

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

TEXTRON FINANCIAL CORP. :
 :
 v. : C.A. No. 09-061S
 :
 TWO RIVERS, INC., et al. :

MEMORANDUM AND ORDER

This is one of nine (9) cases filed in this Court in February 2009 by Plaintiff Textron Financial Corporation (“TFC”) against out-of-state farm tractor dealers alleging that they, and their guarantors, if applicable, were in default of their payment obligations under certain inventory financing agreements known as Wholesale Security Agreements.¹ Defendants in this particular case are Two Rivers, Inc. of Drakesboro, Kentucky as the alleged defaulting entity, and its corporate officers, Timothy Cook and Larry Cook, as the guarantors.

Defendants answered on March 27, 2009 and asserted a multi-count counterclaim against TFC, pursuant to Fed. R. Civ. P. 13, alleging that TFC and Farmtrac, North America of Tarboro, North Carolina, a farm tractor manufacturer, engaged in a conspiracy to “dump” tractor inventory on its dealers such as Two Rivers and thus effectively transferred debt from Farmtrac to the dealers. (Document No. 10). Defendants contend that TFC also extended credit to Farmtrac and benefitted from the inventory dumping because Farmtrac was in “financial distress” and could not repay its loans to TFC. Id. Farmtrac ceased operations in early 2008 and apparently is the subject of a receivership action in North Carolina.

¹ This is the only case that remains open out of the original nine.

On March 4, 2011, Defendants moved for leave to file a motion to compel out of time. (Document No. 79). Later, on March 18, 2011, Defendants moved under Fed. R. Civ. P. 56(d) for a continuance to obtain additional discovery prior to responding to Plaintiff's pending Motion for Summary Judgment. (Document No. 84). Plaintiff opposes both Motions. (Document Nos. 85 and 88). Defendants' Motions have been referred to me for determination pursuant to 28 U.S.C. § 636(b)(1)(A); LR Cv 72. A hearing was held on August 16, 2011.

Discussion

This case was commenced over two and one-half years ago. On June 1, 2009, a Rule 16 Conference was held and a nine-month period (through February 28, 2010) was initially set for the completion of fact discovery. (Document No. 16). The discovery deadline was extended at the joint request of the parties on three occasions through December 15, 2010. (Document Nos. 18, 31 and 45). On December 7, 2010, Defendants filed an Emergency Motion for a further extension based solely on the need to complete certain out-of-state depositions. (Document No. 56). That Emergency Motion was opposed by Plaintiff. (Document No. 58). Based on Defendants' representations as to the difficulty of coordinating the depositions, the Emergency Motion was granted in part over Objection. However, because of the advancing age of the case and the appearance that the parties had not diligently used the prior eighteen months to complete fact discovery, Defendants' request to extend the deadline to February 28, 2011 was not granted, and a new deadline of January 31, 2011 was set for the closure of fact discovery. (Document No. 59). In addition, the deadline for nondispositive motions (without leave of Court) was extended to February 14, 2011 and to February 28, 2011 for dispositive motions.

On January 30, 2011, Defendants filed another last-minute Motion to extend the pretrial deadlines by two months to pursue certain “supplemental discovery.” (Document No. 65). The Motion also referenced a Motion to Enforce Order Compelling Discovery (which was to be “filed in the coming days”) and a “potential” Motion to Compel regarding a privilege log. *Id.* The Motion to Enforce was not filed “in the coming days” as advertised and, in fact, no motions to compel were filed before the February 14, 2011 deadline. Plaintiff opposed the Motion to Extend and, on February 23, 2011, the Court denied the Motion finding that Defendants had not established good cause under Fed. R. Civ. P. 6(b) to further extend the pretrial deadlines. (Document No. 72). After a summary judgment conference held before Judge Smith on February 15, 2011, Plaintiff filed a timely motion for summary judgment on the February 28, 2011 deadline. (Document No. 75).

