

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**GLADE SPRINGS VILLAGE PROPERTY
OWNERS ASSOCIATION, INC.,
a West Virginia non-profit corporation,**

Plaintiff,

vs.

**Civil Action No.: 19-C-357
Presiding: Judge Dent
Resolution: Judge Lorensen**

**EMCO GLADE SPRINGS HOSPITALITY, LLC,
a West Virginia limited liability company;
ELMER COPPOOLSE, an individual;
JAMES TERRY MILLER, an individual;
R. ELAINE BUTLER, an individual; and
GSR, LLC, a West Virginia limited liability company,**

Defendants,

and

**EMCO GLADE SPRINGS HOSPITALITY, LLC,
a West Virginia limited liability company, and
GSR, LLC, a West Virginia limited liability company,**

Counterclaim Plaintiffs,

vs.

**Civil Action No.: 19-C-357
Presiding: Judge Dent
Resolution: Judge Lorensen**

**GLADE SPRINGS VILLAGE PROPERTY
OWNERS ASSOCIATION, INC.,
a West Virginia non-profit corporation**

Counterclaim Defendant.

ORDER GRANTING IN PART POA'S MOTION TO COMPEL DISCOVERY

This matter came before the Court this 3rd day of June 2021, upon Plaintiff, Glade Springs Village Property Owners Association, Inc.'s Motion to Compel Discovery From EMCO Glade Springs Hospitality, LLC and GSR, LLC. The Plaintiff, Glade Springs Village Property

Owners Association, Inc., by counsel, Ramonda C. Marling, Esq., and Defendants, EMCO Glade Springs Hospitality, LLC and GSR, LLC, by counsel, Arie M. Spitz, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds the claims in the Second Amended Complaint¹, wherein Plaintiff, Glade Springs Village Property Owners Association, Inc. (hereinafter “Plaintiff” or “POA”), asserted claims against Defendants, EMCO Glade Springs Hospitality, LLC and GSR, LLC (hereinafter “Defendants” or “the Resort”) premised upon their alleged respective breach of various contracts with GSVPOA, as well as accounting claims and a claim of unjust enrichment. *See* Second Am. Compl; *see also* Reply, p. 6.

2. On April 13, 2021, Plaintiff, Glade Springs Village Property Owners Association, Inc. filed the instant Glade Springs Village Property Owners Association, Inc.’s Motion to Compel Discovery From EMCO Glade Springs Hospitality, LLC and GSR, LLC, seeking an order compelling Defendants to respond to certain discovery requests.

3. On May 5, 2021, Defendants EMCO Glade Springs Hospitality, LLC, and GSR, LLC filed their Response Plaintiff’s Motion to Compel Discovery, arguing their position as to each individual discovery request listed in the instant motion, and requesting the Court enter an order denying the instant motion. *See* Defs’ Resp., p. 11.

¹ The Court notes that by Agreed Order Granting Plaintiff’s Motion for Leave to File Second Amended Complaint, entered May 20, 2021, the Second Amended Complaint in this civil action is deemed filed as of May 20, 2021. *See* Ord., 5/20/21.

4. On May 25, 2021, the POA filed its Reply, indicating that it was withdrawing the motion as to GSR's storage area and audited financial statements and GSR's identification of the members of Glade Acquisitions, LLC, and that the only issues left pending in the instant motion are those that relate to the tax returns and ledgers. *See* Reply, p. 1-2. It argued such tax returns and ledgers are discoverable and necessary for it to cross validate Defendant's invoices for Glade Costs. *Id.* at 3-5. Further, it argued the tax returns are discoverable as evidence of Defendant's financial position with regard to the POA's claims for punitive damages. *Id.* at 5-8.

5. On May 26, 2021, the POA filed a "Notice of Filing" in which it corrected Exhibit 1 to the Reply, the Affidavit of Monte Kane.

6. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

The POA filed the instant Glade Springs Village Property Owners Association, Inc.'s Motion to Compel Discovery From EMCO Glade Springs Hospitality, LLC and GSR, LLC, seeking the Court to enter an order compelling responses to the following discovery requests: Request for Production No. 5 of the POA's First Set of Requests for Production, Request for Production No. 3, Request for Production No. 4, Request for Production No. 5, Request for Production No. 6², and Interrogatory No. 7³. The Court will take the issues in turn

Request for Production No. 5 (of the POA's First Set of Requests for Production)

First, Request No. 5 states as follows:

Produce any and all documents evidencing and relating to operating costs (including, but not limited to, timecards, payroll records, pay checks (with stubs) and W2s) for EMCO and/or GSR employees for which reimbursement was sought or obtained from the POA under the Deed of Easements and Licenses from 2010 through present.

