

**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,	)	
	)	ACTION FOR DECLARATORY
Plaintiffs,	)	JUDGMENT, INJUNCTION,
v.	)	REFORMATION, RESCISSION,
	)	ESCROW OF RENT, AND
CROWN BAY MARINA, L.P.,	)	DAMAGES
	)	
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 Plaintiff Gourmet Gallery's Motion to Compel Full, Complete and Good Faith Responses To: Plaintiff's First Set of Interrogatories and Motion for Award of Attorney's Fees, which was filed on January 13, 2016. Plaintiff Gourmet Gallery Crown Bay, Inc. (herein referred to as "Gourmet Gallery") attached a Memorandum of Law in support of its Motion. Defendant Crown Bay Marina, L.P. (herein referred to as "Crown Bay") filed an Opposition on February 3, 2016¹ and Gourmet Gallery filed a Reply on March 4, 2016.

BRIEF BACKGROUND

Gourmet Gallery is a grocery store and Crown Bay is Gourmet Gallery's landlord. Gourmet Gallery and Crown Bay are parties to a landlord-tenant agreement pertinent to this matter (herein referred to as the "Sublease"). The parties are in dispute over alleged violations of the Sublease's exclusive use clause and provisions concerning common area expenses. Gourmet Gallery claims Crown Bay's lease of space to a business called Scoops & Brew violates the exclusive use clause found in Exhibit E of the Sublease because Scoops & Brew also purportedly sells groceries.

On March 16, 2015, Gourmet Gallery served upon Crown Bay its First Set of Interrogatories to Crown Bay. Crown Bay served its Responses on April 16, 2015. It objected to, and therefore, did not answer most of the interrogatories. Crown Bay provided short answers to the rest. Gourmet

¹ Crown Bay's Opposition responds to the present Motion and another motion to compel discovery filed by Gourmet Gallery.

Gallery requests that the Court order Crown Bay to answer all of the interrogatories fully. The Court will examine the validity each interrogatory.

STANDARD

In general, Virgin Islands Rules of Civil Procedure 26 and 33 govern the scope of a party's duty to disclose information during discovery and to answer interrogatories.² Under V.I. R. Civ. P. 26(b)(1), parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Unlike its federal counterpart, Rule 26(b)(1) does not require the Court to consider the proportionate needs of a case when determining if material is discoverable. In addition, V.I. R. Civ. P. 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. Furthermore, V.I. R. Civ. P. 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
- (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Rule 33 requires that a party served with interrogatories provide an answer to each interrogatory unless it “represents in good faith in its response that it cannot — in the exercise of reasonable efforts — prepare an answer from information in its possession or reasonably available to the party”³ or it objects to the interrogatory. “The grounds for objecting to an interrogatory must be stated with specificity.”⁴ “Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.”⁵

ANALYSIS

I. The Court Will Not Deny Gourmet Gallery’s Motion Due to Untimely Filing.

The first issue in dispute is whether the Court should deny Gourmet Gallery’s Motion to Compel because it was filed after the deadline for fact discovery. Crown Bay argues that “the Fact

² Since Gourmet Gallery filed its Motion, the Supreme Court of the Virgin Islands adopted the Virgin Islands Rules of Civil Procedure. *In re Adoption of the V.I. Rules of Civ. Procedure*, No. 2017-001, 2017 V.I. Supreme LEXIS 22, at *1 (V.I. Apr. 3, 2017). Finding that adjudicating the Motion under the new procedural rules would not be infeasible or work an injustice, the Court will consider the Motion under Virgin Islands Rules of Civil Procedure. *See* V.I. CIV. R. 1-1(c)(2).

³ V.I. R. Civ. P. 33(d).

⁴ V.I. R. Civ. P. 33(b)(4).

⁵ V.I. R. Civ. P. 33(b)(3).

