United States Bankruptcy Court
Northern District of Illinois
Western Division

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

Bankruptcy Caption: In re Jerome Maurice Davis

Bankruptcy No. 11-81785

Adversary Caption: Jerome Davis v. CitiMortgage, Inc.

Adversary No. 14-96129

Date of Issuance: September 18, 2018

Judge: Thomas M. Lynch

Appearance of Counsel:
Attorney for Plaintiff-Debtor: Jerome Maurice Davis
Attorney for Defendant: Irina Dashevsky, Locke Lord LLP

Synopsis:
Plaintiff-Debtor's motion under Fed. R. Civ. P. 37 (as adopted by Fed. R. Bankr. P. 7037) to compel further discovery was granted in part and denied in part.

United States Bankruptcy Court, Northern District of Illinois

NAME OF ASSIGNED JUDGE	Thomas M. Lynch	**BANKRUPTCY CASE NO.**	11-81785
DATE	September 18, 2018	**ADVERSARY CASE NO.**	14-96129
CASE TITLE	In re Jerome Maurice Davis: Jerome Davis v. CitiMortgage, Inc.		
TITLE OF ORDER	Order Supplementing August 30, 2018 Bench Ruling Granting in Part and Denying in Part Plaintiff's Motion to Compel		

DOCKET ENTRY TEXT

The Plaintiff-Debtor's Motion to Compel CitiMortgage, Inc. to Respond to Discovery (ECF No. 162) is GRANTED IN PART and DENIED IN PART as discussed by the court at the hearing held on August 30, 2018 and further indicated below. CitiMortgage, Inc. ("CMI") shall supplement its interrogatory answers and serve Mr. Davis with a copy of the same no later than September 21, 2018. The parties may file by September 24, 2018, any proposals for a protective order that they may have compliant with this court's rulings. CMI shall provide the Plaintiff its supplemental production responses by October 5, 2018, by which time the parties shall have arranged for the review or production of the materials. The parties shall file a joint status report regarding all discovery by October 8, following which the court will further consider discovery deadlines. No further discovery motions will be permitted without prior leave of court.
[For further details see text below.]

STATEMENT

Before the court is the motion of the Plaintiff pursuant to Fed. R. Civ. P. 37 (as adopted by Fed. R. Bankr. P. 7037) to compel further answer to his interrogatories and production requests. This motion is the latest in a long line of discovery controversies between the parties.[1] Fed. R. Civ. P. 37. On July 25, 2018, this court denied Plaintiff's motion to suspend the already thrice-amended timetable for the completion of discovery while the parties brief their "discovery dispute" and ordered them to meet and confer to resolve their differences regarding written discovery no later than August 6. (ECF No. 161.) Warning the parties that the court will not tolerate further delay or dilatory conduct, the July Order went on to address the Plaintiff's vague account of the parties' dispute regarding his fifteen interrogatories and twenty-seven requests to produce. The court then reminded both sides that discovery in the adversary proceeding must be compliant with the "bounds established by Rule 26 [and] ... this court's rulings and orders made over the course of this case." *Id.* The parties made little progress, apparently, and on the last day allowed, August 16, the Plaintiff filed his motion to compel the Defendant to further answer nine interrogatories and twelve production requests.[2] The Defendant filed its court-ordered response on August 27, 2018 before the hearing on the motion on August 30, 2018. (ECF No. 167.) Neither parties' written submission on the motion convinced the court that they had met their obligation to attempt in good faith to resolve their differences. Accordingly, the court began the hearing by ordering the parties to further confer face-to-face in the courthouse, after which it held a lengthy hearing where it considered the parties argument and ruled on all but six of the objections raised, taking the latter under advisement. The following determinations from the bench on August 30, 2018 briefly summarize the court's earlier rulings and decisions on the remaining objections.

Objections Taken Under Advisement. At the end of the August 30 Hearing, we took under advisement the Defendant's remaining objections to Production Requests 13, 14, 17, 18, 24 and 27.[3]

The procedural history of this matter has been recounted in previous orders and need not be repeated here. (*See, e.g.*, ECF Nos. 137, 149, and 152.)

[2] Disregarding the requirement that motions set out a brief and clear statement regarding relief, nowhere in his fifteen-page motion does the Plaintiff respond to the specifics of the CMI objections to the discovery, saving these material points for the separate appendix attached to this motion.

