

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

MICHAEL A. DUNHAM, et al., :
Plaintiffs : **CASE NO. 2011 CVH 01063**
vs. : **Judge McBride**
US BANK, N.A. : **DECISION/ENTRY**
Defendant :

Dever Legal Services, Jonathan T. Dever, attorney for the plaintiffs Michael A. Dunham and Jane M. Dunham, 9146 Cincinnati-Columbus Road, West Chester, Ohio 45069.

Taft Stettinius & Hollister LLP, Timothy C. Sullivan, attorney for the defendant US Bank, N.A., 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202-3957.

This cause is before the court for consideration of a motion to compel filed by the plaintiffs Michael Dunham and Jane Dunham.

The court scheduled and held a hearing on the motion to compel on April 10, 2012. At the conclusion of the hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

In their complaint against the defendant US Bank, N.A., the plaintiffs Michael Dunham and Jane Dunham assert claims for breach of contract, breach of good faith and fair dealing, promissory estoppel, violation of the Fair Debt Collection Practices Act, fraud and fraudulent misrepresentation, conversion and unjust enrichment, slander of credit, and violation of the Real Estate Settlement and Procedures Act and Ohio Consumer Protection Act.

On March 1, 2012, the plaintiffs filed their present motion to compel answers to certain interrogatories and requests for production of documents.

STANDARD OF REVIEW

Pursuant to Civ.R. 37(A):

“Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:

(1) Appropriate court. A motion for an order to a party or a deponent shall be made to the court in which the action is pending.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, 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 an order compelling inspection in accordance with the request. On matters relating to a deposition on oral examination, the proponent of the

question may complete or adjourn the examination before he applies for an order.

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed 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, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.”

LEGAL ANALYSIS

(A) INTERROGATORY #1

The first interrogatory in the plaintiff's first set of interrogatories states as follows:

“Please state the full legal name, address, telephone number of any and all

employee(s), servicers, and/or third party vendors who have knowledge of or have conducted work on Plaintiff's file or loan number.”

The defendant objected to the portion of the interrogatory that asked “for information about work done on Plaintiffs' loan that is not relevant to the disputed issues in this case[,]” but went on to provide a list of names of employees who may have knowledge of the plaintiff's file, although addresses or telephone numbers for those employees were not provided.

Pursuant to Civ.R. 26(B)(1), “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

The defendant argues that the listed individuals are employees of US Bank and, consequently, the plaintiffs' attorney can contact defense counsel in order to set up a deposition or for any other information sought from these individuals. As a practical matter, it would seem sufficient to have the ability to contact these individuals through defense counsel, given that any requests for information from these individuals will likely be given to defense counsel for review under the circumstances of this litigation. However, the court finds that the plaintiffs do have the right to the requested information, specifically the addresses and phone numbers of these employees, as there is nothing in the law preventing plaintiffs' counsel from contacting these potential

witnesses and the plaintiffs are entitled to sufficient information which would allow their counsel to contact these individuals.

At the hearing on this matter, counsel for the plaintiffs stated that he was not seeking the personal addresses and telephone numbers of these employees, but was instead seeking their work addresses and telephone numbers. The court will order the disclosure of the personal or business addresses and personal or business telephone numbers of these individuals. So long as the defendant discloses one of these two categories of contact information (personal or business contact information), it will be in compliance with this order.

Finally, the court would note that, at the hearing on this matter, plaintiffs' counsel indicated plaintiffs were also seeking the job titles of these individuals. However, the interrogatory at issue does not request the job titles of any individuals named in response to the interrogatory, so the plaintiffs are not entitled to an order compelling said information.

Consequently, the plaintiffs' motion to compel shall be granted as to interrogatory #1 in that the defendant shall be ordered to provide the personal or business addresses and personal or business telephone numbers of the listed employees who may have knowledge of the plaintiffs' loan file.