Discovery Deadline set by this Court ended on December 31, 2015,⁶ so therefore Gourmet Gallery's Motions to Compel are untimely and the relief they seek has been waived."⁷ Crown Bay appears to misinterpret the meaning of the fact discovery deadline set in the Court's February 25, 2015 Scheduling Order. The August 14, 2015 deadline is the date by which the parties were required to respond to propounded discovery requests, such as interrogatories and demands for production of documents, and to complete depositions of potential fact witnesses. It follows that a motion to compel responses to discovery requests has to be served after the deadline has passed. Otherwise, such motion would not be ripe for adjudication because the served party would not be in violation of its duty to respond to discovery requests until the deadline has passed. In addition, the Scheduling Order does not have a cutoff date for filing motions to compel discovery. Therefore, the Court finds Crown Bay's argument to be meritless and it will not deny the Gourmet Gallery's Motion to Compel due to untimely filing.

II. Crown Bay's Obligation to Answer Interrogatories Stems from the Virgin Islands Rules of Civil Procedure, Not the Sublease.

For several interrogatories, Crown Bay argues that the Sublease does not require it to disclose the requested information.⁸ However, while a contract can stipulate that parties agree to limit or expand discovery in the event of litigation,⁹ Gourmet Gallery's entitlement to information through discovery is based on the applicable rules of civil procedure, not the text of the Sublease. Therefore, the Court is unconvinced that Crown Bay only needs to disclose information if there is text in the Sublease that requires such disclosure.

III. The Court Will Order Crown Bay to Respond Fully to Interrogatories 1, 4, 5a, 5b, 21, 22, 23, 24, and 25.

INTERROGATORY 1.

The first interrogatory requests information concerning the area in square feet of Gourmet Gallery's premises and the area other businesses in Crown Bay Marina. Gourmet Gallery states that this information touches upon the validity of Common Area Maintenance (CAM) charges subject to the parties' dispute.

Crown Bay presents several objections. Crown Bay asserts the requested information is unlikely to lead to admissible evidence. The Court disagrees. This matter concerns, among other issues, whether Crown Bay properly assessed CAM charges against Gourmet Gallery under the Sublease.¹⁰ The Sublease states that Gourmet Gallery is obligated to pay a proportionate share of CAM charges based on its portion of the rented area of Crown Bay Marina. Therefore, Interrogatory 1 requests relevant information.

⁶ The Court's February 25, 2015 Scheduling Order sets August 14, 2015 as the deadline for fact discovery.

⁷ Def.'s Opp. 1.

⁸ See, e.g., *id.* at 5 ("[n]othing in the Amended Lease entitles Plaintiffs to request or compel documentation related to CAM charges . . .").

⁹ See V.I. R. Civ. P. 29.

¹⁰ See Count V of the First Amended Complaint.

Crown Bay also mischaracterizes the Court's ruling in an October 14, 2015 Order and states the Court determined that Gourmet Gallery claims regarding CAM charges is "irrelevant and immaterial."¹¹ The Court made no such ruling. Instead, the Court stated that the Sublease's text does not entitle Gourmet Gallery to an audit of CAM charges. But the Court allowed Gourmet Gallery to file a memorandum of law discussing whether common law provides such a right. The Court did not rule that any discovery requests pertaining to CAM charges are irrelevant and immaterial.

All the same, in a May 19, 2017 Memorandum Opinion and Order, the Court allowed Plaintiffs Gourmet Gallery Crown Bay, Inc. and Zakaria Suid to file a First Amended Complaint, which was filed on May 30, 2017. The First Amended Complaint addresses Crown Bay's obligation to levy proportionate CAM charges. Therefore, the Court determines that the first interrogatory requests relevant information and it will order Crown Bay to respond to it.

INTERROGATORIES 2, 3, 14a, 14b, and 14c.

Interrogatories 2 and 3 request information regarding the number of parking spaces Crown Bay Marina has available. Interrogatory 14a seeks discovery concerning the amount of monthly area expenses that Crown Bay has passed on to its tenants for several years. Interrogatory 14b seeks information regarding how common area expenses are billed. Interrogatory 14c asks whether the owners of yachts and other boats that dock at Crown Bay Marina are charged common area expenses.

Gourmet Gallery declares that it has "RESERVED" making arguments regarding the validity of these interrogatories. Gourmet Gallery also states it will be filing a separate motion to compel with respect to interrogatories concerning parking spaces. No such supplementary motion to compel has been filed yet. Therefore, the Court will not consider the propriety of Interrogatories 2, 3, 14a, 14b, and 14c and it will not compel Crown Bay to respond to them.