[3] At the hearing, the court explained its ruling overruling CMI's boiler-plate objections to many of these and other discovery requests as "vague", "unduly burdensome", "overly broad" and "premature."

CMI objected to each of these on the grounds of "relevancy". We also took under advisement CMI's challenges to all but items 21 and 24 on the grounds they seek "confidential and competitively sensitive information."

If a party from whom the documents are requested objects to their production, that party has the burden to show why the request is improper. *See* Fed. R. Civ. P. 34(b) (as adopted in Fed. R. Bankr. P. 7034); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996). Courts interpret the "federal discovery rules ... liberal[ly] in order to assist in trial preparation and settlement." *Cannon v. Burge*, 2010 WL 3714991, at*1 (N.D. Ill. Sept. 14, 2010). However, while the rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense", the request "must be tied to the particular claims at issue." *Charvat v. Valente*, 82 F. Supp. 3d 713 (N.D. Ill. 2015), *quoting* Fed. R. Civ. P. 26 (a) and *Sykes v. Target Stores*, 2002 WL 554505, at *3 (N.D. Ill. April 15, 2002).

With regard to CMI's first objection, "[r]elevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." *In re Capuccio*, 558 B.R. 930, 935 (Bankr. W.D. Okla. 2016) (citing cases). Federal Rule of Evidence 401 provides the test for relevant evidence, namely that which "(a)...has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401(a), (b). Thus, to be relevant, a requested item needs only "reasonably show that a fact is slightly more probable than it would appear without that evidence." 1 Kenneth S. Broun *et al.*, MCCORMICK ON EVID. § 185 (7th ed. 2016) "Evidence need not prove conclusively the proposition for which it is offered, nor make that proposition appear more probable then not, but it must in some degree advance the inquiry." 2 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE § 401.04[2][b] (2d ed. 2016).

In addition to this probative value concept, Rule 401 also requires that the matter be "of consequence to the determination of the action", a more precise formulation that courts used to evaluate under the rubric of "materiality." Fed. R. Evid. 401; *see, e.g., U.S. v. Burge*, 711 F.3d 803, 812-13 (7th Cir. 2013) (excluding as immaterial evidence of the merits of an underlying civil suit against the defendant in a subsequent case for obstruction of justice while determining that evidence of the defendant's false interrogatory answers in that case were both relevant and material to the pending perjury charges), cert. denied, 571 U.S. 888 (2013). However, while the rules of evidence allow us to understand the terms used for what may be discovered, they do not restrict discovery beyond

that. As Rule 26 makes explicitly clear: "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b). Rather, the amended discovery rules allow discovery as to any non-privileged and relevant matter that is "proportional to the needs of the case." *Id.* Whether requested relevant matter is "proportional to the needs of the case" in turn turns on "importance of the issues..., the amount in controversy, ...relative access..., [respective] resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* The trial court has broad discretion in ruling on a motion to compel and tailoring the scope of permitted discovery. *Charvat*, 82 F. Supp. 3d at 717.

In this case, the court finds that the remaining disputed requests fall within the scope of and limits to discovery contemplated by Rule 26. At the hearing, the parties acknowledged that the subject of **Request 13**, seeking "[a]ll documents relating to 'INV. 60155/00000' ", refers to "the investor in the plaintiff's loan,"[4] with CMI's attorney further indicating that the referenced number is based on "the internal notation in Citi's file" for the loan. (ECF No. 157.) The Plaintiff further explained that his request pertains to all investors, transferees, assignees, holders, custodians or recipients of the loan at issue in this adversary proceeding or the Plaintiff's related Note, including Hudson City Savings Bank and M&T Bank. The present action challenges CMI's interest in the loan instruments and the collateral residence and seeks to bar the Defendant from recovering this debt. The amended complaint alleges that CMI falsely asserts such an interest. CMI denies these allegations. The identity of all these entities—not just the first and the last as CMI apparently would have it—beginning with the original noteholder to the present, and including, of course, who they were at the time of the commencement of the foreclosure action in the state court and during the proceedings over modification of the automatic stay here, goes to the heart of the complaint.

It is similarly apparent that documents which refer or relate to these entities' involvement with this loan will increase the apparent likelihood that the disputed facts regarding who, in fact, has a right to assert the loan and whether its security interest does or does not exist. And so to, the relevancy of **Request 14** for "[a]ll documents relating to any investor in Plaintiff's Loan #648762073" and **Request 17** for "[a]ll documents that relate to any servicer agreement between ... [CMI] and any entity with an

4 Hereinafter, the "Plaintiff's Loan", that being the loan Plaintiff Davis obtained in 2009 from ABN/Amro which is further identified in his amended adversary complaint and which is the subject of the action.

interest in Plaintiff's mortgage and Note," also is apparent, but only to the extent that the documents relate to the entity's "investment" or interest in that particular loan. (ECF No. 157.) For example, it is not evident that any files regarding Hudson City Saving's Bank's dealings with CMI or, for that matter, ABN Amro Mortgage Group, Inc. that do not involve the Plaintiff's Loan, make a fact at issue in this action more or less likely. At this stage of litigation, to suggest otherwise without more amounts to the very speculative and disproportionate "fishing expedition" that Rule 26 does not permit. *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 2018 WL 946396, at *4 (N.D. Ill. Feb. 20, 2018). For that reason, the Defendants' relevance objection to the request for material about "potential investors" in **Request 24,** and to the Plaintiff's attempts to seek a more expansive interpretation of Requests 13, 14 and 17 is sustained. Probative and material information regarding communications regarding any "investors" in the Plaintiff's Loan will be obtained in the production responding to Requests 13, 14, and 17 as described in the last section of this order.

Similarly, the Plaintiff's **Request 18** for "[a]ll documents outlining ... [CMI's] foreclosure procedures" falls within the scope of discovery permitted by Rule 26 at least to the extent that the request is limited to CMI's procedures for Illinois residential mortgage loans from the time CMI resumed its foreclosure action in McHenry County through its filing its notice of noncompliance with the Agreed Order in the bankruptcy case in May 2014. The court need not remind the parties that these documents need not tend to show that it is likely that CMI did or did not have a basis for the disputed actions it took, let alone that these items are themselves admissible. Nor is there any showing that the request, so limited, is not proportional to the needs of the case.

The Defendant, however, further objects to these and other requests, on grounds that they cover information that is "confidential and competitively sensitive." (ECF No. 159.) Rule 26 limits allowable discovery to "nonprivileged matter[s]." Fed. R. Civ. P. 26(b)(1). But general or boilerplate privilege objections to discovery are insufficient. *See*, generally, 8 Charles A. Wright *et al.*, FED. PRAC. & PROC. CIV. § 2016.1 (3d ed. 2018); *see also Miller v. Pruneda*, 236 F.R.D. 277, 281 (N.D. W. Va. 2004) (finding that boilerplate objections may waive the asserted privilege where the court does not find the underlying discovery request patently improper). Instead, Rule 26 requires that a party interposing such a claim must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A). The rule

contemplates that the court may customize this disclosure requirement to balance the need for information to assess the claim against the burdensomeness of description of voluminous material. *See* Fed. R. Civ. P. 26 advisory committee's note. Here, however, the Defendant has not submitted the requisite statement to support its claim of privilege for information sought under Requests 1 or 16 or Interrogatory 1. It shall do so pursuant to Rule 26(c) and the term of this order without further delay.

Related to this is CMI's additional objection to Responses 8, 13, 14, 17, 18, 21 and 26 on the grounds of "confidentiality" or "competitive sensitivity." There is no privilege against the discovery of trade secrets or commercially sensitive information. *Nata v. Zietz*, 405 F.2d 99, 101 (7th Cir. 1968), cert. denied, 395 U.S. 909 (1969). "Documents that affect the disposition of federal litigation are presumptively open to public view, even if the litigants strongly prefer secrecy, unless a statute, rule, or privilege justifies confidentiality." *Marcial v. Rush Univ. Medical Center*, 2018 WL 4144634 (N.D. Ill. Aug. 30, 2018), quoting *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010). Rule 26(c) provides, in pertinent part that a party may request an order, among other things, "requiring that a trade secret or other confidential research, development, or commercial information not to be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c)(1)(G). Thus,

> for good cause shown ... the court may make any order ... that a trade secret or other confidential ... information not be disclosed or be disclosed only in a designated way. In order to establish that information should be subject to a protective order, the party seeking protection bears the burden of establishing: (1) that the information is in fact a trade secret or confidential commercial information and (2) that there is good cause to protect the information.

Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297, 300 (1993) (citation and internal quotation omitted), order clarified, 153 F.R.D. 614 (N.D. Ill. 1993). CMI argued at the August 30 Hearing that there may be confidential and sensitive commercial terms in servicer agreements or other documents responsive to the allowed production requests. If so, it needs to meet and confer with the Plaintiff regarding a suitable remedy, and then bring the appropriate motion under Rule 26(c). Additionally, the information responsive to Response 3 that is contained in the personnel files of Ms. Sherry Doza, a third party in this case, may well contain personal medical, financial or other sensitive information that merits protection. If that proves to be the case, the parties are ordered to propose an agreed protective order covering that material.

Finally, the Defendant objects to the relevancy of **Request 27** which seeks "[a]ll documents relating to the decision not to offer Plaintiff a loan modification or forbearance under HAMP or any other program." (ECF No. 157.) Rather than explain the relevancy of this request in his written motion pursuant to this court's order regarding discovery, the Plaintiff refers to "society's interest in avoiding the courts being used to fraudulently take a person's home" after first acknowledging that he "has not asserted a HAMP claim to his amended complaint." (Ex. A to Motion ("Plaintiff Seeks to Compel a Response to the Following Request [sic] to Produce") at 8 (ECF No. 162)). Instead, he argues that it is CMI's burden to establish this request is proportional to the needs of the case, *id.*, leaving us to speculate how that this request is "tied to the particular claims at issue." *Charvat*, 82 F. Supp. 3d at 716. This we decline to do, noting that were we able to somehow discern whether anything probative might be obtained via this request, nothing raised in this case or in connection with the pending motion indicates that this discovery would be proportional to the needs of the case. Accordingly, we sustain the relevancy objection to Request 27.

Amended Interrogatory Answers. This court ruled on all the objections to the disputed interrogatories during the August 30 hearing. For the reasons then discussed in open court, CMI shall supplement its answer to **Interrogatory 1** to identify all persons known to it to possess knowledge of the claims asserted by Plaintiff and the defenses raised by the Defendant in this case. The supplementary answer shall state the latest available contact information for each person identified, her/his job title and employer (if applicable) and shall briefly describe the basis for this information.

With regard to **Interrogatories 3 and 4,** CMI's attorney indicated at the August 30 hearing that in addition to the three systems identified in its writing answer, the Defendant may have also utilized "DRI Notes" in connection with the origination, transfer or servicing of the "Plaintiff's Loan". CMI is ordered to confirm its initial answer and, if incomplete, identify all other electronic systems that it uses now or previously used to manage the Plaintiff's Loan. Similarly, CMI shall supplement its answer to **Interrogatory 5** and clarify whether it or any other entity conducted an "Independent Foreclosure Review" (as described in that Interrogatory) relating to the Plaintiff's Loan and whether it has any knowledge of whether the Plaintiff "was offered a cash payment pursuant to a payment agreement under the Independent Foreclosure Review." Upon further review, the Plaintiff accepted the Defendant's answer to **Interrogatory 6** during the hearing.

With regard to **Interrogatories 9 and 22**, CMI shall identify all persons involved with the filing of the foreclosure action alleged in the amended adversary complaint, as well as the identity of all persons known to have been involved in any review of the Plaintiff's credit file before the filing of the foreclosure action. The amended answers shall include for each person identified their contact information, last relevant job title and employer, together with a brief summary of each such person's involvement in with the filing or review.

CMI will supplement its answer to **Interrogatory 19** and prepare a list of all judgments in which a court found, ruled or otherwise determined that CMI or ABN/Amro engaged in the practice of "robo-signing" documents in foreclosure or bankruptcy proceedings for the period beginning with the date of the foreclosure action was filed until when this adversary proceeding commenced. This will be accomplished by an electronic search of the Westlaw database, using search terms agreed to by the parties. The parties shall meet and confer to devise the appropriate search terms by October 1, 2018.

