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

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

MEMORANDUM OPINION AND ORDER

Before the Court is an Emergency Motion to Quash Subpoenas Duces Tecum, which was filed on February 2, 2016 by Scoops & Brew and Sarah Haynes Brin. Plaintiffs did not file an opposition. Upon review of the discovery requests, the Court will quash certain items and order Scoops & Brew to disclose the rest.

BRIEF BACKGROUND

Plaintiff Gourmet Gallery is a grocery store and Defendant is Gourmet Gallery's landlord. This matter mainly concerns a dispute over an exclusive use clause in the landlord-tenant agreement between the parties. However, Plaintiffs also presents other claims, such as alleging Defendant overcharged Plaintiffs for Common Area Maintenance fees. Exhibit E of the pertinent Lease provides that Gourmet Gallery's premises shall be used as follows:

> for a gourmet grocery store to include, but not necessarily limited to the following merchandise:
>
> -Gourmet cooking oil and spices
> -Wine, beer, liquor, sodas
> -Deli and bakery
> -Fresh and frozen meat

-Tobacco products
-Magazine and newspapers
-High quality canned and bottled products(e.g. gourmet jellies and vegetables[)]
-Fresh pastas
-Custom order department (i.e. charter yacht provisioning)

In addition, the exclusive use clause, also found in Exhibit E to the Lease Agreement, provides the following:

> Landlord is not providing Tenant with any exclusive right to the sale of the above described merchandise except that, as long as Tenant provides such goods and services with displays and inventories appropriate to Tenant's Crown Bay Marina[,] Landlord agrees to not lease space in the Marina for a store which shall carry groceries, liquor, produce, drugs, delicatessen, fish and meat or the items listed above.

Plaintiffs allege that Defendant violated the Lease by renting space to Scoops & Brew, LLC, whose sole member is Sarah Haynes Brin, because Scoops & Brew sells "groceries" within the meaning of the exclusive use clause.

Plaintiffs served subpoenas *duces tecum* demanding a multitude of documents upon Scoops & Brew and Sarah Haynes Brin (collectively referred to herein as "the Non-Parties"). The two subpoenas make identical discovery demands. The subpoenas' discovery demands are numbered and the Court will refer to each numbered demand as an "Item." The Non-Parties request that the Court quash the subpoenas, alleging they are unreasonable, irrelevant, and oppressive.

RULES

Under Superior Court Rule 11(c), the Court may quash or modify a subpoena for production of documentary evidence if compliance would be unreasonable or oppressive. In addition, Federal Rule of Civil Procedure 26(g)(1)(B) alludes that a discovery request should not be made for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and it should not be unreasonable or unduly burdensome or expensive.[1] Furthermore, FRCP 26(b)(2)(C) provides that a court must limit a discovery request if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

[1] Under Superior Court Rule 39, Federal Rules of Procedure 26 to 37 govern discovery for matters before the Superior Court.

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

FRCP 26(b)(1) limits discovery to relevant and non-privileged matter and requires a court to consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Lastly, courts have afforded non-parties greater protection from discovery than a normal party.[2] Motions to quash a subpoena served upon a non-party have been granted where compliance would require extensive sifting and analysis by the non-party, especially where the requests for documents were sweeping in nature, covering every paper on any transaction between a party and the person subpoenaed.[3]

ANALYSIS

I. The Non-Parties Fail to Establish that the Two Subpoenas Make Impermissibly Broad and Unduly Burdensome Discovery Demands.

When addressing each discovery request, the Non-Parties cursorily state that requests are "impermissibly broad, unreasonable, and unduly burdensome." However, the Non-Parties do not provide any arguments explaining why each request is impermissibly broad or unduly burdensome. For example, the Non-Parties do not claim that the amount of documents involved in fulfilling a particular request would be immense and the cost in creating and reviewing copies would be considerable. In addition, the Non-Parties do not claim that the requested documents are not readily available and would require great effort to compile. Therefore, the Court will not quash any Item in Plaintiffs' subpoenas due to concerns that the request is impermissibly broad or unduly burdensome. Instead, the Court will consider if each Item is reasonable and relevant.

II. The Two Subpoenas Unreasonably Make Duplicative Discovery Demands. In Addition, the Subpoenas' Demands Duplicate Discovery Demands Made in a Subpoena Served upon Defendant.

As acknowledged in Plaintiffs' Opposition to Defendant's "Emergency" Motion to Quash Subpoenas *Duces Tecum* with Respect to Four (4) Subpoenas,[4] the subpoenas served upon Sarah Haynes Brin and Scoops & Brew seek identical documents. Plaintiffs state they served both subpoenas to ensure that at least one of the respondents would produce the requested documents.

