

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

FILED

NOV 21 2019

Candy L. Warner
Tyler Co. Circuit Clerk

DIRECTIONAL ONE SERVICES INC. USA,
a foreign corporation authorized to do business
in the State of West Virginia,

Plaintiff,

v.

Civil Action No.: 18-C-14
(Presiding Judge H. Charles Carl, III)

ANTERO RESOURCES CORPORATION,
a foreign corporation authorized to do business
in the State of West Virginia,

Defendant.

ORDER DENYING DIRECTIONAL ONE SERVICES INC. USA'S
MOTION FOR RULE 37(b) SANCTIONS

This matter came before the Court pursuant to Plaintiff Directional One Services Inc. USA's Motion for Rule 37(b) Sanctions. The Court has considered Plaintiffs' motion and Defendant's response in opposition and the applicable law and finds that Plaintiff is not entitled to the relief that it seeks. Plaintiff's motion is DENIED.

In its motion, Plaintiff sought "an order excluding from evidence any damages computations or facts relating to damages not disclosed by Antero Resources Corporation ("Antero"), exclusion of the raw lump sum number disclosed by Antero without supporting detail contrary to this Court's order, exclusion of Mr. Kilstrom or Mr. Schopp from testifying at trial differently from their deposition testimony," and any other sanctions available under Rule 37(b).

Findings of Fact

1. On June 11, 2019, Defendant disclosed Kevin Kilstrom and Al Schopp, Antero's employees, as fact witnesses for the trial in this matter.

2. At the time that Kilstrom and Schopp were deposed, both individuals stated that they did not then know the basis for Antero's Fourth Counterclaim, in which Antero claims that Plaintiff improperly double-billed or overbilled Antero for services.

3. After these individuals were deposed, Antero completed the time-intensive project to review and analyze Plaintiff's voluminous field tickets and invoices to determine the substance of its Fourth Counterclaim. The evidence supporting Antero's improper billing claim is the field tickets and invoices, all of which Plaintiff created and then disclosed in discovery.

4. On May 22, 2019, upon completing the analysis, Antero provided Plaintiff with a chart listing the alleged incidents of improper billing.

5. On June 18, 2019, Antero provided Plaintiff with a lump sum number of damages.

6. On October 7, 2019, Antero notified Plaintiff that its witnesses' anticipated trial testimony would include information related to its Fourth Counterclaim.

7. Trial was continued until January 8, 2020.

8. On October 11, 2019, Plaintiff filed its Motion *in Limine* Regarding Unsupported Allegations, pointing out errors in Antero's chart of instances of improper billing and seeking to exclude the field tickets it claimed were erroneously listed as containing improper charges.

9. On October 18, 2019, Plaintiff filed the instant motion arguing that Antero violated Rule 26(e) by not disclosing an itemized damages account either within the discovery period or after this Court's order and not disclosing that certain witnesses would now testify regarding this claim.

10. On November 1, 2019, Antero provided a revised chart that showed not only each incident of alleged improper billing but also the charge associated with that incident. Antero stated

that the errors in the previous chart were good faith errors that resulted from a shift in the spreadsheet tables.

11. Antero offered for Plaintiff to take a supplemental deposition of Kilstrom, and this is scheduled to occur on November 25, 2019.

Conclusions of Law

1. Under West Virginia law, this Court has broad discretion to govern the discovery process, including making procedural rulings and the appropriateness of sanctions. See Syl. Pt. 1, Graham v. Wallace, 214 W. Va. 178, 180, 588 S.E.2d 167, 169 (2003).

2. Under the West Virginia Rules of Civil Procedure, a party who has responded to a discovery request has a duty to “seasonably” supplement its response to any question directly addressed to the identity and location of persons having knowledge and discoverable matters and to “seasonably” amend a prior response if it was incorrect when made or is no longer true. W. Va. R. Civ. P. 26(e). The duty to supplement responses may be imposed by order of the court, agreement of the parties, or *at any time prior to trial* through new requests for supplementation of prior responses. Id.

