

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

JULIUS WOLFORD,

Plaintiff,

vs.

Civil Action No. 20-C-660

Presiding Judge: Paul T. Farrell

Resolution Judge: Shawn D. Nines

FORM TECH CONCRETE FORMS, INC.,
a Michigan corporation,

Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL DISCOVERY
FROM DEFENDANT FORM TECH CONCRETE FORMS, INC. AND GRANTING
PLAINTIFF'S MOTION TO EXTEND DEADLINE**

This matter came before the Court this 9 day of December 2021, upon Plaintiff, Julius Wolford's Motion to Compel Discovery From Defendant Form Tech Concrete Forms, Inc. The Plaintiff, Julius Wolford, by counsel, Christopher D. Pence, Esq., and Defendant, Form Tech Concrete Forms, Inc., by counsel, Roberta F. Green, 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. On August 6, 2020, Plaintiff filed a Complaint in this civil action based on the following causes of action: 1) Count 1 – Breach of Contract (consulting agreement); 2) Count 2 – Violations of WVWPCA; 3) Count 3 – Breach of Oral Contract (forklift rental); and Count 4 – Quantum Meruit (forklift rental). *See* Compl. The matter surrounds contracts between the parties

related to employment and the rental of a forklift. *Id.* Further, the matter also surrounds allegations of the alleged hazardous disposal of Plaintiff's curing compound and subsequent leak into a nearby stream and DEP violation(s). *Id.*

2. On or about October 22, 2021, Plaintiff filed the instant Plaintiff's Motion to Compel Discovery From Defendant Form Tech Concrete Forms, Inc., seeking to compel Defendant to produce certain discovery in this matter. Specifically, Plaintiff seeks the production of the following: Request for Production of Documents Nos. 3, 4, 15, and 16. *See* Pl's Mot., p. 3-9.

3. On or about November 9, 2021, Defendant filed its Response in Opposition to Plaintiff's Motion to Compel and For Award of Attorney's Fees, averring that discovery with regard to the calculation of commissions is not discoverable because Plaintiff is not entitled to any commissions because he did not meet his contractual predicates to earn commissions. *See* Def's Resp., p. 3. Further, it contends the scope of the discovery requests are unduly burdensome, as they request certain documents until the present when Plaintiff's contract was terminated in July 2019. *Id.* at 9-10. It also contends certain discovery requests are unduly burdensome as they seek information regarding the financial performance of a nationwide company. *Id.* at 10-11.

4. On or about November 19, 2021, Plaintiff filed his Reply, arguing it does not agree that the aforementioned contract was terminated in July 2019, and that issue is more appropriate for dispositive motions, that the requests are not unduly burdensome, and that it would limit its request for financial performance to the St. Albans, West Virginia branch of Defendant's nationwide business. *See* Reply.

5. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

The Plaintiff filed the instant Plaintiffs' Motion to Compel Discovery From Defendant Form Tech Concrete Forms, Inc., seeking the Court to enter an order compelling responses to the following discovery requests: Request for Production No. 3, Request for Production No. 4, Request for Production No. 15, and Request for Production No. 16. The Court will take the issues in turn

Request for Production No. 3

First, Request No. 3 states as follows:

Please produce any financial reports, statements or other documents which reflect Form Tech's monthly financial performance from March 1, 2019 to present.

See Pl's Mot., p. 3.

Plaintiff avers this information is necessary in order for him to calculate the commissions for which he is due. *Id.* Plaintiff avers in the Reply that it agrees to limit this request to the St. Albans, West Virginia branch of Defendant's nationwide business in order to make it less burdensome to produce. See Reply, p. 7-8. The Court finds this request should be granted. The Court notes Defendant has argued that producing documents in response would be unduly burdensome due to the multiple branches of the company, it appears that this problem will be solved by limiting the scope of Request No. 3 to the St. Albans location only.

Further, Defendant has averred that information that is sought for Plaintiff to calculate the commissions for which he is due should not be compelled because he is due no commissions under their understanding of the contract and when it was breached. However, this is disputed by Plaintiff, and at this point in time, the Court has made no substantive, dispositive ruling on whether or not Julius Wolford completed all his contractual predicates to earn commissions

under his contract with Defendant. At this time, Plaintiff is entitled to discover the information relevant to his claims for commissions under the contract at the heart of Count I.

For these reasons, the Court finds the motion shall be GRANTED as to Request for Production No. 3, as limited by Plaintiff's offer to limit the location to the St. Albans, West Virginia branch.

Request for Production No. 4

Next, Request No. 4 states as follows:

Please produce any and all documents relating to, in any way, sales which were attributable to Plaintiff or to Form Tech sales identification number 85 from March 1, 2019 to present.

See Pl's Mot., p. 3.

Plaintiff argues that this request also goes to the calculation of commissions. *Id.* at 4-5. Plaintiff argues that Defendant did partially respond to this request for the months up to July 2019, the time which Defendant believes the contract was terminated, and that Defendant produced a calculation Plaintiff did not ask for, as well as included only a portion of the documents it requested. *Id.* at 5-6.

The Court rejects Defendant's arguments that Request No. 4 is irrelevant (*see* Def's Resp., p. 8) for the same reasons contained in its analysis of Request No. 3. Particularly, the Court's reasoning is the same regarding Defendant's argument the request is irrelevant, and the fact that the Court has made no dispositive rulings on the contract, or when it was terminated, at this point in time. The Court notes Defendant's arguments regarding the requests being unduly burdensome and expensive appear to be directed at Request No. 3. *See* Def's Resp., p. 8, 10 (bottom paragraph).

