

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

NATIONAL GLASS & GATE :
SERVICE, INC. :
 :
v. : C.A. No. 08-186S
 :
SERVICE EVERYWHERE, LLC :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72) is Plaintiff's Motion to Compel Compliance with a Court Order and to Compel Production of Documents. (Document No. 32). Defendant objects. (Document No. 35). A hearing was held on January 13, 2010. After reviewing the parties' filings and considering the arguments of counsel, Plaintiff's Motion is resolved as follows:

A. Compliance with October 9, 2009 Order (Document No. 31)

Plaintiff contends that Defendant has not complied with paragraph 2 of the Order because it failed to produce responsive documents "in its possession, custody or control, including documents that it can receive from its Lender, Unity Bank." (Document No. 31, ¶ 2) (emphasis added). Under Rule 34, Fed. R. Civ. P., documents are considered to be under a party's "control" when that party has the "right, authority, or practical ability" to obtain the documents from another entity. See In re NTL, Inc. Sec. Litig., 244 F.R.D. 179, 195 (S.D.N.Y. 2007). Thus, the question is whether Defendant has the "right, authority, or practical ability" to obtain responsive documents from Unity Bank.¹

¹ Unity Bank is a commercial lender to Defendant and, according to Defendant, was granted a security interest in Defendant's receivables which it foreclosed the same receivables which are the subject of the Consent Judgment in this case.

At the hearing, Defendants' counsel represented that Unity Bank has sued Defendant, and its principals as guarantors, in a Texas collection action, and thus Unity Bank is in an adversarial position to Defendant and "will not voluntarily provide any information" to Defendant or its principals. Plaintiff's counsel also indicated that she served a subpoena on Unity Bank in Texas and reports that Unity Bank has ignored it and that Plaintiff has not yet taken steps to enforce the subpoena in Texas.

Although Defendant represented at the hearing that its request for the documents from Unity Bank was rejected, it did not provide any specifics or proof of the request such as copies of correspondence or an affidavit from the person who made the request. Based on the current record before the Court, Defendant simply has not shown that it does not have the "right, authority, or practical ability" to obtain these documents from Unity Bank in the context of the Texas action. The documents described in paragraph 2 of Judge Smith's Order (Document No. 31) directly relate to the commercial loan which apparently is the subject of the Texas action and presumably should be discoverable in that action. Thus, it is reasonable to conclude that Defendant "can receive" these documents from Unity Bank or, at a minimum, should make a good faith effort to do so.

Defendant has shown no such good faith effort other than to represent that it asked for voluntary production and Unity Bank said no. Thus, Defendant is ORDERED to send a letter to Unity Bank's counsel in the Texas action within seven (7) days, accompanied by a copy of Judge Smith's Order (Document No. 31), which requests production of the documents in question. Defendant's counsel shall serve a copy of such letter on Plaintiff's counsel. If Unity Bank produces responsive documents, copies shall be promptly turned over to Plaintiff's counsel. If Unity Bank fails to produce responsive documents in response to the letter, Defendant shall require that its

counsel in the Texas action promptly serve a discovery request on Unity Bank for production of the documents in issue under the applicable discovery rules. Defendant's counsel shall promptly serve on Plaintiff's counsel both a copy of such discovery requests and subsequently Unity Bank's response. If the documents are not produced and Plaintiff believes that Defendant has not made a good faith effort to obtain such documents, it may renew its motion for compliance or seek other appropriate relief.

B. Plaintiff's May 22, 2009 Request for Production of Documents

Plaintiff asserts that it served document requests on Defendant on May 22, 2009 and that Defendant has not objected or responded. Thus, Plaintiff requested entry of an Order requiring Defendant "within 20 days, to produce the documents requested in [its] Request for Production served May 22, 2009." (Document No. 32-2 at p. 10). Plaintiff did not file a copy of its Request for Production with its Motion or restate the Requests made in its Memorandum so they are not part of the Court record. See Local Rule Cv 37(a). In its Opposition, Defendant represents that it produced some responsive documents on or about September 21, 2009 and describes Plaintiff's argument that it ignored the discovery requests as "disingenuous." (Document No. 35-2 at pp. 3-4). Further, Defendant outlined its responses and objections to each of the Requests (without restating the Requests) within its opposition to Plaintiff's Motion. (Document No. 35-2 at pp. 4-6). Since the Requests themselves are not part of the record, it is impossible for the Court to consider the substance of Defendant's objections.²

² Although it is arguable that Defendant's failure to respond in a timely fashion has resulted in a waiver of objections, Plaintiff did not specifically raise a waiver argument in its Motion and thus Defendant did not address the issue of waiver in its Opposition. Accordingly, the Court does not presently have a sufficiently developed record upon which to make a waiver finding.

In response to Request Nos. 5, 6 and 8-10, Defendant represents either that it will produce copies of responsive documents in its custody, control and/or possession or that it is presently unable to locate responsive documents and is continuing to search. Defendant does not, however, provide a production date. Thus, Defendant is ORDERED to undertake a reasonably diligent search of its business records and to produce all responsive documents to these requests to Plaintiff within twenty (20) days. Also, as to Request No. 2, Defendant invites Plaintiff to go to Houston to view “voluminous boxes of ‘hard data’” because it represents that it does not have sufficient financial or manpower resources to review and compile the production sought by Plaintiff. In response, Plaintiff’s counsel reasonably expressed concern about expending her client’s money to travel and review such boxes without any indication as to what is or may be contained in them. Thus, Defendant is ORDERED to, within twenty (20) days, either (1) review the boxes and produce responsive documents as is its obligation under Fed. R. Civ. P. 34(b)(2)(E); or (2) ship the boxes to its counsel’s office in Providence and grant Plaintiff’s counsel access to the documents for review and copying.

C. Conclusion

For the foregoing reasons, Plaintiff’s Motion to Compel (Document No. 32) is GRANTED in part as specified herein.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
January 21, 2010