

In the Circuit Court of Jackson County, West Virginia

**Southern Jackson County Public
Service District,**
Plaintiff,

v.

Case No. CC-18-2022-C-91
Judge Michael Lorensen

**C.J. Hughes Construction Company,
Inc.,
Tri-State Pipeline, Inc.,
Ferguson Enterprises, LLC,
Master Meter, Inc.,**
Defendants

**ORDER GRANTING C. J. HUGHES CONSTRUCTION COMPANY'S MOTION TO
COMPEL**

By Motion filed October 17, 2023, Defendant, C.J. Hughes Construction Company, Inc. ("CJ Hughes"), moved to compel Plaintiff, Southern Jackson County Public Service District ("Plaintiff"), to respond and fully answer and respond to the written discovery served on Plaintiff by CJ Hughes. Having reviewed Motion filed by CJ Hughes, the written discovery requests served on Plaintiff by CJ Hughes, the responses and objections filed by Plaintiff and being otherwise sufficiently familiar with the proceedings in this matter, the Court is of the opinion to, and hereby does, **GRANT** the Motion to Compel filed by CJ Hughes. Accordingly, the Court hereby **ORDERS** Plaintiff to fully and completely respond to the aforementioned discovery responses within twenty one (21) days of the entry of this Order. In reaching its decision the Court makes the following findings of fact and conclusions of law:

FACTUAL AND PROCEDURAL BACKGROUND

1. On July 11, 2023, CJ Hughes served Plaintiff with "*Defendant CJ Hughes Documents to Plaintiff*" (the "Discovery Requests"). A copy of which is attached

to the Motion as “**Exhibit 1.**”

2. On August 8, 2023, by email to counsel for CJ Hughes, Plaintiff’s counsel requested a thirty (30) day extension until September 10, 2023. A copy of said request is attached to the Motion as “**Exhibit 2.**”

3. On September 7, 2023, Plaintiff served “*Plaintiff’s Answers and Responses to Defendant CJ Hughes Interrogatories and Requests for Production of Documents to Plaintiff.*” A copy of which is attached to the Motion as “**Exhibit 3.**”

4. On September 15, 2023, counsel for CJ Hughes, in an effort to obtain the necessary information sought without the involvement of the Court, and as required by Rule 37(a)(2) of the West Virginia Rules of Civil Procedure, sent a letter to Plaintiff’s counsel requesting responsive answers and production in response to the Discovery Requests as well as inviting Plaintiff’s counsel to meet and confer regarding any disagreement (the “Letter”). A copy of said letter is attached to the Motion as “**Exhibit 4.**” No contemporaneous communication such as a telephone call or face to face meeting was undertaken to resolve this dispute.

5. The Letter advised Plaintiff’s counsel that failure to respond and/or supplement its responses by September 30, 2023 would lead to CJ Hughes filing a motion to compel responses.

6. The Plaintiff responds to the motion to compel by citing a failure to comply with Rule 37(b)’s “meet and confer”. While the Plaintiff makes a strong point, this letter invited a response and a discussion and gave two weeks for the opportunity to respond and discuss. The court will find minimal compliance, though not entirely satisfactory. The court may consider this with regard to the CJ Hughes’ anticipated fee application.

7. In the Motion, CJ Hughes certified that it attempted in good faith to resolve this discovery dispute without requesting Court intervention, but further advised

that its efforts were unsuccessful.

8. In outlining the deficiencies in Plaintiff's objections, answers and responses to the Discovery Requests, CJ Hughes asserts the following answers as evasive and improper and sought meaningful responses:

a. CJ Hughes argues that Plaintiff's response to Interrogatory No. 1 included

improper objections and unresponsive or vague reference to documents. Interrogatory No. 1 requests: "Identify each and every contract provision Defendant is alleged to have violated in any contract by and between Plaintiff and Defendant and upon which Plaintiff seeks damages."

b. Plaintiff's response was as follows:

Plaintiff objects based upon the overbroad interrogatory and reserves the right to address any future defense or factual issue to which the contract has a bearing upon. Without waiving said objection, as part of the contract for construction and installation, C.J. Hughes agreed to test the meters at the installation stage. Plaintiff refers defendant generally to BS 000229-000574-Project Manual-SJPSD Contract 3 and BS 000229-000531- Portions of Project Manual-SJPSD, which reference the testing requirements.