INTERROGATORY 4.

Interrogatory 4 requests that Crown Bay identify each general and limited partner of Crown Bay Marina, L.P. Gourmet Gallery states that it does not know the identity of Crown Bay's partners and it is unaware of the extent of each partner's knowledge of relevant facts. Gourmet Gallery also claims that the partners are potential fact witnesses and disclosure of their identities may lead to the discovery of relevant and admissible evidence.

In addition, Gourmet Gallery also discusses its rights under Superior Court Rule 13.¹² Superior Court Rule 13 allows a party to bring an action against a firm's partners and it also allows

¹¹ Def.'s Opp. 4, 5.

¹² Upon adoption of the Virgin Islands Rules of Civil Procedure, all Superior Court Rules inconsistent with the Virgin Islands Rules of Civil Procedure were repealed. *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS 22. However, Superior Court Rule 13 is not inconsistent with any newly adopted rule. The Virgin Islands Rules of Civil Procedure do not discuss bringing actions against partnerships, except for Rule 4, which concerns service of process.

a court to order joinder of an absent partner. Gourmet Gallery states it cannot exercise its rights under Rule 13 without finding out the identities of Crown Bay's partners.¹³ The Court agrees.

Crown Bay argues that "[a]lthough these partners may have some interest in the proceedings, their identity will not lead to discovery of evidence that is likely admissible."¹⁴ However, information does not need to be admissible in evidence to be discoverable.¹⁵ Crown Bay also asserts that "[t]he identities of the individuals actually involved in negotiation of the Amended Lease and the agreement with Scoops & Brew have already been provided."¹⁶ However, Crown Bay's partners may have discoverable information germane to the firm's decision to execute a contract with Scoops & Brew. Lastly, Crown Bay does not address Gourmet Gallery's right to bring an action against a partner under Superior Court Rule 13.

The Court determines Interrogatory 4 requests relevant and discoverable information. Therefore, the Court will order Crown Bay to provide Gourmet Gallery with an answer.

INTERROGATORY 5a.

Interrogatory 5a requests information regarding the services provided by Dennis Kissman and Marina Management Services, Inc ("MMSI"). Crown Bay argues that "[t]he relationship between CBM and Dennis Kissman and the employees of MMSI has nothing to do with whether the Amended Lease has an exclusivity clause . . ."¹⁷ However, Gourmet Gallery represents that Kissman negotiated the Fifth Amendment to the Lease and issued the first notice of default. Gourmet Gallery states the purpose of Interrogatory 5a is to discover the nature and extent of MMSI's authority with respect to Crown Bay Marina. The Court finds that Interrogatory 5 seeks relevant information for a specified purpose. Therefore, the Court does not agree with Crown Bay that Interrogatory 5 is overly broad. As such, the Court will compel Crown Bay to produce the requested information.

INTERROGATORY 5b.

Interrogatory 5b requests information about other MMSI employees that work at Crown Bay Marina. Gourmet Gallery states that the employees are potential fact witnesses. This matter involves in part whether customers are patronizing Scoops & Brew, instead of Gourmet Gallery. Therefore, the Court determines that individuals present at Crown Bay Marina could provide relevant facts as witnesses. Therefore, the Court will compel Crown Bay to produce the request information.

INTERROGATORY 6a and 6b.

In addition to other businesses, Crown Bay Marina provides services to water crafts, such as a fueling station and a place for boats to dock. Interrogatory 6a directs Crown Bay to "state whether rental income and/or common area expenses of the Crown bay mall is segregated for tax, accounting, reporting, or other purposes from the income and/or expenses of the Crown Bay marina, the Crown

¹³ Pl.'s Mem. of Law. 6.

¹⁴ Def.'s Opp. 6.

¹⁵ V.I. R. Civ. P. 26(b)(1).

¹⁶ Def.'s Opp. 6-7.