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[2] *See, e.g., Stamy v. Packer*, 138 F.R.D. 412, 419 (D.N.J. 1990) ("the standards for nonparty discovery require a stronger showing of relevance than for simple party discovery"); *Laxalt v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev. 1986) ("The rule is . . . well established that nonparties to litigation enjoy greater protection from discovery than normal parties"); *Tetratec Corp. v. E.I. DuPont De Nemours & Co., Inc.*, 1992 U.S. Dist. LEXIS 12101, at *1 (E.D. Pa. Aug. 12, 1992) ("[It is] well established that non-parties to litigation enjoy greater protection from discovery than normal parties").

[3] *O'Neale's Transp. v. Marshall & Sterling*, 1994 V.I. LEXIS 3 (V.I. Super. Ct. Feb. 15, 1994); *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1978).

[4] Filed on February 3, 2016.

However, FRCP 26(b)(2)(C)(i) provides that "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative . . .." Therefore, in regards to the subpoena served upon Sarah Haynes Brin, the Court will quash items demanding documents that are likely in Scoops & Brew's possession. These Items are numbered 2 to 21, as well as Item 22 to the extent it requests documents from Sarah Haynes Brin.

III. Analysis as to Each Item in the Subpoenas.

A. The Court Will Quash Items 1a to 1e Because They Are Unreasonably Duplicative.

Items 1a to 1e demand copies of documents depicting communications between Sarah Haynes Brin and various agents of Defendant. The Non-Parties contend that Plaintiffs are not entitled to serve a subpoena upon Sarah Haynes Brin because Scoops & Brew is a limited liability corporation and, therefore, the parties' dispute does not implicate Sarah Haynes Brin as an individual. The Court recognizes that Scoops & Brew is a Defendant's tenant, not Sarah Haynes Brin. In addition, the limited liability company form creates a separation between a business and its owners.

However, it is likely that, prior to the establishment and incorporation of Scoops & Brew, Sarah Haynes Brin and Defendant had discussions regarding setting up Scoops & Brew in Crown Bay Marina and regarding what products it would offer. These communications are relevant to whether Defendant acted in good faith by agreeing to rent space to Scoops & Brew. Accordingly, the Court determines that the subpoena served upon Sarah Haynes Brin is not invalid because Scoops & Brew's limited liability.

Nevertheless, the Court determines that Items 1a to 1e are unreasonably duplicative. Plaintiffs previously demanded that Defendant produce copies of correspondence between Defendant, its agents, and Sarah Haynes Brin. In its October 14, 2015 Order, the Court ordered Defendant to produce such materials[5] and all relevant information requested Items 1a to 1e is likely in Defendant's possession. Therefore, the Court finds that any relevant discovery requests in Items 1a to 1e are duplicative and it will quash them.

B. The Court Will Not Quash Items 2 and 3 Because Scoops & Brew's Sales Are Relevant to Plaintiffs' Damages.

Item 2 requests "Gross Receipts Tax Returns"[6] and Item 3 requests documents depicting Scoops & Brew's sales during December of 2014 and 2015. The Non-Parties claim Scoops & Brew's sales are irrelevant to this matter and that "GOURMET GALLERY is not expressly claiming lost profits." However, Plaintiffs claim they are entitled to damages resulting from Defendant's alleged breach of contract in Count IV of the Complaint. While Plaintiffs do not specifically claim lost profits, the Court determines that Scoops & Brew's sales are relevant to this matter because Plaintiffs allege their sales were displaced by Scoops & Brew's sales.

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[5] Order (Oct. 14, 2015) (addressing Plaintiffs' Expedited Motion to Compel (filed on May 4, 2015)).
[6] A gross receipts tax return depicts taxes paid on a business's gross revenues.

The Non-Parties also appear to argue that the requested tax information is confidential. Tax returns are not privileged but sound public policy considerations weigh against their unnecessary disclosure.[7] Taking this public policy into consideration, the Court determines that Scoops & Brew's sales are relevant to this matter and Scoops & Brew's gross receipts tax returns would reveal information about its sales. In addition, Plaintiffs appear to assert that every product that Scoops & Brew sells violates the exclusive use clause. Therefore, the Court will not quash Item 2.

The Non-Parties also assert that sales figures are confidential. However, the Non-Parties do not provide, and the Court is not aware of, any legal principle or authority supporting this claim. Therefore, the Court will not quash Item 3.