Plaintiff reserves the right to supplement as discovery is ongoing.

c. CJ Hughes argued that its request was not "overbroad" and specifically requested that Plaintiff identify the specific provision(s) of every contract CJ Hughes is alleged to have breached. CJ Hughes argued that it is entitled to know exactly which provision(s) of a 335 page contract TMLF 4365 000229 to TMLF 4365 000574 Plaintiff believes CJ Hughes breached. Furthermore, the initial contract required CJ Hughes to provide a very limited number of meters and CJ Hughes advised that Change Order No. 3 did not require CJ Hughes to install meters. Change Order No. 3, however, simply required CJ Hughes "furnishing 830 each 5/8" multi-jet water meter

with radio-read register @ \$247.25/ea.; 190 ea. Two-way RI-902-928 mH2 transceiver with batteries @ 120.75/ea; and 28 ea. lid-mount mH2 active antenna @ \$97.75 ea.” (See TMLF 4365 001124). No provision of Change Order No. 3 required CJ Hughes to install or test those products. Accordingly, CJ Hughes argued that it cannot tell whether Plaintiff is claiming, as against CJ Hughes, whether the items set forth in the Change Order were not provided, or which of the alleged provisions of the contract required testing by CJ Hughes of any meters sold. CJ Hughes is entitled to know, as to itself, what the exact provisions of what documents they have been alleged to breach.

The court finds that CJ Hughes is entitled to know exactly which contract(s) and provision(s) Plaintiff alleges CJ Hughes breached. Accordingly, the Court FINDS that Plaintiff has failed to fully and completely respond to Interrogatory No. 1 and, pursuant to the terms hereof, Orders Plaintiff to so respond.

d. CJ Hughes further argued that Plaintiff’s response to Interrogatory No. 2 includes improper objections and unresponsive answers. Specifically, Interrogatory No. 2 requests: “Identify the dates in which Defendant gave Plaintiff’s Engineer, Boyles and Hildreth, Consulting Engineer, notice of readiness of the Work for all required inspections, tests, or appraisals – Work being as defined in any contract entered into by Defendant and Plaintiff and upon which Plaintiff seeks damages.”

e. Plaintiff’s response was as follows: “Objection. This interrogatory is ambiguous. It is unclear what date or dates defendant is requesting and what is meant by readiness of the Work. Without waiving said objection, to the best of plaintiff’s knowledge and belief, defendant CJ Hughes did its work in 2014 and 2015.”

f. CJ Hughes argued that Article 13 of the “Standard General Conditions of the Construction Contract,” which was entered into by and between Plaintiff and CJ Hughes (a copy of which is attached to the Motion as “**Exhibit 5**”),

states in Paragraph 13.03 titled “Tests and Inspections” Subparagraph A that: “Contractor shall give Engineer timely notice of readiness of the Work for all required inspections, tests, or approvals and shall cooperate with inspections, tests, or approvals and shall cooperate with inspection and testing personnel to facilitate required inspections or tests.” CJ Hughes states this language is directly from Plaintiff’s contract as prepared by Plaintiff, or its agents. The relevant contract language required only that CJ Hughes furnish the meters and then provide “timely notice of readiness” for Plaintiff’s Engineer to inspect the same. CJ Hughes argued the Interrogatory is simply attempting to determine if Plaintiff’s allegations in the Complaint are that CJ Hughes somehow failed to provide Plaintiff’s Engineer with “notice of readiness” to enable Plaintiff’s Engineer to so inspect the meters.