For these reasons, the Court finds that the request should be produced, for the time period to the present, or Plaintiff should indicate if no records exist. The Court imagines that if Plaintiff's view is correct, and Plaintiff himself believed himself to be terminated in July 2019 and stopped submitting requests for his consulting fee (*see* Def's Resp., p. 9), there would be little to no relevant discovery responsive to this request in the months from August 2019 to the present and this request would not be unduly burdensome in the least. However, at the point in the litigation, Plaintiff is entitled to know if such information exists regarding the calculation of commissions he may argue for/calculation of damages to be presented at trial.

For these reasons, the Court finds the motion shall be GRANTED as to Request for Production No. 4.

Request for Production No. 15

Next, Request No. 15 states as follows:

Please produce all documents including, but not limited to, invoices, delivery tickets and bills of material reflecting all sales and rental transactions between Form Tech and all customer accounts assigned to Plaintiff as reflected in the customer list attached as Exhibit A from March 13, 2019 to present.

See Pl's Mot., p. 7.

As an initial matter, the Court will not deny the motion as to Request No. 15 on the basis of Defendant's argument that Mr. Wolford failed to engage in any of the contractually agreed-to predicates for commissions (*see* Def's Resp., p. 13) for the reasons set forth above.

The Court also notes Defendant's averment regarding production under this request would involve customer records being shown to a competitor, as Plaintiff's wife owns, and Plaintiff now works at, a competitor company that sells concrete forming materials. *See* Def's Resp., p. 14. Upon the Court's review of the request, the Court considers that it is limited to

“customer accounts assigned to Plaintiff”. Further, the Court considers that there is a Protective Order in place in this civil action. The Court finds this is not a compelling reason to deny production of relevant discovery.

The Court finds that at this point in the litigation, Plaintiff is entitled to discovery that will elicit commission related information, as this would be directly relevant to his claim for contractual damages in the Complaint. The Court finds that this request would elicit information from the customer accounts assigned to Plaintiff in his assigned sales territory which would be directly relevant to Plaintiff’s claim for unpaid sales commissions. *See* Pl’s Mot., p. 7.

Plaintiff argued in its motion and reply that this information is not burdensome to produce, citing deposition testimony from Defendant’s CEO, Guy Williams, who testified that Defendant uses an internal recordkeeping system known as “FACTS” from which commission reports can be generated for individual salespersons by using their sales identification number assigned to specific customer accounts that would take about a day to produce. *See* Pl’s Mot., p. 7; *see also* Reply, p. 7. However, Defendant contends in the Response that it has no obligation under the rules of discovery to generate a report. *See* Def’s Resp., p. 13. The Court notes that Plaintiff, in response to other discovery requests, created and produced (or offered to create and produce) a line item spreadsheet to respond to Defendant’s discovery request. *See* Def’s Resp., p. 1. At any rate, the Court finds that whether Defendant opts to create a report from an internal system (which appears from the briefing to be acceptable to Plaintiff), or produces individual documents responsive to this request, at this point in the litigation, the motion must be GRANTED as to this request, as there exists a valid claim regarding allegedly unpaid commissions through the present.

Request for Production No. 16

Next, Request No. 16 states as follows:

Please produce all documents including, but not limited to, invoices, delivery tickets and bills of material reflecting all sales and rental transactions between Form Tech and all customer accounts within the defined geographic sales territory assigned to Plaintiff as determined by Form Tech's Vice President of Sales from March 13, 2019 to present.

See Pl's Mot., p. 7.

Like Request No. 15, Request No. 16 deals with sales between Form Tech and customers specifically limited to the geographic sales territory assigned to Plaintiff (who has been assigned a number). The Court notes that Defendant argued that customers in the geographical area "might make purchases based on their being Form Tech's customers generally over time prior to any affiliation with Mr. Wolford". *See* Def's Resp., p. 4. Again, whether Mr. Wolford did or did not as a matter of law satisfy all this contractual predicates and duties under his contract with Defendant is not before the Court at this time. At this point in the litigation, the information sought is reasonably calculated to lead the discovery of evidence regarding Plaintiff's damages and claims contained in Count I. For this reason, the Court finds the motion must be GRANTED as to this request.

Plaintiff's Motion to Extend Deadline

Finally, the Court addresses Plaintiff's Motion to Extend Deadline. Plaintiff filed this motion seeking to extend the discovery period in this matter for the deposition of Lucy Klohs, Defendant's Chief Financial Officer, who it intended to question on the information that is the subject to this motion to compel. *See* Pl's Mot., p. 1. Defendant filed a Response, avering it may agree to a short extension in discovery if the Court grants the same, they find a resolution of the motion to compel should be accomplished first. *See* Def's Resp., p. 5. The Court also considered Plaintiff's Reply to Defendant's Response to Motion to Extend Deadline. Now that

the motion to compel has been resolved, and granted, the Court finds the motion to extend deadline is not premature and must be granted. The Court does grant the motion to extend and ORDERS that Ms. Klohs's deposition be conducted within fourteen (14) days of Plaintiff's receipt of the information ordered to be produced by the Court. The remaining dates in the Court's scheduling order remain unchanged.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion to Compel Discovery From Defendant Form Tech Concrete Forms, Inc. is hereby GRANTED.

It is further hereby ADJUDGED and ORDERED that Plaintiff's Motion to Extend Deadline is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Ms. Klohs's deposition be conducted within fourteen (14) days of Plaintiff's receipt of the information ordered to be produced by the Court. The remaining dates in the Court's scheduling order remain unchanged.

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.

December 9, 2021
date of entry



JUDGE PAUL T. FARRELL
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

Date: 12/13/21
Certified copies sent to:
___ counsel of record
___ parties
___ other Bus ct
(please indicate)
By: ☒ certified/1st class mail
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___ hand delivery
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Other directives accomplished:

Deputy/Officer Clerk

C Pence
R. Green

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13th
DAY OF December, 2021
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA