IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

L.S.S REALTY CORPORATION	:	CIVIL ACTION
	:	
v.	:	
	:	
VANCHLOR CATALYSTS, LLC. and	:	
ELEMENTIS CATALYSTS, INC.	:	NO. 04-197

MEMORANDUM AND ORDER

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE March 16 , 2005

The Plaintiff has filed a Motion to Compel against Defendant, Elementis, in this action alleging the breach of a lease. Although litigation is often contentious, the Court's review of the current Motion, the Defendant's response, and related documentation has convinced us that – at this point at least – "juvenile" is a better word to describe the conduct of opposing counsel. While we recognize that some of the disputes we are now called upon to resolve are legitimate ones, others are nothing more than the by-product of needless bickering. We trust, therefore, that civility and politeness will, hereafter, be the watchwords of this matter.

For clarity's sake we will review the history of the case briefly. Plaintiff owns a commercial property in Allentown that had been rented by Elementis for a term of ten years, beginning in September, 1996.[1] During the term of the lease, Elementis sold its assets, including the lease of the property to Vanchlor. Vanchlor took possession of the property on October 1, 2002, and continued making the rental payments until vacating the premises in May, 2003. Pursuant to the lease with Elementis, LSS could not unreasonably withhold its consent to an assignment of the lease. See Lease, at ¶ 12.

[1]The lease provided for an earlier termination date if certain requirements were met.

LSS filed an action in ejectment against Elementis and Vanchlor in the Lehigh County Court and purported to confess judgment against both parties pursuant to the lease. On December 24, 2002, a Lehigh County Court judge struck the confessed judgment and dismissed the Plaintiff's action. Vanchlor vacated the premises in May, 2003.

LSS then filed a breach of lease action against Elementis and Vanchlor in Lehigh County. Elementis removed the action to this court on January 16, 2004, and filed a counterclaim against LSS alleging the LSS breached the lease agreement and engaged in malicious prosecution by instituting the first lawsuit.

Presently before the Court is Plaintiff's Motion to Compel, relating to several different discovery requests.

A. Deposition of Juliana Goldenberg

On September 17, 2004, the Plaintiff noticed the deposition of Juliana Goldenberg, Elementis's corporate counsel, for November 2, 2004, in Bethlehem, Pennsylvania. Based on her affidavit of December 13, 2002, it is clear that Ms. Goldenberg is intimately familiar with the lease in question and the assignment of that lease to Vanchlor. She is also the corporate designee of Elementis to respond to certain inquiries made by LSS.

Through review of the correspondence between counsel attached to the Motion and response, it becomes apparent that the issue pertains only to the location of Ms. Goldenberg's deposition. See Letter of Gaul, 7/9/04; Letters of Jordan, 12/29/04; 1/18/05. Plaintiff's counsel requires that it take place in Bethlehem and defense counsel insists on the deposition occurring in Hightstown, New Jersey, where Ms. Goldenberg's offices are located.

Elementis contends that Plaintiff's counsel has already agreed that the Defendants' witnesses could appear in Philadelphia. However, the letter referenced by Elementis in support of this concession was written to counsel for Vanchlor, not Elementis. See Letter of Gaul, 9/17/04. Elementis also complains that Plaintiff failed to make a good faith effort to resolve this dispute prior to filing the current motion, contravening Local Rule of Civil Procedure 26.1(f). Rather than prolong the written bickering, we shall resolve the issue.

Pursuant to the Federal Rules of Civil Procedure the location of a deposition is first left to the party noticing the deposition. Fed.R.Civ.P. 30(b)(1). However, "the deposition of a corporate officer or employee should usually take place at the corporation's principal place of business or . . . at his place of business or employment." Philadelphia Indemnity Insurance Co. v. Federal Insurance Co., 215 F.R.D. 492, 495 (E.D. Pa. 2003)(citing Generale Bank Nederland N.V. v. First Sterling Bank, No. Civ. A 97-2273, 1997 WL 778861 *1-2 (E.D. Pa. Dec. 17, 1997)). Here, the Plaintiff has not established that taking Ms. Goldenberg's deposition at her office would present any hardship. Therefore, we will deny the Plaintiff's motion with respect to the location of Ms. Goldenberg's deposition. She shall appear for deposition within twenty days of the date of entry of the accompanying Order at her office in Hightstown, New Jersey, at a time convenient to all counsel.