The court finds that CJ Hughes is entitled to know if notice of readiness was ever provided to Plaintiff’s Engineers and, if so, what dates that Defendant communicated its “readiness” for purposes of Plaintiff’s Engineers to conduct any inspections. Accordingly, the Court FINDS that Plaintiff has failed to fully and completely respond to Interrogatory No. 2 and, pursuant to the terms hereof, Orders Plaintiff to so respond.

g. CJ Hughes also contended that Plaintiff’s response to Interrogatory No. 3 includes improper objections and unresponsive answers. Interrogatory No. 3 requests: “Identify the dates and testing of any Master Meter product undertaken by Plaintiff’s Engineer prior to the filing of the Complaint of this action. Said dates and testing being limited to Master Meter products installed pursuant to any contract by and between Defendant or Tri-State Pipelines and Plaintiff.”

h. The response of Plaintiff was as follows:

Objection. This term “Plaintiff’s Engineer” is ambiguous.

Without waiving said objection, if the by plaintiff's engineer, defendant means expert identification, Plaintiff objects to said interrogatory as premature. Plaintiff will disclose experts in accordance with the Court's scheduling order. If by plaintiff's engineer, the defendant means the engineer for Contract No. 3, Boyles and Hildreth, plaintiff does not believe or know of any testing anticipated or required by the contract of Boyles and Hildreth of the installed Master Meter products.

i. The Suggested Form of Agreement between Owner and Contractor for Construction Contract (Stipulated Price) in Article 3 titled "Engineer" states in Section 3.01 (a copy of which is attached to the Motion as "Exhibit 6") as follows: "3.01 CJ Hughes argued that the Project was designed by Boyles and Hildreth, Consulting Engineers (Engineer), which is to act as Owner's representatives, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents." CJ Hughes argued that Interrogatory No. 3 did not ask if Contract No. 3 required Plaintiff's Engineer to undertake any testing, it simply asked if Plaintiff's Engineer did undertake any such testing. Accordingly, CJ Hughes seeks an answer. If that answer is yes, then, pursuant to the Interrogatory, CJ Hughes wants to know on what dates any such testing was performed.

The court agrees that CJ Hughes is entitled to know if Plaintiff's Engineer conducted any testing and, if so, on what dates. Accordingly, the Court FINDS that Plaintiff has failed to fully and completely respond to Interrogatory No. 3 and, pursuant to the terms hereof, Orders Plaintiff to so respond.

j. CJ Hughes also argued that Plaintiff's response to Interrogatory No. 4 included improper objections and unresponsive answers. Interrogatory No. 4 requests: "Identify the Resident Project Representative furnished by Plaintiff's Engineer to Defendant and required by any contract entered into by Defendant and Plaintiff."

k. The Response of Plaintiff was as follows:

Objection. This terms "Plaintiff's Engineer" and Resident Project Representative are ambiguous. Without waiving said

objections, if the by plaintiff's engineer, defendant means expert identification, plaintiff objects to said interrogatory as premature. Plaintiff will disclose experts in accordance with the Court's scheduling order. In addition, this interrogatory presupposes a requirement, "required by any contract entered into by Defendant and Plaintiff," to which plaintiff does not concede. Without waiving said objection, plaintiff's contact were with Mr. Hildreth. However, Mr. Hildreth may not be a designated Resident Project Representative. Plaintiff does not know if anyone else from Mr. Hildreth's office also worked on the project.

l. CJ Hughes contends this response is improper. CJ Hughes notes that Plaintiff's Contract specifically (see TMLF 4365 000380) (attached to the Motion as "Exhibit 7"), entered into by CJ Hughes and Plaintiff provides "ENGINEER shall furnish a Resident Project Representative ("RPR"), assistants and other field staff to assist ENGINEER in observing progress and quality of the Work." CJ Hughes argued that it is entitled to know who that "Resident Project Representative" was as per Plaintiff's Contract or if there was no such representative assigned then Plaintiff should simply respond accordingly.