The court is unclear if there is further information being sought under this interrogatory which the plaintiffs are alleging was not provided. Since the request, if one is being made, has not been made clear to the court, the plaintiffs have not demonstrated the need for an order compelling further discovery with regard to Interrogatory #1. If the plaintiffs have some good faith belief that there are additional

individuals with knowledge of the plaintiffs' loan file which were not disclosed, they may file another motion specifically setting forth who they believe these individuals to be and why the defendant should be compelled to disclose their identities.

(B) REQUEST FOR PRODUCTION OF DOCUMENTS #13

The court notes that there are two requests with the number 13 in the plaintiff's request for production of documents. The request relevant at this time is the first request numbered 13, which states as follows: "A complete record of phone records, taped telephone conversations, and unredacted telephone recordings of conversations with Defendant and computer files/notes specifically between the period of October 1, 2009 through October 1, 2011."

The defendant's response to this request indicates that it has "no record of any recordings but has produced copies of notes that were made of communications with Plaintiffs concerning their default and potential modification of the loan."

First, the plaintiffs argue that it is their "understanding that U.S. Bank records all conversations made with customers concerning home mortgages." Counsel for the bank indicated that the bank has searched its records and there are no recordings of the plaintiffs' phone calls in its possession. The plaintiffs respond that, if the recordings have been deleted, there could be a purge log or other data which might be recovered from the bank's hard drive.

However, the request for production at issue does not seek a purge log or similar information; it requested phone records and taped telephone conversations, of which

there are none. If the plaintiffs believe that there may be relevant information that has been deleted from the bank's computers but which may still be recovered from the hard drive by an expert, it can propound further discovery requests to attempt to discover if such information does, in fact, exist. Regardless, the issue before the court is whether the defendant gave a proper and full response to the request at issue and the court finds that it did so. Therefore, the motion to compel shall be denied as to request for production #13.

(C) REQUEST FOR PRODUCTION #2

The plaintiffs' request for production #2 seeks "[a] complete and accurate copy of any and all communications, whether written, electronic, or otherwise by and between US Bank, NA, and any of the Plaintiff's (*sic*) named in Case Number 2011 CVHY (*sic*) 1063." As noted in the bank's answer above, it provided a "Consolidated Notes Log" which, as explained by counsel at the hearing on this matter, are notes made by US Bank employees when they are on the phone with a client. Defense counsel indicated that there were no emails or other electronic transmissions made by US Bank employees regarding the plaintiffs' file and that, when employees make electronic notes about a client's file, they are made on the notes log which has been provided.

The plaintiffs set forth no real argument as to why they believe there are electronic communications which exist but were not produced and, as such, they are not entitled to an order compelling discovery on this matter. If, as plaintiffs' counsel indicated, there may be some shorthand or other abbreviations within the notes log that

counsel cannot decipher, defense counsel can request further information about the meaning of these abbreviations in discovery.

As such, the motion to compel shall be denied as to request for production #2.

(D) PARTY SIGNATURE ON RESPONSE TO INTERROGATORIES

The plaintiffs note that the defendant's response to the first set of interrogatories was not signed by a representative of US Bank and, instead, was signed only by defense counsel.

Pursuant to Civ.R. 33(A)(3), "[t]he answers [to interrogatories] are to be signed by the person making them, and the objections signed by the attorney making them." Counsel for the defendant indicated at the hearing on this matter that the lack of a party signature on the response to the interrogatories was simply an oversight.

Therefore, the motion to compel shall be granted ordering the defendant to provide a copy of the discovery responses signed by the representative of US Bank making said responses.

CONCLUSION

The plaintiffs' motion to compel is well-taken and is hereby granted as to the request for the personal or business addresses and personal or business telephone numbers of the US Bank employees listed in the response to interrogatory #1 and as to the need for a party signature on the response to the first set of interrogatories.

The remainder of the plaintiffs' motion to compel is not well-taken and is hereby denied.

Due to the fact that this motion was granted in part and denied in part, a hearing on the plaintiffs' request for attorney fees is required. Counsel are hereby ordered to conference and call the Assignment Commissioner (732-7108) within seven days of the date of this decision to obtain a hearing date on the request for attorney fees. That hearing shall be set no later than four weeks from the date of this decision.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 10th day of May 2012 to all counsel of record and unrepresented parties.