The Plaintiff also opposes Ms. Goldenberg's designation as the corporate designee because they anticipate that, as corporate counsel, Ms. Goldenberg will assert the attorney/client privilege and work product privilege with respect to the information sought in the deposition. In the alternative, the Plaintiff asks that we prohibit Ms. Goldenberg from asserting attorney/client

or work product privileges. With no offense meant to the Plaintiff's powers of clairvoyance, it is not as clear to the court that Ms. Goldenberg will be a useless witness.

Specifically, Elementis designated Ms. Goldenberg to address three specific areas of inquiry: (1) the agreement of sale between Elementis and Vanchlor; (2) assignment of the lease to Vanchlor; and (3) the prior litigation between the parties. In her affidavit, Ms. Goldenberg addresses the first two of these categories and attaches the letters regarding same to her affidavit. Moreover, we note that, based on the affidavit, Ms. Goldenberg may be in the best position to provide the Plaintiff with information. She contacted third parties for the company and was involved in the discussions leading to the assignment of the lease. See Affidavit, at ¶¶3, 6, 7. "Counsel is often a fact witness with respect to various events, and may testify on deposition by the opposing party as to such matters without waiver." In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370, 1376 (Fed. Cir. 2001).

Furthermore, the Plaintiff's view of the privilege is a bit narrow. Although Ms. Goldenberg, as corporate counsel, may assert the privilege, so too may any corporate designee regarding information exchanged from client to counsel or vice versa. See Farrans v. Johnston Equipment, Inc., No. 93-6148, 1995 WL 549005 *6, n.3 (E.D. Pa. Sep. 12, 1995). Thus, we decline to prohibit Ms. Goldenberg's designation merely because she serves as corporate counsel and we decline to prohibit her invocation of the privileges if the questioning ventures into protected waters.

B. Areas of Inquiry

The Plaintiff next complains that Elementis has failed to designate a deponent for nine areas of inquiry. The Plaintiff points out that Elementis has failed to file any Motion for a

Protective Order regarding these areas of inquiry. The problem with the Plaintiff's argument is that review of the areas of inquiry and the related correspondence from Elementis's counsel reveals that Elementis has informed LSS that it cannot produce anyone to testify concerning matters about which it has no knowledge.

The areas of inquiry for which Elementis has allegedly failed to designate a deponent are: (1) Vanchlor Catalysts occupancy of the Leased Premises; (2) Agreements of Sale between Vanchlor Catalysts, LLC, and Elementis Catalysts, Inc.; (3) Assignment of the Elementis/LSS Realty Corp. Lease to Vanchlor Catalysts, LLC; (4) Performance or non-performance of Lease obligations subsequent to assignment of the Lease to Vanchlor Catalysts and/or Vanchlor Catalysts' occupation of the Leased Premises; (5) LSS Realty Corp's alleged dispossession of Vanchlor Catalysts from the Leased Premises; (6) the prior confession of judgment litigation between the parties; (7) Vanchlor Catalysts' vacation from the Leased Premises; (8) Vanchlor Catalysts' termination of the Leased Premises; and (9) All matters alleged in LSS Realty's Complaint and Defendant, Elementis' Answer, Affirmative Defenses and Counterclaim, filed in this action.

First, we note that Elementis has already designated Juliana Goldenberg to respond to inquiries numbered 2, 3, and 6, above. As previously discussed, Ms. Goldenberg will be permitted to act as the corporate designee for purposes of responding to questions regarding the agreements of sale between Elementis and Vanchlor, the assignment of the lease, and the prior confession of judgment litigation.