¹⁷ *Id.*

Bay fuel dock, and/or other physically separate areas of the Crown Bay marina.”¹⁸ Upon reviewing Gourmet Gallery’s Memorandum of Law, it appears that Gourmet Gallery seeks the above-provided information to determine if Crown Bay assessed CAM charges based on expenses for “common areas in connection with the land based operations, and not the marine based operations and/or the fuel dock.”¹⁹ Gourmet Gallery asserts it is liable for CAM charges only for “land based operations.”

First, Crown Bay’s rental income is wholly separate from its assessment of CAM charges and Gourmet Gallery does not provide any explanation as to why rental income is relevant. While common area expenses are pertinent to CAM charges, Gourmet Gallery does not provide any justification for seeking information regarding Crown Bay’s taxes, accounting practices, and reporting practices. Therefore, the Court will not compel Crown Bay to provide information related to rental income and segregation of common area expenses for tax, accounting, and reporting purposes.

The Court also must consider whether Gourmet Gallery is entitled to information concerning segregation of common area expenses for “land based operations” and “marine based operations.” Gourmet Gallery references Section 6.1 and 6.2 in support of its Motion. Section 6.1 defines the “Common Area” as “the part designated by the Landlord from time to time for common use of all tenants . . .” The Sublease’s Exhibit A depicts a map of the Common Area and Section 6.1 provides Crown Bay with “the right to change from time to time the dimensions and location of the Common Area . . .” A review of Section 6.1 and the map does not indicate that Crown Bay was obligated to separate expenses associated with “land based operations” and “marine based operations.” More so, Section 6.1 does not mention any such differentiation and Gourmet Gallery provides no reference to contract language providing that such division within Crown Bay Marina exists.

Therefore, the Court does not find that Interrogatory 6a asks for relevant information and, consequently, it will not compel Crown Bay to answer.

INTERROGATORY 7.

Interrogatory 7 requests information pertaining to Crown Bay’s cost and sales of fuel at the dock at Crown Bay Marina. Gourmet Gallery states it “believe[s] that Defendant is earning a sizable income form the operation of its fuel dock . . . yet is charging Plaintiffs, and other land based tenants, with all of the expenses associated with operation of the fuel dock.”²⁰ Crown Bay’s purchase and sale of fuel for ships has no bearing on its assessment of CAM charges. Section 6.2 of the Sublease provides that CAM charges are supposed to be based on the proportionate cost of operation and maintenance of the Common Area. The Sublease does not provide that Crown Bay is supposed to adjust CAM charges based on Crown Bay’s fuel sale profits or other profits. How much Crown Bay t makes in fuel sales is immaterial to Gourmet Gallery’s claim. Therefore, the Court determines that Interrogatory 7 asks for irrelevant information and it will not compel Crown Bay to provide an answer.

¹⁸ Pl. Gourmet Gallery Crown Bay, Inc.’s First Set of Interrogs. to Def. 11 (dated Mar. 16, 2015).

¹⁹ Pl.’s Mem. of Law 8.

²⁰ *Id.*

INTERROGATORIES 8 to 13, 15, and 16.

Interrogatories 8 to 13, 15, and 16 request information regarding assets belonging to Crown Bay or St. Thomas Marina Corporation, one of Crown Bay's partners. Examples of requested discovery include figures concerning income statements and the amount of rental income Crown Bay receives monthly. Rule 26(b) limits discovery to "any nonprivileged matter that is relevant to any party's claim or defense." Information pertaining to Crown Bay's assets is unrelated to Gourmet Gallery's claims, i.e., whether Crown Bay violated the Sublease's exclusive use clause and overcharged Gourmet Gallery for common area expenses.

The Court recognizes that Virgin Islands Rule of Civil Procedure 69 allows for post-judgment discovery of a party's assets to aid execution of a judgment. However, such inquiry is permitted only after a judgment is rendered. If Gourmet Gallery obtains a judgment in this matter, the Court then will consider upon motion if Gourmet Gallery is entitled to discovery of Crown Bay's and its partners' assets. Presently, the Court will not compel Crown Bay to respond to Interrogatories 8 to 13, 15, and 16.

INTERROGATORIES 21 to 25.