C. The Court Will Not Quash Items 4 to 18 Because Scoops & Brew's Sales of Particular Products Are Relevant to Plaintiffs' Damages.

Items 4 to 18 request documents showing Scoops & Brew's sales of certain food and beverage products, such as bottled water and croissants. First, it appears that the Court's reading of Items 4 to 18 differs from the Non-Parties' interpretation of the discovery requests. The Non-Parties apparently read Items 4 to 18 as requesting Scoops & Brew's purchases of the pertinent products. However, Items 4 to 18 request "[c]opies of all documents showing purchases . . . *from* Scoops & Brew." (emphasis added) The Court interprets this phrase to mean that Plaintiffs request information regarding Scoops & Brew's sale of certain products, not its inventory of them.

The Non-Parties claim that these discovery requests are irrelevant because this matter concerns the interpretation of the pertinent landlord-tenant agreement, instead of the Non-Parties' sales. However, an important aspect of Plaintiffs' claim involves demonstrating damages. Plaintiffs assert that Gourmet Gallery lost sales because customers bought particular products from Scoops & Brew instead of Gourmet Gallery. Therefore, the Court determines that Items 4 to 18 are relevant and the Court will not quash these discovery requests.

D. The Court Will Not Quash Item 19 Because Scoops & Brew's Outdoor Seating Is Relevant to Whether It Meets the Definition of "Restaurant."

Item 19 requests information about outdoor seating provided by Scoops & Brew. The Non-Parties claim that the discovery request is unduly broad and irrelevant. However, the Court disagrees. First, the Non-Parties incorrectly represent that Item 19 requests all documents regarding the purchase and installation of outdoor seating. Item 19 specifically asks for all documents showing when the outdoor seating was ordered and when it was installed. The Court does not find this request to be overly broad.

In addition, the Court determines that the requested information is relevant to Plaintiffs' claims. This matter concerns the definition of "restaurant," as written in the Lease, and seating for patrons might be part of that definition. However, the parties should not interpret the preceding sentence as the Court holding that a restaurant must have seating. The Court merely finds that

[7] *Gustav A. Danielson & Co., P.C. v. Witty*, 17 V.I. 32, 34 (V.I. Super. Ct. 1980) (quoting *Maldonado v. St. Croix Discount, Inc.*, 77 F.R.D. 501, 503 (D.V.I. 1978)).

discovery requests concerning when Scoops & Brew obtained seating for patrons meet the threshold for relevance under FRCP Rule 26(b)(1). "Information within this scope of discovery need not be admissible in evidence to be discoverable."[8]

Lastly, the Non-Parties claim it is unreasonable to demand information regarding Scoops & Brew's business expenses but it does not does not provide any arguments to support its position. The Court refuses to adopt an all-encompassing position that discovery requests for Scoops & Brew's business expenses are unreasonable, oppressive, and irrelevant.

E. The Court Will Not Quash Item 20 Because the Documents Requested Are Relevant.

Item 20 demands documents pertaining to the Non-Parties' payment of rent to Defendant. The Non-Parties assert that Item 20 is irrelevant, unreasonable, and oppressive. The Court acknowledges that, in other filings, Plaintiffs allege Defendant acted in bad faith by not charging Scoops & Brew rent.[9] The Complaint does not allege a claim of bad faith dealings and Plaintiffs have not filed a request to amend the Complaint to include such a count. Nevertheless, the Court recognized in its October 14, 2015 Order that discovery requests pertaining to Defendant's alleged failure to observe a duty to an implied duty of good faith and fair dealing are relevant to whether Plaintiffs are entitled to rescind the fifth amendment to the Lease or the personal guaranty signed by Zakaria Suid, as claimed in paragraphs 26 to 30 of the Complaint.[10] Therefore, Item 20 is relevant.

F. The Court Will Quash Item 21 Because It Is Unreasonably Duplicative of Other Discovery Demands.

Item 21 requests information regarding payment of CAM charges. The Court finds that Item 21 unnecessarily duplicative of demands for production of documents made to Defendant. However, Plaintiffs' Second Demand for Production of Documents to Defendant also extensively demands disclosure of information regarding CAM charges paid by the tenants of Crown Bay Marina to Defendant.[11] The Court determines that Plaintiffs' request for documents pertaining to CAM charges are unreasonably duplicative. Therefore, the Court will quash Item 21.