The remainder of the categories referenced by LSS involve actions taken by or against Vanchlor. Counsel for Elementis informed Plaintiff's counsel of this in a letter dated

January 18, 2005, and suggested that the remaining topics would be properly directed to Vanchlor. We agree. There is no evidence, nor has the Plaintiff asserted, that there is any relationship between the Defendants other than seller and buyer. We will not require Elementis to respond to the 30(b)(6) inquiries regarding Vanchlor.

C. Production of Attorney Fee Invoices

Plaintiff next complains that Elementis has failed to produce attorney fee invoices related to the earlier Lehigh County matter. Part of the damages sought by Elementis in its counterclaim is attorneys' fees related to the earlier ejectment action. LSS argues that it is entitled to challenge the reasonableness of the fees before the jury. Therefore, disclosure of the fee invoices is necessary to prepare for trial. Elementis argues that the reasonableness of the fees is for the court to decide after the trial, if the jury determines that Elementis is entitled to damages for attorneys' fees arising from the prior litigation.

LSS has provided no caselaw to support its position that the reasonableness of the fees is to be determined by the jury. Elementis, on the other hand, has directed the court to a line of cases, including McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1312-15 (2nd Cir. 1993), which discusses the issue at length. In determining whether the court or jury should consider the amount of a fee, the Second Circuit, relying on the Supreme Court, noted "a court should consider, among other things, 'the practical abilities and limitations of juries.'" Id. at 1315 (quoting Ross v. Bernhard, 396 U.S. 531, 538 (1970)).

> To compute a reasonable amount of attorneys' fees in a particular case requires more than simply a report of the number of hours spent and the hourly rate. The calculation depends on an assessment of whether those statistics are reasonable, based on, among other things, the time and labor reasonably required by the case, the skill demanded by the novelty or complexity of the issues,

> the burdensomeness of the fees, the incentive effects on future cases, and the fairness to the parties. Such collateral issues do not present the kind of common-law questions for which the Seventh Amendment preserves a jury trial right.

McGuire, at 1315.

Here, reasonableness is exactly the basis for which the Plaintiff seeks Elementis's fee invoices. Based on the Second Circuit's reasoning and recognizing the limitations of a jury's expertise, we find that the question of reasonableness of the fees is to be left to the court, if the jury determines Elementis is entitled to the fees. Obviously, in the event Elementis prevails on its malicious prosecution counterclaim, the claimed fee damages would be subject to attack by LSS. At this point in the litigation, however, Elementis need not turn over the fee invoices.

D. Document Requests

1. Document Requests 3 and 11 - Safety Hazard Study & Bransen Study

In Document Request 3, LSS sought any documentation regarding an analysis of possible safety hazards in connection with the storage of chlorine at the leased premises. In Request 11, LSS sought an analysis for Bransen that was done in 2002. LSS stated that these studies were performed by David Escott, a former Elementis employee, and were specifically referred to by Mr. Escott during his deposition. In response, Elementis has stated that, after undertaking an extensive review of its files, it does not have the documents identified by Mr. Escott. Such a statement is sufficient to respond to the document requests.

2. Document Request 17 - Financial Data

In Request 17, LSS sought "[a]ny and all periodic statements for Elementis Catalysts' checking, savings, and/or other financial accounts from January 2002 to the present." LSS explains in its Motion that the basis for the request is to compare the relative worth of

Elementis and Vanchlor to establish that LSS's basis for opposing the assignment of the lease was not unreasonable, as Elementis has contended.

Elementis argues that the relative worth of the companies is irrelevant because Vanchlor's parent company executed a financial guaranty at the time of the assignment of the lease, sufficient to satisfy any concerns over Vanchlor's ability to pay. Moreover, the Plaintiff has abandoned its argument that the assignment was improper. Therefore, argues Elementis, the evidence going to the propriety of the assignment is no longer relevant to the case.

What Elementis fails to acknowledge are the allegations contained in its counterclaim that LSS unreasonably objected to the assignment of the lease and imposed additional terms to the lease for the assignment, including financial guarantees. We believe these allegations make the economic status of both companies relevant. Such evidence is necessary to defend Elementis's allegations that LSS unreasonably objected to the assignment and imposed new lease terms. Elementis, therefore, shall comply with Document Request 17.

