Not Reported in F.Supp., 1996 WL 129815 (D.Kan.)
(Cite as: 1996 WL 129815 (D.Kan.))

United States District Court, D. Kansas.
TURNER & **BOISSEAU**, **CHARTERED**, Plaintiff,
v.
NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant.
No. 95-1258-DES.

Feb. 29, 1996.

ORDER

REID, United States Magistrate Judge.

***1** On January 22, 1996, defendant's filed a motion to compel (Doc. 41-42). A response was filed on February 8, 1996 (Doc. 45). A reply brief was filed on February 12, 1996 (Doc. 47). Each discovery item in dispute will be addressed below.

Interrogatory Number 2: Plaintiff's answer is clearly inadequate. Even if this is an implied contract, plaintiffs must provide to the defendant those individuals with knowledge of the terms of the implied contract. Plaintiff must provide the names of all individuals with knowledge of the facts and circumstances surrounding the formation of the implied contract.

Interrogatory Number 4: Defendant seeks the cases where plaintiff has retained the services of Dr. Joseph Lichtor. Defendant seeks this information because it has filed a counterclaim that plaintiff breached the contract by recommending Dr. Lichtor to conduct an independent medical examination without notifying the defendant that Dr. Lichtor charged excessive fees and generated such extreme opinions that he had been the subject of protective orders and has been prohibited from testifying in certain courts. Plaintiff is claiming fees it incurred on behalf of Dr. Lichtor. Plaintiff is also claiming that Dr. Lichtor has assigned his claim against defendant to the plaintiff. Defendant claims the request is overbroad and burdensome.

In deciding whether a discovery request is burdensome, courts have adopted a proportionality approach that balances the burden on the interrogated party against the benefit that having the information would provide to the party submitting the interrogatory. 8A, Wright, Miller and Marcus, *Federal Practice and Procedure* § 2174 at 299 (1994). If the information sought may be particularly cogent to the case, the party from whom the discovery is sought must shoulder the burden. *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 343 (10th Cir. 1975). The fact that an unwieldy record keeping system would require heavy expenditures of time and effort to produce requested documents is not a sufficient reason to prevent disclosure of otherwise discoverable material. *Snowden v. Connaught Laboratories, Inc.*, 137 F.R.D. 325, 333 (D. Kan. 1991).

There is no doubt that the information sought could be relevant to this case. Despite plaintiff's claims of burden, the court does not believe that it would be too difficult to ascertain those cases in which Dr. Lichtor has conducted an independent medical examination or has been retained as a medical expert to testify at trial. Certainly, Dr. Lichtor might be able to assist plaintiff in tracking down those cases. However, the court believes that the interrogatory should be limited to those cases where Dr. Lichtor conducted an independent medical examination or had been retained as a medical expert to testify at trial. In addition, the court finds that the request should be limited to a specific seven year period in the absence of any compelling reason for a longer time period. Defendant shall therefore provide to plaintiff a seven year time period from which the plaintiff shall provide a list of cases in that seven year period in which Dr. Lichtor was retained to conduct an independent medical examination and/or was retained as a medical expert to testify at trial. The court finds that providing such information would not result in the disclosure of confidential information, as plaintiff alleges. Once defendant has provide the seven year time period, plaintiff shall have 30 days from that date to provide the above information.

***2** Interrogatory Number 5: Plaintiff shall provide a list of all attorneys and paralegals who worked on the *Murphy* case. A brief summary of their work on the case must also be provided.

Interrogatory Number 7 and 8: Defendant should clarify their interrogatories by stating whether they seek information gathered in the *Murphy* case, or the ***Turner & Boisseau*** case now before the court, or both. Once that clarification is made, plaintiff should fully respond to the two interrogatories within 30 days.

Interrogatory Number 9: Defendant should also clarify from which case they seek to gather this information. However, if it refers to the *Murphy* case, the court finds that the request is clearly relevant and not unduly burdensome. However, the court finds that it would be sufficient to provide to defendant all written records which are responsive to this interrogatory and the names and addresses of those then in plaintiff's employment involved in such conversations. Once the clarification is made, plaintiff should fully respond to the interrogatory within 30 days.

As to the requests for production of documents, defendant has offered to pay the expense of having the requested documents shipped to plaintiff's Overland Park office. It is not clear whether the parties reached an agreement on this matter. However, insofar as defendant is willing to incur the expense of shipment, the court will order plaintiff to ship the requested documents to its Overland Park office for review by defendant's counsel.

Request for Production No. 12 and 13: The parties have reached agreement on these two requests.

Request for Production No. 15: As a general rule, this court has previously held that a party asserting a claim of privilege must meet the burden of proof as to that privilege. *Jones v. Boeing Co.*, 163 F.R.D. 15, 17 (D. Kan. 1995). However, it is obvious that any of the documents produced after this lawsuit was filed clearly implicates the work product rule and need not be disclosed. However, as to any document which was produced prior to the filing of the lawsuit in the case now before this court, the plaintiff will have to produce a privilege log which meets the requirements of Fed.R.Civ.P. 26(b)(5) and the requirements set forth in *Jones.* The privilege log will have to cover each document in question, although documents may be categorized when the facts surrounding the elements of the work product rule are the same. In addition, the date or dates of each document will have to be disclosed, since that information will be important in determining whether or not the document was prepared in anticipation of litigation. The test will be whether, in light of the nature of the document and the factual situation in this case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. 8 Wright, Miller and Marcus, *Federal Practice and Procedure* § 2024 at 343 (1994). The privilege log must be prepared and given to the plaintiff by March 25, 1996. After the log is provided to defendant's counsel, counsel for the parties must meet and confer in an effort to resolve any disputes regarding the application of the work product rule before a renewed motion to compel is filed.

***3** IT IS THEREFORE ORDERED that the motion to compel is granted in part, as set forth above. Plaintiff has until March 25, 1996 to supplement their answers, unless otherwise provided for in this order.

The second motion before the court is defendant's motion for a protective order, filed on February 12, 1996 (Doc. 48-49). A response was filed on February 23, 1996 (Doc. 51).

Defendant seeks to block the taking of certain depositions until it has had the opportunity to review the materials sought in the motion to compel. However, the mere fact that defendant has not received all of the requested written discovery, necessitating the above motion to compel, cannot, of itself, justify freezing all discovery by the plaintiff until the defendant obtains the information they are seeking. Defendant has failed to show that the order is needed to protect them from annoyance, embarrassment, oppression, or undue burden or expense. Therefore, the motion for a protective order is denied.

IT IS THEREFORE ORDERED that the motion for a protective order is denied.

Copies of this order shall be mailed to counsel of record for the parties.

D.Kan.,1996.
Turner & Biosseau, Chartered v. Nationwide Mut. Ins. Co.
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