Interrogatories 21 to 25 ask Crown Bay to "state with specificity all facts which you know, and/or all information of which you are aware to support [a particular affirmative defense]." For Interrogatories 21 and 22, Crown Bay tersely answers "Execution of the Lease and Fifth Amendment thereto by Plaintiff."²¹ This answer is not responsive to the questions asked. For Interrogatories 23 and 24, Crown Bay states "Investigation continues into this Affirmative Defense." Crown Bay's answer to Interrogatory 25 is not responsive to the information requested.

In its Opposition, Crown Bay argues that, because "Plaintiffs have yet to provide even the most basic discovery[,] . . . it is impossible to determine which Affirmative Defenses Defendants [sic] CBM actually will pursue."²² Crown Bay further states that "[i]f CBM determines after receipt of Plaintiffs' discovery that these affirmative defenses are unsupported, then they may be withdrawn."²³ However, Crown Bay's obligation to answer interrogatories is not predicated on Gourmet Gallery's responsiveness to Crown Bay's discovery requests. Virgin Islands Rule of Civil Procedure 33(d) requires a responding party to answer fully each interrogatory "unless the responding party represents in good faith in its response that it cannot — in the exercise of reasonable efforts — prepare an answer from the information in its possession or reasonably available to the party."

Interrogatories 21 to 25 merely ask Crown Bay to disclose facts that it knows and information of which it is aware. They do not ask Crown Bay to disclose all supportive evidence that actually exists, whether Crown Bay is aware of such evidence or not. Therefore, the Court determines that Crown Bay is capable of answering these interrogatories without needing to conduct its own discovery. If Crown Bay learns of new facts supporting its affirmative defenses upon receipt of

²¹ Def.'s Responses to Def. [sic] Gourmet Gallery First Set of Interrogs. 12 (dated Apr. 16, 2015).

²² Def.'s Opp. to Pl.'s Mot. 10.

²³ Def.'s Opp. 10 n.14.

discovery from Gourmet Gallery, then Crown Bay would be required to supplement its answers, pursuant to Virgin Islands Rule of Civil Procedure 26(e). Lastly, the Court finds that Crown Bay's responses to Interrogatories 21 and 22 provide deficient answers and do not meet its obligation to answer interrogatories fully. As a result, the Court will order Crown Bay to serve Gourmet Gallery with new answers to Interrogatories 21 to 25 that fully disclose the information requested.

IV. The Court Will Not Award Gourmet Gallery Attorney's Fees.

Gourmet Gallery also seeks an award of attorney's fees involved with obtaining responses to its interrogatories. Neither Gourmet Gallery's Motion nor Memorandum of Law provide a legal foundation for awarding attorney's fees. In addition, while Gourmet Gallery's counsel filed a Declaration describing the parties inability to come to an extrajudicial resolution to this matter's pertinent discovery dispute, the Declaration does not specify the litigation expenses incurred as a result of Crown Bay's failure to respond to interrogatories. Therefore, the Court determines Gourmet Gallery has not met its burden of demonstrating it is entitled to attorney's fees.

Accordingly, it is hereby

ORDERED that Plaintiff Gourmet Gallery's Motion to Compel Full, Complete and Good Faith Responses To: Plaintiff's First Set of Interrogatories and Motion for Award of Attorney's Fees is **GRANTED in part** and **DENIED in part**; and it is further

ORDERED that, **on or before Monday, June 19, 2017**, Defendant Crown Bay Marina, L.P. shall respond fully and completely to the following numbered interrogatories in Plaintiff Gourmet Gallery Crown Bay, Inc.'s First Set of Interrogatories to Defendant (served upon Defendant by email on March 16, 2015):

1, 4, 5a, 5b, 21, 22, 23, 24, and 25; and it is further

ORDERED that Defendant Crown Bay Marina, L.P.'s failure to fully comply with this Memorandum Opinion and Order may result in sanctions, including, but not limited to, holding Defendant and its counsel in civil contempt; and it is further

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to Attorney Joseph B. Arellano, 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: June 2, 2017

ATTEST: Estrella H. George
Clerk of the Court

By:

Lori Boynes-Tyson
Chief Deputy Clerk

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