3. Document Request 18 - Documents between Elementis and Elementis Pigments

In Request 18, LSS sought "[a]ny and all agreements, correspondence or other documents from 1995 to the present between Elementis Catalysts, Inc. and Elementis Pigments." Again, one of the stated purposes of this request is to defend the counterclaim regarding the reasonableness of LSS's objection to the assignment based on the relative financial conditions of the assignor and assignee. LSS also argues that such records are necessary to clear up discrepancies regarding the ownership and operation of Elementis Catalysts and the whereabouts of the monies paid by Vanchlor to Elementis.

Elementis objects to the Request as overbroad and unduly burdensome. We agree. Because no guarantee from Elementis Pigments was included in the original lease, the financial condition of this related company is irrelevant to Elementis's counterclaim. Moreover, disclosure of the financial records from Elementis should disclose the whereabouts of the monies paid by Vanchlor.

A request for "all" agreements, correspondence, etc., for nearly eleven years has the potential to fill a warehouse. In its Motion, LSS has pointed to specific discrepancies in the paperwork regarding the ownership of Elementis, and LSS also noted that the representative for Elementis who signed the Agreement of Sale, which included the lease assignment, actually worked for Elementis Pigments, not Elementis Catalysts. We suggest that the request for documents be narrowed to those areas. At this point, Elementis's objection to the Request as currently drafted, will be sustained.

E. Sanctions

Finally, we address Elementis's request for sanctions against LSS. Specifically, Elementis complains that counsel for LSS did not meet its obligation to meet and confer before resorting to the filing of this Motion. Additionally, Elementis contends that the Motion to Compel was filed in retaliation for an earlier pleading in this case and asserts that LSS "has sought to poison the Court against Elementis without any proper basis in fact." (Response, at 11).

We will conclude this Memorandum as we began. This Court does not appreciate being called upon to settle petty squabbles between counsel. Review of the documentation related to this Motion reveals that both sides have attempted to infect the Court's perception of

the other. Although we decline to impose sanctions at this point, hereafter the Court will strictly enforce Local Rule 26.1(f)'s good faith effort requirement. Any future discovery motion must be accompanied by the Certification and an enumerated list of the attempts made to resolve the dispute.

An appropriate Order follows.

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O R D E R

AND NOW, this 16th day of March , 2005, upon consideration of the Plaintiff's Motion to Compel, the response, thereto, the attached documentation, and for the reasons stated in the accompanying Memorandum, IT IS HEREBY ORDERED that the Motion is GRANTED IN PART and DENIED IN PART.

With respect to the deposition of Juliana Goldenberg, the motion is granted to the extent Ms. Goldenberg shall make herself available at her office in Hightstown, New Jersey, at a date and time convenient to all counsel, within twenty days of the entry of this Order. Ms. Goldenberg may act as the corporate designee of Elementis Catalysts and is permitted to invoke the attorney/client and/or work product privilege, necessary.

To the extent LSS seeks the designation of a corporate representative of Elementis to respond to the inquiries regarding Vanchlor, seeks disclosure of Elementis's attorney fee invoices related to the ejectment action, and seeks production of the studies performed by David Escott, the motion is denied.

To the extent the Plaintiff seeks the financial data of Elementis Catalysts, the motion is granted. Elementis shall produce the response documentation within twenty days of the entry of this Order.

To the extent the Plaintiff seeks all agreements, correspondence, etc., between Elementis Catalysts and Elementis Pigments, Elementis's objection is sustained and the motion is denied.

Elementis's request for sanction is DENIED.

IT IS FURTHER ORDERED that any future discovery motion filed by either side shall be accompanied by the certification required by Local Rule 26.1(f) and an enumerated list of all attempts made to resolve the dispute.

BY THE COURT:

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JACOB P. HART
UNITED STATES MAGISTRATE JUDGE