² The Court notes Requests Nos. 3, 4, 5, and 6, are Requests from the POA's Second Set of Requests for Production. *See* Pl's Mot., p. 7.

³ The Court notes this Request is directed to Defendant GSR, LLC only. *See* Pl's Mot., p. 10.

See Pl's Mot., p. 6.

The parties' arguments regarding this request revolve around an offer for the POA to search boxes in storage for paper files responsive to this request. It was proffered that this document type was stored digitally for years 2017-present. *Id.* The parties proffered they have agreed that the POA may search boxes of stored paper files archived in a storage facility, provided a GSR representative is present to monitor the process. *Id.*

The parties disagree as to who should bear the cost for this monitoring. The POA argues while they do not object to having a GSR representative present to oversee the search and review process, the West Virginia Rules of Civil Procedure do not require the POA to pay Defendants' litigation costs in order to proceed with permissible discovery. *Id.* at 7. On the other hand, Defendants proffered that it is unduly burdensome and expensive for GSR to have a representative oversee the POA's review of the documents contained in the storage facility. *See* Defs' Resp., p. 3. Additionally, Defendants argue to the extent that there are responsive documents in the storage area, these documents are copies of records that the POA already possesses. *Id.* at 3, 4. Defendants argue this is another reason that "the POA should have to pay the costs incurred". *Id.* at 3.

However, in the Reply, the POA stated it was withdrawing the motion as to GSR's storage area. *See* Reply, p. 2. Finding this issue is moot and has been withdrawn, the Court moves to the next category.

Request for Production No. 3

Next, Request No. 3 states as follows:

Produce complete copies of Your tax filings for tax years 2001 through present.

See Pl's Mot., p. 7.

The POA argues that GSR's tax returns for 2010 (when it assumed ownership of the resort) through present clearly falls within the range of permissible discovery because the returns "will provide information regarding GSR's gross revenue from the operation of Glade Springs Resort during these periods of time and permit GSVPOA to cross reference the summary documents produced thus far by GSR". *Id.* at 7, 8-9.

On the other hand, Defendants argue that as an initial matter, there are no documents responsive to that request because GSR does not make tax filings, as they are wholly owned by Glade Acquisitions, LLC. *See* Defs' Resp., p. 4. Further, Defendants argued the tax returns of Glade Acquisitions, LLC contain no line item in which the revenue derived from operation of the Glade Springs Resort is listed. *Id.* at 5. Further, Defendants seek to protect their confidential information, arguing the tax returns contain "copious amounts of information that are highly confidential: net income (or losses), etc.". *Id.*

In the Reply, the POA argues that even though the tax returns of Glade Acquisitions, LLC contain no line item in which the revenue derived from operation of the Glade Springs Resort is listed, they still contain relevant and discoverable information regarding gross sales, which the POA can cross-reference with the ledgers, and the charged Glade Costs. *See* Reply, p. 3, 5. Further, the POA asserts that the Agreed Protective Order in this matter solves any confidentiality concerns. *Id.* at 5. The POA avers that Defendant had agreed to produce redacted tax returns, but the unredacted version is necessary in order for it to fully evaluate whether the gross sales were accurately reported for reconciliation processes under the DOE. *Id.* at 4. The POA included an Affidavit of its expert, Monte Kane, in support of its contention that

redacted versions of Glade Acquisitions, LLC's tax returns would not suffice for his forensic review and evaluation of revenues and expenses under the DOE. *Id.* at 3.

Additionally, the Court notes the POA argues the tax returns are discoverable due to its claims for punitive damages, as they go to the financial position of the defendant. *Id.* at 5-8. The POA avers GSR cited no case in West Virginia limiting this type of discovery until some type of prima facie showing is made on liability for punitive damages. *Id.* at 7.

The West Virginia Supreme Court of Appeals has recognized that the West Virginia Rules of Civil Procedure generally provide for broad discovery "to ferret out evidence which is in some degree relevant to the contested issue." *State ex rel. Wausau Bus. Ins. Co. v. Madden*, 613 S.E.2d 924, 928 (2005); *see* W. Va. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."). However, the broad nature of discovery has "never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition." Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 26(b)[1], at 744 (5th ed. 2017) (hereinafter, *Litigation Handbook*). As such, a court may limit otherwise permissible discovery where the information requested is privileged, cumulative, previously obtainable, or burdensome. W. Va. R. Civ P. 26(b).

Pursuant to Rule 37(a)(2) of the West Virginia Rules of Civil Procedure, if a party fails to respond to written discovery requests, "the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request." W. Va. R. Civ. P. 37(a)(2). "[A]n evasive or incomplete answer or response is to be treated as a failure to answer or respond." W. Va. R. Civ. P. 37(a)(3).

