plan, and a party "may not seek discovery from any source before the parties have conferred"²⁰ in such a manner.

II. THE SUBPOENAS SHALL BE QUASHED.

The Court "may quash or modify [a] subpoena if compliance would be unreasonable or oppressive."²¹ There are no reported opinions in the Virgin Islands interpreting the terms "unreasonable" or "oppressive" within the context of this rule. Here, Plaintiffs have not complied with the applicable procedures for obtaining discovery in this case, and Defendant asserts that "it is probable that many of the documents sought will be disclosed in the Defendants' [sic] Rule 26 Self-Executing Disclosures."²² Given Defendant's representation, Plaintiffs' noncompliance threatens to render the applicable rules of discovery meaningless. It would be unreasonable for the Court to permit Plaintiffs to circumvent the rules of discovery when those very rules will likely provide Plaintiffs with the information they seek. Consequently, the Court will quash the Subpoenas.

¹⁷ *Id.* ¶¶ 35–36.

¹⁸ *See id.* ¶ 3 (identifying the defendant in this matter).

¹⁹ FED. R. CIV. P. 26(f)(1).

²⁰ *Id.* 26(d)(1).

²¹ SUPER. CT. R. 11(c).

²² Def.'s Mot. to Quash Subpoenas *Duces Tecum* 1.

Even if Defendant's self-executing disclosures do not provide Plaintiffs with the information sought in the Subpoenas, Defendant correctly observes that such information may be obtained through service of a request for the production of documents upon the Defendant.²³ A party must respond to such a request within thirty days of service,²⁴ and a failure to respond may be grounds for sanctions.²⁵ Finally, to the extent that neither self-executing disclosures nor a request for production of documents can provide Plaintiffs with the information they seek, Plaintiffs may issue subpoenas in accordance with all applicable rules of procedure.

During the status conference held on February 19, 2015, Plaintiffs expressed concern that the traditional avenues of obtaining discovery may prove untimely, given that this matter is scheduled for a hearing on Plaintiffs' Motion for a Preliminary Injunction on April 22, 2015. Specifically, Plaintiffs hypothesized that Defendant could provide incomplete responses to requests for production, or that Defendant could simply ignore Plaintiffs requests altogether, forcing Plaintiff to request Court intervention. Plaintiff argued that any such intervention cannot guarantee that Plaintiffs will receive the documents they seek prior to the April 22, 2015 hearing. This concern is reiterated in Plaintiffs' Opposition to Defendant's Motion to Quash.²⁶ The Court is sensitive to Plaintiffs' concern, but the Court will not overlook one violation of the rules in order to address another violation that has not yet occurred, and may not ever occur.

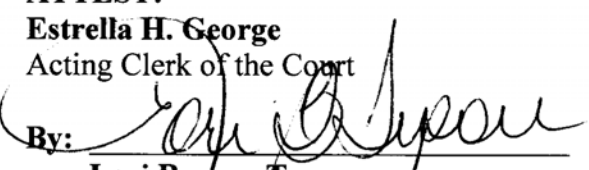
CONCLUSION

Plaintiffs violated the applicable rules of discovery by issuing the Subpoenas before holding the conference mandated by Federal Rule of Civil Procedure 26(f). Due to this violation, and because Plaintiffs have alternative avenues to obtain the information sought by the Subpoenas, compliance with the Subpoenas would be unreasonable under Superior Court Rule 11. Plaintiffs' fear that they will not obtain relevant information prior to April 22, 2015 does not provide this Court with sufficient justification to overlook Plaintiffs' clear violation of the rules. Defendant's Motion to Quash will be granted. An appropriate order will follow.

Dated: March 5, 2015

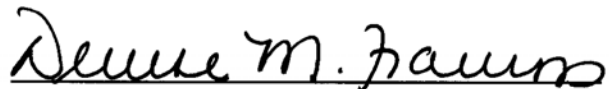
ATTEST:

Estrella H. George
Acting Clerk of the Court

By: 

Lori Boynes-Tyson
Court Clerk Supervisor

3/5/15



DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

²³ See FED. R. CIV. P. 34 (setting forth the procedures for requesting the inspection or production of documents in an opposing party's possession).

²⁴ *Id.* 34(b)(2)(A).

²⁵ See generally *id.* 37 (setting forth the procedures for seeking orders compelling discovery and sanctions for discovery-related violations); LRCI 37.1–37.3 (setting forth additional procedures for same). Local Rules of Civil Procedure 37.1 through 37.3 apply to this proceeding through the operation of Superior Court Rule 7.

²⁶ See Pls.' Opp. to Def.'s Mot. to Quash Subpoena Duces Tecum 5 (alleging that ruling in the Defendant's favor "would mean—as a practical matter—that Plaintiffs would be unable to obtain discovery prior to a hearing on their preliminary injunction motion").