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[8] Fed. R. Civ. P. 26(b)(1).
[9] *See* Pls.' Opp. to Def.'s "Emergency" Motion to Quash Subpoenas *Duces Tecum* with Respect to Four (4) Subpoenas 11 (filed on Feb. 3, 2016).
[10] Order (Oct. 14, 2015) (addressing Plaintiffs' Expedited Motion to Compel (filed on May 4, 2015)). In its October 14, 2015 Order, the Court noted that Plaintiffs would have to establish under the framework provided in *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) that the Court should adopt the common law principle of implied duty of good faith and fair dealing. However, the Court has not received a brief from Plaintiffs that provides such analysis. Therefore, the Court will Plaintiffs order to file a memorandum explaining whether the Court should recognize an implied duty of good faith and fair dealing in contract disputes.
[11] *See* Ex. 1 of Plaintiffs' Motion to Compel, Full, Complete, and Good Faith Responses to: Plaintiffs' Second Demand for Production of Documents to Defendant and Motion for Award of Attorney's Fees (filed on January 22, 2016).

G. The Court Will Not Quash Item 22 Because It Does Not Demand Information That Is Privileged.

Item 22 requests copies of agreements between the Non-Parties and Defendant. The Non-Parties contends that such documents contain protected information under the doctrine of attorney-client privilege and attorney work product privilege. The Non-Parties also argue that FRCP 45(d)(3)(A) allows a court to quash a subpoena that requires disclosure of privileged or other protected matter. The V.I. Supreme Court has held that Federal Rule of Civil Procedure 45 is inapplicable to the Superior Court's proceedings because Superior Court Rule 11 governs service of subpoenas.[12] However, FRCP 26(b)(1) limits discovery to non-privileged matter.

In general, contracts are not privileged. Attorney-client privilege protects against the disclosure of confidential communications between a client and an attorney. However, a contract does not contain information shared only between an attorney and a client. A contract inherently is communicated with someone outside the confidential relationship.

The work product doctrine protects materials prepared by an attorney in anticipation of litigation. The documents requested under Item 22 would not qualify as attorney work product. Therefore, the Court will not quash Item 22.

Accordingly, it is hereby

ORDERED that the Emergency Motion to Quash Subpoenas Duces Tecum is **GRANTED in part** and **DENIED in part**; and it is further

ORDERED that the Subpoena *Duces Tecum* served upon Sarah Haynes a/k/a Sarah Haynes Brin is **QUASHED**; and it is further

ORDERED that Items 1a, 1b, 1c, 1d, 1d, 1e, and 21 in the Subpoena *Duces Tecum* served upon Scoops & Brew are **QUASHED**; and it is further

ORDERED that Scoops & Brew shall provide Plaintiffs with the information demanded in the following Items in the Subpoena *Duces Tecum* served upon Scoops & Brew: Items 2, 3, 19, 20, and 22; and it is further

ORDERED that, **within twenty-one (21) days of the date of entry of this Order**, Plaintiffs shall file with the Court and serve upon Defendant a memorandum of law that sets forth the basis regarding whether the Court should adopt the common law principle of good faith and fair dealing in contracts; provided, however, that said memorandum be supported by binding authority and, to the extent binding authority is not available, by principles of common law that have been derived from analysis mandated by the Supreme Court of the Virgin Islands in the case of *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011); and it is further

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[12] *Terrell v. Coral World*, 55 V.I. 580, 591 (V.I. 2011).

ORDERED that, **within fourteen (14) days of the date of service of the memorandum of law identified in the preceding paragraph**, Defendant may filed with the Court and serve upon Plaintiffs a response thereto; provided, however, that said response be supported by binding authority and, to the extent binding authority is not available, by principles of common law that have been derived from analysis mandated by the Supreme Court of the Virgin Islands in the case of *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011); and it is further

ORDERED that, **within fourteen (14) days of the date of service of the response identified in the preceding paragraph**, if such service occurs, Plaintiffs may filed with the Court and serve upon Plaintiffs a reply thereto; provided, however, that said reply be supported by binding authority and, to the extent binding authority is not available, by principles of common law that have been derived from analysis mandated by the Supreme Court of the Virgin Islands in the case of *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011); and it is further

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to Attorney Joseph B. Arellano and Attorneys Gordon C. Rhea and Campbell C. Rhea of Gordon C. Rhea, P.C., counsel for Plaintiffs; and to Attorney Matthew Duensing, counsel for Defendant.

Dated: November 30, 2016

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

ATTEST:
Estrella H. George
Acting Clerk of the Court

By:
Lori Boynes-Tyson
Acting Chief Deputy Clerk 11/30/16