W. Va. R. Civ. P. 26(b)(1) permits discovery of any non-privileged matter that is relevant to the subject matter of the action. “The scope of discovery in civil cases is broad.” *State ex rel Shroades v. Henry*, 187 W. Va. 723, 725, 421 S.E.2d 264, 266 (1992). Broad discovery is necessary to eliminate surprise and trial by ambush. *McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 796 (1995); *Graham v. Wallace*, 214 W. Va. 178, 184-85, 588 S.E.2d 167, 173-174 (2003). Further discovery is not limited “only to admissible evidence, but applies to information reasonably calculated to lead to the discovery of admissible evidence.” *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 246, 460 S.E.2d 54, 61 (1995).

The POA has proffered Monte Kane, CPA⁴, PFS, CFF, CGMA, CSA, who has been designated as an expert witness by the POA in this matter. Specifically, the POA averred that Mr. Kane has been asked to review and evaluate the financials records of GSVPOA, supporting original documents (including contracts) and other information (including discovery in this matter) in order to quantify the amounts due to and from GSR, LLC and/or EMCO Glade Springs Hospitality, LLC under various agreements and claims in this matter. Mr. Kane specifically requested copies of GSR’s tax filings and general ledgers to complete his review and analysis. Corrected Exhibit 1 (Affidavit of Monte Kane), ¶ 5. As set forth in the Kane Affidavit:

To the extent the revenues and expenses of Glade Springs Resorts are not separately shown on the tax return, that determination could only be verified by examining the full and unredacted version of the Glade Acquisitions LLC tax returns.

After determining that such revenues and expenses are not separately reflected on the tax returns, it would be necessary to examine all accounting records that form the basis of the Glade Acquisitions LLC tax returns, and then extract the components solely comprising the accounting records of Glade Springs Resorts.

Id., ¶¶ 9 - 10. Further, Mr. Kane attests that redacted versions of Glade Acquisitions, LLC’s tax

⁴ Mr. Kane is licensed to practice in the states of Florida, Nevada, and New York.

returns will not suffice for [his] forensic review and evaluation of revenues and expenses under the DOE. Rather, the full tax return information, and all supporting records to extract the revenues and expenses, are necessary to facilitate a full evaluation of whether and to what degree GSR, LLC's gross sales from Glade's operation of the Resort, excluding real property sale, have been accurately reported for reconciliation purposes under the DOE. Further, these records along with their original supporting documents, are necessary to determine the existence and propriety of expenses of GSR that are charged to Glade Springs Property Owner's Association. Disclosure of full ledger information is likewise necessary to facilitate a full evaluation of whether and to what degree GSR, LLC's revenue and expenses have been accurately reported for reconciliation purposes under the DOE. *Id.* at ¶¶11-12.

While tax returns of Glade Acquisitions, LLC may not contain a line item dedicated to Resort revenue, said tax returns do in fact contain discoverable information regarding the Resort's revenue and expenses (including "Glade Costs" as that term is defined in the DOE). GSR acknowledges as much: "the tax returns only show gross receipt and sales." *See* Def's Resp., p. 5. The Court finds the POA has proffered evidence to show why discovery of these items would be relevant and material as to an issue in this case – it goes directly to the reconciliation process. Thus, this Court finds that GSVPOA is entitled to discovery of the unredacted tax returns and the full general ledger from 2010 to present.

As to the confidentiality concerns, an *Agreed Protective Order* was entered into this matter by agreement of the parties on February 21, 2020. GSR need only designate the returns as confidential under the Protective Order to preserve their confidentiality.

Accordingly, the instant motion is GRANTED as to this request from 2010 to present, and GSR shall serve responses consistent with the terms of this Order within twenty (20) days of entry of this Order.

Request for Production No. 4

Next, Request No. 4 states as follows:

Produce complete copies of Your General Ledger from 2001 through present.

See Pl's Mot., p. 9.

The POA argues the same argument from Request No. 3 applies with equal force to this request. *Id.* Defendants argued that the general ledger "contains copious amounts of proprietary, confidential business information: inventory, assets, liabilities, owners' equity, and bank account deposits". *See* Defs' Resp., p. 7. Further, Defendants detailed multiple compromises proposed to the POA with regard to this request. *Id.* at 7-8.

In its Reply, the POA maintains that the ledgers are needed to cross reference and cross validate GSR's gross sales and calculation of Glade Costs, in conjunction with "all sources", including invoicing under the DOE, the general ledgers, and tax filings. *See* Reply, p. 5. The POA argues the ledgers are necessary to evaluate whether and to what degree GSR's revenue and expenses have been accurately reported for reconciliation purposes under the DOE. *Id.* at 4.