The Defendant shall answer **Interrogatory 20** and state whether or not Ms. Sherry Doza was ever employed by the Defendant or ABN/Amro. If she had been so employed, CMI shall provide the dates of her employment (including separation date) and her last position and job title with the Defendant or ABN/Amro. CMI shall supplement its answer to **Interrogatory 23** by identifying all persons believed to have knowledge of any review, including an audit, of the Plaintiff's Loan or his credit file. Again, for each person identified, their location, last position, and basis for such information will be included with the answer.

These supplemental answers shall be accompanied by a party representative's signed verification after due investigation that the answers are true and complete. The Defendant shall provide these items to the Plaintiff no later than September 21, 2018.

Supplemental Production of Documents. For the reasons and rulings set forth above and in open court at the end of the August 30 Hearing, CMI shall:

- Produce, subject to such protective order that may be approved by the court, all documents not already produced or protected but that relate to the claims asserted by Plaintiff in his amended complaint and the defenses raised by Defendant **(Request 1)**.
- Produce subject to such protective order that may be approved by the court the personnel file of Ms. Sherry Doza **(Request 3).**

- Supplement its response to **Request 8** to confirm that no requested pooling servicing agreements existed.
- Produce, subject to such protective order that may be approved by the court, all documents not already produced that relate or refer to all investment in, pooling agreements, transfers and assignments of, and any actual holders, custodians or recipients of the loan at issue in this adversary proceeding or the Plaintiff's related Note, mortgage and loan, sometimes referred to Loan #648762073 or "INV. 60155/00000" (the latter as referring to the investors or investment in the Plaintiff's Loan). This production will include all documents relating to any interest or involvement of Hudson City Savings Bank and M&T Bank in the Plaintiff's Loan, and any servicer agreement with CMI that involves the Plaintiff's Loan **(Requests 13, 14 and 17).**
- Supplement its response to **Request 16** to make available for review all non-privileged information not already produced contained any electronic database used by the Defendant that refer or relates to the Plaintiff's Loan.
- Produce, subject to such protective order that may be approved by the court, all non-privileged documents that outline CMI's foreclosure procedures for Illinois residential mortgage loans for the period from CMI's commencement of its foreclosure action in McHenry County through its filing its notice of noncompliance with the Agreed Stay Modification Order in the bankruptcy case in May 2014 **(Request 18).**
- Produce, subject to such protective order that may be approved by the court, all non-privileged documents not already produced that refer or relate to an Independent Foreclosure Review of the Plaintiff's Loan, if any, including any consideration of whether to offer a payment to the Plaintiff as part of said review **(Requests 21 and 26).**

As previously directed by the court, the Defendant shall provide the Plaintiff its verification of the completeness of its production with these supplemental materials.

Compliance. At the August 30 Hearing, the Defendant was ordered to serve its supplemental answers to the interrogatories identified above, signed and verified in accord with the rules, within 15 days. With respect to Interrogatory 19, however, the parties shall meet, confer and reach an agreement on the electronic search by October 1. CMI shall deliver the product of the resulting search no later than October 5, 2018.

This minute order in great part summarizes that rulings made during the August 30 Hearing and the Court expects that the supplemental responses then ordered have been prepared. Nevertheless, we will modify those rulings to order that CMI must deliver to the Plaintiff the ordered supplemental answers to interrogatories no later than September 21, 2018.

The Defendant shall supplement its responses to its production of documents as ordered no later than October 5, 2018. CMI's verification of the completeness of its inquiry, search, and production shall accompany its supplemental responses. It shall also deliver to the Plaintiff by then its disclosure of material withheld under claim of privilege or work product, if any, in compliance with Rule 26(b)(5)(A). The parties shall submit a proposed agreed protective order for the Sherry Doza personnel file (Request 3) no later than September 24, 2018, by which time the Defendant may, after meeting and conferring with the Plaintiff, file a request for a protective order consistent with this Court's rulings. The August 30 ruling is further modified to extend the time for the parties to file their joint discovery status report to October 8, 2018.

The remaining discovery orders are not disturbed, including the court's order that the parties may not file, without prior leave of court, any additional discovery motions. The court will consider the need, if any, for any additional modification of the existing discovery deadlines after the joint status report is filed.

ENTER:

Thomas M. Lynch
United States Bankruptcy Judge