Defendants responded to the Summary Judgment Motion with a Rule 56(d) Motion. Rule 56(d), Fed. R. Civ. P., provides that “[i]f a nonmovant shows by affidavit...that, for specified reasons, it cannot present facts essential to justify its opposition [to a summary judgment motion], the Court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits...or to take discovery; or (3) issue any other appropriate order.” A party seeking to invoke Rule 56(d) must establish (i) good cause for his inability to have discovered or marshaled the necessary facts earlier in the proceedings; (ii) a plausible basis for believing that additional facts probably exist and can be retrieved within a reasonable time; and (iii) an explanation of how those facts, if collected, will suffice to defeat the pending summary judgment motion. Rivera-Torres v. Rey-Hernandez, 502 F.3d 7, 10 (1st Cir. 2007). The party must also demonstrate “due diligence both in pursuing discovery before the summary judgment initiative surfaces and in pursuing an extension of time thereafter.” Resolution Trust Corp. v. N. Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994).

Although Rule 56(d) is a useful safety valve “intended to safeguard against judges swinging the summary judgment axe too hastily,” Resolution Trust, 22 F.3d at 1203, it “is not designed to give relief to those who sleep upon their rights.” Rivera-Torres, 502 F.3d at 10. “In other words, Rule 56(d) is designed to minister to the vigilant, not to those who slumber upon perceptible rights.” Resolution Trust, 22 F.3d at 1203.

Here, Defendants rely, in part, on the claim that Plaintiff has impermissibly withheld documents as privileged which would be relevant to summary judgment and may lead to additional discovery. However, Defendants concede that they received the privilege log in question approximately one month prior to the discovery closure date and the subsequent deadline to file discovery motions, but did not challenge the sufficiency of the privilege log through either a Rule 37 meet and confer letter or a motion to compel. Rather, in their unsuccessful, eleventh-hour Motion to extend deadlines, Defendants mentioned only the “potential” for moving to compel on the privilege logs. Further, Defendants never filed the Motion to Enforce which they indicated would be filed “in the coming days.”

This is not a case where a party is attempting to ambush the opposition with a premature motion for summary judgment. Plaintiff did not file its Rule 56 Motion until after the close of discovery and after conferring with Judge Smith. In fact, the Motion was filed on the dispositive motion deadline.

After thoroughly reviewing the parties’ submissions, the Court finds that Defendants have failed to make the requisite showing under Rule 56(d) for a continuance to reopen discovery and pretrial motion practice. In particular, they have failed to meet the first prong of the Rule 56(d) test which requires a showing under Rule 56(b) of good cause for their inability to have discovered or

marshaled the necessary facts during the lengthy pretrial discovery period. For example, in their Rule 56(d) Motion, Defendants challenge the sufficiency of Plaintiff's responses to Interrogatories 15 and 16. However, this is not a new issue, and Defendants have failed to show good cause why the dispute was not raised and resolved earlier. On May 5, 2010, the Court overruled, in part, Plaintiff's Objections to those Interrogatories and Ordered a supplemental response which Plaintiff made on June 8, 2010. In a letter dated July 2, 2010, Defendants' counsel accused Plaintiff of "failing to truthfully answer Two Rivers' interrogatories 15 and 16." (Document No. 88-2 at p. 3). On July 13, 2010, Plaintiff's counsel responded by defending its Responses. (Document No. 88-11 at p. 5). There is no record of Defendants pursuing the issue further or moving to compel or enforce Court Order as to these Interrogatories prior to the close of discovery. Similarly, in their Reply, Defendants charge that Plaintiff has violated Rules 26, 33, 34 and this Court's prior Discovery Order by "fail[ing] to fully answer Interrogatories and withh[olding] the vast majority of documents that it was ordered to produce." (Document No. 92 at p. 3). However, despite the egregious nature of these alleged discovery violations, Defendants did not file any motions to compel or enforce after April 6, 2010 and before the February 14, 2011 deadline for filing discovery motions.²

For the foregoing reasons, Defendants' Rule 56(d) Motion (Document No. 84) is DENIED. Further, for these same general reasons, Defendants have failed to show either good cause or excusable neglect under Rule 6(b) for their failure to pursue a motion to compel as to the allegedly deficient privilege log prior to the pretrial motion filing deadline and thus their Motion for Leave to File a Motion to Compel out of time (Document No. 79) is also DENIED. Defendants shall file

² Additionally, in the May 5, 2010 Discovery Order, the Court limited the scope of certain of Defendants' discovery requests but without prejudice to Defendants later renewing their request for broader discovery if warranted. (Document No. 29 at p. 3). Defendants never made any such request for broader discovery.

their Opposition to Plaintiff's pending Motion for Summary Judgment by September 15, 2011 as previously scheduled by stipulation. (See Document No. 99).

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
August 19, 2011