3. “Seasonable” does not mean immediate but rather within a reasonable time after the information becomes available to the party. See § 19:32. Duty to supplement discovery responses—Requirements of Rule 26(e), 3 Pattern Discovery Products Liability 3d § 19:32. Supplementing even an expert witness’s disclosure six weeks prior to trial is “seasonable.” See State ex rel. Tallman v. Tucker, 234 W. Va. 713, 719, 769 S.E.2d 502, 508 (2015).

4. Antero seasonably supplemented its prior witness disclosures when it informed Plaintiff on October 7, 2019, that the anticipated trial testimony had changed and that Kilstrom would be the primary witness. With trial scheduled for January 8, 2020, Plaintiff had

approximately three months of notice. See Tucker, 234 W. Va. at 719, 769 S.E.2d at 508 (finding six weeks of notice adequate for a supplemental expert disclosure).

5. Antero promptly provided a revised chart of each incident of alleged improper billing and the associated charge within 21 days of Plaintiff's notice that the original chart contained errors. Plaintiff received this chart in November 1, 2019, which is more than two months before trial.

6. Antero also made Kilstrom available for a supplemental deposition, which is scheduled for November 25, 2019, and is more than six weeks prior to trial.

7. Antero has complied with Rule 26(e), and discovery sanctions are not warranted.

8. Alternatively, even if Antero had failed to supplement its discovery responses under Rule 26(e), discovery sanctions are still not warranted because Plaintiff failed to show that it would be incurably prejudiced or that Antero acted in bad faith.

9. If a party does fail to supplement discovery as required under Rule 26(e)(2), then a Court may exclude evidence related to the supplementary material upon considering the following factors:

(1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded.

Graham v. Wallace, 214 W. Va. 178, 183, 588 S.E.2d 167, 172 (2003).

10. First, Plaintiff has failed to articulate or establish any prejudice or surprise that it would suffer if Antero were able to use its itemized incident and damages chart and its witnesses' testimony. Plaintiff created the field tickets and the invoices that are the basis of both the chart and the testimony.

11. Second, even if prejudice or surprise did exist, Plaintiff has failed to show how they could not and, indeed, have not already been cured. On November 1, 2019, Antero provided a revised chart showing both the alleged incidents of improper billing and associated damages. On November 25, 2019, Plaintiff will have the opportunity to take Kilstrom's supplemental deposition and inquire about the claim and damages computation. Plaintiff's only other basis for prejudice was mere disruption of its trial preparation process, but Plaintiff will have over six weeks to prepare for trial after deposing Kilstrom for the second time. No prejudice exists here.

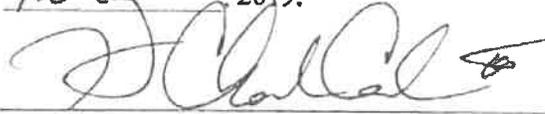
12. Third, Plaintiff provides no grounds for its claim that Antero has engaged in "a deliberate campaign of concealment." The simple fact that Antero informed Plaintiff that Kilstrom would be the primary witness at the same time Antero moved for a continuance does not mean that Antero was acting in bad faith or engaged in willful concealment. Kilstrom is a fact witness who has long been listed on Antero's witness list.

13. Fourth, Plaintiff's argument that it lacks important information related to damages and primary witnesses is moot because Antero provided a revised chart detailing the instances of improper billing and has made Kilstrom available for a supplemental deposition on November 25, 2019. Plaintiff has full access to Antero's alleged damages and primary witness and can ask the questions detailed in its motion.

14. Therefore, Plaintiff has failed to establish the four factors under Graham and discovery sanctions are not warranted.

For the foregoing reasons, Plaintiff's motion is DENIED. It is further ORDERED that the Clerk forward a copy of this Order to all counsel of record upon its entry.

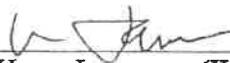
Enter this 21 day of November 2019.



The Honorable H. Charles Carl, III

I hereby certify that the appended...
and a copy of the original...
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