

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

**TRITON CONSTRUCTION, INC.,
a West Virginia corporation,**

Plaintiff,

vs.

Civil Action No. 21-C-07

Presiding Judge: H. Charles Carl, III

**Resolution Judge: Michael D. Lorensen
and Jennifer P. Dent**

**GANNETT FLEMING, INC.,
a Delaware corporation, and**

**MONONGAHELA CONSERVATION DISTRICT,
a West Virginia Conservation District,**

Defendants.

ORDER GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL

This matter came before the Court this 4th day of April 2022. The Plaintiff, Triton Construction, Inc., by counsel, has filed Triton Construction, Inc.'s Motion to Compel Responses By Gannett Fleming, Inc. to Interrogatories and Requests for Production of Documents. The Plaintiff, by counsel, and Defendant, Gannett Fleming, Inc., by counsel, 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 civil action surrounds a multi-year project to rehabilitate the Upper Deckers Creek Site 1 Dam in Preston County, West Virginia. *See* Second Am. Compl., ¶7. Involved in

the instant motion are two parties. First, Defendant Gannett Fleming, Inc. (hereinafter “Defendant” or “GFI”) is a professional engineering firm employed to plan, design, prepare bidding documents for, and oversee the construction of said project. *Id.* at ¶9. Second, Plaintiff Triton Construction, Inc. (hereinafter “Triton” or “Plaintiff”) was the successful bidder and was awarded the contract to construct the project. *Id.* at ¶15.

2. On or about December 9, 2021, the Court’s Scheduling Order was entered, setting forth various discovery deadlines.

3. On January 7, 2022, Triton served its First Set of Interrogatories and Requests for Production of Documents upon Defendant GFI.

4. On or about March 18, 2022, the instant Triton Construction, Inc.’s Motion to Compel Responses By Gannett Fleming, Inc. to Interrogatories and Requests for Production of Documents was filed, wherein Triton argued Defendant GFI had not yet responded to its First Set of Interrogatories and Requests for Production of Documents served January 7, 2022, although counsels for the parties had been communicating regarding the status of the production and extensions. The Court notes this motion did not have an accompanying affidavit certifying the attorney conferred in good faith, but did make a certification in a footnote in the motion. *See* W. Va. R. Civ. Proc. 37(a)(2).

5. On or about March 21, 2022, GFI filed its Response, averring technical difficulties arose getting files from client to counsel, and averring that Triton did not meet its requirement to meet and confer in good faith prior to filing the motion to compel.

6. On or about March 25, 2022, Triton filed its Reply, reiterating its position that it was taking GFI too long to produce its own documents, and averring that court intervention seemed reasonable under the circumstances.

7. The Court now finds the matter ripe for adjudication.

CONCLUSIONS OF LAW

8. Plaintiff brought its motion to compel under Rule 37 of the West Virginia Rules of Civil Procedure. Generally,

Civil discovery is governed by the West Virginia Rules of Civil Procedure, Rules 26 through 37. The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue.

Syl. Pt. 1, in part, *Evans v. Mutual Min.*, 199 W.Va. 526, 485 S.E.2d 695 (1997) (internal quotations and citations omitted). Rule 33 provides, in pertinent part, that “any party may serve upon any other party written interrogatories ... to be answered by the party served”. W.Va. R. Civ. P. 33 (a). The Rule goes on to require that “[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. Requests for Production are governed by Rule 34 of the West Virginia Rules of Civil Procedure which provides, inter alia, “[a]ny party may serve on any other party a request (1) to produce ... any designated documents...” This Rule requires parties to respond to this type of request within certain time frames and to “organize and label them to correspond with the categories in the request.” W.Va. R. Civ. P. 34 (b).

9. Further, Rule 37 of the West Virginia Rules of Civil Procedure provides, in pertinent part:

(2) *Motion*. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(7) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in

response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action.

W. Va. R. Civ. P. 37.

11. Rule 37(a)(2) sets forth the requirement that “the discovering party may move for an order compelling an answer” when “the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action.” *See also Keplinger v. Virginia Elec. & Power Co.*, 208 W.Va. 11, 25 n. 19, 537 S.E.2d 632, 646 n. 19 (2000) (recognizing requirement that a party in “good faith ... confer [] or attempt[] to confer with the ... party failing to make the discovery in an effort to secure the information ... without court action”). *cited by Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W. Va. 1, 7, 614 S.E.2d 1, 7 (2005).

12. Specifically, in this matter, GFI argues the instant motion did not include a certification that the movant in good faith has conferred or attempted to confer with counsel for Gannett in an effort to secure the information or action without court action.

13. As an initial matter, the Court considers that Plaintiff certified it engaged in a good faith meet and confer as required by Rule 37 in a footnote in its motion to compel. Next, the Court notes that Plaintiff’s initial letter to GFI on February 7, 2022 indicated that its discovery responses were now late¹, and included language that if responses were not received by February 16, 2022, it would file a motion to compel. *See* Pl’s Mot., p. 2. Further, even if this mention of court action

¹ The Court notes Defendant averred in the Response that it disputed that the discovery responses were late as of this date.

alone did not fulfill counsel's duty to meet and confer, following this initial letter, Plaintiff averred there had been multiple calls and emails regarding the discovery issue and extensions. *Id.* Counsels engaged in phone calls regarding the reasons for the delayed discovery responses (technical difficulties getting the documents from client to counsel) and memorialized phone calls with emails throughout February and the beginning of March 2022. The parties agreed to some initial extension(s) between themselves during this timeframe. The parties agree that on March 16, 2022, a phone call occurred wherein GFI requested another extension to April 1, 2022, and counsel for Plaintiff denied this request. *Id.*

14. The Court considers that in the Response, GFI averred that counsel for Plaintiff indicated it was not agreeing to the April 1, 2022 extension but would get back with GFI. *See* Def's Resp., p. 3. GFI averred that instead of getting back to GFI, it instead filed the instant motion to compel.

15. However, the Court considers this March 16, 2022 phone call and email, the fact that the motion to compel was filed soon after², as well as the numerous communications which had occurred between the parties regarding the status of this discovery dispute in February and March 2022. The Court also considers Plaintiff's certification of its good faith attempt meet and confer, even though it was contained in a footnote, and its explanation that that the parties exchanged in numerous letters and emails regarding the issue.

16. For these reasons, the arguments regarding failure to meet and confer in good faith are hereby rejected, and the instant motion shall not be denied on that basis.

17. Moreover, the Court finds that almost three months have passed since the discovery requests were served, and although the Court understands initial extensions were

² The Court notes the undersigned was served with its courtesy copy of the motion on March 18, 2022.

granted due to technical difficulties, at this point in time, it would be an unreasonable delay for it to deny this motion on the basis of technical difficulties at this time. The Court notes it has taken GFI over three months to produce its own documents. *See* Reply, p. 6. For these reasons, the Court finds the motion to compel these discovery responses must be granted.

18. However, the Court next addresses the motion's request that the Court order that GFI respond without objection. *See* Pl's Mot., p. 3; *see also* Reply, p. 6.

19. The Court recognizes the general principle found mainly in the federal courts that failure to timely object to discovery requests constitutes waiver. *See Essex Ins. Co. v. Neely*, 236 F.R.D. 287, 291 (N.D.W. Va. 2006).

20. Further, "the plain terms of the relevant discovery rules provide that a party served with a document request actually has four options:

- (1) respond by agreeing to produce the requested documents (W.Va. R.Civ.P. 34(b));
- (2) respond by objecting (W.Va. R. Civ.P.34(b));
- (3) move for a protective order (W.Va. R.Civ. P. 26(c) and 37(d)); or
- (4) do nothing and face imposition of sanctions (W.Va. R.Civ. P. 37(d)).

State ex rel. Wausau Bus. Ins. Co. v. Madden, 216 W. Va. 776, 781, 613 S.E.2d 924, 929 (2005).

21. With regard to facing the imposition of sanctions under Rule 37(d), Rule 37(d) states, in pertinent part:

"If a party....fails...(2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories....the court in which the action is pending on motion **may** make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule."

W. Va. R. Civ. P. 37 (emphasis added).

22. The Court finds under the West Virginia Rules of Civil Procedure and relevant West Virginia state law, the undersigned as discretion as to whether or not a failure to object constitutes waiver of said objection.

23. Here, the Court, in its discretion under Rule 37(b), finds such a sanction is not appropriate at this time. As an initial matter, the Court considers that Plaintiff provided “authoritative text” consisting of secondary sources and federal court decisions, but no published decisions by the West Virginia Supreme Court of Appeals mandating such a result under these circumstances. Further, although the Court finds the requested responses must be compelled at this point in time, and further extension of time for technical issues unreasonable, the Court considers the circumstances of the production. Responses have not been provided at all due to apparent technical difficulties and related delays. Extensions have been sought, the merits of which have been argued by GFI in the instant motion. Further, the parties were negotiating extensions amongst themselves and communicating about the reason for the delay throughout February and early March 2022. The Court considers that counsel for Plaintiff denied GFI’s latest request for a further extension before filing the instant motion. The Court considers this circumstance is different than one in which a party has been derelict in their duty to respond or participate in discovery at all.

24. Under the circumstances, the Court agrees with GFI that it should not be required to waive any objections prior to viewing the documents requested in this initial round of written discovery. *See* Def’s Resp., p. 4. However, the parties are on notice that failure to provide responses as directed in this order could result in sanctions under Rule 37(d), including waiver of any objections not lodged.


25. For these reasons, the Court finds Plaintiff's motion must be granted in part, as it does not grant Plaintiff's request that the discovery responses be compelled without objection at this time.

CONCLUSION

26. **WHEREFORE**, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion to Compel is GRANTED IN PART. GFI is directed to provide its responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents served January 7, 2022 within fifteen (15) days of the entry of this Order. The Court notes the objections of the parties to any adverse ruling herein.

27. Upon its entry, the Circuit Clerk is directed to forward a copy of this Order to all counsel of record and to the Business Court Division Central Office, Berkeley County Judicial Center, Suite 2100, 380 West South Street, Martinsburg, WV 25401.

IT IS SO ORDERED this 4 day of April, 2022.


H. Charles Carl, III, Presiding Judge
Business Court Division

Entered: April 4, 2022

Lisa Leishman, Clerk

By: Sandy Murray, Deputy

4 copies
SD
4-4-22
Business
Court
HB
JAL
NTD Jr

A TRUE COPY:

ATTEST: S/LISA LEISHMAN
CLERK OF THE CIRCUIT COURT
By: S. Murray Deputy