The court agrees that CJ Hughes is entitled to know the identity of the Resident Project Representative furnished by Plaintiff's Engineer, if any. Accordingly, the Court FINDS that Plaintiff has failed to fully and completely respond to Interrogatory No. 4 and, pursuant to the terms hereof, Orders Plaintiff to so respond.

m. Finally, CJ Hughes argued that Plaintiff's response to Interrogatory No. 5 included improper objections and unresponsive answers. Interrogatory No. 5 requests: "Identify the date or dates Plaintiff's Engineer was consulted in advance of scheduled major inspections, tests, and system startup of important phases of the Work (work being defined in any contract entered into by Defendant and Plaintiff and upon which Plaintiff seeks damages)."

n. Plaintiff's response was as follows:

Objection. This term "Plaintiff's Engineer" is ambiguous. In

addition, “consulted” is ambiguous. Without waiving said objection, if by plaintiff’s engineer, defendant means expert identification, plaintiff objects to said interrogatory as premature. Plaintiff will disclose experts in accordance with the Court’s scheduling order. If by plaintiff’s engineer, the defendant means the engineer for Contract No. 3, Boyles and Hildreth, plaintiff does not know the precise dates anyone spoke with or consulted with Boyles and Hildreth. Plaintiff refers defendant generally to the attached documents, which reference various stages of the work.

Plaintiff reserves the right to supplement as discovery is ongoing.

o. CJ Hughes states Plaintiff’s Contract SC-28 (TMLF 4365 000381) (attached to the Motion as “Exhibit 8”), required that the Resident Project Representative: “Consult with ENGINEER in advance of scheduled major inspections, tests and system startup of important phase of the Work.” CJ Hughes challenges Plaintiff’s contention that “Engineer” is ambiguous and that “consulted” is ambiguous when Plaintiff’s own Contract requires a consultation by the Resident Project Representative with Plaintiff’s Engineer. CJ Hughes argues that it needs to know if that consultation occurred and, if it did in fact occur, when that consultation occurred.

The court agrees that CJ Hughes is entitled to know if any such consultation occurred and, if so, on what date or dates. Accordingly, the Court **FINDS** that Plaintiff has failed to fully and completely respond to Interrogatory No. 5 and, pursuant to the terms hereof, Orders Plaintiff to so respond.

LEGAL ANALYSIS

8. The Court notes that Rule 37(a)(2) of the West Virginia Rules of Civil Procedure state that if “a party fails to answer an interrogatory submitted under Rule 33” then the discovering party may move for an order compelling an answer. W.Va. R.C.P. 37(a)(2).

9. Moreover, the Court holds that Rule 37(a)(3) states that “an evasive or

incomplete answer or response is to be treated as a failure to answer or respond.” *Id.* at R. 37(a)(3).

10. Finally, the Court holds that in granting a motion to compel, Rule 37(a)(4) states “the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees.” *Id.* at R. 37(a)(4).

11. The Plaintiff has attempted to argue burdensomeness without providing any affidavit or bringing forth any facts which would justify a finding of burdensomeness.

12. The court finds CJ Hughes has complied with the letter of Rule 37(d) requiring a meet and confer. Counsel for CJ Hughes wrote a detailed letter outlining the issues it has now brought forth in its motion to compel. Counsel for the movant invited a call within the next 15 days. Despite the mountain of materials supplied in support of the motion and in opposition to it, no one suggests any follow up call was made. After months of delay, the Plaintiff filed answers which included unsupported claims of burden or overbreadth with no detail or proof. The Plaintiff claimed ignorance of defined terms of a contract to which it is a party. When detailed objections were brought to its attention, it appears there was no attempt to call back to discuss these problems.

13. The Court **FINDS** that Plaintiff’s answers to the written discovery responses, as addressed above, were evasive, incomplete and that Plaintiff failed to make any good faith effort to rectify those deficiencies in a timely fashion (or communicate their intent to do so).

Accordingly, it is hereby **ORDERED, ADJUDGED and DECREED** that Plaintiff shall provide full and complete responses to the aforementioned discovery responses forthwith but no later than December 29, 2023;

It is further ORDERED, ADJUDGED and DECREED that counsel for CJ Hughes may submit its costs incurred as it relates to filing its motion to compel answers for the Court's review and approval in a filing which would comport with the requirements of Syllabus Point 4 of *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986);

It is further ORDERED, ADJUDGED and DECREED that the Clerk shall forward a copy of this Order to all counsel of record.

/s/ Michael Lorensen
Circuit Court Judge
5th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.