The Court relies on and incorporates its analysis for the tax returns for the ledgers. As stated above, the POA provided evidence, through the Affidavit of Monte Kane, that disclosure of full ledger information (in addition to the tax returns) is likewise necessary to facilitate a full evaluation of whether and to what degree GSR, LLC's revenue and expenses have been accurately reported for reconciliation purposes under the DOE. Corrected Exhibit 1 (Affidavit of Monte Kane), ¶12.

Mr. Kane has stated in his verified affidavit that for his forensic review and evaluation of revenues and expenses under the DOE, full records will be needed in order to extract the revenues and expenses and evaluate fully whether and to what degree GSR, LLC's gross sales from Glade's operation of the Resort, excluding real property sale, have been accurately reported for reconciliation purposes under the DOE. The Court finds this is plainly relevant and material and is, thus, discoverable. Like with the tax returns, as to any confidentiality concerns, an *Agreed Protective Order* was entered into this matter by agreement of the parties on February 21, 2020. GSR need only designate the ledgers as confidential under the Protective Order to preserve their confidentiality. Like the tax returns, the Court finds the permissible scope of time for this request to be from 2010 to present.

Therefore, the instant motion is GRANTED as to this request from 2010 to present and GSR shall serve responses consistent with the terms of this Order within twenty (20) days of entry of this Order.

Request for Production No. 5 (of the POA's Second Set of Requests for Production)

Next, Request No. 5 states as follows:

Produce complete copies of Your revenue journals and any other documents relating to Your revenue from 2001 through present.

See Pl's Mot., p. 9.

The POA argues the same argument from Request No. 3 applies with equal force to this request. *Id.* at 9. Defendants argued that GSR doesn't maintain a revenue journal in its accounting system that is distinct from its general ledger. *See* Defs' Resp., p. 8. Further, Defendants argue this request is overly burdensome, as the Resort can generate thousands of receipts per day, from sales of everything from rooms to a pack of chewing gum, and that the

receipts would need to be redacted to redact the personal information on them, such as individual names or credit card information. *Id.*

It appears this request is now moot, as the POA averred in the Reply that the only issues left pending in the instant motion are those that relate to the tax returns and ledgers. *See Reply*, p. 1-2. The Court also notes Defendants argued that GSR doesn't maintain a revenue journal in its accounting system that is distinct from its general ledger. *See Defs' Resp.*, p. 8. It appears that this specific request is now moot and the POA's arguments go toward the discovery request specifically dealing with ledgers. Therefore, the Court finds this request is now moot.

Request for Production No. 6

Next, Request No. 6 states as follows:

Produce Your audited financial records from 2001 through present.

See Pl's Mot., p. 10.

The POA argues the same argument from Request No. 3 applies with equal force to this request. *Id.* at 9. Defendant argues GSR does not have documents responsive to this request, as GSR is not audited internally or externally. *See Defs' Resp.*, p. 9. Further, Defendants contend the same reasoning and arguments to the above requests apply equally to this request. *Id.*

In the Reply, the POA avers that this issue is now moot, based on the Response's averment that the Defendant does not possess audited financial statements. *See Reply*, p. 2. The Court finds this request is now moot and has been withdrawn by the POA.

Request for Production No. 7

Next, Request No. 7 (directed to GSR only) states as follows:

Identify all members of Glade Acquisitions, LLC from 2010 through present. If the membership has changed during this time period, describe how and when the membership changed.

See Pl's Mot., p. 10.

In the Reply, the POA avers that this issue is now moot, based on the fact that GSR has agreed to identify the members of Glade Acquisitions, LLC. *See* Reply, p. 2. The Court finds this request is now moot and has been withdrawn by the POA.

CONCLUSION

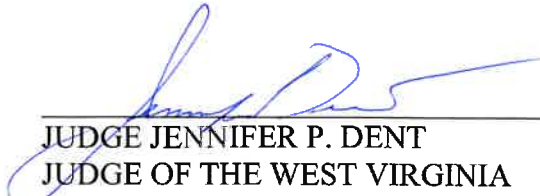
Accordingly, it is hereby ADJUDGED and ORDERED that Glade Springs Village Property Owners Association, Inc.'s Motion to Compel Discovery From EMCO Glade Springs Hospitality, LLC and GSR, LLC is hereby GRANTED IN PART.

It is further hereby ADJUDGED and ORDERED that the instant motion is GRANTED as to Request for Production Nos. 3 and 4 from the POA's Second Set of Requests for Production from 2010 to present, and GSR shall serve responses consistent with the terms of this Order within twenty (20) days of entry of this Order.

It is further hereby ADJUDGED and ORDERED that the instant motion is moot and/or withdrawn as to Request for Production No. 5 of the POA's First Set of Requests for Production, Request for Production Nos. 5 and 6 from the POA's Second Set of Requests for Production, and Interrogatory No. 7.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, to any *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

June 3, 2021
date of entry



JUDGE JENNIFER P. DENT
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION